

1 ALEXANDER COHN
2 Arbitrator - Mediator
3 P.O. Box 4006
4 Napa, CA 94558.

5 IN ARBITRATION PROCEEDINGS PURSUANT TO
6 AGREEMENT BETWEEN THE PARTIES

7 In the Matter of a Controversy

8 between

9 VALLEJO POA,

10 and

11 CITY OF VALLEJO, PD.

12 Involving the dismissal appeal/arbitration of
13 Jarrett Tonn, Grievant
14 LDF #20-1415

15 **ARBITRATOR'S**
16 **OPINION AND AWARD**

17 This Arbitration arises pursuant to Memorandum of Understanding ("MOU")
18 between the CITY OF VALLEJO, POLICE DEPARTMENT, hereinafter referred to as
19 the "City" and/or "Department," and the VALLEJO POLICE OFFICERS
20 ASSOCIATION, hereinafter referred to as the "Association," under which ALEXANDER
21 COHN was selected to serve as sole, impartial Arbitrator, and whose decision shall be
22 final and binding upon the parties.

23 Hearing was held on March 20-21, 2023, via Zoom video. The parties were
24 afforded full opportunity for the examination and cross-examination of witnesses, the
25 introduction of relevant exhibits, and for closing argument. Post-hearing briefs were
26 received from the parties on or about June 30, 2023, and the matter was submitted.

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1 APPEARANCES:

2 On behalf of the Association:

3 JOSHUA A. OLANDER, Esquire, Mastagni Holstedt,
4 1912 I Street, Sacramento, California 95811.

5 On behalf of the City:

6 JAMES E. "JEB" BROWN, Esquire, Liebert, Cassidy,
7 Whitmore, 6033 W. Century Boulevard, Suite 500,
8 Los Angeles, California 90045.

9 **ISSUE**

10 Was there just cause for the termination of Detective
11 Jarrett Tonn from the Vallejo Police Department; and if not,
12 what is the appropriate remedy?

13 **RELEVANT PROVISIONS OF VPD POLICY**

14 **ATTACHED HERETO AS APPENDIX "A"**

15 **FACTS**

16 Background/Stipulations¹

17 The salient facts are not in dispute. Grievant, a "sworn" officer with the
18 Department for since 2014,² was terminated on October 3, 2022, based on an alleged
19 improper use of deadly force, failure to turn on body camera and other alleged
20 violations of Policy, on June 1, 2020, which took the life of Sean Monterossa.

21 On June 1, 2020, Grievant, Detective [REDACTED] and Detective [REDACTED]
22 [REDACTED] were called into work to supplement Department staffing due to a high level of
23 civic unrest and looting in the City of Vallejo. All three were members of the SWAT
24 Team and Crime Reduction Team ("CRT") and rode in an unmarked pickup truck. On
25 June 1, they were all activated in their SWAT Team capacity to assist with the
26 apprehension of looters and other criminals, and were all wearing their SWAT Team

27 ¹The parties submitted a stipulated factual statement which was reviewed in its entirety by the Arbitrator and
28 included in the stipulated and additional fact sections of this decision.

²Grievant had no prior disciplinary record. As noted in more detail, *infra*, his Performance Evaluations ("PE")
usually exceeded standards.

1 uniforms and equipment. [REDACTED] was driving, [REDACTED] was in the front passenger
2 seat and Grievant was in the rear seat.

3 On June 2, at approximately 12:36 a.m., Captain [REDACTED] [REDACTED] broadcast that
4 looting was occurring at the Walgreens on Broadway and Redwood Street. [REDACTED]
5 drove to [REDACTED] location and there was a brief conversation, lasting only a few
6 seconds, wherein [REDACTED] ordered [REDACTED] to drive through the south entrance of the
7 Walgreens while he drove into the northwest entrance.

8 As [REDACTED] drove into the Walgreens parking lot, he broadcast words to the
9 effect that the looters were all wearing black and it looked like they were armed;
10 possibly armed. In response, [REDACTED] turned on his emergency lights as he
11 approached the Walgreens and people began to flee.

12 As people began to flee, [REDACTED] stopped the truck and he and [REDACTED] began
13 to exit the vehicle. At this time, the detectives encountered Monterossa in the parking
14 lot. As they were exiting their vehicle, Grievant perceived Monterossa grabbing an
15 object in his waistband that Grievant believed to be a firearm. Perceiving a threat of
16 death or serious bodily injury to himself and his partners, Grievant fired five rounds in
17 quick succession with his duty rifle through the front windshield. One round struck
18 Monterossa, resulting in his death. It was subsequently determined that Monterossa
19 had a hammer in his waistband and was not armed with a firearm.

20 The OIR Group subsequently conducted an administrative investigation into the
21 officer involved shooting, which was completed in June 2021. Grievant was placed on
22 Administrative Leave on June 17. On December 1, the City served Grievant with a
23 Notice of Intent to Discipline for Termination for various Policy violations, including use
24 of deadly force. On April 20, 2022, Grievant participated in a *Skelly* meeting with the
25 City's designated *Skelly* Officer, Marc Fox. On May 10, Fox issued his *Skelly* findings
26 and decision wherein he determined that Grievant did not violate the Department's
27 Use of Force Policy and recommended retention of Grievant's employment and
28 corrective action for poor performance, consistent with the discipline received by the

1 other employees involved in the incident.

2 On October 3, the City served Grievant with a Notice of Discipline for
3 Termination. On October 4, Grievant filed a Notice of Appeal and Request for
4 Arbitration.

5 Supplemental Facts

6 The officer-involved-shooting ("OIS") in this case took place on June 2, 2020,
7 on the heels of the George Floyd incident, when peaceful protests were ongoing as
8 well as looting and violence throughout the country. On the night in question, there
9 was unprecedented rioting, looting, vandalism, burglary, and violence going on
10 throughout Solano County, including in the City. The Department responded by
11 summoning resources, including mutual aid from other departments, to deal with this
12 high level of criminal activity. There were incidents of broken windows and graffiti
13 painted on the street and walls of the police station itself so that the City erected
14 concrete barricades around it, closed the area off to the public, and at one point
15 stationed SWAT team members on the roof and summoned in officers in riot gear.
16 The Department viewed itself as being "under siege" in that there were reports of
17 people engaging in violence against police officers.

18 The SWAT team was also summoned to help restore order and to protect the
19 police station itself, if needed. Detectives [REDACTED] [REDACTED] and Grievant were on
20 the SWAT team. They responded to looting at the local Walgreens and an officer-
21 involved shooting occurred at about 12:36 am, when Grievant fatally shot Monterossa,
22 who was in possession of a framing hammer. Grievant mistakenly believed that he
23 was in the process of drawing a firearm. The City then undertook an administrative
24 investigation of the shooting, which was handled by an outside consulting firm, the OIR
25 Group. The OIR Group determined that the shooting was not within Department policy.
26 The Chief adopted the reasoning of the report and Grievant was terminated, leading to

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1 this arbitration.³

2 A. Testimony of Officers Present at the Scene

3 Testimony of [REDACTED]

4 [REDACTED] is currently a [REDACTED] after
5 serving as a detective for the Department's CRT and was a member of the SWAT
6 team.⁴ [REDACTED] testified that when he was called into work on June 1, he drove his
7 assigned take-home vehicle, a truck containing his equipment;⁵ that it was typical to
8 have three officers in the vehicle; that he and Grievant were on the same patrol team
9 as well as on the CRT together for five years and the SWAT team together for 2-3
10 years; that they drove to the Gateway Plaza area where the SWAT command post
11 was set up; that there were at least 20 officers at the command post, including
12 members of outside agencies; that his group was assigned to a SWAT role at the
13 direction of the SWAT commander Lt. Knight.

14 At the command post, Knight held a briefing, stating that their primary objective
15 was to protect the Department, in that there had been mass rioting in front of the
16 Department building the day before; and that if the Department was under siege again,
17 they would respond there, and, that, in the meantime, they would protect businesses
18 within the City including those at Gateway Plaza, which housed Best Buy, Costco, and

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23 ³Grievant and his partners gave voluntary statements as part of the criminal investigation and were again
24 interviewed as part the administrative investigation. For purposes of brevity, the Arbitrator will rely upon the
25 testimony given under oath at hearing and will not repeat information given by witnesses in previous contexts
26 unless cited specifically by the parties as relevant and material to the ultimate determination. At the time of
arbitration, the local District Attorney had recused herself from the matter and the criminal investigation was
still pending before the State Attorney General's office.

27 ⁴At the time of the events in question, he had worked as police officer for about 7 years, all with the City.
28 Detectives on CRT investigate high profile felony crimes.

[REDACTED] vehicle was a pickup truck with a back seat and a locked container in the truck bed for gear.

1 other high-end businesses.⁶

2 [REDACTED] testified that, after his team left the briefing, they began to patrol and
3 monitor the radio traffic as the looting started; that as they arrived at various locations
4 where looting was reported, the looters would be gone and looting was starting
5 elsewhere; that at one point, they responded to a potential looting at a gun store, but
6 by the time they arrived, the individuals were gone; that he thought that the looters
7 were probably monitoring the radio scanner; that they continued to patrol until they
8 heard from [REDACTED] and went to assist him; that he observed [REDACTED] in an unmarked
9 vehicle parked just east of the Walgreens on Redwood and pulled up next to him and
10 rolled down his windows; that [REDACTED] spoke with [REDACTED] that he could see the looters
11 coming and going from the Walgreens; that he then drove north to enter the
12 Walgreens parking lot to do an enforcement stop; that they understood that [REDACTED]
13 would be coming in from the north while they came in from the south; that [REDACTED] had
14 a flash bang device, which is a common tool used by SWAT and the CRT team; that
15 he thought they would establish a perimeter and conduct a felony stop of the looters;
16 and, that it took five seconds or less to get to the parking lot.

17 [REDACTED] also testified that as they entered the parking lot, [REDACTED] notified them
18 over the radio that the suspects were armed, and that "the guy in the black, he's
19 armed"; that [REDACTED] activated the emergency lights and sirens to give notification
20 that they were police officers; that he and his partners were wearing their navy blue
21 SWAT uniforms with the Department patches on the shoulders and badges on the
22 front of their vests and "police" on the back; that he then observed several individuals
23 running from the Walgreens and getting into vehicles; and, that the individuals "were
24 _____
25 _____

26 ⁶As a SWAT team member, [REDACTED] went through an 80-hour SWAT training. SWAT team members are
27 trained in special weapons and tactics, including hostage rescues, barricaded residences, and tactics to de-
28 escalate situations. They have monthly scenario trainings, firearms training, and other trainings. [REDACTED]
testified that 99 percent of his training was with Grievant. He recalled attending a training with Grievant which
involved shooting from within vehicles through the windshield. He also recalled being trained to keep shooting
to stop the threat, not to fire one shot, wait to see the impact, and then fire another shot.

1 all running with their hands kind of up toward their shoulders or their chest" carrying
2 items from the store and getting into vehicles.

3 According to [REDACTED] there was a pickup truck closer to his vehicle which fled
4 with at least two other individuals. He testified that a sedan was parked east of
5 Monterrosa's vehicle; that there was Monterrosa's vehicle which he believed was a
6 black sedan parked closest to the Walgreens; that all the individuals got into vehicles
7 and left; that Monterrosa was the last one running from the carport by the Walgreens
8 towards the vehicle; that [REDACTED] saw him running with his hands on his waistband
9 and "what looked to be a Glock pistol with a high-cap magazine, protruding from his
10 sweatshirt;" that he believed Monterrosa was armed; and, that Monterrosa was
11 wearing a black hoodie sweatshirt which had "a long object causing the sweatshirt to
12 be pulled away from his body."

13 [REDACTED] also testified that he was at very heightened alert because they were
14 dealing with an armed individual fleeing from them, so he slowed the vehicle down, as
15 he did not want to drive into an area where someone was armed; that he was scared
16 they were going to be shot; that Monterrosa got into the vehicle or got one foot into the
17 back passenger seat on the driver's side of the vehicle and "looked like he was going
18 to get in," which alerted [REDACTED] to a potential vehicle pursuit, but that Monterrosa
19 only got his "right buttocks and his right shoulder basically leaning into the vehicle;"
20 and, that he then heard Grievant say "watch out" and push his rifle between himself
21 and [REDACTED]⁷

22 [REDACTED] further testified:

23
24 as I scanned back, I could see Monterrosa had – was spinning his body
25 towards us and facing us. He was completely outside of the vehicle at
26 this time facing us with his hands down towards his waistband. And
almost simultaneously [Grievant] discharged his firearm;

27 that he did not see anything in Monterrosa's hands, which were down by his

28 ⁷Due to their work together on CRT and SWAT, [REDACTED] assumed Grievant would act as lethal cover.

1 waistband, because it was dark and it all "kind of happened fairly fast;" that he "just
2 knew [his hands] were down by his waistband;" that he was still in the driver's seat
3 when Grievant fired through the windshield; that Monterossa had completed his turn
4 and was facing them when Grievant fired; and, that he saw Monterossa go down and
5 the vehicle take off; that he put his vehicle in park and exited, drew his firearm and
6 began giving commands such as "police," "let me see your hands" and so on, which
7 were recorded on his body camera.⁸

8 According to [REDACTED] when they were all out of the vehicle, Grievant said,
9 "What did he point at us?" and [REDACTED] answered, "I don't know." He testified that
10 Grievant replied, "He pointed a gun at us;" that they continued to give commands; that
11 [REDACTED] then suggested they make an approach; that they then approached
12 Monterossa and handcuffed him; that at that point [REDACTED] rolled Monterossa over
13 and the framing hammer fell out of his front sweatshirt pocket; that [REDACTED] was still on
14 the scene just northeast of them; that one of the vehicles had collided or rammed his
15 vehicle as it fled the scene; that [REDACTED] went back to his truck to get a medical kit;
16 that he believed it was [REDACTED] who started first aid on Monterossa; that he responded
17 to the Walgreens drive-through window due to possible unknown threats within the
18 building; and, that he held the window until other officers arrived, when they formed a
19 team and cleared the Walgreens.
20

21 [REDACTED] also testified that he has "never had anyone that [he] believed to be
22 armed turn and make an aggressive shooting athletic stance toward [his] direction,"
23 and was thankful that Grievant had the lethal threat at that time, when:

24 Monterossa presented an immediate threat by kind of like a surprise and
25 a spinning around in that shooting position;
26 that he believed Monterossa had the present ability, opportunity and intent to cause

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28 ⁸In his statement to the police, [REDACTED] stated that he saw the subject step out of the vehicle "while holding his waistband" and then "make a quick turning movement to face the detectives" and that, after the shots were fired, he "observed the subject fall down, face first." See, CX 2.

1 death or serious bodily harm to himself and his partners; that he believed that
2 Monterossa was the person [REDACTED] had described as armed because of the manner in
3 which he was "running holding his waistband;" and, that, if he had been lethal cover in
4 the truck, he would also have discharged his firearm to stop the threat.

5 [REDACTED] further testified that he thought that [REDACTED] directive did not strike
6 him as a bad plan or tactically unsound, because the type of felony arrest they
7 intended to make is a common scenario and not contradictory to sound officer safety
8 tactics; that once [REDACTED] radioed that the subjects were armed or possibly armed, they
9 had no other feasible option other than continuing with what they expected to be a
10 high risk felony stop, because they were committed and there was no reason to
11 change the plan, because they could not leave [REDACTED] by himself at the scene
12 because it would present a huge officer safety issue.

13 Testimony of [REDACTED]

14 [REDACTED] assigned to the Solano County violent crime task force at the time of
15 the events at issue, was a new CRT detective and held the collateral assignment of
16 SWAT operator for less than two years.⁹ He was called in to work on June 1 because
17 the City was being overrun by violent criminals and patrol staff was overwhelmed. His
18 mission was police station security and to protect high-value targets such as gun
19 stores and pharmacies, and to assist with patrol.

20 [REDACTED] recalled that, while on patrol, they heard [REDACTED] on the radio say that
21 he was viewing a burglary in progress at the Walgreens; that they were about a mile
22 away; that they drove to where [REDACTED] was and pulled up next to him; that he was the
23 primary person speaking to [REDACTED] who pointed toward the Walgreens and said, "This
24 _____
25 _____

26 [REDACTED] started his career as an officer with the [REDACTED] Police Department, where he worked for 11 years
27 prior to moving to the City and overlapped with Grievant when he worked at [REDACTED] While at [REDACTED] he did
28 narcotics work for two years and was then transferred to the regional multiagency gang team for two years.
He did six years of crime suppression and investigative work. He estimated that he has done at least 300
felony stops in his career.

1 is where it's going on. I'll go this way, I want you guys to go this way," and drove off;
2 that the discussion took less than ten seconds; that [REDACTED] was the second highest
3 ranking officer in the Department, and he considered this an order; that he considered
4 the order an appropriate tactic for the situation; and, that the whole department was
5 engaged in the same tactic for the entire night.

6 [REDACTED] also testified that they entered the south end of the parking lot through
7 Redwood Street; that he could see two cars parked outside the pharmacy drive-up on
8 the east side of the building, a silver Nissan Titan or Frontier and a black Nissan
9 Altima; that one person was running from the building drive-up for the pharmacy
10 toward the vehicles; that as they turned into the parking lot, they drove toward the
11 vehicles; that they heard [REDACTED] say they (the suspects) were armed or possibly
12 armed as they approached the two cars; that they were a hundred yards or less from
13 the vehicles in the middle of the parking lot driving at 5-10 mph; and, that the silver
14 Nissan Titan left at a high rate of speed through the parking lot driving north toward
15 [REDACTED] but made a left-hand turn and went behind the building.

16 [REDACTED] further testified that the person on foot was Monterossa; that he ran up
17 to the Nissan Altima and tried to get into the back left seat or put something in the
18 back left seat; that the car took off for 10 or 15 feet and stopped; that he ran back up
19 to the car to try to get in; that the vehicle left him behind going northbound through the
20 parking lot in the same direction as the silver truck; that at this point they were 15 to
21 20 yards from him; that it was too late to change plans to turn or exit the scene, as that
22 would have left [REDACTED] alone; and, that leaving the vehicle would not have been
23 feasible or safe because there were no places to take cover or bail out.

24 [REDACTED] also testified that Monterossa immediately turned to his left, went down
25 to a knee, and had what he thought was a gun in his right hand; that Monterossa
26 turned and faced his entire body towards them as they were approaching while down
27 on his right knee with the left knee facing up; that he saw a black object in
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1 Monterrosa's hand being held like he was holding a firearm, in that the pinky and ring
2 finger wrapped around the object and his index finger extended along the side of it,
3 how you would index your finger along the frame of a gun if you were waiting to shoot;
4 that he thought Monterossa was going to start shooting at them and that he posed an
5 imminent threat of death or serious bodily injury to him and his partners; and, that he
6 believed that the use of deadly force was the only option.¹⁰

7 According to [REDACTED] he was in the process of getting out of the passenger
8 seat to conduct a felony stop. He testified that, as he was getting out of the vehicle,
9 Grievant pulled up his rifle and fired five rounds; that Monterrosa's right hand was up
10 near his chest in a low, ready position; that [REDACTED] had a flash bang in his hand which
11 he had discussed deploying earlier in the night; that he was transferring the flash bang
12 from hand to hand because he had to hold the flash bang and potentially pull the pin
13 and also manipulate the door so he could get out; that he thought this was a scenario
14 in which he could deploy the flash bang to distract and de-escalate the situation, but
15 he did not do so; that as he exited the vehicle, he switched the flash bang to his left
16 hand and drew his handgun with his right hand; that he wound up dropping the flash
17 bang in the parking lot; because he needed a free hand after the Nissan Altima
18 crashed into [REDACTED] vehicle; that he thought he could apprehend anyone fleeing from
19 that car, which he thought would be disabled; and, that the vehicle that rammed
20 [REDACTED] initially stopped, but then made it onto Broadway driving northbound.

22 [REDACTED] also testified that he got on the radio to report an officer-involved
23 shooting and that all the officers were okay; that Monterossa had a gun; that they had
24 a handful or two vehicles take off; that he then yelled to Grievant and [REDACTED] that
25 they should make an approach; that they did so; that he was flanking Monterossa
26 relative to his partners; that he and [REDACTED] rolled Monterossa over, handcuffed him

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28 ¹⁰When the scene was searched, a black cell phone was found near Monterossa, which was apparently
what [REDACTED] may have mistaken for a firearm.

1 and searched him for weapons; that they found a large framing hammer stuffed into
2 the front of his pants or into his jacket, so that the handle of it was sticking out of his
3 waistband; that there was maybe a fold-up pocketknife in one of his pockets; that,
4 before he made the approach, he did not hear Grievant or [REDACTED] say anything; that
5 after they searched Monterossa for weapons, they started giving medical aid and
6 coordinating with other people coming in; that they ended up clearing the Walgreens
7 for additional suspects; and, that he did CPR on Monterossa until he was relieved by a
8 paramedic.

9 Finally, [REDACTED] testified that he received a Letter of Reprimand for failure to
10 activate his body camera in a timely matter and for failure to devise a plan regarding
11 the felony vehicle stop; that he disagreed with Chief Williams that the plan was not
12 well-designed, as the entire Department was doing similar felony stops; and, that
13 although Chief Williams was at the SWAT briefing, he never said that they should take
14 a reactive approach.¹¹

15 Investigation and Discipline

16 Shawny Williams was the Chief of Police at all material times herein and is
17 currently retired.¹² He testified that he arrived at the scene after the shooting and
18 spoke with [REDACTED] who was "pretty shaken up;" that he drove [REDACTED] back to the
19 station; that the next day, a preliminary email was sent about what had happened;¹³
20 that he filmed a video about the incident which was put out to the public several weeks
21 later; that in the video, he mentioned the retention of the OIR Group to conduct an
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24 ¹¹A grievance was filed concerning the Reprimand, which was not made part of this record.

25 ¹²Williams started in law enforcement in March 1993 with the City of San Jose Police Department and
26 worked there until 2019. He retired from that position as Deputy Chief of Investigations. While in that role, he
oversaw more than 20 officer-involved shootings. He was hired as Chief at the City in 2019.

27 ¹³In the email, Chief Williams gave a synopsis of what occurred, including that the detectives "perceived
28 a deadly threat" and one "discharged his firearm" and that he had "the most profound appreciation for your
hard work, dedication and courage." See, UX C.

1 administrative review under his authority; that the Department retained the OIR Group
2 because it would conduct a thorough, objective, and unbiased investigation; that the
3 OIR group is a nationally recognized organization which conducts this type of
4 investigation; and, that the investigation took about a year.¹⁴

5 The 66-page report was based upon interviews of [REDACTED] Grievant,
6 Potts, Knight, and Bower. The OIR investigators were provided the criminal
7 investigation documents, which included an interview with [REDACTED] body-worn camera
8 footage and audio; and copies of Department Policies, including a new Policy called
9 "De-Escalation," which had been adopted in January. The report contains a summary
10 of witness interviews; summary of subject interviews; and investigative findings
11 concluding that Grievant's "determination to use deadly force was not objectively
12 reasonable."¹⁵ In summary, the main points supporting its conclusion were:

- 13 1. The "detectives' approach left no margin for error, thereby subjecting Mr.
14 Monterrosa to an unduly extreme interpretation of a movement that was
15 ambiguous or even meant as surrender."
- 16 2. The "officers' reckless approach was the most significant factor in
17 increasing the level of threat presented to them."
- 18 3. The fatal shot was to the back of Monterrosa's head, meaning he was
19 turned away from the detectives, dissipating any threat when he was
20 fatally struck; but because Grievant chose to shoot through the
21 windshield, he was unable to discern it.
- 22 4. After the shooting, Grievant said, "What did he point at us?" and then
23 stated, "He pointed a gun at us," even though Grievant never saw
24 Monterrosa pointing a gun at them; that all three detectives gave different
25 accounts of what Monterrosa did prior to being shot, only agreeing that
26 they saw signs of what they believed was a weapon, and none saw
27 Monterrosa turn away.
- 28 5. Grievant's statement immediately after shots fired showed uncertainty
about whether he actually saw a gun, more evidence of a tactically
defective approach in which an accurate threat assessment could not be
made, leading to a premature decision to shoot when all that was

14 The OIR Administrative Investigation Report was issued in June 2021. See DX 7.

15 DX 7.

- involved was a property crime.
6. The detectives had SWAT expertise and should have evaluated the "extremely rushed, unplanned, and aggressive nature" of [REDACTED] plan and interceded to develop a sounder response; failure to do so "caused a seriously flawed approach to proceed."
7. The team violated Department Policies on de-escalation and activation of body-work cameras.¹⁶

Chief Williams testified that, based upon the report, he proposed terminating Grievant.¹⁷

The Skelly Recommendation

Grievant was given a *Skelly* hearing before consultant Marc A. Fox, who issued his report on May 10, 2022. Prior to the hearing, the Association provided Fox with a report from a use of force expert Robert Fonzi,¹⁸ as well as copies of case authorities and materials from Force Science concerning de-escalation and the use of force.

Without crediting the Force Science materials, Fox summarized Grievant's position, which included 1) This was "a case where someone had something that looks like a firearm" in a "place (waistband) where firearms are typically stored;" 2) the OIR investigators "cherry-picked facts" and failed to include a human factor analysis or consider what was going on in the community, including attacks on the Department; 3) OIR investigator's analysis was "purely hindsight" based on Monterrosa being unarmed, which does not matter under a totality of circumstances analysis or analysis by a use of force expert; 4) there is no requirement that an officer see a gun prior to taking action; 5) all three officers perceived Monterrosa as having the ability, opportunity, and apparent intent to immediately cause serious bodily injury; and, 6) the

¹⁶See, DX 7.

¹⁷Grievant was not put on administrative leave until June 17, 2021.

¹⁸Fonzi, a retired Undersheriff from San Bernardino County Sheriff's Department who has qualified as an expert witness in court, reviewed the file and provided an expert opinion letter dated April 15, 2022, to counsel for the Association. His opinion was that "a police officer acting consistently with standard police practices and training would conclude that [Grievant] used reasonable force in self-defense, defense of others, and to overcome the active and assaultive behavior presented by Sean Monterrosa." UX C.

1 plan did involve planning, distance, and cover.¹⁹

2 Fox's report stated that he personally had a "reasonable belief" that Grievant
3 "fired and shot Mr. Monterrosa based upon a generalized fear, acted based on
4 insufficient information, and violated" the use of force/deadly force policies. After
5 reviewing the record, Fox concluded that Grievant's "shooting of Mr. Monterrosa was
6 heavily influenced because of this generalized fear" in contradiction of [relevant case
7 law.] However, he found that due to conflicting evidence, including the statement
8 issued by the Chief the day after the shooting that the officers acted within Policy and
9 because of an immediate deadly threat, and the Chief's decision to keep Grievant at
10 work pending the investigation, he was unable to sustain the findings that Grievant
11 violated Policy.

12 Fox also determined that the Department failed to provide sufficient evidence
13 that Monterrosa had his back to them at the time the deadly shot was fired, in that "it
14 would be reasonable to anticipate a person to make some bodily movement if a
15 firearm is shot toward that person." The report also states:

16
17 As mentioned at the beginning...I have a reasonable belief that
18 [Grievant] fired and shot Mr. Monterrosa based upon a generalized fear,
19 acted based upon insufficient information, and violated Policy 300.5 and
20 300.6. **The above paragraphs, with the exception of the placement of**
21 **[Grievant] on administrative leave, diminished my ability to make**
22 **affirmative statements that the City has demonstrated the requisite**
23 **proof.** Assuming I would have made a sustained finding(s) as to
24 violation(s) of the Use of Force policy, then the timing of when [Grievant]
25 was placed on administrative leave would likely have been included in
26 my analysis as to any recommendation as to whether the proposed
27 disciplinary action should be sustained, modified in some specific way, or
28 revoked. (Emphasis added)

29 Fox determined that Grievant was guilty of negligent and poor performance by
30 failing to plan for armed suspects to be at the Walgreens and that Grievant should

31 ¹⁹ In addition, the Association pointed out that the Department failed to convene a CIRB, which was
32 required by Policy 301, which states that such a Board "will be convened" in OIS which end in serious injury
33 or death and that Grievant was permitted to work for a year prior to termination.

1 receive the same level of discipline given to the other officers, provided other factors
2 were equal. He also upheld proposed discipline for failure to activate the body-worn
3 camera but noted that dismissal would be excessive for that violation.²⁰

4 Chief Williams' Testimony

5 After reviewing the *Skelly* report, Chief Williams testified he decided to go with
6 the OIR Group's opinion because they were national experts in their field, including
7 regarding police accountability; that the opinions of OIR Group were more compelling
8 than the opinion from the *Skelly* report, which he felt contained errors or failure to
9 review important information; that the *Skelly* officer failed to review one of the
10 interviews; that the *Skelly* officer considered an email sent by the Chief which implied
11 the Chief had tacitly approved the shooting, when he had not formed an opinion, and
12 other things he found troubling; and, that the OIR Group had more information than
13 the *Skelly* officer.

14 Chief Williams also testified that he terminated Grievant because the
15 independent analysis and investigation said that the force used was not objectively
16 reasonable; that the use of deadly force is governed by law and policy; that he
17 concurred with the findings of the investigation, considering the questions of the
18 severity of the crime, which was a property crime, and whether the individual had the
19 present ability, opportunity and intent to commit a violent act or pose a violent threat,
20 including that the individual was actually shot in the back of the head and was face
21 down when the officers went to turn him around as well as the lack of a plan, and took
22 into account the totality of the circumstances, and found that the force was not
23 objectively reasonable. He considered the officers' accounts that Monterrosa took a
24 shooting position by going down on one knee, and that he had something black in his
25 hand or was going to his waistband, but felt that Monterrosa could have been doing a
26

27
28 ²⁰See, DX 13.

1 lot of different things; and, that two of the SWAT officers did not draw their weapons
2 when they reportedly saw a threat, when their training and experience potentially
3 dictated they would do so.

4 In addition, Chief Williams also testified that de-escalation is required by Policy,
5 to use time, distance and cover when feasible to do so; that in this case, techniques
6 for de-escalation were not implemented; that a better tactical plan could have been
7 developed by SWAT operators to allow getting more resources, to slow down, and to
8 go into the situation with a unified manner with a clearly stated objective, rather than
9 rushing in from different directions, causing potential cross-fire issues in this situation;
10 that the use of tactics is a perishable skill; and, that he would have expected the
11 SWAT team to advise the Captain of a better tactical plan.

12 Accordingly to Chief Williams, the OIR Group concluded that Monterossa was
13 attempting to flee the scene based upon a number of factors; first, that the autopsy
14 report showed a shot to the back of the head, which supported that he was not facing
15 the CRT vehicle at the time he was shot; second, that if someone is facing away, that
16 makes them less of a threat; third, that Grievant made a statement captured on the
17 body-worn camera asking [REDACTED] "What did he point at us?" and that [REDACTED]
18 answered, "I don't know, man;" fourth, that if SWAT officers saw a suspect pointing a
19 gun at them, they would yell "gun," which was a something that did not happen here;
20 and, that Grievant's question to [REDACTED] showed that he was not certain of what, if
21 anything, was being pointed toward them.

22 Chief Williams testified that he did not view [REDACTED] conversation with Grievant
23 and his partners, which took only seconds, as an "order," but rather the communication
24 of a poor tactical plan which the SWAT team members, who have more expertise,
25 should have discussed further with [REDACTED] that the SWAT team should have either
26 provided a more sound tactical plan or taken over the incident entirely, which SWAT
27 can do; that the team did not use time, distance, and cover to handle the scenario,
28

1 which should have been done through collaboration with [REDACTED] that the fact that it
2 was chaotic that night did not relieve officers from following Policy or the law,
3 especially when dealing with commercial burglary, looting, crowds, and potentially
4 dangerous situations; that, for example, the team as well as [REDACTED] could have
5 stopped or backed up/repositioned when they heard from [REDACTED] that the subjects
6 were possibly armed; and, that, if they had repositioned, they could have had the
7 advantage of time, distance, and cover.

8 Chief Williams explained that it was necessary to terminate Grievant rather than
9 impose lesser discipline because deadly force was utilized when it was not objectively
10 reasonable; because of the type of Policy violation involved and the nature of the
11 intrusion and the existence of a deceased person; that, considering that de-escalation
12 was not used, the only course of action in this case was termination; that a CIRB was
13 not convened in this case; and, that this was because the Attorney General's office
14 was still conducting their review or investigation, so that he did not consider the
15 criminal investigation complete.
16

17 [REDACTED]
18 [REDACTED]
19 [REDACTED]²¹

20 Chief Williams testified that the City is currently defending a civil lawsuit
21 regarding the shooting. He agreed that Grievant had annual reviews from 2019 and
22 2020 reflecting that he exceeded performance expectations, including in the areas of
23 judgment/decision-making.²²

24 Contrary OIR Opinions

25 Jason Potts is currently the Chief of Police for Public Safety in Las Vegas. On
26

27 ²¹The [REDACTED] was not in evidence.

28 ²²UX M.

1 the night in question, he was a Captain with the Department, where he had worked for
2 about 22 years. Potts was the Incident Commander at the time of the shooting as the
3 Commanding Officer of the Department's ESU (Emergency Services Unit).²³ Potts
4 testified that Chief Williams asked Command staff to review the OIR Group's report
5 and to discuss it together; that the Command group at that time included Deputy Chief
6 Ta, Captain Tribble, and Potts; that he gave Chief Williams the following feedback: 1)
7 The emphasis on de-escalation was "unrealistic and far-fetched" and 2) Potts believed
8 that the subject had the ability, opportunity, and intent if Grievant believed he was
9 armed with a firearm. Although Chief Williams listened, he was not responsive to his
10 feedback, because the Chief was "hung up on the fact that the subject did not have a
11 firearm."

12 Professional Standards Unit/Internal Affairs Involvement

13
14 In June 2020, Robert Knight was a police Lieutenant assigned to the
15 Professional Standards Division overseeing IA and was also the Commanding Officer
16 of the SWAT team.²⁴ Knight testified that he interacted on a regular basis with Chief
17 Williams; that his normal supervisor ([REDACTED]) left the Department shortly after the
18 Monterrosa shooting, so that he reported directly to the Chief for several periods; that,
19 after the OIS occurred, he changed hats from SWAT Commander to Division
20 Commander of Professional Standards, because, anytime there is an OIS or fatality, it
21 was his responsibility to initiate the administrative investigation to be conducted by the
22 IA Sergeant, who at that time was Sanjay Ramrakha.

23 Knight also testified that they were prepared to conduct an IA and were
24

25 ²³ESU encompasses several specialized units within the Department, including the mobile field force which
26 does riot and crowd control; hostage negotiations team; and a TAC team which flew drones.

27 ²⁴Knight has been with the Department for about 23 years and had conducted upwards of 50 IA
28 investigations and reviewed well over 100. He had ultimate command and control of the members of the
SWAT team, the regulation of training, and the overall approval of operations plans and day to day tasks
of the team.

1 assigned to the Monterossa shooting; that he called out Ramrakha; that they
2 responded to the scene and participated as administrative investigators on all case
3 briefings that night, including attending a scene walk-through; that they observed and
4 were able to give input to the criminal investigators asking questions; and, that they
5 started a parallel investigation.

6 Knight explained that, about two days later, IA was removed from the
7 investigation; that Chief Williams walked into his office stating that he had just met with
8 City Manager Greg Nyhoff, and that the Department was going to contract the services
9 of the OIR Group, which had just done an overall assessment of the Department, to
10 conduct the IA investigation; that his jaw just dropped; that he told the Chief this was a
11 bad idea because the OIR Group was not there that night and would not have the
12 benefit of what was gleaned; that Chief Williams stopped him and said it was a
13 "political decision" or "it's political;" that Knight responded that they were not politicians
14 and that this was not a good idea; that the Chief abruptly left; so IA was taken off the
15 case, but the OIR Group was not brought in until some time later, after a lot of valuable
16 time had transpired; and, that he was interviewed as a witness in the administrative
17 investigation in his role as SWAT Commander and whether what happened at the
18 Walgreens parking lot was in keeping with the overall mission that night.

19 Knight explained that he assumed the role of liaison with the OIR group's
20 primary investigatory Steve Connolly; that he had routine phone calls with and
21 provided copious documents to Connolly, including the audio files, police reports, and
22 interview documents; that the criminal investigation was ongoing; that Knight provided
23 Connolly with updated supplemental reports and assisted him with notices of witness
24 interviews; that they had countless discussions about case strategy and several
25 conversations about specific policies and protocols related to IA investigations and
26 how they were conducted and policies governing the way things are done; and, that
27
28

1 while Connolly was drafting the report, they had some conversations to clarify some
2 points.

3 Knight also testified that eventually he gave his opinion of what happened; but
4 that his opinions as to tactics were left out of the summary of the OIR Group report
5 even though they were included in the audio recording of his interview; that he told
6 Connolly that what happened was in keeping with the mission for that night; that, if all
7 the looters had raised their hands and safely surrendered, there would have been no
8 incident; that the plan was a "completely acceptable tactic;" that at this point, Connolly
9 stopped questioning him, even though it is common for officers conducting high-risk
10 stops to take people into custody who voluntarily surrender; that the instruction given
11 to the officers at the command post briefing was to conduct enforcement actions as
12 appropriate; that moving into a parking lot, activating red and blue lights, and then
13 conducting a vehicle stop or arrest would be a completely standard way to handle
14 enforcement if officers view criminal activity; that the plan followed by the three officers
15 worked, to the extent that an officer patrolling a high value target (a pharmacy) saw
16 looters, did not rush in, but got on the radio and asked for help; that the officers
17 showed up, formulated a quick plan, and followed Policy, but unfortunately a fatal
18 encounter occurred; that although the plan was quick, it was standard enforcement
19 practice, in that it involved the use of cover and distance, because things can be
20 slowed down when you have the cover of a vehicle, as you can have subjects
21 voluntarily surrender one at a time; and, that he would not have expected the officers
22 to push back on [REDACTED] plan because it was not completely egregious or even a bad
23 plan, nor did the OIR Group administrative report suggest a better plan.

24
25 According to Knight, Connolly seemed very strict on wanting to do full interviews
26 with Grievant, [REDACTED] and [REDACTED] rather than using the voluntary statements as the
27 start. He testified that he felt the statements from the night of the incident would be:
28 one of the most pure statements you're going to obtain from someone

1 involved in something like that;
2 but that Connolly did not conduct his interviews until a year and a half later, which
3 would be too late to ask for recollection of details which had already been provided;
4 that there were multiple pitfalls in doing so; that best practice would be to use the
5 voluntary criminal investigative interview as the foundation for more building blocks for
6 an IA interview; that Policy 306 addresses this exact topic, by cautioning interviewers
7 not to conduct duplicative interviews but to focus on issues that might involve Policy
8 violations; and, that he was concerned that Policy be followed.

9 Knight also testified that he felt that Connolly struggled with the timing of the
10 events that led up to and followed the shooting; that Connolly was looking at materials
11 Knight had provided such as CAD dispatch reports, body camera videos, and audio
12 files of dispatch recordings; that dispatch audio is only produced when there is a
13 transmission, so that dead time is not recorded; that Connolly was struggling to put a
14 timeline together; that his understanding of the time frames were much longer than
15 what actually occurred, to the point where he had to tell Connolly that his view of the
16 timeline was inaccurate, because there were no long stretches of time; that he told
17 Connolly he needed to pair the audio transmissions with the CAD reports as best he
18 could because they did not know the exact times and because minutes can go by that
19 are not reflected in the audio; and, that Knight "got the sense that he was really feeling
20 like this was a rushed—a very rushed situation" despite Knight trying to get him to
21 understand the sequence of events.

23 Knight further testified that, when he read the OIR Group report, he noted that
24 the time sequence was not there; that he was shocked; that timing is especially
25 important in a shooting, when it is used as a part of the analysis as to whether the
26 force was reasonable; that the times noted by a dispatcher are not 100 percent
27 accurate because dispatchers must type in the abbreviated version of what is said,
28 which takes some time; that there is a timestamp associated with the CAD software

1 and timestamps on the body-worn camera footage; that there are always going to be
2 times which are off a couple of minutes here and there, so that when a timeline is
3 created, the investigator must take in all the information to come up with a valid
4 timeline; and, that it is not easy to do so if one does not know the Department's
5 software.

6 Having reviewed many IA investigations, Knight testified that administrative
7 investigations are done using a "preponderance of evidence" standard based on
8 factfinding; that the investigator must never start with an "end state in mind," but must
9 obtain information without knowing what the conclusion will be; that it is a "fatal flaw" to
10 "run your case to meet that end state;" that these are some important tenets that are
11 industry-wide and followed at the Department; that investigations must be done timely,
12 as the more time goes by, the more people's recollections and information can get
13 lost; and, that he became concerned that the investigation was not happening in a
14 timely manner.

15 Knight also testified that he expected to sit down as liaison with Connolly to at
16 least evaluate his report for factual accuracy; that after the OIR Group report was
17 received, he made an official request to see it before any further steps were taken; that
18 he made this request by email in July 2021; that Chief Williams ignored it; that he
19 followed up later with Mike Kihmm, who told him that the Chief would not approve his
20 request to review the report and Chief Williams was unhappy he made the request;
21 that Kihmm told him that the report found that the use of force was objectively
22 unreasonable; that Knight could not understand that conclusion, based upon all the
23 information he had reviewed and provided; that he wanted to be sure Connolly was in
24 fact using the provided information and understood it; and, that although Connolly was
25 a very intelligent man, Knight had some personal concerns about his understanding as
26 an actual investigator.

27 In reviewing the OIR Group report, Knight found a number of things that stuck
28

1 out as additional issues, including that the report seemed to rely upon the secondary
2 interviews that occurred a substantial period of time after the original ones, so that
3 there was not as much reference to the criminal investigation as he would have
4 expected; that Connolly did not use quotes from the transcript to really enumerate the
5 things that officers said; that he failed to give Bower enough information to make a
6 thorough assessment; and, that they failed to have someone other than Bower act in
7 the role of expert witness to give an opinion on tactics and force reasonableness
8 rather than having the OIR investigators go down that road themselves.

9 According to Knight, the analysis section of the report was opinion, rather than
10 factual analysis; and that it "fell short to me on lots of levels." He testified that he was
11 most struck by the failure of OIR to dedicate a section of the report to an analysis of
12 the video evidence, which would have been done by any expert; but in the absence of
13 an expert, there should have been a body camera or video analysis of the events and
14 how that led to their findings, as the issue of the timeline was very important to
15 substantiate the claim that the plan was bad and too rushed; that analysis of use of
16 force should rely upon facts and not opinion, preferably by listing factual bullet points
17 rather than final determinations, which is the way the Department is heading, so that
18 the findings are made by a Captain, with which the Chief can ultimately agree or
19 disagree; and, that in his view, the OIR Group report was a "catastrophically bad
20 administrative investigation."
21

22 Knight further testified that the Department maintains a CIRB governed by
23 Policy 301 which creates a secondary mechanism for review of critical incidents,
24 typically fatalities. The CIRB includes commanding officers, members of the training
25 department, members of professional standards, and at least two subject matter
26 experts, who conduct a thorough review and evaluation of an incident to determine if it
27 comports with Policy and training, including helping inform if training is sufficient. The
28 Board reviews the administrative investigation and may recommend further review or

1 recommendations to Chief Williams. Knight expected this case to go to the CIRB and it
2 did not, to this day, which Knight believes is a Policy violation.

3 Finally, Knight testified that he spoke to Chief Williams personally to urge him to
4 convene the CIRB, but it was clear he did not want to do so; and, that in his tenure,
5 Knight could not think of another case involving a critical incident which did not go to
6 the CIRB and that they occur one hundred percent of the time except for in this case.

7 Officer Training on Use of Force

8 Lt. Shane Bower has worked for the Department for 23 years and serves as the
9 Professional Standards Division Commander, which includes IA. He is the SWAT
10 Commander, the Department Rangemaster, and a peer support member.²⁵ As
11 rangemaster, he provides firearms and tactics training to officers at the range
12 approximately two days per month, including training regarding law and policies related
13 to the use of deadly force. This includes training on the "human factors" which come
14 into play in shooting situations, including the ways individuals perform under stress,
15 which is important in analyzing use of force encounters.²⁶

17 Bower testified that in use of force situations, an individual sees what they
18 perceive as a threat and has to formulate some type of reaction to that threat; that in
19 addition to the thought process, there is a physical component that follows the thought
20 process; that a variety of studies show that for average law enforcement officers, it
21 might be a bit longer than that; but that $\frac{3}{4}$ of a second is viewed as the fastest
22 response time for a law enforcement officer to respond to a deadly threat; that he has

24 ²⁵On June 2, he was a Sergeant for the Traffic Division, the Commander of the hostage negotiation team,
25 and worked as a firearms instructor. He spent over four years on the CRT, has 17 years of experience with
26 the U.S. Army as a firearms and tactics instructor, and was a Deputy Sheriff with Contra Costa County for over
27 two years prior to joining the Department. He has been called upon to render expert opinions for the
Department regarding firearms and tactics in use of force situations, including rendering an opinion on whether
use of force was justified or not.

28 ²⁶The parties agreed that based upon this experience and training, Bower qualified as an expert in firearms
and tactics.

1 testified in court about use of force; and, that he provides use of force analysis for the
2 City.

3 Bower also testified that in a high-risk or felony vehicle stop, typically a plan
4 would be made; that officers would get behind the suspect vehicle; that officers
5 responding would have their weapons drawn and would coordinate with the person
6 giving commands to the suspect, so that if they are cooperating, they are allowed to
7 surrender; that the person responsible for apprehending the suspect would be an
8 arrest team or less lethal option in those circumstances; that, in a pedestrian stop,
9 officers would stop short, point weapons at the suspect and give commands;
10 depending upon the level of compliance, the officers would take further action; that the
11 principles of time, distance, and cover apply to high risk stops to the advantage of the
12 officers because they give officers more time to formulate a better plan or at least have
13 time to communicate the plan; and, that the standard is to have more officers than the
14 number of suspects the officers are engaging with at that point in time.

15 According to Bower, a high-risk stop is consistent with the principles of de-
16 escalation because officers have the ability to use the time and distance to gain a
17 tactical advantage over the suspect and buy time to formulate the plan and neutralize
18 the threat. He testified that this may also give the suspect time to surrender; but if the
19 suspect decides to present a deadly threat, officers have the advantage of distance,
20 time and position to neutralize the threat; that, based upon his years with the
21 Department, officers working for the City are extremely experienced in conducting
22 high-risk felony stops, because officers routinely face situations such as stopping
23 stolen vehicles and violent crimes and are trained to do so from new hire orientation
24 through advanced officer training; and that, due to short staffing, there is more per
25 officer exposure to these types of events since the early 2000s, and that the CRT team
26 has significantly more experience and training in conducting high risk stops and high-
27 risk contacts of all aspects.
28

1 Bower also testified that there is a training concept, "action beats reaction," to
2 the effect that reaction requires time to process what is happening, formulate a plan,
3 and then react, meaning that an officer is at a disadvantage when they are reacting to
4 something; that this is where training and experience come into play, as well as luck,
5 to allow the officer to overcome the action taken against them with a successful
6 reaction; that the term "present ability, opportunity, and apparent intent" in PC 835a to
7 him means that the person has the ability to use deadly force on officers or others, that
8 they have the ability to carry that out, and that the officer must formulate a plan and
9 react; that this is looked at from the officer's perception at the time and not in
10 hindsight; and, that to use hindsight is a disservice to what the officer is experiencing
11 at the time and leaves out relevant facts, so that the fact that a subject turns out not to
12 be armed does not change the analysis if the officer perceived such a threat at the
13 time, taking into account all of the events leading to the encounter and the events
14 during the encounter.

15
16 Bower further testified that he has studied the behavior of officers following their
17 involvement in critical incidents, in that he has been present in such situations, having
18 been in an OIS and deadly force encounters in the military; that he has been Force
19 Science certified, which required a one-week class; that Force Science is an
20 internationally recognized training that breaks down everything leading up to, during,
21 and after a use-of-force incident, which considers all relevant factors using a scientific
22 formula of how these events occur, to come up with a better explanation of what is
23 often understood by the naked eye; and, that Force Science considers human factors,
24 including officers' emotional response, physiological response, and physical response
25 to events before, during and after the event.

26 Based upon his experience in Force Science and his own experience, he has
27 seen experienced officers engaging in behaviors or statements that sometimes do not
28 make sense following a shooting. He testified that bizarre statements or actions after a

1 critical incident may occur because the officer has just been put into an extremely
2 stressful situation; that some people have the inability to formulate words or coherent
3 sentences; that some are still processing the events in their mind while they are trying
4 to verbalize what they want to say; that others may say something and not recall; that
5 others may be able to communicate clearly; that officers may experience a wide range
6 of emotions and responses regardless of how many events they have been in,
7 including negative or odd reactions even if they have had coherent reactions in the
8 past; and, that in his opinion, the cause of these behaviors relates to the stress,
9 potential sensory overload, and a reaction to having their life or the lives of others
10 threatened.

11 Bower has trained Department members regarding shooting through a vehicle's
12 windshield and into a windshield; that the training involves the use of loaner vehicles
13 from tow yards; and discussion of the ballistics and details that come into play in such
14 shootings, including replicating shooting scenarios in which the officer must engage a
15 threat from within the vehicle through the windshield or side window;²⁷ that, during the
16 training, they explain the reasoning behind shooting through a windshield, which
17 occurs when time is of the essence and firing a weapon through the windshield is the
18 most immediate and safest way to address the threat, rather than taking the time to
19 put a vehicle in park, undo seat belts, and open the doors, all of which lose critical time
20 and divide attention in a potential deadly force situation.²⁸

23 ²⁷Shooting through the windshield results in less shattering, because it is made of safety glass, as well as
24 increased noise, and that there is a constant perception of threat by the officer firing.

25 ²⁸In Bower's opinion, shooting through the windshield may be the quickest and most efficient way to
26 address the threat, even though shooting through the interior of the vehicle will create a slight deviation
27 upward of the projectile, which can be reduced by firing more than once through the same hole, increasing
28 the odds that a bullet will find its target. In other words, when firing through a windshield, officers are trained
to fire multiple rounds in quick succession. Once the threat is neutralized, the officer can then exit the vehicle,
take cover, and formulate a plan to approach. They train their officers to shoot until the threat is neutralized
or they no longer perceive the threat, in distinction from snipers, who are trained to do one precise shot. He
testified that the "physical response in most [OIS] is that the officer fires a volley of rounds."

1 Bower also testified that officers who have neutralized the threat go into a low,
2 ready position to assess for any additional potential threats, and to take a look around
3 in order to break the potential of tunnel vision, as there is a delay in what the officer is
4 seeing due to the perception/response time factor, or lag time between what occurs
5 and when it is processed. For example, sometimes a suspect will be shot in the back
6 because they present a threat, the officer perceives the threat, they respond to the
7 threat and begin firing, and at the point where the suspect may be turning, the officer is
8 still responding and reacting to the threat as it was facing them due to the lag time of
9 perception reaction as an event is occurring.

10 Regarding this shooting, Bower had no role in the criminal investigation of the
11 incident involving Grievant except for responding with the Traffic Division to do the
12 forensic mapping of the scene. He was also interviewed by OIR Group during the
13 administrative investigation to give expert analysis of the use of force. He testified that
14 he was called in to discuss the tactics used by officers during this incident, although
15 during that interview, he did not have access to the reports, interviews, or the videos;
16 that he informed OIR Group that he lacked that information; that, since that time, he
17 has read the complete OIR report; and, that it was only by reading the report that he
18 found out that Grievant, [REDACTED] [REDACTED] and [REDACTED] met for 5 to 15 seconds prior to
19 responding to the Walgreens parking lot, with very little communication during that
20 short meet-up.
21

22 According to Bower, in his review of the materials, he interpreted that [REDACTED]
23 gave the detectives a directive, coming from one of the highest ranking members of
24 the department, whereas the SWAT operators are the people specifically trained to
25 respond to this type of event. He testified that he would not expect the detectives in
26 this scenario to push back against the Captain or disagree with his plan, because
27 there was nothing in the directive which was unethical, immoral, illegal, or outside
28 policy, as they were responding to a crime; that he has worked with [REDACTED] for many

1 years; that he is a very efficient and knowledgeable patrol officer and detective in his
2 career with the City; that he would think that these younger detectives responding to a
3 person of significantly higher rank, with an abundance of training and experience,
4 would not challenge his decision, especially in that they likely believed they would just
5 go into the scene and effect an arrest or prevent looting; and, that if he had been in
6 that situation, he would not have challenged [REDACTED]

7 Bower testified that he understood the plan was to go in and prevent further
8 looting and destruction of a business by taking two avenues of approach, presumably
9 to prevent escape, and then arrest any or all subjects engaging in criminal activity; that
10 in his opinion, the plan was not poor from the standpoint of approaching a crime in
11 progress from more than one avenue; that he would not have expected the officers to
12 wait and call for backup, as they had three CRT detectives/SWAT operators and a
13 Captain; that in an ideal scenario, there are always more people available, but in the
14 reality of this incident, they did not have the luxury of asking for additional personnel;
15 and that they used the "best tools and people that were available to them at the time to
16 go in and carry out this plan;" that he did not see what occurred as an inappropriate
17 response; that the team went in with a plan to prevent crime; and, that, when [REDACTED]
18 broadcast that the subjects were armed or possibly armed, this would have heightened
19 their awareness from the standpoint of going into a "potentially significantly more
20 dangerous situation" and possibly exigent circumstances.

22 Bower would not have expected the officers to retreat or reposition their
23 vehicles at the time [REDACTED] was pulling into the lot; because [REDACTED] was in close
24 proximity to the threat; that [REDACTED] vehicle was struck by fleeing suspects and [REDACTED]
25 sustained injury from that; that officers cannot leave another officer there; and, that he
26 would not have expected them to put the vehicle in reverse, with [REDACTED] in the lot and
27 potentially being engaged by the suspects.

28 Bower also testified that, by putting out that someone is armed or may be

1 armed, this primes the officers to expect an armed subject, which can have positive
2 and negative effects on the individuals responding and the outcome; that he
3 understood all three officers stated that they perceived a threat of imminent death or
4 serious bodily harm, but two did not draw their weapons; that he would not have
5 expected all of them to do so in these circumstances, as [REDACTED] responsibility was
6 to drive and [REDACTED] was the flash bang, whereas Grievant was in the back seat with
7 a rifle; that, in this situation:

8 the designated lethal force option was the most stable shooting platform
9 under these circumstances and the others had their own assigned
responsibilities;

10 that only if Grievant were no longer effective to address a threat, then the other two
11 would have to formulate a secondary plan to engage a threat with lethal force; that
12 having [REDACTED] try to multitask while driving would not be fair; that [REDACTED] focus
13 was to use a diversionary device; and to have them switch to the use of lethal force in
14 that time frame would not be reasonable, because Grievant was the one to deploy the
15 lethal force options; that in his opinion, the distribution of responsibilities was
16 consistent with Department training; so that the failure of [REDACTED] and [REDACTED] to
17 draw and fire their weapons did not mean there was no imminent threat of deadly
18 force, as they each had their area of responsibility; and, that by the time they would
19 have had the opportunity, there was no need to do so.

21 Based upon his expertise, Bower further stated that the matter in which
22 Grievant fired through the windshield was consistent with his Department training, in
23 that the Department teaches officers to engage through windshields at varying
24 distances in the safest possible manner; that Grievant had the center most position
25 and a shoulder-fired weapon with a suppressor and engaged the immediate threat;
26 that the fact that Monterrosa was shot in the back of the head does not change his
27 conclusion that Grievant's actions were consistent with his training; that once a
28 suspect is being fired upon, they can have a variety of reactions in a very short period

1 of time; that the mere fact that somebody is shot in the rear portion of their body does
2 not take away from the perceived threat and/or reaction that the officer displays; and,
3 that he concluded that Grievant's actions were in line with Department training and
4 Policy as it pertains to addressing a threat.

5 Testimony of Grievant

6 Grievant had worked for 8 years with the Department at the time of his
7 termination.²⁹ He joined the Department in August 2014 to work for a Department with
8 a larger breadth of assignments. He was initially assigned to patrol for a year and then
9 was assigned to the newly formed CRT. He joined the Department SWAT team in
10 2018 and was on both at the time of his termination, both assignments requiring
11 specialized training.³⁰ His primary role has focused on investigations, including on
12 CRT, which was tasked with apprehension and surveillance of wanted violent persons
13 or fugitives. These duties almost always involved covert plainclothes surveillance. As
14 a SWAT team member, he responded in fully marked gear to situations with better
15 resources, equipment, and training to alleviate the burden on patrol officers who may
16 be facing situations beyond their training or capabilities. In late 2020, he was made
17 one of two Department SWAT team leaders and was responsible for overseeing all
18 training and for direct tactical movement during operations to carry out tactical plans of
19 the SWAT Commander, who was typically offsite at a command post. Essentially, he
20 supervised the other 15-18 SWAT operators who might be on the scene. When his
21

22
23 ²⁹Grievant had previously worked for 7 years as a police officer and detective for the [REDACTED]
24 [REDACTED]. For [REDACTED], he worked patrol prior to becoming a detective investigating
25 gangs and crimes against persons and then joining the regional gang task force as an investigator and the
26 joint [REDACTED] SWAT team. He served as a SWAT operator there for almost four years.

27 ³⁰Grievant's training included an 80-hour basic investigator course, an 80-hour gang investigator course,
28 attendance at the Institute of Criminal Investigation courses at a local college, the initial 80-hour FBI SWAT
course, an advanced FBI SWAT course, and a 40-hour advanced handgun firearms course. He has also
received ongoing training through other agencies including the Los Angeles, Sacramento, and other local
police departments and law enforcement agencies in areas such as investigations, surveillance techniques,
and electronic surveillance.

1 Sergeant was unavailable, he was also the designated Acting Sergeant of his CRT unit
2 overseeing five or six officers.

3 Grievant recalled that civil unrest in Vallejo and nationwide began about a week
4 before June 1, in the direct aftermath of the George Floyd incident in Minneapolis.
5 Because of his familiarity with social media investigations, he was tasked with
6 gathering intelligence and providing briefings to command staff regarding potential
7 criminal behavior associated with riots happening in the Bay Area. During the previous
8 week, he perceived things starting to become progressively worse within the City,
9 evolving from peaceful demonstrating to nighttime vandalism, including rocks and
10 bricks thrown through Department windows and individuals trying to break into the
11 lower-level dispatch center. Several people were arrested in the back parking lot of
12 the Department, which at that time was not very secure, so tear gas and flash bangs
13 had been used to disperse vandals and people causing damage trying to enter the
14 building.
15

16 As a SWAT team member, he was on standby for almost the entire week.
17 There was a high concern among command staff that the Department was going to be
18 overrun. Numerous emails went out about what would happen should people breach
19 the Department and whether deadly force should be used. There was a general
20 feeling that things were not getting better and in fact were getting progressively worse.

21 On June 1, he was called into work around 6:00 pm and arrived in Vallejo at
22 9:00 pm. He originally reported to the CRT office to meet with [REDACTED] and [REDACTED]
23 On his way there, he spoke with several on-duty officers who told him about ongoing
24 looting, specifically break-ins at pharmacies and other high value targets. He also
25 received updates from SWAT team members and listened to the police radio, where
26 he heard about vehicle pursuit after vehicle pursuit in rapid succession, multiple priority
27 one (highest priority) calls, shootings in progress, carjackings, and robberies. He also
28 noted that Potts and [REDACTED] were engaged in direct responses to burglaries and

1 pursuits, a very unusual activity for Watch Commanders.

2 After he got to CRT, they decided to ride in [REDACTED] truck, as it was the
3 largest and roomiest for multiple people, as they did not want anyone to ride alone.
4 They assumed [REDACTED] would drive because it was his vehicle. Grievant jumped into
5 the back seat because he is only 5'11" as opposed to [REDACTED] who is about 6'3" tall
6 and would need more room. [REDACTED] brought up that he had a flash bang and Grievant
7 took lethal cover with his rifle in the back seat. Because of space, it would not have
8 made sense to have [REDACTED] bring his rifle into the front seat, due to lack of room but
9 also because he was handling the less lethal option. They were in an unmarked car
10 because the Department did not have enough patrol vehicles for everyone, not
11 because they were in any sort of undercover capacity.

12 They drove to the command post located at the Best Buy per instructions from
13 Knight. On their way, he saw a pack of seven cars driving together with lights out on
14 the freeway exit and enter the Walgreens lot and start looting it. At the command post,
15 they attended a briefing given by Knight, Grievant's direct supervisor that evening,
16 where Grievant learned that SWAT resources would be used to assist patrol, which
17 was unable to handle the volume of calls; that SWAT would spread out in the City and
18 respond to calls for service regarding looting and take enforcement action against the
19 looters.

20 Their first call was a shooting call, but while on the way they were redirected to
21 a burglary attempt at the local gun store in the middle of the City, but as they arrived,
22 they were told the looters were unable to access the store and had left and eventually
23 responded to [REDACTED] call for reinforcements.

24 At that point, Grievant did not know [REDACTED] as he had never worked with him.
25 They were driving north on Tuolumne approaching Redwood when [REDACTED] broadcast
26 that he had viewed or was viewing a burglary in progress at the Walgreens. The team
27 drove to [REDACTED] location and pulled up alongside him. [REDACTED] pointed to the
28

1 Walgreens and said that looters were going in and out of the drive-through window.
2 Grievant looked and could see them for himself. [REDACTED] then said he was going to go
3 that way (north) and "you go that way"(south entrance.) [REDACTED] then drove off. The
4 encounter lasted about ten seconds, as the strategy did not require much
5 communication other than the direction each vehicle would go.

6 Grievant understood that the plan was to contain the looters by triangulating
7 their positions using a high-risk stop for enforcement, or felony stop.³¹ He testified that
8 he understood [REDACTED] directions to be a legal order from a superior officer setting
9 forth a plan; that [REDACTED] drove northbound to the northernmost entrance of Walgreens
10 and pulled into the lot a car length or two and triangulated his vehicle to point where
11 the looters had been exiting; that they traveled westbound on Redwood across
12 Broadway and turned into the first of the two southern entrances into Walgreens; that
13 he was armed with his Department rifle which had a light and a suppressor attached to
14 the barrel,³² that he carried the rifle because it provides better ballistics than a
15 handgun, meaning it could defeat certain armor and provide a longer distance for
16 accurate shoots, allowing him to stay further back from a potential threat, and also is a
17 shoulder-mounted weapon which is secure, accurate, and has a holographic sighting
18 system allowing cover and accuracy, as well as a higher magazine capacity allowing
19 the user to reload less frequently; that, as they drove through the lot, he heard an
20 update from [REDACTED] that the subject "was armed and in black;" that he did not hear the
21 word "possibly," that the term "armed" meant that the subject had a firearm; and, that
22

23
24 ³¹Grievant testified that he has conducted at least 150 high risk stops; that they are one of the primary tools
25 used in Vallejo for gang members and armed felons; that he participated in regular training regarding
26 conducting them; that the tactic can be used in a wide variety of scenarios; that the concept of de-escalation
27 itself is not used in such scenarios other than using time on your side as much as possible and using cover
28 and distance; but that the concept applies more to situations where there is no crime in progress, such as
dealing with a person in crisis, not when a felony is being committed; and, that Grievant admitted that
Department Policy on de-escalation was brand new, only adopted in February 2020, and there had not been
training on its use.

³²The suppressor can be shot in close quarters without causing hearing damage to other officers.

1 the picture changed because this was now not just a burglary, but a situation with an
2 armed suspect, so his number one concern was to identify the threat.

3 Grievant also testified that the first thing he tried to do was open his door so he
4 would be able to exit and not be stuck inside the car if the threat started to shoot at
5 them, but the door had child locks on; that when he could not exit, he scooted to
6 center himself between [REDACTED] and [REDACTED] to identify the person [REDACTED] said was
7 armed; that his number one thought was to make sure that whoever had the gun did
8 not shoot at them; that they could not go in a different direction or move away because
9 [REDACTED] was in the lot covering them; that even if they had time to back up, he would
10 not have left [REDACTED] behind in that situation; that changing plans at that point would
11 have been dereliction of duty to leave the Captain behind after he said someone had a
12 gun; and, that he would rather be killed than leave a team member behind.

13
14 Grievant further testified that after he centered himself in the back seat, he saw
15 a person in black who was running from underneath the area of the Walgreens drive
16 through with his hands down by his waist as though he were coddling an object; that
17 this type of gait is common when criminals carry guns in their waistband, as they do
18 not have holsters to secure their guns; that criminals have this gait to avoid the gun
19 from falling out; that this person was later identified as Monterrosa; that he was
20 running eastbound toward Broadway to a dark sedan parked there; that the back door
21 of the sedan was open as he ran toward it; that Monterrosa got partially inside the
22 vehicle, maintaining his feet on the ground outside the vehicle but leaning in; that he
23 abruptly got back out and the vehicle took off; that Grievant was expecting him to get
24 into the car and drive away; that he expected a pursuit would ensue; that the truck they
25 were in was not a pursuit-rated vehicle; but when the suspect exited, it looked like he
26 intentionally got out of the vehicle and that he was not just left behind; that it surprised
27 Grievant as he expected him to flee and he was not fleeing; that he had ignored his
28 avenue of escape and was now doing something different; that Grievant was sure this

1 was the person [REDACTED] was referencing; and, that he recalled that, after turning out of
2 the vehicle, Monterrosa began running away from it. Grievant testified:

3 He turned, began to move in a western direction away from the vehicle,
4 and then at which point he abruptly spun. And then I saw an object
5 protruding from his waistband, which looked exactly like the butt of a
6 firearm. He grabbed that object and started to take a - what looked like a
7 half-kneeling type of position while facing our truck. . . [The object was]
8 dark. It was elongated. It was about three or four inches long. It, at that
9 distance, looked exactly like the butt of a handgun. . . I was convinced
10 Mr. Monterrosa was going to fire at the officers and me, my partners and
11 myself.

12 Grievant explained that Monterrosa's actions were not consistent with
13 somebody surrendering to law enforcement; that at no point did Monterrosa put his
14 hands up, which is the sign of surrender; and that:

15 every normal person or suspect knows that the police are aware that
16 handguns are kept in a waistband. And they know, if I move my hands
17 toward my waist, the police are going to think I'm going for a gun;

18 that Monterrosa grabbed the object in the same manner one would grab a firearm,
19 with his hand over the back side; that because Grievant believed that Monterrosa was
20 grabbing a firearm from his waistband to shoot them, there was an immediate threat;
21 that he was worried about himself but also [REDACTED] who had started to exit the vehicle;
22 that he was concerned [REDACTED] had not seen Monterrosa; that he felt he had no
23 choice because he was the only one able to react to this threat, so he fired his duty
24 rifle at Monterrosa; and, that about 3-4 seconds had passed since [REDACTED] broadcast.

25 According to Grievant, he did not yell "gun" because he needed to respond with
26 deadly force to prevent them from being shot. He testified that yelling "gun" would not
27 be more appropriate than taking action, as words would not have saved [REDACTED] or
28 [REDACTED] that he fired five rounds in less than 1.5 seconds with no break between
29 rounds, because that is how he has been trained to shoot through a windshield,
30 because a short burst of rounds assured:

31 that the target, Mr. Monterrosa was still on target, meaning a subject
32 can't really move very far in a second. He may have taken a step, but
33 your target is now not somewhere completely different;

1 that the vehicle was stopped or almost stopped at the time he shot; that he did not give
2 any commands prior to using force; that Monterossa never actually pulled out or
3 presented any sort of weapon; and, that he fired when he saw Monterrosa's hand on
4 what was discovered to be a framing hammer, and he spun to face them.³³
5

6 Grievant recalled that he had been trained on shooting through windshields by
7 the Department, including an extensive training block in 2019 which involved sitting in
8 actual vehicles shooting at targets so they could learn best how to do that; that he
9 attended this training in his capacity as a SWAT operator,³⁴ that he successfully
10 passed the training; that the training covered the trajectory and upward movement of a
11 bullet and related concepts including trying to shoot through the same hole or area of
12 glass as much as possible to have the least amount of bullets affected by the
13 trajectory; that in order to defeat the glass while still being on target, he was trained to
14 shoot a reasonable amount of rounds in rapid succession, that, after firing the weapon,
15 he realized he needed to get out of the vehicle, so he exited on the driver side to be
16 next to [REDACTED] that he activated his body camera as he was exiting the vehicle; that
17 he said, "What did he point at us?"; that when he said that, he was in shock and utter
18 disbelief at what had happened; that when he made that statement he knew
19 "absolutely in his mind that Monterrosa had a gun and was about to shoot my partners
20 and myself," but his mind was still in disbelief as to what had just happened; that he
21 was not sure what the others had seen; that he needed to say something to let them
22 know he was "in absolute disbelief;" and, that the adrenaline, surprise, and a:
23

24
25 ³³In Grievant's interview with OIR Group, he said that [REDACTED] had already given commands for the people
26 at the Walgreens to surrender. At hearing, he did not remember whether he heard [REDACTED] give commands
27 to people to surrender or whether he was relying upon what he might have heard from others during
discussions of the shooting at the Department in the eight months between the shooting and his interview by
the OIR Group. He testified that he thought [REDACTED] had gotten out of his vehicle and got back in as the car was
coming at him and was rammed by the car that Monterossa had partially entered.

28 ³⁴See, UX Y.

1 word salad comes out in my attempt to communicate with them of what
2 just happened, what kind of gun is this, I don't- - what just occurred.³⁵

3 Grievant also testified he had no doubt whatsoever that Monterrosa had
4 grabbed and was drawing a firearm; that he has captured hundreds of murder
5 suspects in his role as CRT, and never previously had a moment where his brain told
6 him, "It's going down now, you are about to be shot;" and that he "100 percent
7 believed he was an imminent threat and about to shoot at us;" that Grievant recalled
8 stating "he pointed a gun at us;" that his intent was to communicate to his partners and
9 [REDACTED] that he has a gun and tried to shoot us; that he was not sure why "word salad
10 came out and I said 'point';" that he was trying to convey that Monterrosa tried to shoot
11 them; that he did not know whether Monterrosa was hit at that point; that he knew he
12 had to say something to let them know what was going on because he did not know if
13 there was possibly still a threat; that they rapidly converged on Monterrosa to detain
14 him; that it was discovered that he had a framing hammer sticking out of his
15 waistband; and, that they began first aid.

16 Grievant also watched the body-camera video and heard that he said "fucking
17 stupid" or something of that nature. He testified that this was in reference someone
18 acting so much like they had a firearm and it was a hammer; that he was "just
19 dumbfounded," and could not understand why Monterrosa did what he did; that he
20 was upset he had just shot someone; that he was so certain it had been a gun only to
21 find out it was just something that looked like a gun; that he did not want to hurt or kill
22 someone that did not have a gun; that he was feeling the weight of it come down on
23

24
25 ³⁵The body cameras have a two-minute buffer, meaning that they are always re-recording and then
26 recovering over in two-minute intervals, so that when a body camera is activated, it goes back and shows the
27 previous two minutes that the camera had recorded; that the cameras did not capture the shooting itself
28 because of the angle of the cameras, but the timing of the shooting was recorded on all the officers' body
cameras. The external surveillance video at Walgreens, which might have been helpful, had been damaged
the night before by looters. As shown in the criminal report, a drone flying over the Walgreens also did not
contain useable footage.

1 him; and, that, to this day, he still does not know why Monterrosa did what he did.³⁶

2 Grievant further testified that he made the statement "I don't fucking need this"
3 to [REDACTED] that he knew that they were out there because of the wake of the George
4 Floyd incident and that he had just shot someone who only had a hammer in the
5 middle of a nationwide protest; that he knew his life would never be the same; that
6 this was bad, because it would cause more of what they were trying to stop; that this
7 would be a high profile incident and he understood the politics behind the situation;
8 that he knew that he did the right thing because he had no other options; and, that the
9 situation was a "huge tragedy;" but just because of the outcome did not mean that his
10 tactics or judgment was bad.³⁷

11 Grievant's Work Record

12 Grievant received regular PE's from his supervisors including the most recent,
13 conducted by Sgt. Bautista and signed by the chain of command, including by Chief
14 Williams on March 17, 2021. He was rated as "exceeds expectations" in all areas,
15 including a recommendation from his supervisor that he consider promotion. He is
16 described as one of the Department's:

17
18 most experienced detectives who continues to find innovative ways to
19 combat violent criminals, ultimately locating and arresting them.

20 He was deemed:

21 an informal team leader but a team player as well and does not hesitate
22 to teach and guide his fellow detectives the proper way to conduct these

23
24 ³⁶Grievant admitted that he told the OIR investigator that Monterrosa was:
25 shooting at us so his friends can get away. That was just 100 percent and I don't know why I was able
to process and I actually made that thought in my head...And I remember just thinking that very
distinctly... that's what was going through my mind.

26 ³⁷Grievant admitted that he had told the OIR Group during his interview:
27 Don't hear me say that this was the best plan. I will concede that the planning portion wasn't there.
28 But given what we were doing, and given that the train had already been- - was already going, you
know, 80 miles an hour, there was no—there wasn't time to broadcast anything, there wasn't time to
ask anything, there wasn't time to say anything.

1 complex types of investigation.³⁸

2 Grievant's 2020 PE also ranked him as exceeding expectations in all areas,
3 noting his "vast amount of knowledge and experience" and a "pioneer in digital/social
4 media investigations and search warrants." His supervisor also noted that he has
5 "played an integral role in acquiring investigative tools that lead to our detectives being
6 about to do more efficient and detailed investigations." His supervisor noted that
7 Grievant was "a true team player, hard worker, and truly dedicated to his job" and that
8 "it has been my pleasure to supervise [Grievant] and look forward to even more
9 investigative and tactical advancements he has to offer in the following years."³⁹

10 POSITION OF CITY

11 The grievance must be denied because Grievant was discharged for just cause.
12 The City did not abuse its discretion under these facts and circumstances. Grievant
13 participated in a "plan" that was poorly and hastily conceived and led to the shooting of
14 Monterrosa. The development of the "plan" lasted less than ten seconds. Grievant
15 admitted that the "plan" was not great. Those in the CRT vehicle each thought the
16 plan had a different goal. [REDACTED] thought they were going to set a perimeter and
17 conduct a felony stop of the looters. But as the vehicle drove into the parking lot,
18 [REDACTED] stated that the looters were armed or possibly armed.

19
20 Grievant failed to de-escalate the situation and used excessive force in violation
21 of Department Policy. When [REDACTED] broadcast stated that someone in black was
22 armed, all three detectives focused on him because he was wearing black and
23 attempted to get into a sedan that fled the scene before he could enter the vehicle.
24 Even though Grievant never saw Monterrosa pull and present any sort of weapon, he
25 fired through the windshield at Monterrosa. [REDACTED] saw Monterrosa with his hands
26

27 ³⁸UX L.

28 ³⁹UX L.

1 at his waistband but did not see anything in his hands at the time. [REDACTED] saw a
2 "black object" in Monterrosa's hand which he thought was a gun, but later determined
3 it was likely a cell phone. Neither [REDACTED] nor [REDACTED] fired at Monterrosa.
4 When Grievant shot through the windshield, it created difficulty in seeing the alleged
5 threat presented by Monterrosa. Grievant gave no warning prior to firing and fired five
6 rounds in 1.5 seconds.

7 As testified by Bower, there should be constant perception and reevaluation of
8 the threat, which is primarily visual. Because the shots damaged the windshield,
9 Grievant could not perceive or reevaluate any alleged threat because he could no
10 longer see through the windshield. Therefore, he could not constantly perceive and
11 reevaluate the alleged threat. Grievant was not even sure what threat existed, stating
12 immediately after the shooting, "What did he point at us?" to [REDACTED] After [REDACTED]
13 said, "I don't know, man," Grievant said, "He pointed a gun at us." The three detectives
14 eventually searched Monterrosa and realized he possessed a framing hammer not a
15 firearm. In addition, Grievant failed to activate his body worn video recorder prior to the
16 incident despite Policy requiring it. As he testified, he did not believe that this incident
17 would present exigent circumstances. He failed to comply with the Policy.

18 The City has the burden to prove Grievant's misconduct by a preponderance of
19 the evidence. This burden is met if the evidence shows that Grievant more likely than
20 not engaged in the misconduct. The City's discipline should not be overturned unless
21 the City has abused its discretion. The fact that reasonable minds may differ regarding
22 the penalty imposed supports a finding that the City has acted within its discretion.

23 An unfortunate cascade of errors led to the tragic outcome in this case. [REDACTED]
24 plan contradicted the general practice of slowing events and gathering the necessary
25 resources to address a particular situation. This "plan" forced the detectives to rush
26 into a situation where looters outnumbered officers and created the potential for
27 catastrophe. When analyzing the facts as presented in the OIR Investigation Report,
28

1 interview transcripts and the evidence at this arbitration hearing, Grievant failed to de-
2 escalate this incident as required by Policy 300.4.

3 Grievant followed an insufficient plan proposed by [REDACTED] erroneously believed
4 that Monterrosa was presenting a threat when he only had a hammer; and based on
5 that, fired multiple rounds through a windshield which caused the windshield to
6 fragment making it impossible to see Monterrosa or to evaluate the effectiveness of
7 each round fired. This force used in response to this erroneously perceived threat was
8 unreasonable as defined by the use of force and deadly force policies (300.5 and
9 300.6, respectively). He also failed to activate his body-worn camera as required by
10 Policy 423. The totality of these failures resulted in the charge of poor work
11 performance as provided in Policy 321.5.6, Efficiency. These Policy violations justify
12 the termination imposed on Grievant.

13 Grievant's defenses do not mitigate the charges against him. Grievant
14 perceived Monterrosa as an imminent threat and argued he had no choice but to fire.
15 He believed that Monterrosa was armed with a gun and that he was going to shoot him
16 or one of the other CRT detectives. The evidence simply does not support that
17 position. Grievant admits he never saw Monterrosa pull or present a weapon. Neither
18 of his partners fired at Monterrosa. Grievant's pre-shooting conduct put him in a
19 position where he erroneously perceived a threat where one did not exist resulting in
20 his erroneous decision to shoot at Monterrosa, killing him.

21 After reviewing the OIR Group report, Chief Williams determined that
22 termination was the appropriate level of discipline, because Monterrosa did not
23 present an imminent threat making deadly force unwarranted under Policy. This was
24 supported by the fact that Monterrosa was shot in the back of the head, indicating he
25 was not facing the detectives when the fatal shot was fired. Chief Williams determined
26 that Grievant did not know what, if anything, was pointed at them—and admitted in his
27 investigative interview that he did not see a weapon pulled or presented. The evidence
28

1 further shows that Grievant used deadly force without any effort to de-escalate the
2 situation, without giving any warnings prior to using force and by using the
3 extraordinary tactic of firing through a windshield from the inside of a vehicle.

4 According to the State Courts of Appeal:

5 there are certain professions which impose upon persons attracted to
6 them, responsibilities and limitations on freedom of action which do not
7 exist in other callings. Public officials such as judges, policemen, and
8 school teachers fall into such a category.⁴⁰

9 Here, the Department exercised its discretion to terminate an officer who violated
10 multiple Policies after a careful and considered evaluation of all available evidence.

11 POSITION OF ASSOCIATION

12 The grievance must be sustained and Grievant reinstated to his former position,
13 and completely made whole in wages and benefits lost, because the City has not
14 carried its burden to demonstrate just cause exists for his discharge. The alleged
15 misconduct involved alleged unreasonable use of deadly force, which constitutes a
16 criminal offense and significantly stigmatizes an employee's reputation. Under GC
17 13510.8(a)(1), a peace officer is subject to revocation of their certification if they are
18 terminated for cause or if they have engaged in serious conduct, including "the
19 excessive or unreasonable use of force." Unlawful use of deadly force under color of
20 authority without lawful necessity can be prosecuted as a crime.

21 Based on these factors, the City should be required to prove its case by clear
22 and convincing evidence.⁴¹ Further, the City should be held to the heightened "clear
23 and convincing" standard in this appeal in the conducting of *de novo* review of all

24 ⁴⁰*Ackerman v. State Personnel Bd.* (1983) 145 Cal. App. 3d 395, 440.

25
26 ⁴¹See, Elkouri & Elkouri, *How Arbitration Works*, pgs. 15-27 (8th Ed. 2016); see also Brand & Biren,
27 *Discipline and Discharge in Arbitration*, p. 432 (2nd Ed. 2008) (clear and convincing standard applies to cases
28 involving conduct such as falsification, workplace violence, dishonesty, theft, or other conduct subject to
criminal prosecution).

1 aspects of the case.⁴²

2 As to the legal standard, the seminal case is *Graham v. Conner* (1989) 490 U.S.
3 386, the Court established that the use of deadly force constitutes a "seizure" under
4 the Fourth Amendment, which must be examined for reasonableness:

5 judged from the perspective of a reasonable officer on the scene, rather
6 than with the 20/20 vision of hindsight...the calculus of reasonableness
7 must embody allowance for the fact that police officers are often forced
8 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.

9 The inquiry is one of "objective reasonableness."⁴³

10 Moreover, pursuant to PC 835.a, peace officers may use deadly force "only
11 when necessary in defense of human life." The Code requires that deadly force be
12 evaluated "from the perspective of a reasonable officer in the same situation, based
13 upon the totality of the circumstances known to or perceived by the officer at the
14 time..." A threat of death or serious bodily harm is "imminent" when:

15 based upon the totality of the circumstances, a reasonable officer in the
16 same situation would believe that the person has the present ability,
17 opportunity, and apparent intent to immediately cause death or serious
bodily injury to the peace officer or another person.

18 Imminent harm cannot be based "merely upon a fear of future harm, no matter how
19 great the fear..." The totality of the circumstances is judged based upon:

20 all facts known to the peace officer at the time, including the conduct of
the officer and the subject leading up to the use of deadly force.
21 Peace officers maintain state and federal Constitutional rights to self-defense.

22 Under the above laws, the reasonableness of an officer's use of force must be
23 analyzed based upon the totality of the circumstances known or perceived by the
24 officer at the time force was used. This must be judged from the perspective of a
25 reasonable officer on the scene and must allow for the split-second decision-making
26

27 ⁴²*Caloca v. County of San Diego*, (2002) 102 Cal. App. 4th 433.

28 ⁴³See, UX C-4; C-5.

1 often involved in use of force situations. The law does not require officers to retreat
2 and may use deadly force to protect themselves and others from imminent threats of
3 death or serious bodily injury. Here, the relevant factors all support that Grievant acted
4 reasonably.

5 The OIR Group's analysis completely ignored the totality of the circumstances
6 and corroborating evidence and focused solely on officer tactics leading up to the use
7 of force rather than upon Grievant's perceptions. They determined that by closing the
8 distance, the detectives increased their risk and decreased their tactical options, by
9 ignoring critical facts that establish Monterrosa posed an imminent deadly threat to the
10 detectives. Mere seconds before they made contact with the looters, Grievant heard
11 [REDACTED] advise that the subject in black was armed, which Grievant reasonably
12 interpreted to mean that Monterrosa had a firearm. Although starting to flee by
13 entering a car, Monterrosa suddenly stopped and spun toward the approaching
14 detectives and got into a kneeling, shooting position. He appeared to be holding a
15 firearm in his waistband area, where criminals are known to conceal firearms. He held
16 it in a manner consistent with someone holding a firearm. Grievant perceived
17 Monterrosa to be retrieving a firearm from his waistband and to assume a shooting
18 position, inconsistent with someone surrendering. Grievant 100 percent believed that
19 they were about to get into a shootout and took action to save his life and that of his
20 partners.
21

22 Grievant's perceptions were corroborated by his partners. [REDACTED] saw
23 Monterrosa spin around to face their truck and take a kneeling position consistent with
24 a shooting position, while holding a dark object concealed against his mid-section, like
25 someone holding a gun. [REDACTED] believed they would start taking rounds from
26 Monterrosa and believed he possessed the ability, opportunity, and apparent intent to
27 kill them. [REDACTED] also saw Monterrosa holding his waistband as he ran to the get-
28 away car, and he could see "something" protruding that he thought was a revolver

1 handle or high-capacity pistol magazine. Monterrosa was holding his hands in a
2 manner consistent with carrying or retrieving a firearm. [REDACTED] was surprised when
3 Monterrosa spun around and faced them in an aggressive manner, and thought he
4 was going to be shot. Had he been assigned as lethal cover, he also would have shot
5 Monterrosa. [REDACTED] believed Monterrosa posed an immediate threat and had the
6 present ability, opportunity, and apparent intent to cause death or serious bodily injury
7 to him and his partners.

8 The OIR Group also completely failed to account for the timing of events. The
9 incident, from [REDACTED] advisement to the detectives' perceptions of an imminent
10 threat, unfolded in mere seconds. Grievant and his partners were attempting to
11 enforce looting activity pursuant to the directive. They were doing their jobs. Their
12 training and experience convinced all three detectives that Monterrosa was not
13 surrendering but preparing to shoot them. Their tactics leading up to the use of force
14 does not change the apparent immediacy and severity of the threat Monterrosa posed.
15 The tactic used—a high risk stop—was standard law enforcement procedure and was
16 used throughout the night with other officers.

17 Moreover, the OIR Group ignored critical facts concerning the detectives'
18 perceptions while placing undue weight on the tactics to tip the scale of
19 reasonableness, stating that "their reckless approach was the most significant factor in
20 increasing the threat level they faced." This discounts Monterrosa's aggressive posture
21 and shooting stance, based solely on a pure hindsight determination that Monterrosa
22 was unarmed and theoretically surrendering. OIR determined that the officers'
23 perceptions were objectively incorrect, a hindsight determination forbidden by law and
24 Policy. OIR also placed undue weight on the fact that Monterrosa was shot in the back
25 of the head, concluding that the threat had significantly dissipated. However, as noted
26 by both *Skelly* officer Fox and by Bower, a plausible explanation is that in the less than
27 than two seconds it took for Grievant to fire his rifle, Monterrosa's head turned away
28

1 from the gunfire. OIR Group reached their conclusion by ignoring the real-life timing of
2 the event to reach their conclusion.

3 OIR Group also opined that Grievant limited his ability to perceive that the threat
4 had dissipated by shooting through the windshield. As stated by Bower, Grievant
5 followed his training and fired a short burst of rounds which he thought would be
6 sufficient to stop an imminent deadly threat. Grievant had no other option but to do so;
7 his split-second determination was to save his life and that of his partners. Nor do
8 Grievant's post-shooting statements demonstrate uncertainty about his perceptions.
9 The human factors of individuals under threat may cause them to formulate incoherent
10 sentences as they are processing an event. His statements are only indicative of
11 someone reacting to and attempting to process the situation.

12 The crux of *Graham's* analysis is that the analysis is made without the benefit of
13 hindsight. OIR also relied upon the fact that the other detectives did not unholster their
14 weapons. This ignores the fundamental understanding that Grievant was designated
15 lethal cover, [REDACTED] was driving, and [REDACTED] had the flash bang, which requires two
16 hands. They were not in positions to draw weapons. They did so upon exiting the
17 vehicle.

18 OIR's opinion that the detectives overestimated the threat level is also without
19 merit, because it is based upon the hindsight determination that Monterrosa was
20 unarmed. The threat did not stem from their tactical approach but from Monterrosa's
21 specific actions consistent with someone retrieving a firearm. The detectives did not
22 abandon the principles of time, distance and cover. With respect to de-escalation,
23 OIR relied upon an alleged failure to utilize such techniques to conclude that Grievant
24 increased the likelihood of the use of deadly force. However, these principles do not
25 apply to the current situation but to responses to persons experiencing mental health
26 crises. Here, the detectives were pursuing high risk stops on active looters. High
27 felony stops do indeed use some principles of time, distance and cover, but
28

1 Monterrosa's conduct made such tactics unfeasible. The circumstances simply did not
2 reasonably permit the detectives to mitigate the immediacy of the threat.

3 The OIR report condemned the "rushed, unplanned and aggressive nature" of
4 the Department's response to activity in the lot. However, Grievant and his partners
5 were called into work as SWAT officers to assist patrol with enforcement of looting
6 activity, not to conduct covert surveillance and to gather intelligence. This was due to
7 unprecedented violence and looting throughout the City. As Potts, Knight, Bower, and
8 Chief Williams agreed, the expectation was that the team would enforce the law and
9 make arrests. As Knight testified, it would have been neglect of duty for them to do
10 otherwise. OIR ignored the explicit mission that night given the circumstances that the
11 City was engaging with suspects via high-risk stops throughout the City. Chief Williams
12 knew about this as he was at the command post that night. Every witness had a clear
13 recollection of the chaotic events of the night other than Chief Williams. If he believed
14 the tactics were unsafe, he had a duty to order alternative directives.

15 The focus on [REDACTED] plan was misplaced. Considering the extensive
16 experience of the three detectives and [REDACTED] they all understood the plan despite it
17 being conveyed in only seconds. It was a routine plan to conduct a high-risk stop to
18 arrest looters. These are second nature to City officers and extensive communication
19 is unnecessary, as these are routine methods of enforcement. Although in hindsight
20 more planning can be beneficial, that is only with benefit of hindsight. These four
21 highly trained, experienced officers responded to a crime in progress. Waiting for
22 additional units would also have allowed the criminal activity to continue unabated or
23 allow the looters to escape. As Knight testified, they acted consistent with their
24 training, mission, and expectations, despite the tragic outcome.

25 OIR's conclusion on the seriousness of the suspected offenses was particularly
26 offensive to the citizens of Vallejo. While the reason for the contact was a commercial
27 burglary, the suspected offense at the time force was used was assault with a deadly
28

1 weapon on an officer. Their analysis is significantly undermined by their complete
2 failure to analyze Monterrosa's actions at the time force was used; he was engaged in
3 a felony crime and a potential assault on officers. It was their obligation to respond and
4 attempt to conduct enforcement.

5 In addition, OIR misstates the detectives' statements to diminish their credibility
6 and blames their tactical approach as the cause of their incorrect perceptions.

7 However, each detective perceived Monterrosa to be holding a firearm in his
8 waistband area while attempting to escape, before suddenly spinning around and
9 taking a kneeling shooting position while holding what appeared to be a firearm. In
10 fact, the handle of the hammer closely resembled the handle of a firearm in color,
11 material, shape and size. It was reasonable to believe that the hammer was a firearm;
12 any slight differences in their perception of the object did not change that they all
13 thought Monterrosa had a gun and was preparing to shoot them. The fact that they
14 were wrong is irrelevant. OIR mischaracterizes the situation the officers faced, as the
15 situation they faced was an imminent deadly threat. He was not shot for burglary.
16

17 With respect to the conduct of the individual being confronted, at the time of the
18 shooting, Grievant perceived that Monterrosa posed an imminent threat. The fact that
19 he was struck in the back of the head does not mean the threat had dissipated. It was
20 more likely that he turned his head within the less than 2 seconds it took for Grievant
21 to fire. Grievant fired several rounds in quick succession, which was consistent with
22 his training, to neutralize the threat and then reassess. OIC's hindsight analysis
23 ignores the training, law and policy at issue. Because Grievant saw a specific and
24 imminent threat, the totality of the circumstances was not based upon generalized fear
25 or fear of future harm. Being on edge or on high alert was not why Grievant discharged
26 his rifle. It was based upon specific articulable reasons of the threat he faced at the
27 moment he made the decision to shoot.
28

OIR Group's analysis thus ignored and misstated critical evidence relevant to a

1 use of force analysis, as explained by Knight, including the human factor aspect and
2 the timing of events. There was no evidence that the OIR Group was qualified to
3 render expert opinions on the use of deadly force, other than Chief Williams'
4 unsupported assertion that OIR is nationally recognized and does this type of
5 investigation. Fonzi's opinion, on the other hand, was that of a 32- year veteran of the
6 San Bernardino Sheriff's Department, who is a subject matter expert on use of force.
7 Chief Williams, who relied solely on OIR's findings and conclusions, lacked the
8 credibility to render appropriate conclusions and was based solely on the critically
9 flawed report, which should not be allowed to stand.

10 In addition, under just cause, discipline imposed must be just and fair. The
11 Employer must consider an employee's long, unblemished record when assessing the
12 penalty as well as mitigating evidence. Here, Grievant was a 15 year veteran police
13 officer with no prior disciplinary history and many commendations, who received the
14 rating of "exceeds expectations" on his PE's. He also continued working after the
15 shooting for over a year. He was a highly trained, successful officer.

16
17 In sum, the penalty of termination was unreasonable and excessive. Grievant
18 did not violate the law or Policy and there was no harm to the public service.

19 **OPINION**

20 Preliminary Matters

21 The single stipulated issue is whether there is just cause for Grievant's
22 discharge. Thus, the City bears the burden to demonstrate just cause exists.
23 Generally, the just cause standard requires persuasive proof that Grievant violated the
24 rules and policies alleged and, if so, that, under the totality of circumstances, the
25 penalty imposed was not excessive; i.e., outside the zone of reasonableness for the
26 proven performance deficiencies. The just cause standard generally favors
27 progressive discipline which affords an employee the opportunity to modify behavior
28 before more severe discipline, up to and including discharge, is imposed. Progressive

1 discipline, however, need not always follow the counseling, oral warning, written
2 warning, suspension and discharge path in lockstep order. The facts and
3 circumstances in each case determine the appropriate level of discipline. Moreover,
4 progressive discipline concepts do not apply in the face of proven gross misconduct or
5 performance deficiencies which warrant summary discharge in the first instance.⁴⁴

6 Use of Deadly Force: The Reasonable Officer's Analysis of the Immediate
7 Shoot/Don't Shoot Decision

8 On this record, on balance, the outcome determinative issue is whether
9 Grievant's conduct was within Departmental Policy for use of deadly force. The parties
10 have a mature bargaining relationship and know, or should know, the general
11 reasonable officer standard set out by Policy 300.5 and .6, PC 835a, and SCOTUS'
12 *Graham* decision. More specifically, PC 835a(4) instructs the reviewer to analyze the
13 incident from that of:

14 a **reasonable** officer in the **same** situation, based on the **totality** of the
15 circumstances known to and perceived by the officer at the time....

16 . . .

17 c. 1. Notwithstanding subdivision (b), a peace officer is justified in using
18 deadly force upon another person **only** when the officer **reasonably**
believes, based on the totality of circumstances, that such force is
19 necessary for either of the following reasons:

20 (A) to defend against an **imminent threat** of death or serious
21 bodily injury to the officer or to another person. (Emphasis added)

22 Put simply, these standards are not difficult to state and certainly provide
23 guidance for the reviewer. The particularly nettlesome issue, however, is the factual
24 determination of the totality of circumstances to determine whether Grievant
25 reasonably believed at that point in time lethal force was necessary to defend against
26 such an imminent threat. And, therefore, perhaps outcome determinative, is whether
27 Policy 300.6(b)'s imminent threat definition fits these circumstances.

28 ⁴⁴While unions often disagree, under a just cause provision, the concept of mercy (i.e., leniency) is for the employer – not the Arbitrator, who makes the just cause determination.

1 Finally, the Arbitrator takes administrative notice from his own history hearing
2 law enforcement discharges, that many include a dishonesty charge. Clearly, the
3 parties know that a charged officer's personnel file is subject to discovery via *Pitchess*,
4 *Brady*, etc and therefore, law enforcement is often called a "you lie, you die" career. In
5 the instant matter, none of the sworn officers were charged with dishonesty. Thus, in
6 reaching the following conclusions, all sworn officers involved were considered truthful.

7 Finally, keeping in mind that, especially when deadly force results in the death
8 of a person, each case turns on its own discrete facts and circumstances, we turn to
9 the merits.⁴⁵

10 Merits

11 Without question, this is a close case in which even experts on use of force may
12 reach different conclusions. Nevertheless, the bottom line is whether Grievant violated
13 Policy 300.6/PC 835a when he used force which resulted in Monterossa's death on
14 June 2, 2020. More specifically, did the City present persuasive evidence that Grievant
15 acted unreasonably when he concluded that, under the totality of circumstances at that
16 exact point in time, Monterossa's conduct presented an imminent threat as defined by
17 Policy and PC 835a.

18 As noted, *supra*, the City bears the burden of persuasion on the just cause
19 issue. The first question is whether "cause" exists for discipline. On this record, the
20 answer is yes as to the body camera charge. Here, using hindsight, if there was ever a
21 case where video records would have been helpful, this is it. Common sense and
22 experience tell a neutral reviewer that Grievant and the other two SWAT officers
23 should have fully activated their body cameras when they entered the parking lot
24 where they knew a crime was happening close by. Although Grievant's camera would
25

26
27 ⁴⁵So there is no misunderstanding, the following conclusions are based on the four (4) corners of this particular
28 record and are not intended in any way to bind a criminal reviewer from his/her own *de novo* decision under the
higher criminal standard of proof.

1 most likely not have recorded the shots due to his location in the back seat and the
2 angles involved, these conclusions are of no moment. Simply put, Grievant erred in
3 this regard and should receive the same Letter of Reprimand [REDACTED] received as
4 there were no mitigating factors that would yield a lack of just cause on this issue.

5 The outcome determinative question, of course, is Grievant's use of lethal force
6 which caused the death of Monterrosa. To start at the beginning, Grievant – a trained,
7 experienced SWAT officer with no prior discipline – qualifies as a reasonable officer
8 able to make the Policy 300.6 "imminent threat" assessment.

9 On June 1, 2020, [REDACTED] drove up to Captain [REDACTED] unmarked car,
10 stopped, and [REDACTED] instructed them to come in from the south and he would come in
11 from the north. This "plan" took seconds and has been criticized as tactically flawed.
12 However, [REDACTED] was the second ranked officer under Chief Williams. In this
13 paramilitary organization, junior officers, especially when looting was in process, would
14 be in no position to question [REDACTED] directions. Then, as [REDACTED] drove on, they
15 heard [REDACTED] broadcast that a suspect was, or might be, armed.

16
17 The three SWAT officers then encountered Monterrosa who chose not to
18 remain in the get-away vehicle. While there are some slight differences in testimony,
19 all three SWAT officers agreed on the critical point – Monterrosa presented a life-
20 threatening danger justifying the use of deadly force. Each in his own way testified
21 Monterrosa, *inter alia*, moved/spun his body towards their truck in what they perceived
22 was a shooting position while reaching for an object which resembled a firearm from
23 his waistband area. Accordingly, at that point in time, Grievant (1) reasonably
24 perceived that Monterrosa had the present ability, opportunity, and intent to cause
25 death or serious bodily injury to them; and (2) moving/spinning his body and getting
26 down in a shooting position to face them meant Monterrosa was not trying to leave the
27 scene. Simply put, it is more likely the shots through the front window – which were
28 reasonable under the circumstances – caused Monterrosa to turn his head. All three

1 reasonably believed Monterrosa was either drawing or pointing a weapon and getting
2 ready to shoot. [REDACTED] and [REDACTED] testified they believed Grievant acted to save
3 their lives and that they would have done the same in that moment.⁴⁶

4 Frankly, the analysis could end at this point. However, the Arbitrator cannot
5 ignore the problematic, almost immediate, post-shooting utterances of Grievant. The
6 problematic words require a thorough analysis.

7 According to [REDACTED] when they were all out of the vehicle, Grievant said,
8 "What did he point at us?" and [REDACTED] answered, "I don't know." Grievant then
9 replied, "He pointed a gun at us." Despite these remarks made immediately after the
10 shooting, Grievant subsequently admitted that Monterrosa never pulled out or
11 presented any sort of weapon. In stark distinction to what he said only moments after
12 he acted, Grievant later testified that he fired the fatal shots when he saw Monterrosa's
13 hand on what was discovered to be a framing hammer. He did not testify that he saw
14 Monterrosa point a gun. By then he had seen first-hand that Monterrosa was only in
15 possession of a framing hammer. He was shocked that Monterrosa did not have a
16 gun.
17

18 The parties dispute the relevance of Grievant's admittedly contradictory
19 statements. OIR took the initial utterance at face value, concluding that Grievant's
20 statement immediately after shots fired showed uncertainty about whether he saw a
21 gun and constituted evidence of a tactically defective approach. In turn, Chief
22 Williams relied on the statement as evidence that Grievant's actions were
23 unreasonable. To the Arbitrator, this presents a nettlesome question. Clearly, the
24 tension between Grievant's two statements creates some doubt as to the
25

26 ⁴⁶The City notes neither [REDACTED] nor [REDACTED] drew their guns. This ignores the fact [REDACTED] was driving,
27 [REDACTED] had the flash bang in his hands and, more to the point, Grievant was cover officer. Moreover, there are no
28 requirements in training, Policy, PC 835a and/or case law that Grievant must physically see a weapon before using
deadly force. Finally, although there is no requirement that the officers' retreat in that particular circumstance,
retreat would have resulted in leaving [REDACTED] exposed. Accordingly, as noted, *infra*, on this particular record viewed
without the benefit of hindsight, the City has not persuasively established a violation of Policy, PC 835a and/or case
law presented in this matter.

1 trustworthiness of his later testimony, since neither of his partners in the front seat saw
2 a gun pointed at them even though they were equally or better placed to observe
3 Monterossa and both believed he had a weapon.

4 The Association sought to explain Grievant's statement that a gun was pointed
5 at them using a theory that experienced sworn officers sometimes say things that do
6 not make sense following a shooting. Although Bower did not testify about Grievant's
7 specific remarks, his testimony was clearly addressed to this issue. To the same
8 effect, Grievant explained saying that Monterrosa was pointing a gun at them, because
9 although he was "absolutely certain" that Monterrosa had a gun, "word salad" came
10 out of his mouth in his attempt to communicate with his partners about what had just
11 occurred and that he was impacted by adrenaline and surprise. This echoed Bower's
12 expert testimony that Grievant's immediate statement after the shooting was the result
13 of stress rather than an admission that Grievant mistook or was unsure of the threat
14 level presented. Ignoring the "word salad" explanation, Grievant's remark was neither
15 incoherent nor nonsensical. It was a remark made immediately after he used lethal
16 force and an admission of what prompted him to shoot rather than wait the few
17 additional seconds, in which Monterrosa's unarmed state might well have become
18 clear. Simply put, some might interpret Grievant's remarks as that he shot Monterrosa
19 under the mistaken belief that Monterossa was pointing a gun at him and was ready to
20 fire.
21

22 However, given the totality of this record, the Arbitrator does not conclude that
23 Grievant's mistaken belief that a gun was pointed at them was *per se* unreasonable
24 under these exigent circumstances. Given the events leading up to the shooting,
25 Grievant knew that the Department had been attacked and that there was hostility in
26 the community toward the Department. This certainly heightened his sense of threat
27 as they entered the parking lot to confront armed or potentially armed looters. For
28 these reasons, he was primed to see a weapon when Monterossa acted as though he

1 was about to deploy one. Because all three SWAT officers also saw Monterrosa either
2 holding a gun or moving a hand toward his waistband area to pull one out, Grievant's
3 mistaken belief was one a reasonable officer at such a scene could make. In other
4 words, on this record, Grievant's statement does not render his testimony unreliable or
5 his actions unreasonable.

6 More specifically, this finding is supported by the Association's hard-hitting
7 critique of the OIS report relied upon by Chief Williams in finding that Grievant's
8 conduct was unreasonable. Department Policy and PC 835a forbid second-guessing
9 of an officer's use of deadly force based upon hindsight. This means that facts
10 unknown to the officers are not relevant in analyzing whether an officer reasonably
11 believes there is a threat of imminent harm. Here, OIS relied upon several facts
12 unknown to the officers at the time of the shooting: 1) that Monterossa was in
13 possession of a hammer and not a gun; and 2) that Monterrosa was shot in the back
14 of the head.

15 As to the fact that the item mistaken for the gun was a hammer does not
16 change the fact that all three SWAT officers reasonably believed there was a gun and
17 that Monterossa intended to shoot them. This belief was based not only upon what
18 happened in the split second before the shoot, but in the officers' observations of
19 Monterrosa's gait which suggested he was concealing something in his sweatshirt
20 pocket as he walked, and the fact that his sweatshirt was pulled out, as though
21 containing a heavy item.

22 Moreover, Monterrosa's actions prior to the shooting did not show an individual
23 attempting to surrender to authorities. The SWAT officers were surprised when
24 Monterrosa failed to depart in the getaway vehicle and then turned to face them. Even
25 now, that fact is unexplained---we do not know whether Monterossa put stolen items or
26 a weapon in the car, which offers one explanation but is truly nothing more than
27 speculation. At the time, the three SWAT officers reasonably believed that
28

1 Monterrosa was acting aggressively, moved/spun towards them, getting into a
2 shooting stance consistent with the intent to use deadly force. [REDACTED] had said a
3 suspect was armed or possibly armed. Grievant had a reasonable, objective basis for
4 believing imminent deadly force was about to be deployed not just based upon seeing
5 a gun pointed at him but based on the observation that Monterrosa appeared to be
6 carrying an object consistent with a firearm in his sweatshirt pocket and had failed to
7 flee the scene as all the other looters had done but stayed behind and faced them for
8 some unknown reason.

9 In addition, the testimony of Lt. Knight underscores that the OIR investigation
10 rested primarily upon facts which only became known after the shooting, which he
11 viewed as out of keeping with the way the Department would have conducted its
12 internal investigation under Policy and law. Although not an easy question, the
13 Arbitrator is constrained to view the situation from the SWAT officers' points of view at
14 the time. Using that lens, Grievant acted in self-defense and defense of his fellow
15 officers when he shot and killed Monterrosa, whom he believed was about to shoot
16 them. Put differently, the Department's evidence failed to establish that the findings
17 relied upon to terminate Grievant were true based upon even a preponderance of
18 evidence. Finally, the charge that Grievant should have de-escalated the situation
19 also cannot be sustained because an officer who reasonably believes he is about to
20 be shot and killed is entitled to use deadly force at that moment.

22 As to the just cause standard at issue, there are other troubling facts in this
23 record which undermine a conclusion that the Department has carried its burden. For
24 example, Fox, the *Skelly* officer, noted the Chief's email sent after being at the scene
25 was that the detectives "perceived a deadly threat" and one "discharged his firearm"
26 and that the Chief had "the most profound appreciation for [his] hard work, dedication
27 and courage." This was an admission by the Department that Grievant reasonably
28 perceived a deadly threat and did nothing wrong, despite having shot an unarmed

1 man. In addition, Grievant was maintained in his employment for an entire year after
2 the shooting. This demonstrates that the Department did not view Grievant as a
3 liability. It treated him as a sworn officer who was justified in using deadly force. These
4 actions are another admission that Grievant could be trusted in the use of deadly force
5 despite his actions on the night in question.

6 In this context, Lt. Knight's testimony blaming the Department for failing to
7 convene a timely CIRB takes on new meaning. Essentially, his testimony strongly
8 suggests that many in the chain of command, including those who supervised and
9 trained Grievant, saw nothing unlawful or wrongful in Grievant's actions. Lt. Knight
10 was the head of IA. For him to testify against the Department in this matter
11 underscores the likelihood that, had normal procedures been followed, Grievant would
12 have been cleared of wrongdoing and termination would not have occurred. Chief
13 Williams' email confirms that he believed at the time that Grievant acted with good
14 cause.

15 Further, Department rules require a CIRB to make the initial determination of
16 whether the tragic death of a citizen was justified under Policy and law. The
17 individuals on the CIRB typically include those who supervised, managed, and
18 evaluated Grievant and had the best knowledge of the Policies and practices of the
19 Department. Here, the evidence strongly suggests that the CIRB would have found the
20 shooting justifiable. Moreover, because the Department did not call anyone from OIR
21 as a witness, there was no rebuttal to the Association's trenchant critique of its report.
22 This left the written report to stand on its own, even after several witnesses pointed out
23 the problems with the hindsight lens used by the investigator. These facts bolster the
24 finding that the Department did not have just cause for its decision to terminate
25 Grievant.

26 Accordingly, while the seriousness of Monterrosa's death cannot be ignored,
27 the issue as stated several times, *supra*, is whether the City has sustained its burden
28

1 to demonstrate just cause exists for Grievant's discharge. On this record, for the
2 reasons set out above, it cannot be determined that just cause for Grievant's
3 discharge exists. In sum, Grievant shall be reinstated and made whole in wages and
4 benefits lost as a result of his improper termination.

5 The grievance is sustained in part and denied in part.

6 **AWARD**

- 7 1. On the record presented, just cause exists for Grievant to receive
8 a Letter of Reprimand, given his failure to timely activate his body
9 camera.
- 10 2. On the record presented, just cause does not exist for the
11 discharge of Detective Jarrett Tonn from the Vallejo Police
12 Department. As a result of his improper discharge, as soon as
13 practical, Grievant shall be reinstated to his former position and
14 made whole in wages and benefits lost, including seniority, from
15 the first day he was removed from service to and including the last
16 workday prior to his return to service.⁴⁷ The Department shall
17 provide Grievant any training or retraining it deems necessary.
- 18 3. The Arbitrator retains jurisdiction over the matter for one (1) year
19 for the sole and limited purpose of resolving disputes, if any, over
20 remedy.

21 DATE: August 18, 2023

22 
23 ALEXANDER COHN - Arbitrator

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25
26
27
28

⁴⁷The make-whole Award is subject to setoff for usual and customary items – outside earnings, taxes, etc.

Appendix "A"

RELEVANT PROVISIONS OF DEPARTMENT POLICY

....

Policy 300.4 De-Escalation

It is the policy of this Department that when all of the known circumstances indicate that it is reasonably sage, prudent and feasible to do so, an officer(s) shall attempt to slow down, reduce the intensity or stabilize the situation through de-escalation so that more time, options and/or resources may become immediately available for incident resolution.

De-escalation tactics and techniques are those actions undertaken by an officer(s) to avoid physical confrontations and to increase the likelihood of voluntary compliance or cooperation.

Officers are expected to use de-escalation techniques before using force whenever practical, following department required training, unless force is immediately necessary to protect an individual, stop dangerous behavior, protect or prevent damage to property or stop a crime in progress in an effort to reduce or eliminate the need for varying levels of force.

De-escalation tactics and techniques include, but are not limited to the following:

- (a) Communicating with the suspect
- (b) Gathering information about the incident
- (c) Verifying information provided by dispatch
- (d) Assessing risks
- (e) Gathering resources (both personnel and equipment)
- (f) Using crisis intervention techniques
- (g) Communicating and coordinating with other responding officers

...
A member is not expected to engage in force de-escalation measures that could jeopardize the safety of the community or of any employee. Where circumstances and time reasonably permit, an officer shall take those reasonable and prudent actions which operate to mitigate the immediacy of the threat thereby giving the officer time to call additional officers, utilize other tactics or request specialty assistance such as crisis negotiators.

Policy 300.5 – USE OF FORCE

Officers shall use only that amount of force that reasonably appears necessary given the facts and totality of the circumstances known to or perceived by the officer at the time of the event to accomplish a legitimate law enforcement purpose (Penal Code §835a).

The reasonableness of force will be judged from the perspective of a reasonable officer on the scene at the time of the incident. Any evaluation of reasonableness must allow for the fact that officers are often forced to make split-second decisions about the amount of force that reasonably appears necessary in a particular situation, with limited information and in circumstances that are tense, uncertain, and rapidly evolving.

1 Given that no policy can realistically predict every possible situation an officer might
2 encounter, officers are entrusted to use well-reasoned discretion in determining the
appropriate use of force in each incident.

3 ...
4 While the ultimate objective of every law enforcement encounter is to avoid or
minimize injury, nothing in this policy requires an officer to retreat or be exposed to
possible physical injury before applying reasonable force.

5 **300.5.1 USE OF FORCE TO EFFECT AN ARREST**

6 Any peace officer may use objectively reasonable force to effect an arrest, to prevent
7 escape, or to overcome resistance. A peace officer who makes or attempts to make an
8 arrest need not retreat or desist from his/her efforts by reason of resistance or
9 threatened resistance on the part of the person being arrested; nor shall an officer be
deemed the aggressor or lose his/her right to self-defense by the use of reasonable
force to affect the arrest, prevent escape, or to overcome resistance. Retreat does not
mean tactical repositioning or other de-escalation techniques (Penal Code §835a).

10 **300.5.2 FACTORS USED TO DETERMINE THE REASONABLENESS OF FORCE**

11 When determining whether to apply force and evaluating whether an officer has used
12 reasonable force, a number of factors should be taken into consideration, as time and
circumstances permit. These factors include but are not limited to:

- 13 (a) The apparent immediacy and severity of the threat to officers or others (Penal
Code §835a).
- 14 (b) The conduct of the individual being confronted, as reasonably perceived by the
officer at the time.
- 15 (c) Officer/subject factors (age, size, relative strength, skill level, injuries sustained,
level of exhaustion or fatigue, the number of officers available versus subjects).
- 16 (d) The conduct of the involved officer (Penal Code §835a).
- 17 (e) The effects of drugs or alcohol.
- 18 (f) The individual's apparent mental state or capacity (Penal Code §835a).
- 19 (g) The individual's apparent ability to understand and comply with officer commands
(Penal Code §835a).
- 20 (h) Proximity of weapons or dangerous improvised devices.
- 21 (i) The degree to which the subject has been effectively restrained and his/her ability
to resist despite being restrained.
- 22 (j) The availability of other reasonable and feasible options and their possible
effectiveness (Penal Code §835a).
- 23 (k) Seriousness of the suspected offense or reason for contact with the individual.
- 24 (l) Training and experience of the officer.
- 25 (m) Potential for injury to officers, suspects, and others.
- 26 (n) Whether the person appears to be resisting, attempting to evade arrest by flight, or
is attacking the officer.
- 27 (o) The risk and reasonably foreseeable consequences of escape.
- 28 (p) The apparent need for immediate control of the subject or a prompt resolution of
the situation.
- (q) Whether the conduct of the individual being confronted no longer reasonably
appears to pose an imminent threat to the officer or others.
- (r) Prior contacts with the subject or awareness of any propensity for violence.
- (s) Any other exigent circumstances.

1 **300.6 DEADLY FORCE APPLICATIONS**

2 If an objectively reasonable officer would consider it safe and feasible to do so under
3 the totality of the circumstances, officers should evaluate the use of other reasonably
4 available resources and techniques when determining whether to use deadly force.

5 **The use of deadly force is only justified in the following circumstances** (Penal
6 Code §835a):

7 (a) An officer may use deadly force to protect him/herself or others from what he/she
8 reasonably believes is an **imminent threat of death or serious bodily injury to the**
9 **officer or another person.**

10 (b) An officer may use deadly force to apprehend a fleeing person for any felony that
11 threatened or resulted in death or serious bodily injury, if the officer reasonably
12 believes that the person will cause death or serious bodily injury to another unless
13 immediately apprehended. Where feasible, the officer shall, prior to the use of force,
14 make reasonable efforts to identify themselves as a peace officer and to warn that
15 deadly force may be used, unless the officer has objectively reasonable grounds too
16 believe the person is aware of those facts.

17 Officers shall not use deadly force against a person based on the danger that person
18 poses to him/herself, if an objectively reasonable officer would believe the person does
19 not pose an imminent threat of death or serious bodily injury to the officer or to another
20 person (Penal Code §835a).

21 An "imminent" threat of death or serious bodily injury exists when, based on the totality
22 of the circumstances, a reasonable officer in the same situation would believe that a
23 person has the present ability, opportunity, and apparent intent to immediately cause
24 death or serious bodily injury to the officer or another person. An officer's subjective
25 fear of future harm alone is insufficient as an imminent threat. An imminent threat is
26 one that from appearances is reasonably believed to require instant attention (Penal
27 Code §835a).

28 **POLICY 301 – CRITICAL INCIDENT REVIEW BOARDS**

301.1 PURPOSE AND SCOPE

This policy establishes a process for the Vallejo Police Department to review the use
of force by its employees.

This review process shall be in addition to any other review or investigation that may
be conducted by any outside or multi-agency entity having jurisdiction over the
investigation or evaluation of the use of deadly force.

301.2 POLICY

The Vallejo Police Department will objectively evaluate the use of force by its members
to ensure that their authority is used lawfully, appropriately and is consistent with
training and policy.

301.3 REMOVAL FROM LINE DUTY ASSIGNMENT

Generally, whenever an employee's actions or use of force in an official capacity, or
while using department equipment, results in death or very serious injury to another,
that employee will be placed in a temporary administrative assignment pending an
administrative review. The Chief of Police may exercise discretion and choose not to
place an employee in an administrative assignment in any case.

301.4 REVIEW BOARD

The Critical Incident Review Board will be convened when the use of force by a member results in very serious injury or death to another. However, in certain less complex and more straightforward cases, the Chief of Police can use his discretion as to whether or not to convene the board. If this occurs, the Internal Affairs Sergeant will conduct the administrative review of the incident.

The Chief of Police may request the Critical Incident Review Board to investigate the circumstances surrounding any use of force incident.

The Administration Division Commander will convene the Critical Incident Review Board as necessary. It will be the responsibility of the Division Commander or supervisor of the involved employee to notify the Administration Division Commander of any incidents requiring board review. The involved employee's Division Commander or supervisor will also ensure that all relevant reports, documents and materials are available for consideration and review by the board.

301.4.1 COMPOSITION OF THE BOARD

The Administration Division Commander should recommend five Critical Incident Review Board members, subject to approval by the Chief of Police as follows:

- A Bureau Captain
- A representative from Professional Standards
- A representative from Training
- At least two subject matter expert(s) at the rank of sergeant or above in fields relating to the use of force under review.

The Bureau Captain is the chair person on the board, and he/she will assign one of the board members to complete the written findings.

1. The Chief of Police may designate different personnel to the Critical Incident Review Board as practical or the needs of the agency dictate.

301.4.2 RESPONSIBILITIES OF THE BOARD

The Critical Incident Review Board is empowered to conduct an administrative review and inquiry into the circumstances of an incident

The Critical Incident Review Board will normally make its recommended finding based on but not limited to the following: any documentation regarding the incident, police reports, interviews-audio and video, any photographs or videos, and witness statements. However, the board is not limited to those items. The board may also visit the scene of the incident for better understanding.

If further clarification is needed, the board members may request further investigation, request reports be submitted for the board's review, call persons to present information and request the involved employee to appear.

The Board does not have the authority to recommend discipline.

The Chief of Police will determine whether the board should delay its review until after completion of any criminal investigation, review by any prosecutorial body, filing of criminal charges, the decision not to file criminal charges, or any other action. The

1 board should be provided all relevant available material from these proceedings for its
2 consideration.

3 The review shall be based upon those facts which are were reasonably believed or
4 known by the officer at the time of the incident, applying any legal requirements,
5 department policies, procedures and approved training to those facts. Facts later
6 discovered but unknown to the officer at the time shall neither justify nor call into
7 question an officer's decision regarding the use of force.

8 Any questioning of the involved employee conducted by the board will be in
9 accordance with the department's disciplinary procedures, the department's
10 complaints policy, the current collective bargaining agreement and any applicable state
11 or federal law.

12 The Board shall make one of the following recommended findings:

13 (a) Administrative Approval: No recommendations. Objectively reasonable force was
14 used under the circumstances based on the information available to the officer at the
15 time. The finding acknowledges that the use of force was justified and within VPD
16 policy. There are no concerns surrounding the tactics employed, and there are no
17 policy violations, including those not related to the application of force.

18 (b) Tactics/Decision Making: This finding suggests that the tactics and/or decision
19 making employed were of concern. Specifically designed training will be prescribed to
20 address identified concerns.

21 (c) Policy/Training Issues: This finding suggests changes needed in the VPD Policy
22 Manual and/or the VPD Training Program based on the facts and circumstances of the
23 particular use of force under review. This finding may also identify any policy violations
24 not directly related to the application of force.

25 (d) Administrative Disapproval: The Use of Force Review Board believes that the force
26 used or action taken was not justified under the circumstances and violated VPD
27 policy. This outcome is reserved for the most serious failures in adherence to policy,
28 decision-making, and/or performance.

A recommended finding requires a majority vote of the board. The board may also
recommend additional investigations or reviews, such as disciplinary investigations,
training reviews to consider whether training should be developed or revised, and
policy reviews, as may be appropriate. The board chairperson will submit the written
recommendations to the Chief of Police.

The Chief of Police shall review the recommendation, make a final determination as to
whether the employee's actions were within policy and procedure and will determine
whether any additional actions, investigations or reviews are appropriate. The Chief of
Police's final findings will be forwarded to the involved employee's Division
Commander for review and appropriate action. If the Chief of Police concludes that
discipline should be considered, a disciplinary process will be initiated.

At the conclusion of any additional reviews, copies of all relevant reports and
information will be filed with the Chief of Police.

1 **Policy 306 Officer-Involved Shootings and Deaths**

2 **306.1 PURPOSE AND SCOPE**

3 The purpose of this policy is to establish policy and procedures for the investigation of
4 an incident in which a person is injured or dies as the result of an officer-involved
shooting or dies as a result of other action of an officer.

5 In other incidents not covered by this policy, the Chief of Police may decide that the
6 investigation will follow the process provided in this policy.

7 **306.2 POLICY**

8 The policy of the Vallejo Police Department is to ensure that officer-involved shootings
9 and deaths are investigated in a thorough, fair and impartial manner.

10 This department conforms to the Solano County Officer Involved Fatal Incident
Protocol for investigating officer-involved shootings.

11 ***

12 **306.6 ADMINISTRATIVE INVESTIGATION**

13 In addition to all other investigations associated with an officer-involved shooting or
14 death, this department will conduct an internal administrative investigation of VPD
15 officers to determine conformance with department policy. The investigation will be
16 conducted under the supervision of the Internal Affairs Unit and will be considered a
17 confidential officer personnel file.

18 Interviews of members shall be subject to department policies and applicable laws
19 (see the Personnel Complaints Policy).

20 (a) Any officer involved in a shooting or death may be requested or administratively
21 compelled to provide a blood sample for alcohol/drug screening. ...

22 (b) If any officer has voluntarily elected to provide a statement to criminal investigators,
23 the assigned administrative investigator should review that statement before
24 proceeding with any further interview of that involved officer.

25 1. If a further interview of the officer is deemed necessary to determine policy
26 compliance, care should be taken to limit the inquiry to new areas with minimal, if any,
27 duplication of questions addressed in the voluntary statement. The involved officer
28 shall be provided with a copy of his/her prior statement before proceeding with any
subsequent interviews.

(c) In the event that an involved officer has elected to not provide criminal investigators
with a voluntary statement, the assigned administrative investigator shall conduct an
administrative interview to determine all relevant information.

1. Although this interview should not be unreasonably delayed, care should be taken
to ensure that the officer's physical and psychological needs have been addressed
before commencing the interview.

2. If requested, the officer shall have the opportunity to select an uninvolved
representative to be present during the interview. However, in order to maintain the
integrity of each individual officer's statement, involved officers shall not consult or
meet with a representative or attorney collectively or in groups prior to being
interviewed (Government Code § 3303(l)).

3. Administrative interviews should be recorded by the investigator. The officer may
also record the interview (Government Code § 3303(g)).

- 1 4. The officer shall be informed of the nature of the investigation. If an officer refuses
2 to answer questions, he/she should be given his/her Lybarger or Garrity rights and
3 ordered to provide full and truthful answers to all questions. The officer shall be
4 informed that the interview will be for administrative purposes only and that the
5 statement cannot be used criminally.
6 5. The Internal Affairs Unit shall compile all relevant information and reports necessary
7 for the Department to determine compliance with applicable policies.
8 6. Regardless of whether the use of force is an issue in the case, the completed
9 administrative investigation shall be submitted to the Use of Force Review Board,
10 which will restrict its findings as to whether there was compliance with the Use of Force
11 Policy.
12 7. Any other indications of potential policy violations shall be determined in accordance
13 with standard disciplinary procedures.

14 **Policy 321 Standards of Conduct**

15 **321.3 DIRECTIVES AND ORDERS**

16 Members shall comply with lawful directives and orders from any department
17 supervisor or person in a position of authority, absent a reasonable and bona fide
18 justification.

19 **321.3.1 UNLAWFUL OR CONFLICTING ORDERS**

20 Supervisors shall not knowingly issue orders or directives that, if carried out, would
21 result in a violation of any law or department policy. Supervisors should not issue
22 orders that conflict with any previous order without making reasonable clarification that
23 the new order is intended to countermand the earlier order.

24 No member is required to obey any order that appears to be in direct conflict with any
25 federal law, state law or local ordinance. Following a known unlawful order is not a
26 defense and does not relieve the member from criminal or civil prosecution or
27 administrative discipline. If the legality of an order is in doubt, the affected member
28 shall ask the issuing supervisor to clarify the order or shall confer with a higher
authority. The responsibility for refusal to obey rests with the member, who shall
subsequently be required to justify the refusal.

Unless it would jeopardize the safety of any individual, members who are presented
with a lawful order that is in conflict with a previous lawful order, department policy or
other directive shall respectfully inform the issuing supervisor of the conflict. The
issuing supervisor is responsible for either resolving the conflict or clarifying that the
lawful order is intended to countermand the previous lawful order or directive, in which
case the member is obliged to comply. Members who are compelled to follow a
conflicting lawful order after having given the issuing supervisor the opportunity to
correct the conflict, will not be held accountable for disobedience of the lawful order or
directive that was initially issued.

The person countermanding the original order shall notify, in writing, the person
issuing the original order, indicating the action taken and the reason.

1 **321.5 CAUSES FOR DISCIPLINE**

2 The following are illustrative of causes for disciplinary action. This list is not intended to
3 cover every possible type of misconduct and does not preclude the recommendation
4 of disciplinary action for violation of other rules, standards, ethics and specific action or
5 inaction that is detrimental to efficient department service:

6 **321.5.1 LAWS, RULES AND ORDERS**

- 7 (a) Violation of, or ordering or instructing a subordinate to violate any policy,
8 procedure, rule, order, directive, requirement or failure to follow instructions contained
9 in department or City manuals.
10 (b) Disobedience of any legal directive or order issued by any department member of a
11 higher rank.
12 (c) Violation of federal, state, local or administrative laws, rules or regulations.

13 ***

14 **321.5.6 EFFICIENCY**

- 15 (a) Neglect of duty.
16 (b) Unsatisfactory work performance including, but not limited to, failure,
17 incompetence, inefficiency or delay in performing and/or carrying out proper orders,
18 work assignments or the instructions of supervisors without a reasonable and bona
19 fide excuse.
20 (c) Concealing, attempting to conceal, removing or destroying defective or incompetent
21 work.
22 (d) Unauthorized sleeping on duty-time or assignments.
23 (e) Failure to notify the department within 24 hours of any change in residence
24 address, contact telephone numbers or legal marital status.

25 **CALIFORNIA PENAL CODE**

26 **Penal Code section 835a**

- 27 (a) The Legislature finds and declares all of the following:

28 (1) That the authority to use physical force, conferred on peace officers by this section,
is a serious responsibility that shall be exercised judiciously and with respect for
human rights and dignity and for the sanctity of every human life. The Legislature
further finds and declares that every person has a right to be free from excessive use
of force by officers acting under color of law.

(2) As set forth below, it is the intent of the Legislature that peace officers use deadly
force only when necessary in defense of human life. In determining whether deadly
force is necessary, officers shall evaluate each situation in light of the particular
circumstances of each case, and shall use other available resources and techniques if
reasonably safe and feasible to an objectively reasonable officer.

(3) That the decision by a peace officer to use force shall be evaluated carefully and
thoroughly, in a manner that reflects the gravity of that authority and the serious
consequences of the use of force by peace officers, in order to ensure that officers use
force consistent with law and agency policies.

1 (4) That the decision by a peace officer to use force shall be evaluated from the
2 perspective of a reasonable officer in the same situation, based on the totality of the
3 circumstances known to or perceived by the officer at the time, rather than with the
4 benefit of hindsight, and that the totality of the circumstances shall account for
5 occasions when officers may be forced to make quick judgments about using force.

6 (5) That individuals with physical, mental health, developmental, or intellectual
7 disabilities are significantly more likely to experience greater levels of physical force
8 during police interactions, as their disability may affect their ability to understand or
9 comply with commands from peace officers. It is estimated that individuals with
10 disabilities are involved in between one-third and one-half of all fatal encounters with
11 law enforcement.

12 (b) Any peace officer who has reasonable cause to believe that the person to be
13 arrested has committed a public offense may use objectively reasonable force to effect
14 the arrest, to prevent escape, or to overcome resistance.

15 (c) (1) Notwithstanding subdivision (b), a peace officer is justified in using deadly force
16 upon another person only when the officer reasonably believes, based on the totality
17 of the circumstances, that such force is necessary for either of the following reasons:

18 (A) To defend against an imminent threat of death or serious bodily injury to the
19 officer or to another person.

20 (B) To apprehend a fleeing person for any felony that threatened or resulted in
21 death or serious bodily injury, if the officer reasonably believes that the person will
22 cause death or serious bodily injury to another unless immediately apprehended.
23 Where feasible, a peace officer shall, prior to the use of force, make reasonable efforts
24 to identify themselves as a peace officer and to warn that deadly force may be used,
25 unless the officer has objectively reasonable grounds to believe the person is aware of
26 those facts.

27 (2) A peace officer shall not use deadly force against a person based on the danger
28 that person poses to themselves, if an objectively reasonable officer would believe the
person does not pose an imminent threat of death or serious bodily injury to the peace
officer or to another person.

(d) A peace officer who makes or attempts to make an arrest need not retreat or desist
from their efforts by reason of the resistance or threatened resistance of the person
being arrested. A peace officer shall not be deemed an aggressor or lose the right to
self-defense by the use of objectively reasonable force in compliance with subdivisions
(b) and (c) to effect the arrest or to prevent escape or to overcome resistance. For the
purposes of this subdivision, 'retreat' does not mean tactical repositioning or other de-
escalation tactics.

(e) For purposes of this section, the following definitions shall apply:

(1) "Deadly force" means any use of force that creates a substantial risk of causing
death or serious bodily injury, including, but not limited to, the discharge of a firearm.

1 (2) A threat of death or serious bodily injury is "imminent" when, based on the totality
2 of the circumstances, a reasonable officer in the same situation would believe that a
3 person has the present ability, opportunity, and apparent intent to immediately cause
4 death or serious bodily injury to the peace officer or another person. An imminent harm
is not merely a fear of future harm, no matter how great the fear and no matter how
great the likelihood of the harm, but is one that, from appearances, must be instantly
confronted and addressed.

5 (3) "Totality of the circumstances" means all facts known to the peace officer at the
6 time, including the conduct of the officer and the subject leading up to the use of
deadly force. (Emphasis added) (UX 4; C-2)
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