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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff,** **v.** **JOHANNES MEHSERLE,** **Defendant.**	**AOC# 1009606-10** **Alameda County Superior Court Case #161210** **NOTICE OF MOTION AND MOTION FOR A NEW TRIAL; MEMORANDUM OF POINTS AND AUTHORITIES; EXHIBITS**

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TO: DISTRICT ATTORNEY NANCY E. O'MALLEY, AND DEPUTY DISTRICT ATTORNEY DAVID STEIN:

PLEASE TAKE NOTICE that on November 5, 2010, at 8:30 a.m. or as soon thereafter as counsel can be heard in the Courtroom of The Honorable Robert Perry, Defendant Johannes Mehserle will move the Court for an order granting a new trial pursuant to Penal Code §1181 as to both the involuntary manslaughter conviction and the finding that the gun enhancement allegation is true.

This motion is based on this notice of motion and motion, the accompanying memorandum in support of the motion, the accompanying exhibits, the entire court file in this case, and whatever additional evidence and authorities are presented at a hearing on the matter.

Dated: October 1, 2010

Respectfully submitted,

RAINS LUCIA STERN, PC

By: Michael L. Rains
Attorneys for Defendant Johannes Mehserle

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

In January of 2009, Johannes Mehserle became the first California police officer to be charged with murder for an on duty shooting. Since the Alameda District Attorney was aware of two separate witnesses who heard Mehserle say he was going to tase Oscar Grant, and a host of other witnesses who saw a look of shock and horror on his face immediately after a single gunshot was fired,[1] it would have been understandable had the DA charged Mehserle with involuntary manslaughter. Instead, for reasons that certainly include racial politics and pressure from political figures and community leaders, not to mention the loud demands of rioters and looters, the DA began this precedent-setting murder prosecution.

After a more than three-week trial, deliberating for slightly over six hours, the jury unanimously rejected the prosecution's view of the facts. The jurors found that Mehserle intended to use his taser, announced his intention loudly and clearly, but then, like seven other officers before him had done, mistakenly drew and fired his gun. The jurors nevertheless concluded that Mehserle should be held criminally liable for making that tragic mistake.

Before this Court imposes judgment on that verdict it must be satisfied that three things are true:

First, the Court must be confident that its evidentiary rulings were correct *in light of the verdict*. The Court's rulings excluding Grant's probation and parole status, and the fact that Grant had a gun during his prior arrest—all of which might have been justifiable on 352 grounds in a *murder* prosecution—amount to federal constitutional error in the context of the present verdict.

The central focus of the trial was whether Mehserle intended to pull his gun. Grant's state of mind and his conduct were largely peripheral to the jury's resolution of that issue. Even if Grant resisted arrest, there could be no doubt Mehserle had no right to use *lethal* force.

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[1] At least two witnesses, Officer Anthony Pirone and Jackie Bryson, told the DA within a few hours after the incident that Mehserle said "I'm going to tase him" just seconds before the shooting. Every witness interviewed within two days of the incident told investigators that Mehserle looked like he was in shock after the shooting.

In the context of an involuntary manslaughter charge, however, Grant's state of mind and his behavior when in police custody should have been *the* focus of the jurors' analysis. And although it was entirely irrelevant on the murder charge, the prosecutor devoted a considerable portion of his closing argument to the proposition that Grant never resisted. But because of the Court's evidentiary rulings, key proof was kept from the jurors that contradicted that argument. The error deprived Mehserle of due process and requires a new trial.

Second, the Court must be confident that its instructions guiding the jurors in their understanding of involuntary manslaughter were correct. But as will appear, those instructions—which consume *eight transcript pages*[2]—were confusing, misleading, and in some respects simply false. The involuntary manslaughter instructions, taken as a whole, violated Mehserle's federal due process rights and Sixth Amendment right to be convicted only upon a finding of proof beyond a reasonable doubt by a unanimous jury.

Finally, and most critically, the Court must consider the evidence itself. That involves two distinct analyses, under sections 6 and 8 of Penal Code §1181.

The Court must initially decide whether it was likely that just one juror would have voted to acquit Mehserle had the jurors been aware of newly discovered evidence that shows a key part of the state's case to be built upon a falsehood.

Separately, the court must *independently* consider the evidence to determine whether the prosecution presented proof beyond a reasonable doubt that Mehserle is guilty of involuntary manslaughter. Notwithstanding the verdict, unless *this Court* independently finds such a quantum of evidence in the trial record, it must grant the motion for a new trial.

What appears from the record is simply this: Mehserle's participation in the relevant events lasted slightly over two minutes; there is no proof he acted belligerently, irresponsibly, or recklessly; Mehserle's decision to employ the taser occurred in a loud, hostile, and chaotic environment; there is an overwhelming quantum of evidence that at the time Mehserle made his decision to use the taser, Grant was resisting, including uncontradicted testimony from unbiased

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[2] By comparison, the instructions on the *charged* crime amounted to *one transcript page*.

civilian witnesses presented by the DA that Mehserle was unable to remove Grant's arm from under his body, and indisputable forensic evidence that Grant's body was rising off the platform in the moments before the shot; there is uncontradicted testimony Mehserle acted in compliance with his woefully inadequate taser training and with BART's policies regarding the use of the taser; and perhaps most importantly, there is uncontradicted testimony from witnesses on both sides of the aisle that a police officer has broad discretion to employ non-lethal force, including a taser, when the officer believes a suspect is resisting arrest. These factors, among others, mean that the DA failed to offer proof beyond a reasonable doubt that Mehserle committed an involuntary manslaughter.

This key point bears emphasis: Police officers are *required* to carry and to use weapons (both lethal and non-lethal), and must make and implement the decision to use those weapons in "circumstances that are tense, uncertain, and rapidly evolving." For that reason, absent evidence Mehserle engaged in behavior that was "outrageous or extraordinary" (*see Pagotto v. State* (1999) 127 Md.App. 271, 357, 732 A.2d 920, 966), thus substantially increasing the *likelihood* that he would mistakenly draw his gun in place of his taser, he is not guilty of involuntary manslaughter as a matter of law.

It is now up to this Court to ensure that its evidentiary rulings were sound in light of the result, and that the instructions did not result in an invalid conviction. It is up to the Court to analyze the significance of newly discovered evidence. And, it is up to the Court, exercising independent judgment, to determine whether the prosecution has placed into evidence proof beyond a reasonable doubt that Johannes Mehserle is guilty of involuntary manslaughter. On similar grounds—sitting as 13th juror and in light of instructional errors—the Court should grant a new trial as to the jury's finding that the §12022.5 allegation is "true."

A trial judge is understandably reluctant after a long trial and the expenditure of considerable party and Court resources to require a do-over. But that is precisely what is required here. In the words of Justice Traynor, "It has been said that one of the most prolific causes of miscarriages of justice is the reluctance of trial judges to exercise the discretion with which they

are clothed to grant a new trial when the circumstances show that justice would be thereby served." *People v. Love* (1959) 51 Cal.2d 751, 757.

After a careful review of the facts and relevant law, the Court will find the verdict is flawed and that a new trial must be held.

I. NEWLY DISCOVERED EVIDENCE IN SUPPORT OF MEHSERLE'S CLAIM THAT THE GRANT SHOOTING WAS AN ACCIDENT REQUIRES A NEW TRIAL

A. Introduction

As the Court will recall, a centerpiece of the defense case was evidence that several officers before the defendant had, in like circumstances, mistakenly drawn their firearms while intending to deploy their tasers. The point, of course, was to demonstrate that such a truly accidental shooting was not a story fabricated to defend against a criminal charge, but was rather an ongoing problem of taser-gun confusion on the part of police officers involved in high stress situations.

In response, the DA effectively cross-examined taser trainer Stuart Lehman (RT 3749), and even more effectively, taser and use of force expert Greg Meyer (RT 4663 et seq.), on the subject of the six other incidents. In doing so, the DA made the following point over and over again: while there had been other taser confusion cases, there had never been a case like this one involving a yellow X26 that was set up in a strong-hand, cross-draw holster configuration. The DA's point was clear: given the holster configurations of Mehserle's gun and taser, and the color and weight differences between the weapons, either Mehserle was lying about his intention to use the taser, or he was criminally negligent, because never before had any officer made such a blatant and inexcusable mistake.

In his rebuttal argument, Mr. Stein drove the point home with what was perhaps the most vehement and dramatically worded portion of his closing argument. Just before the case went to the jury, the DA said this:

> I asked [taser expert Meyer] approximately how many times do you think tasers have been fired? And he didn't know for sure, but hundreds and hundreds of thousands of times, if not millions. And if there was a case where an officer pulled his gun and shot someone where he meant to pull it from his support side, his non-

> dominant side, trust me, you would have heard about it. *In almost a million or more instances of tasers being fired, this has never happened. Never happened.* If it had, you would have heard about it.
>
> And yes, I am going to ask you to look at the gun and look at the taser. Inspector Brock. You'll have the opportunity to see and feel both of these items and see what you think. You know, I asked Mr. Meyer why it was they make these things bright yellow, and he didn't want to say. He said, I don't know. You'll have to ask them. They make it this color so that the officers can distinguish the two. I mean, that's common sense, right. We know that. But never before, never before has there been an instance where an officer has confused his taser for his gun where the taser was being held on the opposite side of the gun. *It's never happened. To this day it's never happened.*

(RT 5755-5756)

It was an enormously convincing argument—while the jurors ultimately concluded Mehserle had intended to tase Grant, the apparent fact that no police officer had ever mistakenly drawn his gun while intending to use a yellow X26 set up in dominant-hand, cross-draw configuration was likely key to the jurors' conclusion that Mehserle was criminally liable for Grant's death. Since the DA made the point repeatedly at trial—in its cross-examination, by way of an exhibit (People's 154), and so forcefully at the close of its rebuttal argument—the jurors were being requested to focus on it during their deliberations.

As the accompanying declaration of Lieutenant Billy Jones (Exhibit A) makes clear, the prosecution's extraordinarily convincing cross-examination and the trial argument quoted above turn out to be based on an entirely false premise—although, to be absolutely clear, the defense has no doubt Mr. Stein acted in good faith throughout. Indeed, neither party was aware or realistically could have been aware during trial that less than a year before the Grant shooting, in an incident hauntingly similar to this one, a veteran Kentucky police lieutenant named Billy Jones accidentally shot a suspect *in the back with a yellow X26 taser set up in a dominant-hand, cross-draw configuration.*[3]

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[3] Unlike some of the other weapons confusion cases, the Jones case did not result in any published court decision, and was minimally reported in the media. The matter came to the attention of expert Meyer—who defense counsel tasked with and depended upon to collect the weapons confusion cases—only weeks after the verdict in this case. (Exhibit B, Declaration of Michael Rains)

Five times Mr. Stein told the jury that in a *million taser draws*, an accident like the one Mehserle claimed had occurred here had *"never happened."* The DA placed particular emphasis on the color, asking the jurors why the manufacturer made the taser yellow, and then answered his own question: "They make it this color so that the officers can distinguish the two. I mean, that's common sense, right? We know that. *But never before, never before has there been an instance where an officer has confused his taser for his gun where the taser was being held on the opposite side of the gun. It's never happened. To this day it's never happened.*" (RT 5755-5756)

As will appear, the evidence of the Kentucky shooting is newly discovered and it would likely have convinced at least one juror to vote for acquittal. For that reason, the Court should grant a new trial.

B. The Law

Under Penal Code §1181(8), the Court may grant a new trial in the case of newly discovered evidence. "In ruling on a motion for new trial based on newly discovered evidence, the trial court considers the following factors: 1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial." *People v. Beeler* (1995) 9 Cal.4th 953, 1005. Under Penal Code §1181(8), counsel is obligated to produce "affidavits of the witnesses by whom such evidence is expected to be given . . . ."

C. Argument

1. The Evidence

The Court can read Lieutenant Jones' declaration, which is incorporated here by reference. The key points are as follows:

Contrary to the DA's argument, a dominant-hand, cross-draw, yellow X26 mistaken shooting occurred less than a year before the Grant shooting.

The officer involved was a veteran, having been in law enforcement for 18 years.

The officer intended to tase the suspect and mistakenly drew his gun from a "Safariland" ALS (Automatic Locking System) holster much like the one Mehserle wore.

Lieutenant Jones shot the suspect in the back, critically wounding him. The suspect posed no lethal threat to Jones; rather, Jones decided to tase the suspect because he had punched someone.

Jones made the decision to use his taser to enable him to easily and safely handcuff the suspect.

Jones was carrying a yellow X26 Taser in a strong hand, cross-draw position on his duty belt. The taser was fastened on Jones' duty belt, left of his buckle, adjacent to his ammunition pouches.

Jones' right hand is his dominant hand and his service weapon was carried on the right side of his duty belt.

Like Mehserle, Jones has no conscious recollection of drawing his firearm. Jones received training on the X26 five weeks before the shooting, while Mehserle's training occurred for weeks before the shooting.

He received 10 hours of training. In the class he shot the taser only once. Jones did not receive significant training regarding the drawing of the taser.

Members of Jones' department were issued tasers they could practice with at home.

A criminal investigation determined that Jones had not acted criminally. Rather, the shooting was determined to be a "muscle memory accident."

2. The Evidence Is Newly Discovered

The statute requires that the evidence presented be "newly discovered." The phrase has been interpreted to mean that Mehserle's counsel must have been reasonably diligent in attempting to discover the evidence. As appears, the Jones shooting evidence is newly discovered for the purpose of Penal Code §1181(8).

As the accompanying Declaration of Michael Rains (Exhibit B) demonstrates, shortly after being retained to represent defendant Mehserle, counsel hired Greg Meyer to serve as his use of force and taser expert. Having reviewed the relevant published opinions, counsel was aware that there had been other weapons confusion cases involving tasers. Counsel assumed, correctly, that evidence of other cases that had not resulted in published legal opinions would be

available to an expert like Meyer. Counsel tasked Meyer with reviewing the relevant literature and media reports and compiling a complete and detailed list of the taser cases. Meyer prepared such a list and relayed it to counsel, who in turn provided it in discovery to the DA. Eventually evidence of the six cases was presented at trial. (Defense Exhibit HHH) Meyer informed counsel that after a search of the relevant literature and discussions with colleagues, he believed there were no other reported taser cases.

On July 17, 2010, Meyer forwarded to counsel an electronic message he had received the same day from TASER, Inc., the manufacturer of the X26, which referred him to the Jones case from Kentucky. The message indicates that even TASER, Inc., was until recently unaware of the April 2008 Kentucky case. Apparently the Jones case was not the subject of any significant reporting in the law enforcement media and was not the subject of any published legal opinion.

As noted, the statute requires the "party" to exercise due diligence. As the court made clear in *People v. Randle* (1982) 130 Cal.App.3d 286, 293, the "diligence" of defendant in "marshalling his evidence must be determined in light of the peculiar circumstances involved." A defendant must simply demonstrate a "reasonable effort to produce all his evidence at the trial . . . and he will not be allowed a new trial for the purpose of introducing evidence known to him and obtainable at the time of trial, or which would have been known to him had he simply exercised reasonable effort to present his defense." *People v. Owens* (1967) 252 Cal.App.2d 548, 554. *Compare Randle*, 130 Cal.App.3d at 293 (diligence sufficient where defense learned of witness to credibility of sexual assault complainant after trial, when witness read about the case in the newspaper and called police) with *People v. Farmer* (1989) 47 Cal.3d 888, 917 (diligence insufficient where defense lawyer, although perhaps not defendant, knew about witness from beginning of the case).

Here the defense hired perhaps the leading taser expert in the country, paying him (as the DA was quick to point out at trial) a considerable sum to provide both his opinions and information on comparable cases. Counsel diligently reviewed the incidents provided by Meyer, litigated their admissibility before trial, and presented them to the jury both through witness testimony and an exhibit. (Defense HHH) The defense worked hard to find the relevant incidents

and had no reason whatsoever to fail to introduce evidence of the Kentucky incident at trial. The Kentucky case was not widely reported, and until recently escaped the notice of both Meyer and TASER, Inc. The facts were supplied to Meyer in mid-July and he immediately turned them over to counsel. The newly discovered evidence was immediately turned over the DA and is being presented to the Court at the first available opportunity.

Under the circumstances, the defense was reasonably diligent and the Jones evidence is newly discovered for the purposes of the Court's analysis under Penal Code §1181(8).

To the extent the DA were to argue, or the Court were to find, that Mehserle's counsel was *not* reasonably diligent in presenting the Jones evidence, the Court would nevertheless be required to consider the significance of the evidence to the verdict. Given that defense counsel offered evidence of the six mistaken shootings, offered an exhibit on the cases, examined his witnesses on the issue, and made the relevant jury argument, he could hardly have had any strategic reason *not* to introduce evidence of the Jones case at trial. The accompanying declaration of Michael Rains makes the point expressly—counsel wanted to place before the jurors all other taser-gun confusion cases, had no strategic reason to keep such evidence from the jury, and did everything in his power to unearth and introduce at trial every such incident.

Thus, if the Court were to conclude that it need not reach the issue under Penal Code §1181(8) because counsel was not reasonably diligent in discovering the Jones case, it would necessarily be holding that counsel's representation was deficient. In view of the importance of the evidence to Mehserle's case, such deficient performance would amount to a prejudicial violation of the defendant's Sixth Amendment right to the effective assistance of counsel.

To establish that he was deprived of the effective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant. *People v. Ledesma* (1987) 43 Cal.3d 171, 215-218; *see also Strickland v. Washington* (1984) 466 U.S. 668, 693-94).

In effect, therefore, whether under a Sixth Amendment analysis or under the newly discovered evidence standard, this Court must ultimately reach the question whether one juror would likely[4] have acquitted Mehserle if he or she had been exposed to the Jones evidence and not, in that case, to Mr. Stein's powerful closing argument. As appears, such a conclusion is nearly inescapable.

3. The Newly Discovered Evidence Would Likely Have Led At Least One Juror to Vote for Acquittal

Mehserle's defense at trial, both to the charged and lesser-included offenses was simple: the shooting was an accident, not a criminal act. The cornerstone of that defense was evidence that similar non-reckless, mistaken shootings had happened before. That evidence, and only that evidence, provided a clear, direct, and unbiased answer to a question that must have been in every juror's mind when the case began: How could such an accident have happened to a trained police officer?

Mehserle introduced evidence relating to six incidents in which police officers shot people while intending to use their tasers. (RT 3763: testimony of Stuart Lehman; 4546, testimony of Greg Meyer; Defense Exhibit HHH, detailing six other taser incidents) And counsel made the point explicitly in closing: the jury should believe Mehserle's claim that he shot Grant by accident, and it should find that he did so without criminal negligence, because the same sort of accident had happened six times in the past. (RT 5714 et seq.)

But the defendant's other incidents argument had a gaping hole in it, and the prosecution quickly found and expertly exploited it. As described, the DA countered with cross-examination and powerful argument that never, in a million taser draws, had any officer accidentally drawn his gun while intending to deploy a yellow, X26 taser set up in a dominant-hand, cross-draw configuration. The DA's cross of Meyer on the point consumes *seventeen transcript pages*. (RT 4663-4680) During that examination Mr. Stein was relentless on three issues: the other cases

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[4] Arguably the reversal standard under *Strickland* is *less* exacting than under Penal Code §1181(8) The former requires proof of a "reasonable probability" that one juror would have voted to acquit. The latter requires proof that a more favorable verdict was "probable." For that reason, and for the purpose of preserving the issue, Mehserle formally asserts both the state statutory and federal constitutional claims.

mostly involved M26 tasers; the tasers in all but one of the other cases were black; and *none* of the tasers in the other cases were set up in dominant hand-cross draw configurations.

The DA's closing argument on that point critically impacted Mehserle's defense. Other evidence in the case apparently convinced the jurors that Mehserle was telling the truth about his intent, but the jurors rejected the officer's argument that he was not criminally negligent for Grant's death. It is almost certain that in doing so they relied heavily on the DA's argument.

Indeed, the DA's closing contains nothing upon which the jurors could have based a finding that Mehserle was criminally negligent *other than* its argument that the mistaken shooting here was so extraordinarily unlikely because of the color, weight, and holster configuration of Mehserle's taser. The jurors were told that while there had been several weapons confusion accidents, *never* (Mr. Stein used the word five times in two paragraphs) had any officer made the sort of blatant mistake Mehserle made here. The import of the DA argument is clear: the sheer improbability of Mehserle's claim suggests either that he was lying about his intent, or that his conduct must have been grossly and criminally negligent.

Imagine a hypothetical retrial at which Mehserle faces only an involuntary manslaughter charge. At that trial, police officer Billy Jones could testify that although he has many times Mehserle's experience, he mistakenly shot a suspect in the back who posed no lethal threat to him. The jury would learn that like Mehserle, Jones had received his training shortly before the shooting. Like Mehserle, Jones carried a yellow X26 in a holster configuration nearly identical to Mehserle's. Jones drew his gun from a holster that was much like Mehserle's. Like Mehserle, Jones decided to tase the suspect, then shot him, but thereafter had no conscious recollection of pulling his gun.

Most importantly, of course, having heard from Lieutenant Jones, the DA would be precluded from making the enormously effective point during its rebuttal argument that "In almost a million or more instances of tasers being fired, this has never happened. Never happened."

Can this Court say with any confidence that at such a trial, not one juror would probably vote to acquit?

This Court should grant a new trial at which a jury hears *all* of the relevant proof, and at which the prosecution cannot so effectively capitalize in its jury argument on a factual assertion that turns out to be patently false.

II. SITTING AS THIRTEENTH JUROR, THE COURT SHOULD EXERCISE ITS INDEPENDENT JUDGMENT TO FIND THE ABSENCE OF PROOF BEYOND A REASONABLE DOUBT THAT MEHSERLE IS CRIMINALLY LIABLE FOR OSCAR GRANT'S DEATH

A. Introduction

Imagine Smith is a relatively new ambulance driver. He has received intensive instruction regarding operation of his vehicle in a manner that would be considered grossly negligent were he a civilian—he learns to drive at high speed, go the wrong way up one-way streets, run red lights.

Now imagine at 1 a.m., in the midst of a busy New Years Eve shift, Smith gets a call to come to a residence where there has been an explosion. He is told that there are critical injuries and thus time is of the essence. Putting to use his skills as a trained ambulance driver, Smith speeds toward the residence. On the way, driving at twice the speed limit, he changes lanes without checking his mirror soon enough, cuts off a car, and causes a wreck that kills four people.

Because he is an ambulance driver, unlike the rest of us, Smith *must* drive in a manner that would otherwise be considered negligent or even reckless. His *failure* to do so would amount to a dereliction of duty and lead to his dismissal. Indeed, the law specifically exempts such driving—which would otherwise be considered *per se* grossly negligent—from the application of Vehicle Code sanctions. *See* Vehicle Code § 21055. The California Supreme Court long ago recognized that drivers of emergency vehicles may be *civilly* liable for negligence. But the "ordinary prudence" test must be considered in context: "That standard of conduct which is reasonable under all the circumstances must . . . take into consideration the unusual circumstances confronting the driver of an emergency vehicle, that is, *the emergency which necessitates immediate action* and the *duty imposed upon the driver to take reasonable, necessary measures to alleviate the emergency*." *Torres v. City of Los Angeles* (1962) 58 Cal.2d 35, 48 (emphasis added).

Ambulance drivers and police officers share this striking aspect of their work—if they make mistakes, they can kill people. Moreover, we *insist* that they engage in conduct highly

dangerous to themselves and others—i.e., driving in violation of the law, carrying and using guns and other potentially injurious weapons. And we ask them to exercise their professional discretion, including engaging in potentially lethal activities, instantaneously, and in tense, chaotic, and sometimes violent circumstances.

The thorny question posed by the hypothetical, and by this case, is simply this: Since we expect and *want* ambulance drivers to speed and run red lights, and we expect and *want* police officers to decide almost instantly and under trying circumstances to use their weapons (whether lethal or non-lethal), under what circumstances will we then subject them to *criminal* liability for having made mistakes in the exercise of the very discretion we insist they use?

The answer to that question is not contained in any California opinion, although there is a clear *hint* of it in the thin California authority. The many, many gun and vehicular manslaughter cases on the books are inapposite because they don't account for the fact that the defendant in this case, as the driver in the hypothetical, was engaged in potentially lethal conduct *because he had a duty to do so under the law.*

As much as the DA would like to avoid reference to authorities other than the simple California law of criminal negligence, the clear and rational answer to the question is to be found in the cases Mehserle cited in his Instructional Brief and discussed at the instructional argument.

And the answer turns out to be simple and utterly sane: an emergency worker or law enforcer who kills someone mistakenly on the job is criminally liable *only where his conduct constitutes such a departure from the norm of reasonable police or emergency worker conduct that it may fairly be characterized as "extraordinary and outrageous." See Pagotto v. State* (1999) 127 Md.App. 271, 357, 732 A.2d 920, 966. Put another way, the conduct must so enhance the risk that such a mistake would occur that it evinces a disregard for human life. *Id.*

Perhaps most critically, the bare *fact* of the mistake itself—even if the mistake is blatant (for example, cutting off a car at high speed, or confusing a relatively heavy black gun for a relatively light yellow taser), and even if it results in a great tragedy—is legally insufficient to justify a criminal sanction.

That is so because ambulance drivers and police officers are *required* to engage in such highly dangerous, otherwise illegal activities in enormously trying circumstances. We accept that mistakes and misjudgments sometimes result in unwarranted deaths and in all but the most outrageous and extraordinary cases we relegate compensation for such mistakes to the civil realm. Again, we employ the criminal sanction rarely, and only where the driver or officer's conduct is truly extraordinary and outrageous; where his or her conduct so significantly increases the *likelihood* of a lethal mistake that the conduct clearly reflects a disregard for human life.

If ambulance driver Smith was drunk, he is criminally liable. If Smith was trained to never change lanes while going over the speed limit and he did so knowingly and purposefully, with his training to the contrary clearly in mind, he is criminally liable. If he was talking on his cell phone with his girlfriend while driving at twice the legal limit, he is criminally liable.

But if Smith was sober, and off the phone, and he had been trained to make such lane changes at high speed, he cannot be guilty of involuntary manslaughter—despite his technical violation of the reckless driving law and despite the tragic outcome of his error—because he did nothing outrageous or extraordinary. He engaged in no conduct that substantially enhanced the risk that he would make the driving error that led to the deaths. He made a tragic error of precisely the sort we would expect, on rare occasions, to be made by people charged with undertaking such dangerous activities under difficult conditions.

In this case, Johannes Mehserle made precisely such a tragic error. Unable to secure Oscar Grant's arm for cuffing, Mehserle tried to use his taser and instead drew and fired his gun. He is criminally liable for that error only if this Court, exercising its independent judgment, finds proof beyond a reasonable doubt that he did something in attempting to deploy his taser that was extraordinary and outrageous, which *so enhanced the risk that he would mistakenly pull his taser that it evinced a disregard for human life.*

No such evidence exists.

Mehserle wasn't drunk; he didn't consciously and purposefully ignore his training or BART use of force policies. There is overwhelming evidence that in the short time Mehserle was on the Fruitvale BART platform he reasonably believed Grant was lawfully under arrest and that

Grant had no right to resist cuffing. He tried to handcuff Grant but was unable to secure Grant's arm.[5] Reasonably believing that Grant was resisting arrest, Mehserle exercised his broad discretion to use non-lethal force.

And while there can be no doubt that he made a tragic error in that effort, Mehserle didn't engage in any extraordinary or outrageous behavior of a sort that so substantially increased the likelihood of a gun confusion error that it reflects a disregard for human life. There simply is no evidence in this record to support a finding that Mehserle acted criminally.

This Court should exercise its independent judgment under §1181(6) and order a new trial.

B. Standard of Review

Before this Court imposes judgment it must *independently* conclude that Mehserle was proven guilty beyond a reasonable doubt of involuntary manslaughter. In California, "A defendant tried by jury is entitled to *two* decisions on the evidence, one by jury and another by trial judge in passing upon motion for new trial, and it is his duty to grant new trial if he is not satisfied that evidence is sufficient to sustain the verdict . . . ." *People v. Creswell* (1953) 119 Cal.App.2d 584, 586 (emphasis added)

"Although the trial court is to be guided by a presumption in favor of the correctness of the jury's verdict this means only that the court may not *arbitrarily* reject a verdict which is supported by substantial evidence. The trial court is not bound by the jury's determinations as to the credibility of witnesses or as to the weight or effect to be accorded to the evidence. Thus, *the presumption that the verdict is correct does not affect the trial court's duty to give the defendant the benefit of its independent determination as to the probative value of the evidence.* If the court finds that the evidence is not sufficiently probative to sustain the verdict, it *must* order a new trial." *People v. Dickens* (2005) 130 Cal.App.4th 1235, 1251-52 (first emphasis in original) (internal citations and quotation marks omitted).

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[5] There was also evidence, in the form of Mehserle's testimony, that Grant put his hand in his pocket. But that evidence was not necessary to justify Mehserle's conduct, as every relevant witness agreed.

> When an appellate court reviews the jury's verdict it resolves all conflicts in the evidence in favor of the verdict. . . . *The function of the trial judge is entirely different: He does not review the jury's determination but weighs the evidence himself and exercises an independent judgment, as if there were no jury at all.* As the court said in *People v. Robarge*, supra, 41 C.2d 633: While it is the exclusive province of the jury to find the facts, it is the duty of the trial court to see that this function is intelligently and justly performed, and in the exercise of its supervisory power over the verdict, the court, on motion for a new trial, should consider the probative force of the evidence and satisfy itself that the evidence as a whole is sufficient to sustain the verdict.(See also *People v. Knutte* (1986) 111 C. 453, 455 (additional cites omitted).

6 Witkin, Cal. Crim. Law 3d (2000) Crim Judgm, § 102, p. 134 (emphasis added)

Thus, where an appellate court *must* be bound by the jury's determinations of the credibility of witnesses, a judge hearing a motion under Penal Code § 1181(6) *cannot* defer to those determinations. In *People v Robarge* (1953) 41 Cal.2d 628, 634, the trial judge indicated that he disbelieved much of the testimony of the identifying witness, but nevertheless declared that the jury were the sole judges of credibility. The Supreme Court reversed the order denying a new trial with directions to again hear and determine the motion in accordance with the correct rule of law. "[T]he trial court failed to give defendant the benefit of its independent conclusion as to the sufficiency of credible evidence to support the verdict." *Accord People v. Davis* (1995) 10 Cal.4th 463, 524 (on new trial motion, trial court is to weigh the evidence independently); *see also People v. Hines* (1954) 128 Cal.App.2d 421, 428 (same holding, following *Robarge*); *People v. Trotter* (1984) 160 Cal.App.3d 1217, 1220 (same).

Because this was a prosecution built entirely on circumstantial evidence, this Court must independently apply to that evidence the legal rules that control a jury's decision of such a case: first, that the evidence in the record must be rationally inconsistent with any conclusion other than that of the defendant's guilt; and, second, that each fact essential to complete a set of circumstances necessary to establish the defendant's guilt must be proven beyond a reasonable doubt. CALCRIM 224

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C. The Criminal Negligence Standard in the Context of a Police Shooting

In its briefing and oral argument prior to the verdict, the prosecution dismissed the notion that any law other than California criminal cases could assist this Court in understanding of criminal negligence in the police shooting context. The DA never mentioned the Maryland cases (*Pagotto* and *Albrecht*) in its papers and at argument asserted, without explanation, that the federal civil excessive force cases are irrelevant, despite (a) the cogent argument of the Maryland Court of Appeal that such cases are *highly* relevant to the criminal negligence issue and (b) the DA's request that the jury in this case be instructed, *twice,* on the issue of excessive force, instructions that are indistinguishable from federal *civil* rights law.

It is defendant's hope that the Court will reject this shortsighted view and study *all* the authorities that bear on the difficult question where to draw the line between civil and criminal negligence in the case of a mistaken shooting by a police officer. That legal analysis appeared in Mehserle's Instructional Brief, which is incorporated here by reference. For the Court's convenience, the analysis it is revisited briefly below.

But in a real sense the DA is hoisted by its own petard. It has asked this Court to use only California *criminal law* to understand the application of criminal negligence in this highly unusual context. And it has cited many cases in which defendants *who were not police officers* have been convicted of involuntary manslaughter for mistaken shootings.

But the DA has never discussed the three times California courts have grappled with the issue actually before this Court. The DA has avoided the *police* shooting cases because all three are consistent with the view of the Maryland Court of Appeal: a police officer who mistakenly shoots someone (or causes another officer to shoot someone) on the job can be held criminally liable *only* if his conduct is outrageous and extraordinary, that it so enhances the risk that such a mistake will occur that it evinces a disregard for human life.

Defendant finds the Maryland and §1983 cases to be helpful because they address head-on the issue of where to draw the line between civil and criminal negligence in police cases (Maryland cases), and because they specifically address the problem of liability in the weapon confusion context (§1983 cases). But even if this Court were to ignore the persuasive authority,

under the *relevant* California cases—that is, the police on-duty shooting cases—the Court will find the DA has failed to supply proof beyond a reasonable doubt that Mehserle is criminally liable for Oscar Grant's death.

1. The Persuasive Authorities Revisited: Maryland

In *State v. Albrecht* (1994) 336 Md. 475, 649 A.2d 336, officer Albrecht and his partner were dispatched to investigate a report of a stabbing. Upon arriving at the scene they learned that there had been a fight, that one man had been stabbed, that all three of the men involved were drug dealers, that they may have been involved in a robbery, and that the suspects were driving a green Chevrolet that might have a gun in it. 336 Md. at 480, 649 A.2d at 338.

When the officers found the car it was in a parking lot in front of a playground. A woman, Garnett, stood directly in front of the playground where several children were playing. Another man stood on the other side of the car. A third man remained in the car. It was still daylight. 336 Md. at 480, 649 A.2d at 338.

Albrecht ordered the suspects to freeze. At the same time he removed his shotgun from inside his cruiser. The officer ordered the suspects to put their hands in the air. He racked a shot into the chamber of the shotgun and aimed it directly at Garnett. 336 Md. at 481, 649 A.2d at 339. Albrecht had modified his weapon to hold extra ammunition. 336 Md. at 481, 649 A.2d at 339. Officer Albrecht testified that having concluded Garnett posed no threat, he intended to swing the shotgun away from her toward the other suspects. But when he did so the shotgun discharged, killing Garnett. 336 Md. at 482, 649 A.2d at 339.

After a court trial, Albrecht was convicted of involuntary manslaughter. The court based that decision on the following facts: (a) Albrecht had customized his shotgun in a manner that made it more dangerous, (b) the officer misjudged the dangerousness of the situation, (c) he failed to take into account the risks posed by his behavior—that is, drawing the shotgun in an area filled with innocent bystanders, (d) he failed to consider that the suspects posed little risk, (e) the suspects complied with his verbal commands, and (f) the officer knew the prime suspect by name and could arrest him at a later time at which there would be less risk to the public. 336 Md. at 484, 649 A.2d at 340.

The state supreme court affirmed: "We find that the evidence was sufficient to establish that, notwithstanding the fact that Rebecca Garnett did not pose any danger to either Albrecht himself or to third parties, *Albrecht took substantial steps to use deadly force against her-to wit, racking his shotgun and aiming it, with his finger on the trigger, at Garnett.*" 336 Md. at 486, 649 A.2d at 341 (emphasis added). In addition, the Maryland high court found that in various respects, and in particular with regard to his handling of the shotgun, Albrecht had violated department policy. 336 Md. at 504, 649 A.2d at 350. The suspects gave Albrecht no reason to rack his shotgun—that is, to prepare to fire it. 336 Md. at 504, 649 A.2d at 350. Albrecht admitted he had no reason to worry about Garnett, but nevertheless put his finger in the shotgun's trigger, a move expert witnesses testified was inappropriate unless he intended to fire the weapon. 336 Md. at 504, 649 A.2d at 350.

In *Pagotto v. State* (1999) 127 Md.App. 271, 732 A.2d 920, the officer and a partner stopped a Suburu that had failed to properly display its license plate. The officers pulled the Suburu over and approached it on foot. Sergeant Pagotto saw the driver, Barnes, move in a way that suggested he could be retrieving or stashing a weapon. 127 Md.App. at 285, 732 A.2d at 928. The occupants of the Suburu moved around in an excited manner. It was dark. There were three occupants of the car and only two officers. 127 Md.App. at 286, 732 A.2d at 928.

Sergeant Pagotto had his gun in his right hand as he moved toward the car. The Suburu began to drift forward. Pagotto testified that as he approached the car the driver's side door opened and he believed he might be shot. He therefore briefly grabbed the driver's arm with his left hand, still carrying his gun in his right hand. Pagotto testified that he believed his best defense to a possible shooting was to grab the arm of the driver and pull him out of the car. 127 Md.App. at 293, 732 A.2d at 932. With the car moving, Barnes reached down under the console, which Pagotto thought might be an attempt to reach a gun. Pagotto attempted to disengage from, and to remove the keys from the car. The sergeant testified that as he was trying to remove himself from the car, it lurched into gear knocking him to the ground; as he was being pushed away from the Suburu he hit his right hand on the car, and his gun discharged, killing Barnes. 127 Md.App. at 295, 732 A.2d at 933.

The prosecution based its theory of gross negligence on three actions of Sergeant Pagotto: (a) his closing in on the Subaru with his service weapon drawn; (b) his grappling with the driver, Preston Barnes, with his left hand while his gun was in his right hand; and (c) his placement of his trigger finger along the "slide" of the weapon rather than underneath the trigger guard. The significance of all three actions was that they allegedly increased the likelihood that the weapon might be discharged by accident. 127 Md.App. at 306, 732 A.2d at 939.

Applying the stringent *Jackson v. Virginia* test, the Court of Appeal found that there was insufficient evidence to establish criminal negligence:

> [The prosecution's version] of the evidence shows three or four possible deviations from or violations of departmental guidelines of the Baltimore City Police Department. It shows that the actions of Sergeant Pagotto may well have contributed to the creation of a dangerous confrontation between himself and [the victim]. It shows what may be a case of actionable civil negligence.
>
> We hold that it does not show, however, *such a departure from the norm of reasonable police conduct that it may fairly be characterized as "extraordinary and outrageous." We hold that it does not show on the part of the law enforcement officer, even if guilty of some negligence in the performance of his duties, a mens rea that qualifies as a "wanton and abandoned disregard of human life."*

Pagotto, 127 Md.App. at 357, 732 A.2d at 966.

2. The Persuasive Authorities Revisited: The § 1983 Cases

a. The § 1983 Cases Are Relevant and Persuasive

On one point the DA has been clear in its argument: cases litigated in the federal civil rights context (including taser-gun confusion cases) have no bearing here. But the prosecution has never elucidated its view. It has never articulated *why* the *Pagotto* court's analysis is wrong. And it has never explained its logic in this case where, at the prosecution's insistence, the jury *twice* received instruction on the issue of excessive force by police officers. And where the prosecution argued again and again that Pirone and Mehserle used excessive force in their dealings with Grant. (*See, e.g.,* RT 5432, 5433, 5446).

The federal civil rights standard regarding the use of excessive force is, of course, *identical* to the standard applied in cases alleging the violation of California Penal Code §149. *Compare* Excessive Force Instruction (RT 5798 (In deciding whether the defendant used unreasonable or excessive force, you must determine the amount of force that would have appeared reasonable to a peace officer in the Defendant's position under the same or similar circumstances)) *with Torres v. City of Madera* (2008) 524 F.3d 1053. 1056 ("The reasonableness of a particular use of force is judged from the perspective of a reasonable officer on the scene and in light of the facts and circumstances confronting them.").

The *Pagotto* court made the parallel perfectly clear. Because the DA has so vehemently rejected the relevance of §1983 cases, and because defendant cannot improve upon it, the *Pagotto* court's full analysis is quoted here:

> This case is unusual in that it involves *a criminal prosecution* of a police officer for the involuntary manslaughter of a civilian. Where a police officer in the course of his duties shoots and wounds or shoots and kills a civilian, such a case, in recent decades, typically has resulted in a suit, federal or state, charging a violation of the victim's civil rights, frequently under 42 U.S.C. § 1983. The claim is typically that the officer is guilty of the violation by virtue of having unreasonably used excessive force. *Our case also involves the allegedly unreasonable use of excessive force. It involves the allegedly negligent and unreasonable creation of an enhanced risk that excessive force will accidentally be unleashed.*
>
> These § 1983 cases provide a helpful benchmark for measuring the case now before us, for it is in the context of § 1983 civil rights claims that most of the case law with respect to the alleged use of excessive force by a police officer is to be found. There are not many manslaughter cases brought against police officers and we must look, therefore, to the § 1983 cases to see how other courts are handling this situation. *The prevailing standard of objective reasonableness used in measuring § 1983 claims, moreover, is clearly apposite to the case before us, for it overlaps, though it is less demanding than, the standard of wanton and reckless disregard of human life necessary for a manslaughter conviction.* While some police actions that might be deemed unreasonable in the § 1983 context may still fall short of the standard of gross criminal negligence, the converse is not true. A police action deemed to be reasonable in the § 1983 context could clearly not be the basis for a finding of gross criminal negligence on the part of the officer.

Pagotto, 127 Md.App. at 348, 732 A.2d 961.

After analyzing a series of §1983 cases, the *Pagotto* court reasoned by analogy that a mistaken shooting of the resisting suspect could rarely amount to unreasonable conduct, let alone criminal negligence:

> In all of these cases, the claim that an officer has unreasonably used excessive force must be assessed as of the moment when the force is employed. Antecedent and allegedly negligent acts that may have contributed to the creation of a dangerous situation are not pertinent in evaluating the officer's state of mind at the critical moment when the gun, for instance, is discharged. In most of the § 1983 cases reviewed, moreover, the ultimate decision of the officer was intentionally to pull the trigger and intentionally to kill the person the officer believed to be an actual or imminent assailant. In the present case, by contrast, we are dealing with no such intentional shooting or killing. Sergeant Pagotto's weapon discharged only when the white Subaru was deliberately driven into the Sergeant's body. It cannot be that the accidental discharge of a weapon would be deemed more blameworthy than the intentional shooting of the victim. All that the Sergeant's alleged negligence did was, at most, to bring his body and his hand holding his service weapon into sufficient proximity of the white Subaru so that the white Subaru could more readily be driven into him and it. That is not a criminal *mens rea.*

127 Md.App. at 357, 732 A.2d at 966.

b. The §1983 Cases: An Update

In his instructional brief, defendant focused on the opinions in two weapon confusion cases where, as here, police officers intended to draw their tasers and mistakenly drew and fired their weapons. Mehserle's prior discussion of the three relevant opinions generated by those two mistaken shootings—*Torres v. City of Madera* (9th Cir. 2008) 524 F.3d 1053; *Torres v. City of Madera* (E.D. CA 2009) 655 F.Supp.2d 1109, 1123 (decision following remand); and *Henry v. Purnell* (4th Cir. 2007) 501 F.3d 374—is hereby expressly incorporated by reference. (Instructional Brief at pp. 20-22)

Since the verdict in this case, defendant has discovered the opinion after remand in the *Purnell* case. The Court will recall that in *Purnell* an officer mistakenly shot a person (not fatally) fleeing from arrest in a botched attempt to use his taser. The Fourth Circuit found that the District Court had employed the wrong standard in its summary judgment ruling, and remanded the case back to the lower court to determine whether the mistaken firing of a taser had been unreasonable. The lower court employed these five factors to determine whether the officer's conduct had been

reasonable: (1) the nature of the training the officer had received to prevent incidents like this from happening; (2) whether the officer acted in accordance with that training; (3) whether following that training would have alerted the officer that he was holding a handgun; (4) whether the suspect's conduct heightened the officer's sense of danger; and (5) whether the suspect's conduct caused the officer to act with undue haste and inconsistently with that training. *Henry v. Purnell* (4th Cir. 2007) 501 F.3d 374, 384.

On remand, as occurred in *Torres,* the lower court found that despite the mistaken shooting, the officer's conduct was reasonable—that is, did not amount to excessive force—and therefore again granted summary judgment in favor of the defendant. The court relied on these facts: in *Purnell,* as here, the officer did not intend to shoot the resisting suspect. *Henry v. Purnell* (D. Md. 2008) 559 F.Supp.2d 648. As here, the court noted that officer Purnell's taser training was minimal. *Id.* at 652. As here, there was no detailed discussion during training regarding the possibility of weapon confusion. *Id.* As here, in training, the officer only shot his taser a single time. *Id.*

Unlike Mehserle, the *Purnell* court noted that in at least two respects, officer Purnell violated department policy with regard to the use of the taser: he failed to use a verbal command indicating he was going to use the taser and he failed to point the laser sight at the suspect to ensure that he was firing the taser and not his gun, which had no laser sight. *Id.* But even in light of these violations of policy, the district court concluded that the officer's conduct was not unreasonable (*id.*), a ruling which, under the *Pagotto* rubric, would mean he could not, as a matter of law, be held criminally liable for the mistaken shooting.

3. The California Police Cases

For a police officer to be held criminally liable for the mistaken use of a dangerous weapon he is required to carry and use on the job, employing discretion that must be exercised instantaneously and intense and often violent circumstances, the DA must prove the officer's conduct was outrageous and extraordinary, that it so enhanced the risk that the mistaken use of the firearm would occur that it evinces a disregard for human life.

That is the standard clearly expressed in *Pagotto*, and it is the rule that comports with the §1983 cases. It is absolutely true that the rule has never been articulated that way in any California case, but that hardly means the rule doesn't apply here. It does, as can be seen by considering the three times DA's have pursued involuntary manslaughter charges against California law enforcement Officers.

In *People v. Sidwell* (1915) 29 Cal.App. 12, a company-hired police officer determined that gambling was going on in a company lodge. He had no reason to believe any of the gamblers were armed or otherwise posed a threat of violence. Sidwell nevertheless held his gun in his left hand and broke into the room by force. When he did so his gun when off, killing a man. *Id.* at 15. Sidwell was convicted of involuntary manslaughter. *Id.*

The court of appeal rejected his sufficiency claim, finding that the gun was in the defendant's possession when it fired and he could reasonably have been found to be wielding it recklessly. The court said this:

> That the defendant's mind was not upon his weapon as he was forcing the door open, is very clear from the fact that he did not know precisely how it came to be discharged. *It would seem to be true that the act of the defendant in holding in his hand a loaded weapon at the time he was engaged in forcing an entrance into the room, thus bringing into play much, if not all, of his physical power, and with his mind centered upon getting into the room, itself constituted gross or culpable negligence.*

Id. at 21 (emphases added)

The ruling fits neatly within the *Pagotto* criminal negligence standard applicable to police officers who mistakenly kill someone: Sidwell's conduct was "outrageous and extraordinary" because (a) he had no reason to believe his gun should be drawn and (b) he undertook to break down the door with the gun in hand without regard for the possibility that he might mistakenly shoot someone. The mistaken shooting alone did not subject him to criminal liability; rather, it was the outrageous conduct that substantially increased the *likelihood* of the mistake that sunk the defendant.

In *Somers v. Superior Court* (1973) 32 Cal.App.3d 961, the Court will recall, the defendant was a police sergeant. Following a series of holdups in Sacramento, Somers led a unit

tasked with stopping the gang responsible for the crimes. Somers received various reports relating to three Black men who appeared to be behaving suspiciously. Somers eventually saw three Black men on the street and had the impression they had just left a bar—bars were the targets of the robberies. *Id.* at 965. Somers claimed the men were acting furtively, walking hurriedly, and seemed to be holding objects that might be concealed shotguns. *Id.* Somers testified that he believed the three men had just robbed the bar. *Id.* Somers issued an emergency radio transmission that included the fact that the suspects were armed, and pursued the men. *Id.* The men eventually saw him and ran. *Id.* Somers claimed he heard the sound of a shotgun being cocked. *Id.* Somers fired his revolver at the men, after which another officer fired a shotgun round which killed one of the men. *Id.* at 966.

As it happened, the targets were teenagers who had been engaged in no criminal activity. A grand jury indicted Somers for involuntary manslaughter. Specifically, it faulted Somers for making the initial mistaken radio announcement that the three men he identified had committed a robbery and that they were armed, when in fact they had committed no crime and were unarmed. *Id.* at 969.

But the California Court of Appeal issued a writ of prohibition dismissing the case before it went to trial. The court concluded that given the "tense and menacing situation" in which Somers and his fellow officers were engaged, the sergeant's mistaken radio broadcast, which likely led to the fatal shooting, was not unreasonable. *Id.* at 969-970.

Again, the result fits within the *Pagotto* standard. The sergeant made an error. There was no doubt the error, as the DA alleged, turned the teenagers from innocents into targets, and thus caused a tragic death. But there was no evidence the sergeant did anything outrageous or extraordinary that evinced an indifference to human life. He did nothing—he wasn't drunk, he wasn't distracted like the defendant in *Sidwell*, he hadn't made an entirely unjustifiable decision to deploy a gun—to increase the likelihood that the identification error would occur. And so he could not be tried for a crime.

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Finally, there is the highly instructive case of *People v. Riter* (4th Dist. 2005) 2005 WL 1950867.[6] In *Riter*, a DA investigator in Riverside County went to a shelter to serve protective custody warrants on two minors. Parents Rhonda Parks and Jerry Bradley were staying at the shelter with the children. Investigator Riter and a colleague approached Parks, who lied, saying the children were at her sisters'. A short time later, outside the building, investigator Riter found Bradley and the victim. When Bradley learned that Riter intended to take his children, he told Parks to get in his truck. Riter attempted to stop Parks from leaving, and Bradley pushed or punched him, allowing Parks to escape. Parks and Bradley got in the truck, which was being driven by the victim. Bradley told the victim to drive. *Id.* at *1.

Riter positioned himself at the front of the truck and from various positions fired shots from his semi-automatic handgun at the tires of the truck. The truck backed up and Riter fired more rounds at the truck. The truck eventually collided with a parked car and stopped. At that point Riter, gun still drawn, moved to the driver's side window and pointed his gun at the driver and told him to stop. The truck went forward. Riter followed, again shooting at the truck. Eventually Riter shot the victim in the head. At the time his gun was only inches from the victim's ear. *Id.* at *1.

Minutes after the shooting, Riter told a police officer he shot the victim because the victim was trying to run him over with the truck. But four days after the shooting, Riter told a friend that in fact "he was shooting at the tires to stop the truck from coming towards him but that did not work, 'so he shot at the driver.'" *Id.* at *2.

Riter was convicted of involuntary manslaughter, a verdict that makes perfect sense under the *Pagotto* standard. Riter was executing a warrant for the *children*; he was not arresting the parents. There was no evidence the Parks, Bradley or the victim posed any danger to anyone. Riter repeatedly used his gun for a blatantly improper purpose—simply to try to stop the vehicle, thus wildly increasing the risk of a mistaken shooting. And then he shot into the car. By his own

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[6] Defendant does not rely on Court of Appeals' legal analysis or its holdings. Rather, he asks the Court to take judicial notice of the case as apparently the first time in the modern era in which a law enforcement officer was convicted of involuntary manslaughter for a mistaken on-duty shooting.

admission he did so to try to get the truck to stop. The conduct was unquestionably extraordinary and outrageous; Riter's behavior so substantially increased the likelihood of a mistaken shooting such that it suggests a disregard for human life.

D. Mehserle Is Not Criminally Liable for the Grant Shooting

1. Factual Summary

In Mr. Stein's lengthy closing and rebuttal, other than erroneously claiming that *no other* taser confusion case exists with the identical circumstances to this one, he never once argued that Mehserle was criminally negligent. The argument contains just one extended reference to involuntary manslaughter. The DA read the CALCRIM instruction. (RT 5426-5429) Then he gave the jurors an example to help them understand criminal negligence. It's an example the defense accepts, so it is worth using as a jumping off place for this discussion.

Tree trimmer is cutting down big limbs, some of which hang over a yard in which there is a children's birthday party happening. "And he really doesn't want to wait for the party to get over, he wants to get going, he's thinking, if I cut them just right they'll land in the right places, whatever. You know, something goes wrong, a limb comes down, a person is killed. Lawful act, right. No crime committed. But when that lawful act was committed, it was done with criminal negligence. The law may find that that's a situation that we're not just going to give a person a pass." (RT 5429)

Before it affirms this verdict, thus saddling Mehserle with a serious felony for the rest of his life, this Court ought to insist that the DA point to proof beyond a reasonable doubt that Mehserle's conduct in shooting Oscar Grant was as truly reckless and indifferent to the possible lethal consequences as its tree trimmer. Put another way, the Court should insist the DA answer this simple question: What precisely did Mehserle *do* in less than one minute between starting to handcuff Grant and the mistaken shooting that clearly suggests a disregard for human life?

a. The Policy

BART ECD Policy says this: "Authorized personnel may use TASER when circumstances known to the individual officer at the time indicate that the application of the TASER is reasonable to subdue or control: A violent or physically resisting subject . . . ." BART policy also

gives the officer broad discretion to decide on force options. (RT 2234, 2427, 2456) Under the BART policy, the use of a taser is equivalent to the use of pepper spray, a baton, or a fist. (RT 2428) The BART policy indicates that physical resistance exists any time a suspect refuses to comply with police orders. (RT 2432)

The testimony was uncontradicted that physical resistance need not amount to violence against the officer on the part of the suspect. The *DA's experts* agreed that if Mehserle believed Grant was refusing to give up his right arm for cuffing, or that Grant was otherwise physically resisting arrest, the officer could exercise his broad discretion (*see* RT 2234-2235, testimony of Sergeant Garcia; RT 2432-2435; 2455-2457, testimony of Sergeant Wong) to use less than lethal force, including his taser. BART trainer Wong made clear that a person being held down by a large officer has not necessarily been restrained, and thus may be subject to tasing. (RT 2453)

b. Grant Was Resisting: Witnesses

The DA *told* the jury over and over again in closing (as he had in opening) that Grant was not resisting. (*See, e.g.,* RT 5430, 5432, 5433, 5435, 5438, 5453) But despite the fact that the absence of resistance by Grant during the arrest was a centerpiece of its case, in closing Mr. Stein pointed to a single fact to support his claim: Grant's hands were behind his back. Of course, as we now know and as the video makes absolutely clear, Grant never surrendered his hands for cuffing; he was actively resisting until the shot was fired.

Every relevant witness in the case—police, bystanders, Grant's companions, and experts—told the jury Grant would not give up his arm to Mehserle. No witness supported the DA's position. For obvious reasons, Mr. Stein mentioned none of the relevant evidence in his argument.

Pamela Caneva testified that while Grant was on the platform, Mehserle repeatedly tried to free Grant's right arm from under his body, but could not do so. (RT 1831) Mehserle tried to free Grant's arm from under his body more than once. (RT 1840) Mehserle used substantial force in trying to get a hold of Grant's right arm. (RT 1840) In what may be the most believable and revealing five words spoken in this case, Caneva remarked about Grant to her friend Lynda

Kiersted, "that kid must be strong"—having observed that Mehserle was having a hard time getting Grant's arm from under his body. (RT 1831)

Kiersted, who was sitting with Caneva, confirmed her testimony. Kiersted testified that Mehserle was trying to "pull [Grant's] arms out." (RT 1956) Kiersted told the jurors that Mehserle "was *struggling* to pull [Grant's] arms out, but the guy on the ground just laid on his arms. (RT 1956) She said Mehserle was trying to release Grant's arm from under his body for "quite a while." (RT 1966) Kiersted also confirmed that in reaction to the scene of Mehserle trying to release Grant's arms, her friend Pamela Caneva remarked that Grant must be strong because Mehserle "was having a difficult time getting his arms out."

Lydia Clay said she saw the officers trying to get Grant's arms but never saw them get a hold of Grant's arms successfully. (RT 1881)

Daniel Liu said Grant's left arm was moving up and down shortly before the shooting. (RT 1603, 1611) Liu also said that the attempt to handcuff Grant, who was on his stomach, went on for an extended period. (RT 1610)

Jackie Bryson testified that before the shooting Grant's hands were under his body. (RT 3491) He said both officers were trying to get Grant's hands. (RT 34910 Bryson heard the police telling Grant to give up his hands. (RT 3491)

Officer Pirone testified Grant was moving around on the platform while he and Mehserle were trying to cuff him. (RT 2905) Pirone said both he and Mehserle told Grant to put his hands behind his back. (RT 2906) After Grant's head came out from under him, Pirone heard Mehserle say he could not get Grant's hands, that Grant's hands were in his waistband, and that he was going to tase Grant. (RT 2920) Pirone testified that at no time did he believe Mehserle had control of Grant's hands for cuffing. (RT 2924)

Consistent with all the foregoing testimony, Mehserle testified that after Grant was on the platform his right hand was under his body. (RT 4221) Mehserle's sole focus was on getting Grant's right hand out from his body in order to handcuff him pursuant to Pirone's directive. (RT 4221) Mehserle repeatedly told Grant to give up his arm, but Grant did not comply. (RT 4222) Grant's hand went into his pocket. (RT 4223) Mehserle was still unable to release Grant's arm.

(RT 4224) Mehserle believed Grant might have a gun. (RT 4225) The DA's experts testified that people often secret weapons in their waistbands and pants pockets. (RT 2254, 2422) On four other occasions in his relatively short policing career Mehserle had been present when guns were found in people's right front pockets. (RT 4241) Mehserle knew from his own experience being tased how effective the taser could be in immobilizing a potentially dangerous person. (RT 4248) Mehserle concluded his hands were not working to get Grant's right arm so he decided to use the taser. (RT 4351) Mehserle told Pirone he was going to tase Grant, backed off Grant to create distance in order to achieve the necessary spread for the taser darts, and fired what he believed to be his taser. (RT 4227-4228)

The DA spent a lot of time trying to paint expert Greg Meyer as biased, but it never introduced evidence to counter his substantive findings. Among many other things, including the inadequacy of BART's taser training to prevent weapons confusion incidents, Meyer testified that from his observation of the videotapes, Grant refused to give up his arms for cuffing while he was on the platform. (RT 4528) Grant refused to give up his arms and then moved his hand into his waistband and pocket area. (RT 4661) That conduct amounted to resisting. (RT 4529) Under the circumstances Mehserle acted reasonably in deciding to use his taser. (RT 4531, 4536)

c. Grant Was Resisting: Physical Evidence

The DA's view was that when Mehserle made the decision to use his taser, Grant was lying on the platform, hands behind his back. As appears, the eyewitness and expert testimony is to the contrary and no witness supports the DA's view. As significantly, the physical evidence cannot be reconciled with the prosecution's position.

The videos show that nine seconds before the shooting Grant's midsection was rising up off the platform, with Grant up on his left side. (RT 3916) At the time Mehserle was attempting to pull Grant's right arm from under his body. (RT 3916) Mehserle was using both arms to try to get Grant's arm. (RT 3919) About five seconds before the shooting Grant's head came out from under Officer Pirone's leg and Grant's right shoulder rose up off the platform, which Pirone pushed back down. (RT 3921) At the time of the shooting, Grant's left shoulder was raised up off the platform, with his body twisted to the right and his left arm up in the air. (RT 3939, 4066)

Forensic Pathologist Rogers testified that the bullet entered in the left side of Grant's back going towards the right side of the body, up towards the top of the head at about a 30-degree angle and going towards the front of the body at about a 40-degree angle. (RT 4854; Exh. KKK) Video of the shooting shows that at the time of the shot Mehserle was standing directly over Grant pointing the gun straight downward.

The angle of the bullet through the body and the positioning of Mehserle standing over Grant comports with the witness testimony and the video: Grant's left shoulder was off the ground and he was in the process of rotating his body to the right at the time of the shot.

Dr. Rogers also observed an abrasion located on the front side of the right upper arm of Grant. (RT 4856-4857; Defense JJJ at 5) He testified that although he was not able to rule out the abrasion was a result of medical treatment, the injury was consistent with some other form of blunt force trauma, including the possibility that Mehserle grabbed at that portion of Grant's arm before the shooting. (RT 4857)

d. Mehserle Acted In Compliance With His Taser Training

Having reasonably decided to use his taser in compliance with his training, BART policy, and the circumstances, Mehserle acted precisely as he ought to have done, and in no way demonstrated recklessness in his attempt to tase Grant. He announced his intention to tase. He created distance. He aimed at the proper target—that is, Grant's back. He drew what he believed to be his taser and he fired.

Expert Meyer opined that Mehserle acted uniformly in compliance with his taser training. (RT 4544, 4721) The DA never introduced evidence to contradict the point and it made no contrary argument in closing other than its view that Grant was not resisting. Given the overwhelming evidence that Grant *was* resisting, there is a complete absence of proof in the record that Mehserle's conduct conflicted with his training.

e. Inadequacy of Training

As the §1983 and Maryland cases have held, an absence of adequate training that can be tied to a mistaken shooting or weapons confusion case suggests an absence of criminal

negligence. Mehserle's taser training was woefully deficient. It is possible to draw a straight causal line from the inadequacy and ineffectiveness of his taser training to Oscar Grant's death.

In his *firearms* training—both at the Napa Academy and at BART—Mehserle was instructed to practice drawing his weapon many hundreds of times and was given the tools to do so. (RT 2174, 2199) Also in firearms training cadets were "stress inoculated" so that they are able to handle their firearms on the job. (RT 2176, 2268-2271) BART did no reality-based stress training of any kind. (RT 2173)

BART's taser instructor Stuart Lehman testified that in his opinion Mehserle's 6.5 hours of taser training was too short. (RT 3663-3664) Because BART had an insufficient number of tasers, officers would transfer tasers to the oncoming shift. (RT 3666) Officers did not have tasers to take home with them to practice drawing. (RT 3667) In training the officers did only about 10 static draws. (RT 3678, 3686, 4107) The officers practiced drawing from one of the three[7] holster positions permitted by BART. (RT 3682-3683) The practice draws were both strong hand and weak hand draws. (RT 4108) The officers did no timed draws and they did no stress inoculation. (RT 3687) BART did not use taser simulators in training. (RT 2277) There was no significant discussion of gun confusion issues at the taser training and officers were not told about well-publicized incidents in which police officers had mistakenly shot people while intending to use their tasers. (RT 4108)

BART officers did not know which of the three possible holster configurations they would get each time they received a taser before or during a shift. (RT 4114) BART officers could not take tasers home to train with them. (RT 4112) Mehserle testified that he only wore a taser during about fifty percent of his shifts. (RT 4114) He received the holster in two different configurations: weak-side/weak-hand draw, and cross-body/dominant-hand draw. (RT 4115)

Mehserle had drawn his taser only once on the job, and in that case the configuration was a weak-side/weak-hand draw. (RT 4117) In this case, of course, Mehserle attempted strong-hand cross-draw, which was entirely permissible under the BART taser policy.

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[7] Actually, *four* configurations were allowed, including positioning the taser on the officer's weak side leg. The fourth configuration seems to have been unofficial but widely accepted.

Force and taser expert Greg Meyer testified that BART's taser training was deficient. The training was inadequate to prevent the sort of weapons confusion that occurred in this case. (RT 4543) BART should have used stress training. (RT 4537) There should have been force options training after BART officers began to use tasers. (RT 4538) The limited number of taser draws during the training was insufficient to create muscle memory. (RT 4539) BART policy permitted three different holster configurations but there was insufficient opportunity to practice with any of those configurations during training. (RT 4540) There were too many permissible holster configuration options. (RT 4541) Officers should have had their own tasers to practice with at home. (RT 4541)

f. Circumstances That Made the Shooting More Likely That Were Not Attributable To Mehserle

The §1983 cases have held that if there are circumstances that make a mistaken shooting more likely, but are beyond an officer's control, those facts weigh against a finding that the officer acted unreasonably and with excessive force. The various deficiencies in Mehserle's taser training certainly fall into this category. There were, in addition, various other facts that increased the likelihood that Mehserle would mistakenly shoot Grant, none of which are attributable to Mehserle.

Before the officer arrived on the platform he was involved in a call at West Oakland in which officers seized a gun. (RT 3542, 4123) He also was aware of a report from San Francisco of a fight in which a gun had been found; one of the suspects had escaped and might in the BART system. (RT 3547, 4125) It was New Years Eve, a time when it is widely known that people carry and shoot guns. (RT 4125)

When Mehserle appeared on the Fruitvale BART platform, it is clear at a minimum he became part of a tense, chaotic, loud, volatile, riotous scene. (RT 1512, 1542, 2568, 2711, 2713, 2758, 2762, 2824, 3033, 3550) Officers testified that they were scared for their lives, and that bystanders were cursing at them, threatening them with physical violence, and throwing things. (RT 1511, 1514, 2461, 2645, 2651, 2860, 2861, 3554, 3557) Karina Vargas went as far as to say that she believed the crowd was going to start a riot "because of how mad they were." (RT 1542)

Officers testified they did not feel as if the people on the platform were under control. (RT 2758) Even Jackie Bryson once described the circumstances on the Fruitvale BART platform as "hostile to police." (RT 3467)

Fourteen seconds before Mehserle fired his gun Officer Guerra broadcast the following transmission: "We have a crowd surrounding us." (RT 3100) Dispatch was sufficiently impressed by the statement that it called a Code 33—which is the announcement of an emergency situation and a request to clear the radio airwaves. (RT 3103)

All of these circumstances no doubt raised in Mehserle the sense that in making the arrest of Grant, experiencing Grant's refusal to give up his arms, and observing Grant put his hand in his pocket, Grant might have a gun, a conclusion that clearly justified his decision to use his taser.

g. Testimony of William Lewinski

Expert William Lewinski explained how police officers process information and respond in high stress, high threat situations, even those of very short duration. (RT 4732) An officer's attention is directed towards something in two ways: first, something captures his attention and second, he behaves in accordance with training and experience. (RT 4733) Officers have a limited amount of attentional resources; once attention is directed to something in a high stress situation, few other resources remain for other matters.

Once attention is directed at a particular stimulus, the brain not only fails to focus on other matters, it also actively suppresses other input to avoid dilution of the original point of focus. This can make officers functionally blind to other inputs, a phenomenon called "inattentional blindness." (RT 4737, 4744) Lewinski opined that Mehserle and other officers in weapons confusion cases are literally unaware they are holding guns, despite the many differences between tases and guns pointed out by the prosecution. (RT 4815 – 4818) Officers in high stress situation rely on muscle memory, an automatic response created through repetitive training. (RT 4741, 4808)

Lewinski finally explained the existence of "slip and capture" in a weapons confusion case. An officer makes a decision to use his taser, for example. A division occurs that captures the intended action, and the officer reverts to the more practiced action such as drawing his firearm.

(RT 4815) In a high stress situation where an officer is focusing on a target, he lacks the attentional resources to consider other options or to consider a possible drawing error because the full resources are dedicated to completing the intended action. The officer believes he is drawing the taser, he falls into the more practiced action of drawing the gun, and then all information received amounts to a confirmation of the original intent to use the taser. (RT 4817-18)

h. The Videotapes

The DA's position going into this case was that the videotapes alone proved Mehserle shot Grant intentionally and without cause. But it misread the meaning of the tapes and the jury ultimately rejected its view. Now the DA will argue that the videotapes show Grant was not resisting and thus that the videotapes alone justify Mehserle's involuntary manslaughter conviction

But as noted previously, and as video expert Michael Schott's testimony makes clear, the tapes are entirely consistent with the testimony of every relevant witness: Mehserle could not get Grant's arms and Grant's body repeatedly came off the platform before the shooting. In any event, even if the Court were to find that the tapes are ambiguous in parts, in light of the overwhelming testimonial and physical evidence that Grant was resisting, the tapes could hardly supply the proof beyond a reasonable doubt required to sustain the verdict.

2. Argument

a. There is No Evidence of Recklessness

Again, the relevant question as set up by the DA's own hypothetical in closing is this: What did Johannes Mehserle do, precisely, that suggests the sort of recklessness or indifference to potentially lethal consequences of his conduct that the tree trimmer exhibited when he went ahead with his work during the birthday party?

The DA never argued the point in closing for good reason—there is none. Mehserle made a tragic mistake. But this Court can hold him criminally liable for that mistake only if it finds proof beyond that his recklessness was the cause of Oscar Grant's death. It must find proof that Mehserle's conduct was so outrageous and extraordinary that it evinced a disregard for potentially lethal consequences.

There simply is nothing in this record like the tree trimmer's conduct.

Grant resisted. Mehserle had been trained to use less than lethal force under that circumstance and BART's taser policy clearly permitted him to use the taser. Given his experience of finding guns in the right front pocket of suspects on three separate occasions, Mehserle was legitimately concerned that Grant might have a gun. Mehserle testified Grant's hand went into his pocket. Experts offered uncontradicted testimony that using a taser under all of those circumstances was appropriate.

Mehserle did everything he was taught and required by policy to do in deploying the taser. And because he was badly trained, had too little practice, had pulled the taser only once on the job (in that case in a different configuration), and for the various reasons this Court heard from expert William Lewinski, Mehserle drew the wrong weapon and fired it.

As all of the authorities discussed above make absolutely clear, the mistaken firing of the gun—without some reckless conduct that made such a mistake more likely—cannot as a matter of law supply the basis for an involuntary manslaughter conviction. There was no such recklessness in this case and for that reason Mehserle is not guilty of that crime.

b. The Other Taser-Gun Confusion Cases

Given that the jury has now found that this is a weapon confusion case, the Court has good reason to consider where this case fits among the other taser confusion cases on the issue of the officer's culpability.

Consider the facts of *Torres*. There the officer had the taser for a year. She had two prior incidents in which she confused her gun for the taser. She reported those mistakes to her superiors, who told her to practice drawing the taser. She had pulled the taser five times on the job. The officer admitted that in tasing the suspect she was not concerned for her safety; rather, she decided to use the taser because she believed Torres might hurt himself. An expert testified that the use of the taser in that circumstance was unreasonable. *Torres v. City of Madera* (E.D. CA 2009) 655 F.Supp.2d 1109.

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Here is what the District Court said about the significance of these facts:

> Because Defendant Noriega was not formally trained on how to avoid an incident like the October 27, 2002 shooting, Defendant Noriega did not act inconsistently with her formal training. Similarly, because Defendant Noriega was not formally trained on how to avoid an incident like this one, following her training would not have alerted Defendant Noriega to the fact that she was holding a handgun. Defendant Noriega did act inconsistently with what she had practiced, but Defendant Noriega had never practiced under an unfolding situation like the October 27, 2002 shooting, where there was little time to contemplate. Thus, based on the undisputed facts, little concerning Defendant Noriega's training demonstrates that the mistake she made when she shot Torres was anything other than an honest one.
>
> . . .
>
> All factors at least tilt toward finding that Defendant Noriega's mistake was reasonable. Defendants have provided evidence that Defendant Noriega had no knowledge of other incidents where officers confused their weapons . . . . There is simply no evidence . . . defendant Noriega was formally trained to avoid weapon confusion. . . . [G]iven the lack of formal training on this potential mistake if both weapons were worn on the dominant side, the court cannot find Defendant Noriega's actions unreasonable. While evidence of a sense of danger and haste within which she had to act are not overly strong factors in light of the lack of evidence Defendant Noriega personally felt danger for her own safety, these factors are present. At the moment the door was pushed into her, Defendant Noriega was forced to make a split-second judgment in a tense, uncertain, and rapidly evolving situation about firing a weapon.

Id. at 1122.

The District Court rejected the assertion that her conduct could amount to an unreasonable use of excessive force. As the accompanying Declaration of Robert McFarlane demonstrates (Exhibit C)[8], Officer Noriega was not held criminally liable. She made an honest, reasonable mistake, and because police officers are required to carry guns, absent some evidence of outrageous or extraordinary conduct (*compare Ritter,* discussed *supra*), no liability for the use of excessive force will attach.

By comparison, Mehserle had been trained to use a taser only three weeks before the shooting. He was not on guard about possible weapons confusion because he had only drawn the

[8] Mr. McFarlane's investigation regarding the other taser-gun confusion cases and his Declaration are primarily relevant to the sentencing and will be submitted as part of Mehserle's Sentencing Memorandum and Statement in Mitigation. The Declaration is attached hereto, as well, for the convenience of the Court.

taser once on the job and had never experienced weapons confusion with his taser. He was not able to prepare, as was Officer Noriega, for possible weapon confusion because he had no taser to practice with. Unlike Noriega, Mehserle used the taser on a suspect he believed was resisting arrest and might be going for a gun. And unlike in *Torres,* there was uncontradicted expert testimony in this case that Mehserle's decision to use the taser was reasonable.

As it did at trial, the DA will argue that *Torres* does not apply because it is a civil case. Mehserle has addressed the applicability issue above. *Torres* is an excessive force case; this is an excessive force case, as the jury instructions and the DA's own closing argument make absolutely clear. If Mehserle acted reasonably in his decision to use the taser, and if the mistake was not the product of outrageous or extraordinary behavior, his conduct was objectively reasonable, he cannot have used excessive force, and therefore he cannot be criminally liable.

The DA will also argue that *Torres* is different because in that case she wore the taser below her gun and the taser involved was the M26 rather than the X26 as was used in this case. Indeed, as Mehserle set forth in detail in Argument I, *supra,* the DA made precisely this point in its rebuttal argument. (RT 5755-5756: "[N]ever before, never before has there been an instance where an officer has confused his taser for his gun where the taser was being held on the opposite side of the gun. It's never happened. To this day it's never happened." As it turns out, of course, the argument depended on a false premise—Mehserle made almost exactly the mistake Lieutenant Jones, an officer with many times his experience, made less than a year before the Grant shooting. The Jones incident involved a yellow X26 taser set up in a cross-draw, dominant-hand configuration.

Police officers carry guns. They make mistakes with those guns. Where mistakes occur and lead to the loss of human life, we hold officers criminally liable only where, as in the *Riter* and *Albrecht* cases, the officer's conduct is so extraordinary and outrageous that it reflects a lack of concern for the potentially lethal consequences of his conduct. There is no evidence of such gross recklessness in this case. Certainly the DA has fallen far short of its burden of proving such recklessness beyond a reasonable doubt. This Court should grant the motion for a new trial.

III. INSTRUCTIONAL ERROR REQUIRES A NEW TRIAL

It is a considerable understatement to say that the Court faced a difficult task in fulfilling its sua sponte duty to instruct the jurors on the relevant law in this case. That is why Mehserle began the instructional discussion early in the case by filing his Instructional Brief long before the start of the trial. That is why Mehserle implored the Court to avoid instructing the jury on lessers, and in particular on the lesser included offense of involuntary manslaughter. It is fair to say that once the Court decided to instruct on lesser-included offenses, *every* substantial conflict between the parties, and between the defendant and the Court, related to the involuntary manslaughter charge.

Had Mehserle been convicted of murder or voluntary manslaughter, none of the issues that arose during the considerable instructional briefing and long oral argument would supply the basis for a challenge to his conviction. But in light of the verdict, it is Mehserle's view that the instructions are infirm, having prejudicially violated his Sixth and Fourteenth Amendment rights.

A. The Law

A trial judge is required to explain the law correctly to the jury so that it may "apply the law to the facts," *United States v. Gaudin* (1995) 515 U.S. 506, 514, and determine the defendant's guilt as to every element of the crime with which he is charged. *Id.* at 510.

An instruction that allows the jury to "convict based on legally impermissible grounds" is "flatly" or "clearly" erroneous. *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 967-968. In that instance, the reviewing court should skip any "'reasonable likelihood' analysis and proceed immediately to determination of whether the clearly erroneous instruction requires reversal under the applicable prejudice standard."*Id.* The burden is on the state to show "beyond a reasonable doubt" that the error had no effect on the verdict. *Id.*, citing *Chapman v. California* (1967) 386 U.S. 18.

Submission of a legally unauthorized theory requires reversal where it is impossible to determine whether the jurors relied upon that invalid theory or on an alternative legally permissible ground. *Yates v. United States* (1957) 354 U.S. 298, 312; *Stromberg v. California* (1931) 283 U.S. 359, 369-370; *Zant v. Stephens* (1983) 462 U.S. 862, 880-882.

Reversal is required unless it is "*absolutely certain* that the jury relied upon the legally correct theory to convict the defendant." *Lara v. Ryan* (9th Cir. 2006) 455 F.3d 1080, 1085

"The right to have the jury instructed as to the defendant's theory of the case is one of those rights 'so basic to a fair trial' that failure to instruct where there is evidence to support the instruction can never be considered harmless error." *United States* v. *Escobar de Bright* (9th Cir. 1984) 742 F.2d 1196, 1201; *see also Mathews* v. *United States* (1988) 485 U.S. 58, 63 ("As a general proposition, a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor. [Citations]"

"[A]rguments of counsel generally carry less weight with a jury than do instructions from the court" and "are not to be judged as having the same force as an instruction from the court." *Boyde v. California* (1990) 494 U.S. 370, 384-385. The jurors here were expressly admonished that they must follow the court's instructions on the governing legal standards and that they must disregard any statements by counsel that are inconsistent with the instructions. CALCRIM 200.

B. <u>The Unlawful Detention/Arrest and Related Instructions</u>

1. Procedural History

In the morning session on June 24th the Court for the first time raised the issue of possible instructions on the lawfulness of Oscar Grant's arrest. The DA took the view that *Pirone* had no legal cause to place Grant under arrest and that Pirone (the DA did not mention Mehserle) had used excessive force in effectuating the arrest. (RT 3902) The Court seems at that point to have accepted the notion that the jury should receive instructional guidance on those issues.

Later that day the Court reaffirmed its view: "[I]t seems to me we're going to have two issues on was what *Pirone* doing right. [sic] And if it wasn't, then going into a different standing than if it was appropriate. And then assuming Pirone, even with a lawful arrest was overzealous and too aggressive and using excessive force, then Grant would be licensed to resist under the law as I understand it." (RT 4052)(emphasis added) The Court also wondered aloud whether Pirone's conduct could be imputable to Mehserle. (RT 4052)

At the instructional conference the defense argued that Pirone's decision to place Grant under arrest had no bearing on either the charged crime or any lesser-included offense. (RT 5183)

The defense asserted that the unlawful arrest of Oscar Grant could not form the basis for a conviction of involuntary manslaughter on either the unlawful conduct or criminal negligence prongs of that offense and thus had no logical or rational bearing on any issue in dispute in this case. (RT 5183-5184)

In response, the Court articulated its theory of relevance thusly: "if Pirone's actions were improper, *either* he used excessive force or he unlawfully arrested or was trying to unlawfully arrest Grant, then Grant had a right to resist to a certain level Pirone's unlawful use of force." (RT 5185) The Court took the view that in such a case, because Mehserle may have known that Grant's resistance was caused by Pirone's unlawful arrest or use of excessive force, any use of force by Mehserle could be found to have been unreasonable, thus supplying the predicate for a conviction of involuntary manslaughter.. (RT 5185)

The Court expanded on its view a page later: "I don't think it's enough to argue or to instruct the jury that the question is Grant's resistance, was Grant resisting or wasn't he? Was Mehserle using appropriate force? I think the jury has to be told Grant had the right to resist Pirone if Pirone was acting *improperly.* And that's why we got into all this mish mash." (RT 5186)(emphasis added)

Mehserle answered this way: the use of excessive force might supply Grant the right to resist *Pirone*. But Grant had no right whatsoever under longstanding California law to resist an unlawful arrest. (RT 5185) And Grant had no right to resist *Mehserle* in either case. The Court expressly disagreed. (RT 5185)

The DA had a slightly different take on the matter. It argued that instruction on unlawful arrest was necessary (a) because it "*ties into* the question of 149 [i.e., use of excessive force by a police officer] whether the arrest is lawful is part and parcel of whether or not the allegation that the defendant committed this excessive force needs that context" and (b) because the Court had decided to instruct on justifiable homicide (CALCRIM 507) and if the arrest was unlawful, Mehserle was not acting within the scope of his duties. (RT 5187)

The defense argued that Grant was already under arrest when Mehserle became involved—Pirone told him Grant and Bryson were under arrest for violating Penal Code §148. (RT 5188)

The Court disagreed: "I think that the issue of could Grant resist, how much did he resist, what was appropriate for him to resist involves issues of what did Mehserle know, what didn't he know. What did Pirone do, what didn't Pirone do. I think that's why I felt we ought to just put it out there, and the people seem to agree with me." (RT 5188)

The defense argued that giving the unlawful arrest instructions would amount to a constructive amendment of the indictment, would permit conviction on an invalid basis, and at a minimum would require unanimity instructions to ensure that the jurors agree on the precise basis for a conviction. Again, the Court disagreed. (RT 5190-5192)

Aware that the Court had rejected its arguments that no unlawful detention/arrest (or accompanying) instructions should be given, and that unanimity instructions must be used, the defense finally suggested this substitute for the Court's proposed instruction, including the relevant citations:

> A peace officer may legally detain someone if:
>
> 1. Facts known or apparent to the officer would lead a reasonable police officer to have strong suspicion of the arrestee's guilt;
>
> [*People v. Mower* (2002) 28 Cal.4th 457, 473]
>
> 2. An officer may reasonably rely on information received from a fellow officer to support an arrest.
>
> [*United States v. Hensley* (1985) 469 U.S. 221, 229-230 [83 L.Ed.2d 604, 612-613; *People v. Conway* (1990) 222 Cal.App.3d 806, 811; *Hewitt v. Superior Court* (1970) 5 Cal.App.3d 923, 929; *People v. Wohlleben* (1968) 261 Cal.App.2d 461, 465.]
>
> 3. In order to find that the defendant subjected Grant to unlawful arrest, the prosecution must prove beyond a reasonable doubt (a) that the defendant was not possessed of facts that would lead a reasonable officer to strongly suspect Grant was guilty of resisting arrest and (b) that the defendant did not reasonably rely on information he received from other officers in concluding that Grant could be lawfully arrested for resisting arrest.
>
> When a peace officer employs reasonable force to make an arrest, the arrestee is obliged not to resist, and has no right of self defense against such force. The arrestee is obliged not to resist and has no right of self-defense against such reasonable force even when the arrest is not lawful.
>
> [*People v. Adams* (2009) 176 Cal.App.4th 946, 952; *Evans v. City of Bakersfield* (1994) 22 Cal.App.4th 321, 323]

The Court rejected these instructions and eventually charged the jurors as follows:

> A peace officer may legally detain someone if: Specific facts known or apparent to the officer lead him to suspect that the person to be detained has been involved in activity relating to crime; and a reasonable officer who knew the same facts would have the same suspicion. Any other detention is unlawful. In deciding whether a detention was lawful, consider evidence of the officer's training and experience and all the circumstances known by the officer when he detained the person.
>
> A peace officer may legally arrest someone if he has probable cause to make the arrest. Any other arrest is unlawful. Probable cause exists when the facts known to the arresting officer at the time of the arrest would persuade someone of reasonable caution that the person to be arrested has committed a crime. In deciding whether an arrest was lawful, consider evidence of the officer's training and experience and all the circumstances known by an officer when he arrested the person.
>
> In order for an officer to lawfully arrest someone without a warrant for a misdemeanor such as resisting a peace officer and in violation of Penal Code section 148, the officer must have probable cause to believe that the person to be arrested committed such misdemeanor in an officer's presence.
>
> A peace officer may presume that a fellow officer has acted lawfully. If you find that officer Pirone acted unlawfully or engaged in unreasonable or excessive force on Oscar Grant, Pirone's actions are not imputed to defendant Mehserle unless the defendant knew or should have known that Pirone acted unlawfully or engaged in unreasonable or excessive force on Grant.
>
> A person Commits the misdemeanor offense of resisting, obstructing, or delaying a peace officer in the performance or attempted performance of his or her duties in violation of Penal Code section 148(a) if the following elements are proved: 1. A peace officer was lawfully performing or attempting to perform his or her duties as a peace officer; 2. The person willfully resisted, obstructed, or delayed the peace officer in the performance or attempted performance of those duties; and 3. When the person acted, he knew, or reasonably should have known, that the peace officer was a peace officer performing or attempting to perform his or her duties.
>
> Someone commits an act willfully when he does it willingly or on purpose. It is not required that he intend to break the law, hurt someone else, or gain any advantage.
>
> If a person intentionally goes limp, requiring an officer to drag or carry the person in order to accomplish a lawful arrest, that person may have willfully resisted, obstructed, or delayed the officer if all the other requirements stated above are met.

> A peace officer is not lawfully performing his duties if he is unlawfully detaining or arresting someone or if he is using unreasonable or excessive force when making or attempting to make an otherwise lawful detention or arrest.
>
> If a peace officer uses unreasonable or excessive force while detaining or attempting to detain a person or while arresting or attempting to arrest a person, that person may lawfully use reasonable force to defend himself. A person being arrested uses reasonable force when he (1) Uses that degree of force that he actually believes is reasonably necessary to protect himself from the officer's use of unreasonable force or excessive force; and (2) Uses no more force than a reasonable person in the same situation would believe is necessary for his protection.

(RT 5792-5796)

2. Argument: The Errors

It remains unclear why the jury needed *any* of these instructions which were nothing if not prolix,[9] enormously complex, had no valid bearing whatsoever on the jury's analysis of any charged or lesser-included offense, and ultimately permitted Mehserle's conviction in violation of his sixth and fourteenth amendment rights.

The DA's first theory of relevance was made indisputably inapplicable when the Court decided *not* to instruct the jurors on CALCRIM 507, justifiable homicide by a police officer.

Which leaves the prosecution's second theory: that the instructions were necessary because they "*tie[] into* the question of 149 [i.e., use of excessive force by a police officer] whether the arrest is lawful is part and parcel of whether or not the allegation that the defendant committed this excessive force needs that context" (RT 5187)

In truth, the unlawful detention/arrest instructions and related instructions have nothing to do with the use of excessive force by *Mehserle* or the law of involuntary manslaughter. The Court defined excessive force in a separate part of its charge, explaining that if Mehserle was guilty of Penal Code §149 (excessive force by a police officer), assuming he was also criminally negligent, he could be found guilty of involuntary manslaughter. (RT 5496-5798) The entire three-plus pages

[9] The instructions consume over three transcript pages, which amounts to more than ten percent of the whole charge.

relating to unlawful detention and arrest could have been omitted and the jurors would have had sufficient law on both prongs of involuntary manslaughter to decide the charge.

As the Court expressly acknowledged during the lengthy argument on the issue (RT 5185), the unlawful detention/arrest and related instructions had everything to do with unlawful conduct—whether unlawful detention or arrest, or unlawful use of force—by *Pirone*, and what Mehserle knew or *should have known* about Pirone's alleged unlawful conduct. But neither the Court nor the DA ever articulated a logical, let alone legally valid basis for connecting misconduct by Pirone to Mehserle. In other words, under no circumstance could the fact that Mehserle knew or should have known that Pirone violated some legal duty relating to detention or arrest render the officer guilty of involuntary manslaughter.

BART policy 3.270 says this: "the first member arriving at the scene of any crime accident or other departmental action *will* be in command of the scene and responsible for direction of police personnel in a manner to assure the most orderly and efficient accomplishment of the police task." (RT 4207)(emphasis in original)

Pirone (and his partner Domenici) were the first on the scene. When Mehserle arrived *Pirone had already detained Grant.* Mehserle could not have had any knowledge one way or another about the legality of Grant's *detention*—that is, whether it was supported by reasonable suspicion—because he was not present when it occurred. So, at a minimum, instructions relating to unlawful *detention* should never have been given to the jurors and supplied an altogether improper basis for Mehserle's conviction.

Shortly after Mehserle reached the platform Pirone told the officer Grant and Bryson were "going" for violating Penal Code §148, resisting arrest. The only evidence in this record on the significance of Pirone's directive to Mehserle could hardly be clearer or less in dispute: under the circumstances and under unambiguous BART policy, Mehserle had not only the right, he had the absolute *duty* to rely on Pirone's effective representation that Grant had been lawfully detained—that is, based on valid grounds and without the use of excessive force—that Grant could be legally arrested, and to act as if Pirone's statement to him was an order from a superior officer. (RT 4528, testimony of Greg Meyer; BART policy 3.270)

The policy alone was enough to render all of the detention/arrest and related instructions entirely inappropriate. It doesn't say Pirone *might* be in command, assuming the absence of evidence late-arriving officers knew or should have known that Pirone's conduct was lawful. The policy says (and it uses italics to make the point) that Pirone *is* in command. As a practical matter that means officers who arrive after him are obligated to follow his directives.

Mehserle was compelled *not* to question whether Pirone's detention decision had been based on reasonable suspicion. The defendant was duty-bound *not* to question whether Pirone's arrest decision was based on probable cause that Grant had committed a misdemeanor in his (Pirone's) presence. The officer was required *not* to determine whether in effectuating his detention decision—that is, prior to the arrest directive—Pirone used excessive force. And Mehserle was obligated *not* to determine whether, in response to Pirone's alleged unlawful detention or arrest decisions, or his alléged use of excessive force prior to the arrest, Grant had the right to resist the police. Mehserle's only duty was to carry out Pirone's arrest order in a lawful manner.

It has always been Mehserle's position that the jury's sole proper focus with regard to the charge of involuntary manslaughter, therefore, was Mehserle's conduct in the few seconds between deciding to use his taser, and pulling the trigger of his gun. But even if the Court were to conclude that the relevant period was somewhat broader, starting with Grant's arrest, still the jurors were limited to the seventy seconds between Pirone's directive to Mehserle and the shooting. The alleged unlawfulness of Pirone's conduct prior to that directive ought to have had no bearing whatsoever on the jurors' consideration of the lesser-included offense.

Curiously, in light of its request for instructions related to events *before Grant's arrest*, in its argument to the jury the DA initially took the position that the jurors' focus should be on the period *after* Grant's arrest and before the shooting. Mr. Stein asked the jurors to consider (a) whether Grant resisted "just prior to being shot"; (b) whether Mehserle believed he was going for his gun; and (c) whether Mehserle intended to pull his gun. (RT 5407) The DA told the jurors it

was these questions the jurors would be "ultimately deciding in your jury deliberations, and it is the answers to these questions that will ultimately determine your verdict." (RT 5407)[10]

In that period, did Mehserle use excessive force in violation of Penal Code §149?

In that period, did Mehserle's conduct in deciding to tase Grant and then mistakenly shooting him amount to criminal recklessness?

Those were the relevant questions. And the Court correctly supplied instructions guiding the jurors on those issues later in its charge.[11] The unlawful detention/arrest and related instructions were entirely unnecessary. (RT 5797-5798) As noted, the jurors would have understood the meaning and application of the involuntary manslaughter statute without hearing any of the three pages of legalese quoted above.

But the instructions were hardly insignificant. For the various reasons discussed below, the instructions deprived Mehserle of due process (Fourteenth Amendment) as well as a unanimous verdict upon proof beyond a reasonable doubt (Fourteenth and Sixth Amendments). Thus, to avoid a new trial on the involuntary manslaughter conviction, the prosecution must demonstrate beyond a reasonable doubt that the instructions were harmless. As will appear, it cannot possibly do so.

a. The Detention Instruction

The DA spent quite a lot of time in its case, and in cross-examining witnesses, and in closing, on the question whether Pirone had the right to detain Oscar Grant. (*See, e.g.*, RT 5430, 5432, 5433) Thus, the jurors would have been focused on the question. And, as above, the Court instructed the jurors on the issue of unlawful detention.

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[10] Of course, and as appears below, later Mr. Stein ignored his own argument and spent a considerable time discussing Pirone's conduct before and after Mehserle arrived on the platform, and before Mehserle and Pirone attempted to place Grant under arrest. (*See, e.g.*, RT 5429: "I think a good place to start [on the question whether Grant resisted] is where -- is when officer Pirone first got [Grant] off the train.")

[11] Mehserle has heretofore—in his instructional briefing, proposed instructions, and argument—raised various challenges to those instructions, and has offered his own versions of instructions relating to involuntary manslaughter. Those claims have been preserved for appellate review and Mehserle does not seek reconsideration of them here.

But as noted, Pirone decided to detain Grant and implemented that decision *before Mehserle arrived at the Fruitvale BART station.* Mehserle had no role whatsoever in Pirone's decision or the detention and neither this Court nor the DA has explained how any allegation of unlawful detention was relevant in this proceeding or could somehow subject Mehserle to criminal liability. Indeed, all of the briefing and oral argument related to the issue of unlawful *arrest*. The lawfulness of the *detention*—whether it was supported by reasonable suspicion or effectuated with reasonable force—had nothing to do with the murder or lesser-included charges and the jurors should never have been asked to consider the issue.

The Court instructed the jurors that Pirone's unlawful conduct is not *automatically* imputable to Mehserle. But it opened the door to precisely such an imputation when it told the jurors that Mehserle could be responsible for Pirone's misconduct if Mehserle "knew or *should have known* that Pirone acted unlawfully . . ."

There is no statutory or case authority in California to support the view that a police officer who arrives on the scene of a detention can be held liable for the misconduct of fellow officers. So even if Mehserle *actually* knew Pirone had illegally detained Grant, he had no obligation to do anything other than follow BART policy—that is, to fulfill Pirone's orders.

And it borders on the absurd to suggest that a *should have known* standard could apply—that is, that Mehserle had some inchoate responsibility to *determine* whether Grant had been detained legally, and that a failure to so *determine* could somehow subject him to criminal liability, including for involuntary manslaughter.

Recall that Mehserle's entire involvement in this affair was slightly more *than two minutes*. He arrived. He backed down some aggressive bystanders. He was told by Pirone to watch the detainees and he did so. Mehserle then received a clear order from Pirone, the officer in charge, to arrest Bryson and Grant. He carried out the first arrest, without incident. Then he moved to Grant.

Say Pirone had detained Grant for no reason other than Grant had called him a name and in carrying out the detention had punched Grant in the nose for no reason. Was Mehserle obligated to conduct his own investigation relating to these circumstances? Would a reasonable police officer have ensured that the original detention, which occurred before he arrived at the

scene, was lawful by asking Grant? Given that Grant and others were hurling invectives at Pirone when Mehserle showed up, even without regard for BART policy, didn't Mehserle act reasonably by accepting Pirone's implicit word that he (Pirone) had been doing his job lawfully before Mehserle arrived?

Under the instructions, however, the jurors were at least implicitly told that Mehserle had an obligation to *determine* whether the detention was lawful—i.e., both that it was supported by reasonable suspicion and effectuated without excessive force. And if the jurors concluded Pirone's conduct in detaining Grant was unlawful in either respect, they could use that fact to find that *Mehserle* acted unlawfully.

Either finding would have been an altogether improper predicate for an involuntary manslaughter conviction and as a result the instruction deprived Mehserle of due process.

b. The Unlawful Arrest Instruction

At the instructional conference Mehserle pointed out that Pirone directed him to arrest Grant for violating Penal Code §148. In other words, by the time Mehserle arrived on the platform, Pirone had already decided—lawfully or not—to place Grant under arrest.

Mehserle could not be held criminally liable for Pirone's arrest *decision*. Under BART policy Mehserle was duty-bound to carry out the arrest per Pirone's order and he had no legal duty to conduct a side investigation to determine whether Pirone's arrest decision was based on probable cause that Grant had committed a misdemeanor in Pirone's presence.

The Court rejected this view and instructed the jury on the issue of unlawful arrest. The ruling was error that violated Mehserle's federal due process rights and his Sixth Amendment right to a unanimous verdict upon proof beyond a reasonable doubt.

First, as noted, while the jurors were instructed on the issue of the lawfulness of Grant's arrest, the Court never told the jurors that under BART policy Mehserle had both the right and the duty to rely on the lawfulness of Pirone's order. He *had* to arrest Grant.

Second, under the Court's instructions, the lawfulness of the arrest depended on whether Pirone possessed probable cause to conclude that Grant had resisted arrest in Pirone's presence. The instructions therefore relate to the quantum of evidence in Pirone's possession at the moment

he gave Mehserle the order to arrest Grant. But as noted, probable cause either existed or did not exist *before* Mehserle was present. There is no valid basis for attributing any possible illegality in Pirone's decision to Mehserle. Nowhere does the law make Mehserle vicariously liable for Pirone's conduct vis a vis the arrest *decision.*

Third, as with the detention instruction, the unlawful arrest instruction suggested to the jurors that they could judge the lawfulness of Mehserle's conduct *during* the arrest by reference to the legality of Pirone's *decision* to arrest Grant. The error therefore subjected Mehserle to conviction on involuntary manslaughter for a non-crime—the jury could have concluded that the *decision* to arrest Grant was unlawful, that Grant could therefore lawfully resist arrest, and thus that Mehserle acted recklessly when he decided to use his taser on a *lawfully* resisting suspect. And although the defense suggested a supplemental instruction on the issue, the Court never told the jurors Grant had no right to resist an unlawful arrest. Indeed, the Court took the express position at argument, contrary to long-standing California law, that Grant had the right to resist an unlawful arrest. (RT 5185)

Fourth, even if Mehserle *knew* that the Pirone's decision to arrest Grant was not supported by probable cause, *and* bare awareness of that fact somehow made the officer vicariously liable, that circumstance could at most render Mehserle liable for a charge of unlawful arrest, a crime reflected in no published opinion in California history. Critically, unlawfully arresting Grant could never subject Mehserle to an involuntary manslaughter conviction because there is no rational argument that arresting someone unlawfully—that is, without probable cause—could possibly pose a "high risk of death or great bodily injury because of the way in which it was committed." CALCRIM 580.

Fifth, as Mehserle's proposed alternative instruction makes clear, even if Pirone's decision to arrest Grant was not supported by probable cause and Mehserle knew it, Grant would not have had the right to resist. The jurors were told that Grant could resist only in the case of excessive force; but they were never told that Grant was not entitled to resist an unlawful arrest. So, the jurors could have concluded, wrongly, that Mehserle could be judged reckless by deciding to tase

Grant in the face of Grant's resistance to an unlawful arrest, even in the absence of excessive force.

Finally, as is argued in greater detail below, in light of the instructions subjecting Mehserle to involuntary manslaughter conviction on the basis of an allegation that he unlawfully arrested Grant, defendant moved for unanimity instructions. Specifically, given the two possible involuntary manslaughter theories, and the wide range of possible factual bases for a finding that Mehserle was guilty on one of those theories, how are we ever to know what facts the jurors relied upon to find Mehserle guilty? And how can we be confident twelve jurors agreed on the factual basis? In the absence of unanimity instructions, the answer is we cannot, a circumstance violative of Mehserle's Sixth Amendment right to a unanimous verdict.

These complex and logically conflicting instructions nearly guarantee the jurors misapplied what were in any case conceptually challenging charges. The error deprived Mehserle of a fair trial for all the reasons described above.

c. Instruction on Misdemeanor Arrest

The Court told the jurors that Grant could only be arrested for violating Penal Code §148 if "an officer" had probable cause to believe that the offense was committed in "an officer's" presence. As defendant argued at the instructional conference, the problem with the language of the instruction is that it suggests *Mehserle* could not lawfully arrest Grant simply upon *Pirone's* order. It suggests defendant's participation in Grant's arrest was unlawful if Grant did not resist in *Mehserle's* presence. Mehserle urged the Court to simply use Pirone's name in the instruction, because the language was unquestionably aimed at Pirone's conduct, rather than at Mehserle's. The Court rejected that request. (RT 5196-5197)

The instruction is simply wrong as it applies to Mehserle. Under BART policy Mehserle was duty bound to follow Pirone's order and to arrest Grant, even in the absence of evidence Grant committed a misdemeanor in his presence. A contrary rule—that is, the rule suggested by the Court's instruction—would effectively mean no police officer could seek backup assistance during a misdemeanor arrest.

The jurors might well have found that Grant did not resist between the time of Mehserle's arrival and Pirone's arrest order. Under the instruction, therefore, the jurors could have concluded that because Mehserle—who was, after all, "an officer"—arrested Grant for a misdemeanor not committed in his presence, the arrest was unlawful. The jurors could have considered that unlawfulness in three ways that violated Mehserle's due process: they could have found that the unlawful arrest (a) amounted to recklessness sufficient to support conviction for involuntary manslaughter; (b) amounted to unlawful conduct which supported conviction for involuntary manslaughter; and (c) justified Grant's resistance during the arrest, which thus made unreasonable Mehserle's decision to use the taser—a finding that, as in (a), could have amounted to criminal recklessness.

Every one of these bases for the present conviction is constitutionally infirm.

If Mehserle is guilty of involuntary manslaughter he must have been grossly reckless in his attempt to tase Grant. The jurors could not validly find that Mehserle's *decision* to arrest was unlawful (as not supported by probable cause of a crime committed in his presence) and thereby use that to find the requisite recklessness.

Similarly, for Mehserle to be held criminally liable for Grant's death on the basis of the commission of a misdemeanor, that misdemeanor must have been lethal in its application—the DA has never argued that an arrest unsupported by probable cause could be lethal.

Finally, as Mehserle has argued previously, because he had a duty to arrest Grant, he was never required to make the probable cause determination. And thus Mehserle was never required determine whether Grant's resistance was lawful. His sole duty was to carry out Pirone's order. The jury therefore could not validly rely on the lawfulness of Grant's resistance to find that Mehserle acted unreasonably in his decision to use his taser

d. Should have Known Liability

The Court's instruction says unlawfulness by Pirone—the detention or arrest *decisions* as well as in the manner in which those decisions were carried out—can be imputed to Mehserle if he was aware of the unlawfulness or if he *should have been aware* of it.

But nowhere in California statutory or case law will this Court find a statement that a police officer has a *should have known* duty to consider the lawfulness of another officer's detention or arrest decisions. And nowhere in California law will this Court find support for the notion that a police officer has a *should have known* obligation to determine whether an officer used excessive force in the carrying out of a detention or arrest decision. Perhaps most importantly, there is no case in the history of this state that renders a police officer vicariously liable for the criminal conduct of a fellow officer.

"Should have known" liability is mostly found in the civil context. *See, e.g., Saller v. Crown Cork & Seal Co., Inc.* (2010) 187 Cal.App.4th 1220, *11 n.13 (for liability to be imposed, instruction requires that manufacturer knew or should have known that product was dangerous). Because of the strict limitations on using implied and imputed knowledge to impose criminal liability, the formulation is used sparingly in the criminal context. *See, e.g., People v. Perez* (2010) 50 Cal.4th 222, 224 (jury found by way of special verdict that defendant should have known victim was a police officer); *People v. Davis* (2009) 46 Cal.4th 539, 551 (defendant knew or should have known that his victim was under 14 years of age).

The absence of such authority in the context of police detentions and arrests makes perfect sense. Under what circumstances *should* a late-arriving police officer know that a fellow officer had no reasonable suspicion to detain, no probable cause to arrest, or that the fellow officer used excessive force? Can we really expect officers to conduct side investigations into the legality of their compatriots' work in the midst of tense, rapidly evolving and often violent circumstances? Can such a duty be reconciled with the many state and federal decisions holding that police officers are assumed to be acting in good faith? *See, e.g., United States v. Leon* (1984) 468 U.S. 897. And doesn't such a duty fly squarely in the face of longstanding legal rules that an officer may reasonably rely on information received from a fellow officer to support an arrest? *See United States v. Hensley* (1985) 469 U.S. 221, 229-230 [83 L.Ed.2d 604, 612-613; *People v. Conway* (1990) 222 Cal.App.3d 806, 811; *Hewitt v. Superior Court* (1970) 5 Cal.App.3d 923, 929; *People v. Wohlleben* (1968) 261 Cal.App.2d 461, 465.

Most importantly, while the Court told the jurors to consider the newly imposed *should have known* duty in assessing the charges against Mehserle, it never elucidated that new vicarious liability rule. The jurors were never told *under what circumstances* a police officer *should* know about a fellow officer's unlawful conduct. The Court never explained what Mehserle was supposed to have done by way of investigation during his two minutes on the Fruitvale BART platform to ensure that Pirone's detention and arrest decisions were lawful, and that Pirone had not used excessive force. How was the jury supposed to know whether Mehserle *should have known* that Pirone's detention and arrest decisions, and the implementation of those decisions, were lawful? Having studied the jury instructions at long length, counsel remains unclear how the Court intended the new rule to be implemented. In that event, we can be sure the *jurors* lacked sufficient guidance. The error thus amounted to a due process violation.

e. The Penal Code §148 Instruction

Why were the jurors in this case given the elements of misdemeanor resisting under Penal Code §148?

That offense had no bearing on the primary question they were asked to resolve: Whether Mehserle intended to shoot his gun. If Grant did *not* resist, such intent to shoot under the circumstances would certainly have amounted to second-degree murder. And if Grant *did* resist, precisely the same result would obtain—Mehserle has not once asserted in this proceeding that Grant's resistance justified the use of lethal force.

Penal Code §148 was similarly irrelevant to the lesser-included offenses.

Grant's violation of that statute before Mehserle's arrival is meaningless. Pirone told Mehserle Grant was under arrest for resisting and Mehserle had the right and the duty to follow that directive Whether or not Grant was guilty of that offense, Mehserle had the right and the obligation to arrest him.

And what if Grant was *not* actually guilty of violating Penal Code §148 under the elements provided to the jury? In that case, still, Mehserle had the right and the duty to arrest him because (a) he had no duty to do his own investigation regarding the quantum of evidence

supporting the arrest decision and (b) BART policy makes absolutely clear that Pirone was in charge and that Mehserle had to follow his directives.

Finally, the question whether Grant technically violated the resisting statute *during* the arrest—that is, whether the elements of the offense were satisfied between Pirone's arrest order and the shooting—is meaningless. The jurors did not need the elements of Penal Code §148 to make the key factual finding—that is, whether Grant refused to give up his arms for cuffing.

The instruction was hardly insignificant, though, and its use here violated Mehserle's right to due process. Specifically, the instruction informed the jurors that Grant was technically resisting only if, among other things, "A peace officer was lawfully performing or attempting to perform his or her duties as a peace officer."

The problem, of course, is that by the time the jury heard this instruction, they had already been told that the officers' conduct might have been *unlawful* in various ways—for example, if Pirone's detention and/or arrest decisions were not supported by sufficient evidence, if Pirone used excessive force before Mehserle's arrival, if Mehserle decided to arrest Grant without possessing probable cause that Grant had violated Penal Code §148 in his presence.

So the jurors could well have concluded that in arresting Grant the officers' conduct was illegal and thus that in a technical sense Grant *never resisted*—that is, there was no proof that his conduct satisfied the elements of Penal Code §148. And thus the jurors could have found that Mehserle's decision to use his taser was unreasonable, subjecting him to conviction for involuntary manslaughter.

But the law is clear that Grant had no right to resist an unlawful arrest. *People v. Adams* (2009) 176 Cal.App.4th 946, 952; *Evans v. City of Bakersfield* (1994) 22 Cal.App.4th 321, 323. If Mehserle reasonably believed Grant refused to give up his right arm for cuffing, under his training and BART policy and the law, he had a right to use his taser and his decision to do so could not subject him to criminal liability. The instruction subjected Mehserle to conviction for a non-crime, which amounts to due process error.

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f. The Excessive Force Instruction

The DA's theory was that Mehserle's decision to use his taser amounted to a violation of Penal Code §149, and that crime subjected him to an involuntary manslaughter conviction on the unlawful conduct prong. Over objection, the Court agreed that such a crime was supported by substantial evidence and therefore provided the jury the elements of excessive force by a peace officer. (RT 5797)

But two pages earlier the Court told the jury (a) that a police officer acts unlawfully if he detains or arrests someone with excessive force and (b) a detainee or arrestee who is subject to excessive force may defend himself. (RT 5795)

What purpose was served by these initial excessive force instructions?

As Mehserle has argued, the lawfulness of Pirone's conduct in carrying out Grant's detention could not have had any bearing on Mehserle's criminal liability for shooting Grant because the detention occurred before Mehserle arrived. If *Pirone* used excessive force on Grant during the arrest, although Mehserle might conceivably be vicariously liable for aiding a violation of Penal Code §149, he could not thereby be convicted of involuntary manslaughter, particularly in the absence of instructions on a natural and probable consequences theory. *See People v. Prettyman* (1996) 14 Cal.4th 248. In other words, to be convicted of involuntary manslaughter, Mehserle had to have *personally* violated Penal Code §149 and the manner in which he so violated the statute must have been lethal.

The Court accepted the idea that *Mehserle* could be held liable for involuntary manslaughter if *he* used excessive force during Grant's arrest, the way in which he committed that misdemeanor posed a high risk of death or great bodily injury, and the officer acted with criminal negligence. (RT 5797) But as noted, the Court provided the required instructions later in its charge.

The initial discussion of excessive force was meaningful only insofar as it set up Grant's right to resist arrest under that circumstance. But as Mehserle has argued, the Court's instruction was incomplete and therefore misleading. The instructions suggest Grant could resist the application of excessive force. But, because the Court rejected the defense proposed substitute

instruction, the jurors were never told that Grant could not resist the application of reasonable force *even if the arrest was illegal.*

Because of the prior repeated references to the possible unlawfulness of *Pirone's* decision to detain and arrest Grant, the possible use of excessive force by *Pirone* in the implementation of the detention decision, and the possible unlawfulness of Mehserle's participation in the arrest because of the absence of probable cause Grant committed misdemeanor resisting in Mehserle's presence, the jurors may well have believed, incorrectly, that Mehserle's participation in the arrest meant that Grant could lawfully resist, and thus that Mehserle's decision to use his taser in response to Grant's refusing to give up his arm was unreasonable, illegal, and could form the basis for conviction of involuntary manslaughter. Such a path to the present verdict violates Mehserle's due process rights.

g. The Court Never Told The Jury How the Unlawful Arrest/Detention and Related Instructions Were Relevant to Its Analysis of Any Charged or Lesser Included Offense

After reviewing the instructions that begin with an officer's right to detain a suspect (RT 5792) and end three pages later with a discussion of the right of a detainee or arrestee to resist against excessive force, a thoughtful juror might well have the following question: What do any of these instructions have to do with the charged crime of murder, or the lesser included offenses of voluntary manslaughter or involuntary manslaughter?

The Court separately defined each of those crimes. (RT 5788-5791, 5796-5799) But it never connected the three pages of instructions on unlawful arrest, unlawful detention, excessive force and lawful resistance to the elements of murder, voluntary manslaughter, or involuntary manslaughter.

How could the jurors have any idea what to make of these detailed and complex rules without such guidance from the Court?

The DA never articulated a theory of relevance. It argued only (a) the instructions were necessary to "tie into" the later Penal Code §149 instructions, which were necessitated by the unlawful conduct prong of involuntary manslaughter and (b) they were necessary because the Court intended to instruct the jurors on justifiable homicide. (RT 5187)

But the Court never gave the CALCRIM 507 instruction. And while "tie in" sounds like it might mean something, it is not a legal theory; certainly the "tie in" notion was never conveyed to the jurors.

Unlike the DA, the Court had a clear idea of the significance of the instructions. Its notion, articulated at the instructional conference was this: if Pirone acted unlawfully—whether by deciding to detain or arrest Grant without sufficient cause, or by carrying out those decisions with excessive force—then Grant had the right to resist.[12] And if Mehserle *knew or should have known* of Pirone's unlawful conduct, the defendant therefore must have known that Grant had the right to resist, and thus Mehserle's decision to tase Grant was unlawful, amounting to either an excessive use of force in violation of Penal Code §149 or criminal negligence. (*See* RT 5186 et seq.)

But the jury never heard such a theory. It is not in the jury instructions. And it is not remotely apparent from the three pages of unlawful detention/arrest and related language. The jury was told the circumstances in which an officer may lawfully detain and arrest someone. The jury was told that an officer may not make an arrest for Penal Code §148 unless the offense was committed in his presence. The jury was given the elements of Penal Code §148. And the jury was told that a person may lawfully resist the use of excessive force by a police officer. It was *never* told how any of that related to the charged or lesser-included crimes.

Assume the jurors found that Mehserle should have known Pirone had unlawfully detained Grant. What significance if any would such a finding have to the jurors' analysis of the charged or lesser-included offenses? The instructions are silent on that issue.

Say the jurors found that Mehserle actually knew Pirone had used excessive force on Grant and that such force had been applied before Mehserle reached the platform. Again, how were the jurors to know the legal significance of that factual finding? Even if the Court's analysis of the significance of the relevant facts is correct, it had an obligation to make the jurors aware of

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[12] As Mehserle has argued, the theory, at least as it applied to the lawfulness of Pirone's decision to detain and arrest Grant, is flatly contrary to California law.

its theory so they could make legal sense of their factual findings. But the jury was left completely on its own to determine the significance of this law.

h. The Unlawful Arrest/Detention and Related Instructions Deprived Mehserle of Due Process of Law and the Sixth Amendment Right to a Unanimous Verdict

As the Court will recall, in the discussion regarding the unlawful detention and unlawful arrest instructions, the defense pointed out that if the Court intended to subject Mehserle to conviction for involuntary manslaughter on the basis of such a wide array of possible acts—for example, relating to detention by Pirone, arrest by both Pirone and Mehserle, use of force by both Pirone and Mehserle—the Court would be required to issue unanimity instructions. (RT 5194) The Court rejected the argument. As a result, we now have no idea upon what factual basis the jury determined that Mehserle committed an unlawful act that led to Grant's death, and/or that he was criminally negligent in the commission of a lawful act. And we have no reason to believe twelve jurors settled upon the *same* factual basis for Mehserle's conviction.

Under the California Constitution, a unanimous jury verdict is required to convict a person of a criminal offense. *People v. Russo* (2001) 25 Cal.4th 1124, 1132; Cal. Const., art. I, § 16. The jurors must unanimously agree that a defendant "is criminally responsible for '*one discrete criminal event.*'" *People v. Thompson* (1995) 36 Cal.App.4th 843, 850 "'[W]hen the accusatory pleading charges a single criminal act and the evidence shows more than one such unlawful act, *either* the prosecution must select the specific act relied upon to prove the charge *or* the jury must be instructed in the words of CALJIC No. 17.01 or 4.71.5 or their equivalent that it must unanimously agree beyond a reasonable doubt that defendant committed the same specific criminal act.'" *Id.*, quoting *People v. Gordon* (1985) 165 Cal.App.3d 839, 853; *see also People v. Salvato* (1991) 234 Cal.App.3d 872. The trial court has a *sua sponte* duty to give a unanimity instruction when the evidence shows more alleged unlawful acts than are charged. *Gordon*, 165 Cal.App.3d at 854; *People v. Madden* (1981) 116 Cal.App.3d 212, 219.

The failure to read a unanimity instruction under the conditions described above is an error of federal constitutional dimension. *See, e.g., People v. Melhado* (1998) 60 Cal.App.4th 1529, 1536. First, such an error has the effect of lowering the prosecution's burden of proof, which, in

turn, violates a defendant's right to due process. *People v. Deletto* (1983) 147 Cal.App.3d 458, 472; Second, the failure to read a unanimity instruction in a criminal case notwithstanding the state Constitution's unanimity requirement deprives a defendant of a liberty interest likewise protected by the Fifth and Fourteenth Amendment guarantees to due process of law. *Hicks v.Oklahoma* (1980) 447 U.S. 343, 346 (denial of state procedural right relating to imposition of punishment upon criminal defendant undermines constitutionally protected liberty interest and violates right to due process). Third, the Supreme Court has held that a significant departure from the unanimity requirement cannot be reconciled with Sixth Amendment guarantees. *Burch v. Lousiana* (1979) 441 U.S. 130, 138.

If ever there were a case that cried out for unanimity instructions, this is the case. That is particularly so given the Court's unlawful arrest/detention instructions. Can this Court say with any confidence it knows what the jurors unanimously found Mehserle *did* that forms the basis for his criminal liability? And can this Court say with any confidence that despite agreement on the verdict, all 12 jurors agreed on the factual basis for Mehserle's conviction?

Under the Court's instructions discussed in detail above, Mehserle could be found guilty of involuntary manslaughter (a) if he knew or should have known that Officer Pirone did not have sufficient cause to detain Grant or (b) or if he knew or should have known Officer Pirone did not have sufficient cause to order Grant's arrest or (c) if he knew or should have known Officer Pirone used excessive force in detaining Grant or (d) if he knew or should have known Officer Pirone used excessive force after he gave Mehserle the directive to place Grant under arrest or (e) if Mehserle had insufficient cause to detain Grant or (f) if Mehserle had insufficient cause to carry out Pirone's arrest order or (g) if Mehserle used excessive force before the arrest order or (h) if Mehserle used excessive force between the time he received the arrest order and the moment he decided to use his taser.

And of course, there were the various ways Mehserle could be guilty under the Court's standard instructions: if Mehserle was criminally negligent in deciding to use the taser, if Mehserle was criminally negligent in the implementation of that decision, if Mehserle was guilty

of violating Penal Code §149 by using excessive force in deciding to use the taser, or if Mehserle was guilty of that offense in the implementation of that decision.

Given this profusion of possible routes to conviction served up by the instructions, we cannot possibly know what factual basis the jurors used to convict, and we can be nearly certain twelve jurors never agreed on any factual basis. The absence of unanimity instructions in that context amounted to due process and Sixth Amendment error.

i. The Instructions Permitted Mehserle's Conviction on Proof Less than Beyond a Reasonable Doubt

The Court's three pages of unlawful detention/arrest and related instructions offered the jurors a variety of invalid paths to an involuntary manslaughter conviction, as argued above. But at no point in the course of those instructions did the Court ever require the prosecution to prove any set of facts predicate to such a conviction beyond a reasonable doubt. Indeed, the words "reasonable doubt" do not appear at all in that portion of the jury charge.

But in every other relevant instance—in the application of character evidence (RT 5785), with regard to the elements of the various crimes (RT 5787, 5792), on the issue of the intent required for conviction (RT 5788, 5791, 5799)—the Court reminded the jurors of the DA's burden of proof. The absence of such language in this part of the charge effectively informed the jurors that the standard did not apply, thus depriving Mehserle of his right to due process.

That is particularly true given the general absence of guidance provided to the jurors on the subject of *how* they were supposed to use the instructions in considering the charged and lesser-included offenses. A jury entirely at sea regarding its proper role cannot be relied upon to have insisted on proof beyond a reasonable doubt in the absence of language expressly directing them to do so. Because the Court omitted reference to the DA's burden of proof in its unlawful detention/arrest and related instructions, the jury may have convicted Mehserle on proof less than beyond a reasonable doubt, in violation of the Sixth Amendment.

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2. Argument: The Prejudice

To avoid a new trial, the DA must demonstrate beyond a reasonable doubt not only that none of these errors affected the verdict, but also that the errors as a totality had the same non-impact. As will appear, there is nearly proof beyond a reasonable doubt going the other way.

As defendant has argued, there was precious little in this record to support an involuntary manslaughter conviction. Mehserle has neither history of, nor character for, recklessness or lawlessness. He was on the scene for a total of slightly more than two minutes. He chased away some bystanders who were interfering with Pirone and Domenici. Mehserle stood watch over the detainees. He received the order to arrest Bryson and Grant. He arrested Bryson without incident and without using excessive force. Then Mehserle attempted to arrest Grant. Mehserle could not secure Grant's arm for cuffing. Mehserle decided to use his taser. And because of gross deficiencies his training, and other factors, the officer instead drew his gun and fired. His conduct was entirely consistent with his training, with BART policy, and was confirmed as reasonable and appropriate by experts on both sides of the aisle.

So, why did the jury convict him?

The beginning of an answer can be found in the opening lines of the DA's argument, in which he invited the jurors to convict Mehserle on the basis of facts that could not validly support an imposition of either murder or manslaughter liability: "the Defendant's desire to punish, his desire to belittle, his desire to mistreat Mr. Grant not only resulted in chaos, distrust and disorder; it resulted in the death of an innocent person and for that he must be held liable." (RT 5406)

None of it had anything to do with the charged or lesser-included offenses. The jurors had to determine whether Mehserle intended to shoot Grant. If they rejected that assertion, they had to determine whether in mistakenly shooting Grant Mehserle acted unlawfully and/or with criminal negligence. But having insufficient evidence to prove its case on the elements of the charged or lesser-included charges, the DA sought to sway the jury by reference to undefined, inchoate misconduct—*punishment, belittling, mistreatment*—suggesting that such misconduct should result in criminal liability, without actually proving that Mehserle was guilty of anything.

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The argument fit neatly with the Court's instructions effectively permitting the jury to convict Mehserle of involuntary manslaughter for various ill-defined alleged law violations, many of which began before Mehserle arrived on the platform.

The message to the jurors from the DA's argument and the unlawful detention/arrest instructions was loud and clear: Oscar Grant died unnecessarily and someone should pay. Having no other potential payor before them, the jurors convicted Mehserle.

Three specific aspects of the DA's argument make absolutely clear that the many federal constitutional errors outlined above were prejudicial.

First, Mr. Stein spent a considerable time in argument discussing the absence of resistance by Grant *before* Pirone directed Mehserle to place Grant under arrest, as well as *Pirone's* use of excessive force. (RT 5430: Grant did not resist arrest when he got back on train; 5430: Pirone used excessive force when he pointed his taser before detaining Grant; 5432: None of the detainees resisted arrest while they were against the wall; 5432: Pirone used excessive force when he threw Grant against the wall; 5433: Pirone assaulted Grant; 5433: Grant did not resist arrest when he was against the wall; 5434: no video or witness supports the view that Grant was resisting; 5434: statements by Grant about his daughter suggest a desire to cooperate with police rather than resist; 5435: Grant's statements asking not to be tased are inconsistent with any intent to resist; 5435: Grant's 2006 tasing suggests an absence of motive to resist; 5448: taking Grant to the platform suggested a desire to punish Grant which amounted to excessive force; 5451: Pirone assaulted Grant on the wall; 5453: Officers' testimony about Grant resisting before the arrest was fabricated; 5734: Pirone assaulted Grant on the wall; 5746: Pirone kneed Grant on the wall)

But argument that Grant did not resist before the arrest, and that Pirone assaulted Grant on the wall, had no logical bearing whatsoever on the question whether Mehserle (a) acted unlawfully in deciding to tase grant and/or (b) acted with criminal negligence, whether in making or implementing the taser decision. Rather, Mr. Stein's argument was directed at the subjects made relevant to this case only by way of the unlawful detention/arrest and related instructions. As argued previously, those instructions were constitutionally invalid and the DA's extensive argument suggesting Mehserle's criminal liability on that basis means a new trial is in order.

Second, in his short argument on the subject of involuntary manslaughter, the DA gave the jurors examples to help them understand the proper application of the law. The first, involving the criminal negligence of a tree trimmer was, as noted earlier, correct.

The second example, relating to the misdemeanor-manslaughter prong of the involuntary manslaughter statute, was absolutely incorrect, and badly exacerbated the errors discussed above. The DA said this:

> Let's say there's an individual who is at a bar he gets in a fight. They exchange words, and this guy goes up to the other guy and he just clocks him right here. A battery. All right. The crime of battery. The person who gets hit falls back, hits their head on a bar stool, dead. Okay. That's a crime. All right. A battery is a crime. May not have an intent to kill. *The person acting with criminal negligence by committing that crime and the way he did it and it resulted in death. That could be a situation the law may find, hey, I know you didn't mean to kill him, but you did and you committed a crime during the commission. That's involuntary manslaughter.*

(RT 5428)(emphasis added) In other words, you hit someone, you commit a crime; the person dies, you're guilty of involuntary manslaughter.

But as the DA well knew (if for no other reason than because the parties and the Court discussed it during the instructional argument (RT 5142 et seq.)), a person who commits a simple battery by punching someone in a bar fight is not guilty of involuntary manslaughter simply because the punchee dies. The law is quite clear that the *fact* of the death is absolutely irrelevant to the question of criminal liability for the homicide.

Rather, the relevant question is whether the defendant committed the misdemeanor in a manner that had a high likelihood of being lethal. There was nothing about the commission of the battery in the DA's hypothetical that suggests lethality *other than the fact that the fact that a homicide occurred.* Without other facts, the bar fighter is unquestionably *not* guilty of involuntary manslaughter. If, on the other hand, the bar fighter was aware that he was about to belt someone with a heart condition, or who was aged, or that the bar floor was slippery and cluttered with broken glass, he might well be liable for the homicide because under circumstances known to the bar fighter, commission of the misdemeanor was potentially lethal.

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The risk in a case like this one, of course, was that the jurors would follow Mr. Stein's hypothetical: in that case the jurors would find that Mehserle did something illegal and convict him of involuntary manslaughter without actually concluding that there was something *particularly* dangerous about the commission of that offense. In the absence of the unlawful arrest/detention instructions, at least the *range* of possible law violations that could render Mehserle criminally liable for Grant's death was narrow—if he violated Penal Code §149, and the *manner* of his violation had a high likelihood of lethality, he could be convicted of involuntary manslaughter.

But by instructing the jurors on unlawful detention and arrest, and by allowing the jury to impute unlawful conduct (detention, arrest, or excessive force) by Pirone to Mehserle, the Court vastly broadened the range of law violations upon which the jurors could base Mehserle's conviction. And thus the DA's erroneous exemplification of the unlawful conduct prong of the involuntary manslaughter statute had that much greater impact.

Finally, just as the DA suggested at the outset of his argument that Mehserle should be held criminally liable for Grant's death for a series of inchoate wrongdoing—punishment, belittling, mistreatment—Mr. Stein concluded his argument in the same fashion. The prosecutor asked the jury, why did Oscar Grant take Mehserle's picture? (RT 5764) "He took the defendant's picture, and I submit to you he was trying to document the same thing that Karina, Tommy, Margarita, Daniel and Jamil were trying to document, that's why he took his picture." (RT 5764) The DA told the jurors Grant and the others turned on their cameras because "*Something just wasn't right.*" (RT 5764)(emphasis added)

Notably, Grant took the picture of Mehserle *before* Pirone gave the arrest order. And all of the video cameras were activated *before* the arrest began. So, even if something "just wasn't right" during that time, (a) it most likely had to do with Pirone and not Mehserle and more importantly, (b) even if it had to do with Mehserle, whatever "just wasn't right" could not validly render Mehserle liable for involuntary manslaughter. That is so, of course, because if the defendant is guilty it must be for conduct that occurred after Pirone directed Mehserle to arrest Grant.

Indeed, the "just wasn't right" argument fits neatly with the Court's unlawful detention/arrest instructions, the DA's "punishment, belittlement, and mistreatment" argument, and the prosecution's extensive argument relating to the absence of resistance by Grant before the arrest and Pirone's use of excessive force while Grant was on the wall. All of it permitted the jurors to convict Mehserle of involuntary manslaughter for undefined misconduct or unlawfulness, mostly by Pirone, having nothing whatsoever to do with the shooting.

Because the DA is sure to make a point of it, let us be absolutely clear: Mehserle's argument here is not that the DA's various arguments themselves amount to reversible error. The arguments were misleading and legally wrong and might well supply the basis for a separate legal claim. But that is not the claim being made here. Rather, the point is just this: the instructions were invalid for all the reasons described above, and permitted Mehserle's conviction of involuntary manslaughter in violation of his Sixth Amendment and Fourteenth Amendment rights. The references to the DA's closing show (a) the DA capitalized on those errors in his argument, thus ensuring that the instructions would be put to precisely their improper use and (b) the DA exacerbated the errors by misleading the jurors as to the proper application of law to fact.

The many errors outlined above deprived Mehserle of his right to due process as well as his right to be convicted only upon a finding of proof beyond a reasonable doubt by a unanimous jury. This Court should grant a new trial.

IV. IN LIGHT OF THE VERDICT, THE COURT'S EXCLUSION OF POWERFUL CIRCUMSTANTIAL EVIDENCE THAT GRANT RESISTED ARREST PRIOR TO THE SHOOTING AMOUNTS TO FEDERAL DUE PROCESS ERROR

The DA pursued a murder charge because it disbelieved Mehserle's claim that Grant's death resulted from weapon confusion. And Mehserle's primary task at trial was to explain how such a mistake *might* have occurred and to prove that it *actually* occurred here. As Mehserle has argued, therefore, the question whether Oscar Grant resisted arrest on January 1, 2009, was minimally relevant to the jury's resolution of the primary factual dispute. If he didn't resist, and Mehserle intended to pull the gun, a murder conviction would have been appropriate. But even if Grant resisted, because there was no evidence he posed a threat of death or great bodily injury to

anyone, Mehserle *still* had no right to intentionally fire his gun. That is why this Court ultimately declined to instruct the jury on CALCRIM 507, justifiable homicide by a police officer.

In light of the parties' primary focus on the question whether Mehserle intended to use his gun, this Court carefully sifted through the proposed evidence and excluded some portions of the defense case. Specifically, the Court excluded three items: (a) evidence that Grant was on probation at the time of his 2006 arrest; (b) evidence that Grant was on parole at the time of his 2009 arrest; and (c) evidence that Grant possessed and attempted to secret a gun at the time of his 2006 arrest.

The defense argument as to all of that evidence was the same: it provided powerful circumstantial evidence that at the time of his 2009 arrest, Grant knew he was subject to reincarceration, feared that result, and acted accordingly by resisting arrest. The Court found that the evidence was excludable under §352—its probative force being outweighed by its prejudicial effect. And, in the context of the murder charge and the key issue in dispute, the ruling was arguably right; as noted, Grant's resistance was at best of peripheral significance.

Of course, at the time the Court made the ruling, defendant believed he was on trial for a single charge: murder; he believed (and continues to believe) that there was no substantial evidence that if he *did not intend to pull his gun*, he could be found to be criminally liable. Mehserle was not defending against a charge of involuntary manslaughter and for that reason the rulings were of not of major significance.

But the Court chose to instruct on involuntary manslaughter, and the jurors have convicted Mehserle of that charge. In that event, the evidentiary rulings amount to reversible federal due process error. In light of the result, the question whether Oscar Grant was resisting arrest on January 1, 2009, is *the central issue* in the case. If Grant was resisting, there is uncontradicted evidence Mehserle had a right to use his taser. In that event the only serious argument in favor of an involuntary conviction—i.e., that Mehserle's *decision* to use the taser rendered him guilty of involuntary manslaughter (*see* RT 5154)—falls apart.

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A. **The Law**

As the United States Supreme Court held in *Washington v. Texas* (1967) 388 U.S. 14, 18-19, *Chambers v. Mississippi* (1973) 410 U.S. 284, 302 (1973), and many other cases, few rights are more fundamental than that of an accused to present a defense. In *Crane v. Kentucky* (1986) 476 U.S. 683, 690, the Supreme Court observed that the right to present a defense may be constitutionally guaranteed not only as a matter of compulsory process, but also of due process and the right to confront witnesses.

The high court has expressly held that a defendant's right to introduce relevant evidence that undermines the state's case outweighs a state law provision protecting a complaining witness's interest in privacy. *Olden v. Kentucky*, 488 U.S. 227, 230-231 (1988)

In *Michigan v. Lucas* (1991) 500 U.S. 145 (1991), the high court held that restrictions on a criminal defendant's right to confront witnesses and to present relevant evidence "may not be arbitrary or disproportionate to the state law purpose they are designed to serve." *Id.* at 151 (internal citations omitted); *see also United States v. Scheffer* (1998) 523 U.S. 303, 308 (same). The state may not arbitrarily deny a defendant the ability to present testimony that is "relevant and material, and . . . vital to the defense." *United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 867(1982).

Moreover, the Sixth and Fourteenth Amendments guarantee the right of an accused in a state or federal criminal prosecution to be confronted with the witnesses against him. *Davis v. Alaska* (1974) 415 U.S. 308, 315 (1974); *Washington v. Texas* (1967) 388 U.S. 14, 17-18. The centerpiece of the confrontation right is the right of cross-examination; it is the "principal means by which the believability of a witness and the truth of his testimony are tested." *Davis*, 415 U.S. at 316.

B. **The Court Improperly Excluded Evidence of Grant's Probation, Parole, and Possession of a Gun**

The Court correctly permitted Mehserle to introduce evidence that in 2006 Grant was detained, attempted to flee, was tased, continued to resist (including refusing to give up his arms) and attempt to escape, and was finally subdued when officers repeatedly kicked him. Relying on

Evidence Code §352, however, the Court excluded three items of evidence that were crucial to Mehserle's defense to the involuntary charge—that is, circumstantial proof that Grant had the *character* and *motive* to vigorously resist arrest on January 1, 2009, thus entirely justifying Mehserle's decision to use the taser.

First, the Court excluded the fact that at the time of the late 2006 detention, Grant was on felony probation, having been convicted for a narcotics offense in early 2006. Second, the Court declined to permit Mehserle to introduce evidence that at the time of the 2009 detention, Grant was on parole, having served a state prison sentence after pleading guilty to a gun offense following the late 2006 arrest. Third, the Court prohibited defendant from introducing evidence that Grant was arrested in late 2006 because he was in possession of a gun.

The Court never doubted the fact that all of the proposed evidence was admissible under Section §1103(a). That provision says that "In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is: . . . Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character."

In other words, a criminal defendant can offer evidence that the victim in the case has a bad character, including evidence of prior bad acts by the victim, so long as that evidence is offered to prove that the victim acted in conformity with that character trait at the time of the charged offense.

And the Court acknowledged the admissibility and powerful relevance to Grant's 2009 conduct of character evidence that in late 2006 Grant attempted to escape, resisted arrest, forced officers to tase him, and then, remarkably, continued to resist thereafter.

But the significance of the probation, parole, and gun evidence is equally apparent. It is truly impossible to understand Grant's conduct in either 2006 or 2009 without knowing that arrest for even a simple misdemeanor could have resulted in his reincarceration because of his probation (2006) and parole (2009) status. And it is impossible to understand just *how* clearly at risk of

incarceration probationer Grant was in 2006—thus explaining his futile attempt to flee—without understanding that he didn't just possess contraband, he possessed a loaded gun.

The DA's response to these arguments has been to suggest that no rational person would have believed that he could escape police custody under the circumstances that developed in January 1, 2009 shortly after 2:00 a.m. In other words, according to the DA, none of the motive evidence—circumstantial evidence that Grant *in fact* vigorously resisted arrest in 2009—is probative because Grant must have understood that he had no chance of escaping police custody. The prosecution made the argument again and again in his closing: Grant did not resist because he feared being tased, because he had a young daughter, because he wanted no trouble with the police. (RT 5430-5438)

The obvious reply to the DA's argument is, *precisely*, Grant was not rational in 2006. (*See* RT 3308 et seq.) He was caught red-handed, a felon in possession of a loaded gun. With a gun pointed at his head by a police officer, instead of submitting to arrest, he ran. The officers eventually caught up to Grant and tased him. Having been tased, one would expect Grant to have given up. But he continued to resist, tried to escape again by climbing under a car, refused to give up his arms for cuffing, and eventually led officers to kick him so that he would comply with their lawful orders. Grant's utterly irrational conduct in 2006 is persuasive evidence that he behaved in precisely such an irrational manner in 2009, evidence that squarely contradicts the DA's trial argument that Grant never resisted police on the Fruitvale BART platform.

We know Grant feared being tased, because, over defense objection, the Court permitted witnesses to so testify. The prosecution made great use of that in its ultimately unavailing argument that Mehserle truly intended to use his gun. (*See* RT 5435 et seq.)

But the Court improperly precluded circumstantial evidence that Grant feared one thing far more than being tased, and that was going back to prison. And because the Court instructed the jury on involuntary manslaughter, as it happens, evidence of Grant's attitude toward reincarceration is likely the most important circumstantial evidence in the case.

Was Grant resisting?

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Although the issue was irrelevant to the charged crime, the DA made the absence of such resistance by Grant a centerpiece of its closing. (RT 5430, 5432, 5433, 5434, 5434-5438, 5453)

Had the jury possessed the evidence that Grant had strong motive to resist in 2009—that is, Grant's probation/parole status and his possession of the gun in 2006—it would have found that he actually resisted arrest, thus precluding a finding that Mehserle acted with criminal negligence. The Court's error in excluding the evidence therefore cannot be found harmless beyond a reasonable doubt. *Chapman v. California* (1967) 386 U.S. 18. A new trial is in order.

V. THE COURT SHOULD GRANT A NEW TRIAL REGARDING THE PENAL CODE §12022.5 GUN ENHANCEMENT

As defendant described above, there are two cases in California history in which a law enforcement officer was convicted of involuntary manslaughter for an on-duty homicide. One of those defendants, DA investigator Riter, was also found to have used a gun in the commission of the offense and his sentence was enhanced accordingly pursuant to Penal Code §12022.5.[13]

Riter argued that the enhancement should not apply to police, because unlike civilians, police are required to carry and use guns on duty. He argued that application of the law to on-duty police officers would frustrate the purpose of the statute, which is to stop criminals from using firearms in the commission of felonies. *See, e.g., In re Tameka C.* (2000) 22 Cal.4th 190, 196 (purpose of statute is to "deter persons from creating a potential for death or injury resulting from the very presence of a firearm at the scene of a crime" and to "deter the use of firearms in the commission of violent crimes by prescribing additional punishment for each use.") The Fourth District rejected Riter's argument, finding that the legislature could have expressly excluded on-duty police officers from the application of §12022.5, but never did so. 2005 WL 1950867 *8.

Riter is unpublished. It is not controlling on this Court. And for the purposes of preserving the issue on appeal, Mehserle formerly asserts his objection to the application of the enhancement to an on-duty police officer. The statute was intended to stem the tide of shootings connected to

[13] Specifically, Riter was found to have fired his gun at an occupied motor vehicle, which was then covered under §12022.5(b)(1). *See People v. Riter* (4th Dist. 2005) 2005 WL 1950867 *7.

felonies, and that purpose has absolutely no application to an on-duty police officer who mistakenly shoots a suspect.

But this Court need not reach the difficult issue of the legislature's intent in passing the enhancement statute, or the extraordinary policy implications of subjecting law enforcers to decade-long prison sentences for making mistakes with their weapons under tense, rapidly evolving, and often violent circumstances.

That is because there is a critical fact that distinguishes this case from *Riter*. There, the defendant admitted from the outset that he intended to *use* his gun. There was no factual dispute on that issue. The question at trial was simply whether Riter acted with criminal negligence when, in attempting to stop the truck by firing repeated rounds at it, he ultimately shot the driver in the head at close range.

In this case, of course, a more than three-week trial was dedicated to discovering the truth regarding Mehserle's intention with regard to his gun. And but for the "true" finding on the enhancement, all indications are the issue was resolved in Mehserle's favor. The DA spent weeks trying to convince the jury that Mehserle's mistake of fact defense was bogus, and that the officer truly intended to shoot Grant. Had it prevailed on the point, Mehserle would have been convicted at least of voluntary manslaughter. The involuntary manslaughter conviction standing alone proves that the jury agreed Mehserle never intended to draw or fire his gun, but did so mistakenly.

But, of course, the substantive conviction does not stand alone. The parties staked out their positions very clearly at trial: the DA argued Mehserle intended to pull and shoot his gun; defendant claimed he intended to use his taser and pulled the gun mistakenly. Having resolved the substantive charge, the jurors turned to the verdict form for "guilty on involuntary manslaughter", found a reference to Penal Code §12022.5, and apparently had no idea what to make of it.

At 1:20 p.m. on July 8th they sent this question to the Court: "What is Penal Code Section 12022.5?" The Court, with counsel's assent, provided this answer: "Penal Code Section 12022.5(a) is an allegation that the defendant personally used a firearm in the commission of a crime. The elements for Section 12022.5(a) are set forth in instruction on page 12 of the instructions."

Having spent several hours on the substantive charges, the jurors decided the enhancement with stunning swiftness. The Court's written response indicates it was prepared at 2:00 p.m. Presumably it was delivered a minute or two thereafter. Following receipt of the answer, the jurors deliberated for just a few minutes, wrapped up their work, and contacted the clerk. The Clerk's minutes indicate the verdict was received at 2:10 p.m. It therefore appears the jurors spent perhaps five minutes on the enhancement issue.

For a "true" finding on the enhancement, the jury instructions (and longstanding law) required a finding beyond a reasonable doubt that Mehserle intentionally drew and then *intentionally used the gun for some purpose*—that is, he must have purposefully removed the gun from his holster, and then deliberately displayed it in a menacing manner, or intentionally hit someone with it, or intentionally fired it. *See* CALCRIM 3146; *In re Tameka C.* (2000) 22 Cal.4th at 197.

There is no logical way to *square* the jury's rejection of the murder and voluntary manslaughter charges with its finding of true on the enhancement. There *is* a simple way to *explain* the result, as appears below, but no middle ground between the parties' view of the facts—the DA argued Mehserle intended to draw and shoot, the defense argued Mehserle mistakenly drew and fired what he believed to be his taser.

The irreconcilability of the two verdicts does not doom either of them. The California Supreme Court has made abundantly clear that inconsistent verdicts are permitted under California law. *See People v. Avila* (2006) 38 Cal.4th 491, 601. In this case, however, a new trial motion as to the enhancement must be granted for three reasons entirely unrelated to the apparent factual inconsistency of the two verdicts.

First, the DA failed to prove its case on the point beyond a reasonable doubt. Even without regard for the jurors' rejection of the prosecution's murder theory and the remarkably short time—just a few minutes—the jurors considered the enhancement allegation, there is legally insufficient evidence in the record to sustain the enhancement. Sitting as thirteenth juror, the Court should find that the prosecution offered inadequate evidence that Mehserle *intentionally used his firearm*, and thus grant a new trial on the enhancement.

Second, it seems clear now that the jurors were led astray to some extent by parallel errors in the instructions and verdict forms. Specifically, the enhancement instruction (RT 5803) should not have included involuntary manslaughter, and the form for a finding of guilty on involuntary manslaughter (Exhibit D) should not have contained any reference to the enhancement. That is so because in *this* case, there is no logical way to square a verdict of involuntary manslaughter and a finding that Mehserle intended to use his gun.

Finally, most likely the illogical "true" finding on the gun enhancement, arrived at by the jurors in just a few minutes, is the result of an instructional error that amounted to a deprivation of Mehserle's due process rights. Specifically, because the key defense instruction on mistake of fact was expressly limited in application to the murder and voluntary manslaughter charges—although it unquestionably ought to have applied to the §12022.5 allegation—the jurors were effectively instructed that Mehserle's defense did *not* apply to the enhancement. In other words, in considering the allegation that Mehserle intentionally used a gun in the commission of the involuntary manslaughter, the jurors may well have concluded that Mehserle mistakenly—that is, under a mistaken factual impression—used his gun in place of his taser. But because of the erroneous instruction, the jurors likely concluded they were not *permitted* rely on the mistake of fact defense to find the enhancement "false."

For all of these reasons, the Court should grant a new trial as to the enhancement allegation.

A. Exercising Its Independent Judgment, This Court Should Find That The DA Has Failed To Supply Proof Beyond A Reasonable Doubt That Mehserle Intended To Use His Firearm[14]

This Court presided over a lengthy trial held to resolve one central factual dispute: Did Johannes Mehserle intend to fire his gun on January 1, 2010. The jury resolved that issue against the District Attorney, and did so with surprising speed given the complexity of the case—it

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[14] It is Mehserle's position that as to the gun enhancement, just as with the underlying substantive charge of involuntary manslaughter, there is insufficient evidence as a matter of law to support the verdict, and thus the defendant has satisfied the stringent *Jackson v. Virginia* (1979) 443 U.S. 307, standard. But on the enhancement, as with the underlying charge, the Court must grant a new trial under the less demanding 13th juror standard.

rejected murder and voluntary manslaughter charges and settled on the involuntary manslaughter charge in about six hours.[15]

The reason the state's case on murder and voluntary manslaughter fell apart is simple: there is truly only one meaningful item of evidence in this record that Mehserle intended to draw and shoot his gun at Oscar Grant; and that, of course, is the fact that Mehserle drew and shot his gun at Oscar Grant. All the other evidence introduced by both DA and defense witnesses points the other way: Mehserle intended to draw his taser and fired his gun mistakenly. And that single piece of evidence—the fact of the shooting—in light of the overwhelming proof to the contrary, does not amount to proof beyond a reasonable doubt that the defendant intended to use his gun.[16] Because such proof is necessary to sustain the §12022.5 enhancement (*see* CALCRIM 3146; *In re Tameka C.* (2000) 22 Cal.4th at 197), this Court should order a new trial on the enhancement.

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[15] The panel began deliberations anew at 9:11 a.m., Wednesday, July 7. They were excused at 11:45 that morning. They returned the next morning at 8:45 a.m. and deliberated until 11:45 a.m. They returned from lunch at 1:05 p.m. and delivered the question regarding the enhancement at 1:20 p.m. The total deliberations on the substantive charge were therefore about six hours.

[16] Let us quickly nip in the bud any argument that the §12022.5 enhancement could be based on Mehserle's intended use of his *taser*, as opposed to proof beyond a reasonable doubt that he intended to use his gun.

First, this Court had a sua sponte duty to instruct the jurors on the elements of the enhancement. *See* CALCRIM 3146 Use Note, citing *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490. The form instruction contains language defining a firearm under California law and the Use Note requires the Court to use that language unless it defines firearm elsewhere. The Court did not provide that part of the instruction and did not define firearm elsewhere. In that case, the jury had no guidance to resolve the question whether a taser is a firearm.

Second, the verdict form on which the jurors found that Mehserle personally used a firearm expressly limits firearm to "a handgun." (Exhibit D) The form indisputably means the jurors based the enhancement finding on a gun and not on a taser. Any finding that the enhancement can rely on Mehserle's intended use of the taser would therefore amount to Sixth Amendment and due process error.

Finally, as a matter of fact, the taser used in this case is not a firearm, which the instruction defines as "device designed to be used as a weapon, from which a projectile is discharged or expelled *through a barrel* by the force of an explosion or other form of combustion." The X26 contains no barrel, it discharges no projectile, and it uses electricity, not combustion. Rather, "The TASER X26 Electronic Control Device (ECD) uses a replaceable cartridge containing compressed nitrogen to deploy two small probes that are attached to the TASER X26 by insulated conductive wires . . .. The TASER X26 transmits electrical pulses through the wires and into the body affecting the sensory and motor functions of the peripheral nervous system."
http://www.taser.com/products/law/Pages/TASERX26.aspx

The Court was present during the taking of testimony. For that reason, Mehserle will simply point to the key facts that prove his true intent was to use his taser, and that he never intended to draw or shoot his gun for any purpose:

- Mehserle was trained to consider the backdrop, and in this case the backdrop was totally inappropriate for the use of a firearm;
- Mehserle told Pirone he was going to use his taser;
- Mehserle backed away from Grant and stood up before he fired, movements entirely unnecessary for the use of his gun, and entirely consistent with the use of his taser;
- The manner in which Mehserle attempted to draw his gun out of his holster was inconsistent with an intent to use his gun and consistent with an intent to use his taser;
- In light of Mehserle's extensive training and documented competence and speed in drawing his firearm, the fact that it took Mehserle four attempts to release the gun suggests an intent to tase and is inconsistent with an intent to draw and shoot his gun;
- Various thumb movements on the gun were consistent with an intent to activate and fire a taser and were inconsistent with an intent to shoot the gun;
- Contrary to his firearms training, Mehserle extended his arms before his hands came together on the gun;
- Contrary to his firearms training, Mehserle fired only once;
- Contrary to his firearms training, Mehserle did not assess or scan after the shooting;
- After the shooting Mehserle made statements like "oh shit I shot him" which suggested the shooting was mistaken;
- After the shooting, all witnesses testified Mehserle looked like he was shocked;
- Expert witness Greg Meyer testified that all of Mehserle's conduct was consistent with an intent to use his taser and was contrary to an intent to use his gun;

- Expert witness Greg Meyer and others testified that if Mehserle believed Grant might have a gun, the use of his taser was entirely appropriate;
- Expert Lewinski described how, under tense circumstances, an officer could make precisely the sort of mistake Mehserle made here;
- Mehserle testified that he intended to use his taser and never intended to use his gun.

These facts constitute overwhelming evidence that Mehserle intended to draw and shoot his taser, and never intended to draw and shoot (or use for any other purpose) his gun.

Given that most of the more than three-week trial was focused on the question whether Mehserle intended to pull his gun rather than his taser, Mr. Stein spent a stunningly small portion of his closing argument on the issue.

First, the DA argued that because Mehserle drew his gun hundreds of times before, he knew how to do it and it was unlikely that he would have mistakenly done so this time. (RT 5414) He told the jurors this: "When an officer who has been trained how to use a gun pulls it out and fires a bullet, they intend to shoot. It's that simple." (RT 5416) It would be nice if it were so simple, for Mehserle, and for the minimum of seven other officers who have mistakenly shot people when intending to tase them, but this Court knows it is not at all so simple.

Indeed, viewed through the lens of expert Lewinski's uncontradicted and largely uncross-examined testimony, the fact that Mehserle had so much experience drawing his firearm and so little drawing his taser was a circumstance that supports the defense position that Mehserle did *not* intend to draw his gun. Having decided to use the taser, Mehserle's attention was captured, and automatic programs were tripped in his brain which resulted in the "slip and capture" event described by Dr. Lewinsky.

Second, the DA argued that because it takes an officer four hand movements to release the gun from the holster, Mehserle could not have drawn the weapon without having intended to do so. (RT 5419) Again, the argument makes little sense in light of Lewinski's testimony. Mehserle was trained, and he practiced constantly, to execute those four hand movements *without intention or thought*. Given that it took Mehserle four separate attempts to get the gun out of the holster,

and in light of Mehserle's historic competence and speed in drawing his weapon, in combination with the fact that on seven prior occasions officers have unholstered their firearms without intending to do so and while intending to use their tasers just as Mehserle did, the DA's argument is unavailing.

Third, the DA argued that Mehserle's statements after the shooting, and his failure to tell anyone that the shooting was accidental, proved it was intentional. (RT 5415) The Court will recall, of course, that Mehserle's statements regarding the possibility that Grant had a gun were totally consistent with his decision to use the taser. As uncontradicted evidence from both DA and defense experts makes absolutely clear, if Mehserle believed, as he said, that Grant might be going for a gun, he could reasonably and responsibly and lawfully choose to use a taser in response.

The Court will also recall that by all accounts Mehserle was in shock after the shooting and had little idea himself what had just happened. And Mehserle *did* try to tell Terry Foreman that the shooting was an accident (RT 4261: Mehserle said "it was different," attempting to distinguish his shooting from Foreman's intentional one), but Foreman cut him off.

Concluding, the DA told the jurors they could disbelieve Mehserle's claim that that he drew his weapon mistakenly because while there had been several weapon confusion cases involving tasers in the past, none had involved a dominant-hand, cross-draw with a yellow X26. (RT 5755: "In almost a million or more instances of tasers being fired, this has never happened. Never happened. If it had, you would have heard about it. . . But never before, never before has there been an instance where an officer has confused his taser for his gun where the taser was being held on the opposite side of the gun. It's never happened. To this day it's never happened.")

The argument was no doubt quite persuasive. But as this Court is now aware, the argument is also absolutely wrong. Precisely such an accident occurred less than a year before the Grant shooting.

///

///

The prosecution failed to introduce proof beyond a reasonable doubt that Mehserle intended to draw or use his gun for any purpose. For that reason, sitting as 13th juror, this Court should grant a new trial on the enhancement.

B. The §12022.5 Enhancement Instruction Should Not Have Included Any Reference to Involuntary Manslaughter, Nor Should the Enhancement Have Been Included in the on the Form for a Guilty Verdict on Involuntary Manslaughter

It is an understatement to say that neither the parties nor the Court were focused on the issue of Mehserle's personal use of a gun or the applicable instructions and verdict forms. CALCRIM 3146 was not in the DA's original instructional packet. It was not in the instructions submitted to the Court by the defense as part of its instructional briefing.

Similarly, the CALCRIM 3146 instruction was not in the Court's original draft instructions, although those instructions included CALCRIM 3149 on personal discharge of a firearm that leads to great bodily injury or death. CALCRIM 3146 appeared for the first time in the Court's second revision (that is, the *third* set of instructions provided to counsel, which was the last version before the final instructions). The Court apparently considered the new instruction such a minor addition that it did not refer to it in its cover sheet detailing its second revision changes.

Over three hours of instructional discussion on July 30th, neither side made reference to the issue. Neither party mentioned the enhancement allegation in its closing argument.

The Court delivered the proposed verdict forms to the parties after the completion of closing argument. At the time counsel for both parties were occupied finalizing evidence for the delivery to the jurors and resolving jury instructions regarding the use of the videos by the jurors during deliberations. Neither party raised objections to the verdict forms.

But the instructions and the forms, as they related to the interplay between §12022.5 and the lesser-included offense of involuntary *in this case* were profoundly flawed. The enhancement instruction, CALCRIM 3146, informed the jurors that if they found Mehserle guilty of murder, voluntary manslaughter, *or involuntary manslaughter,* they should decide whether he personally used a firearm in the commission of that offense. The instruction then goes on to define "personal use" as an intention to display the gun in a menacing manner, hit someone with it, or fire it.

Given the evidence placed before the jurors at trial, and in light of the way the case was argued, the jurors should never have been allowed to consider the §12022.5 enhancement in case of a conviction on involuntary manslaughter. In the *Riter* case, a gun use enhancement allegation made perfect sense—the DA investigator in that case admitted he intended to fire his gun to stop the fleeing vehicle. The only question was whether he did so with criminal negligence.

Here, of course, the central issue in dispute was whether Mehserle was guilty of murder (or voluntary manslaughter) as the result of his *intentional* use of his gun. The DA argued that Mehserle intended to pull and shoot his gun, thus rendering him guilty at least of voluntary manslaughter. The defense argued that Mehserle drew the gun mistakenly, never intending to use it for any purpose, and without criminal negligence, making him not guilty of any criminal offense.

The jury's involuntary manslaughter conviction thus rationally implies a determination that Mehserle *did not* intend to use his gun for any purpose. The reference to involuntary manslaughter in the enhancement instruction improperly suggested that despite such a factual finding, Mehserle could be found to have personally used a firearm, an outcome that is squarely contradicted by other parts of the instruction and long-settled California law. *See In re Tameka C.* (2000) 22 Cal.4th at 197; RT 5803.

The form for a guilty verdict involuntary manslaughter (Exhibit D) was similarly misleading. It included language permitting the jurors to find the §12022.5 enhancement. The §12022.5 language should never have been on the involuntary form because, as noted, here a finding by the jury that Mehserle was guilty of involuntary manslaughter (and therefore not guilty of murder or voluntary manslaughter) by its nature amounted to a determination that Mehserle did *not* intend to use his gun for any purpose. Rather, such a verdict amounted to a jury determination that Mehserle intended only to draw and deploy his taser, and *used* his gun unintentionally.

The reason the jurors were confused by the reference to §12022.5 on the verdict form is because it should never have been there. Its inclusion, like the reference to involuntary manslaughter on the CALCRIM 3146 instruction, suggested that a "true" finding as to the

enhancement allegation could be possible, while in view of the way this case was presented and argued, the instruction itself and California law is to the contrary.

C. The Enhancement Instruction Violated Mehserle's Federal Due Process Right to Present a Defense

A neutral observer could fairly ask why or how, if the jury rejected the DA's theory that Mehserle intentionally drew and fired his gun, it nevertheless found true an allegation that expressly requires a finding that Mehserle intended to use the gun.

In another case a jury might have concluded that an officer intended to draw his weapon, perhaps for intimidation purposes, and therefore that he intended to use it even if he did not intent to shoot it. But no such finding is possible here—there is not a shred of evidence in this case to that effect, and the record is devoid of any argument by the DA that Mehserle had such a purpose. Indeed, the very few seconds between Mehserle's decision to use force and the shot means either Mehserle intended to draw and fire the gun, or he drew it and fired it by mistake believing it to be his taser.

So why, then, did the jury find the enhancement true?

One answer can be found in the foregoing argument regarding the instructions and verdict form.

The other is this: the instructions never permitted the jury to apply Mehserle's mistake of fact defense to the enhancement. The jurors were clearly informed that if Mehserle believed he was drawing a taser and not a gun, he could not be guilty of murder or voluntary manslaughter because he would lack the requisite intent. (RT 5787-5788) But as the result of an oversight by the Court and the parties, the jurors were never told that the mistake of fact defense applies to the enhancement. Indeed, the instructions are so clearly directed at the substantive charges, and so obviously omit application to the enhancement, that the jurors effectively were told the mistake of fact defense *does not* apply to the enhancement. But, of course, it does—both require a finding beyond a reasonable doubt that Mehserle intended to use his gun.

The error effectively deprived Mehserle of instructions on his defense, a federal due process error. And the error was unquestionably prejudicial. Indeed, the logical explanation for the jurors'

inconsistent verdicts—particularly in light of the several hours they spent on the substantive charge, and the few minutes they spent on the enhancement—is that as a result of the instructions the jurors erroneously believed the mistake of defense did not apply to the enhancement. This Court should grant a new trial as to the §12022.5 finding.

1. Procedural History

The Court will recall that Mehserle sought instruction on the generic mistake of fact instruction, CALCRIM 3406. (RT 5181) The Court agreed with counsel that the instruction was required, given the defendant's position at trial and powerful evidence supporting the claim that he mistook his gun for his taser. (RT 5182) The DA did not object. (RT 5182)

The Court eventually instructed the jurors in relevant part as follows:

> The defendant is not guilty of *second degree murder* or the lesser included offense of *voluntary manslaughter* if he did not have the intent or mental state required to commit the crime because he mistakenly believed a fact, namely, that he had drawn his taser and not his firearm.
>
> If the defendant's conduct would have been lawful under the facts as he believed them to be, he did not commit second degree murder or voluntary manslaughter.
>
> If you find that the defendant believed he had drawn his taser and not his firearm, he did not have the specific intent or mental state required for second-degree murder or voluntary manslaughter.
>
> If you have a reasonable doubt about whether the defendant had the specific intent or mental state required for *second degree murder* or *voluntary manslaughter*, you must find him not guilty of those crimes.

(Emphasis added)

2. Argument

"It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. *People v. Russell* (2006) 144 Cal.App.4th 1415, 1424, quoting *People v. Sedeno* (1974) 10 Cal.3d 703, 715. The failure to so instruct is federal due process error. *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1098. *Conde v. Henry* (9th Cir.1999) 198 F.3d 734, 739; *California v. Trombetta* (1984) 467 U.S. 479, 485.

Also, critically, the Supreme Court's decision in *Apprendi v. New Jersey* (2000) 530 U.S. 466, establishes that required factual findings relating to certain sentencing enhancements are subject to the same requirements of proof as apply to the elements of substantive offenses. *See People v. Sengpadychith* (2001) 26 Cal.4th 316, 326.

Given that the Court agreed to instruct the jurors on mistake of fact as to the substantive offenses of murder and voluntary manslaughter, and the absence of any objection by the DA, Mehserle was clearly entitled to instruction on that defense under the federal due process clause.

The defense applied with equal force to the enhancement. Like murder and voluntary manslaughter, for the enhancement allegation to be sustained there must be proof beyond a reasonable doubt that Mehserle formed the intent to use the gun. In the case of the substantive charges, Mehserle must have intended at least to shoot it. In the case of the enhancement allegation, the DA was obligated to prove that Mehserle specifically intended to *use* his gun—that is, he must have purposefully unholstered it and deliberately put it to at least one of three purposes: displayed it in a menacing manner, hit someone with it, or fired it. CALCRIM 3146; *In re Tameka C.* (2000) 22 Cal.4th at 197.

For that reason, the Court should have included reference to the enhancement allegation in the mistake of fact instruction quoted above. For example, the jury could have been told that it must find the §12022.5 enhancement false if Mehserle "did not have the intent or mental state required to commit the crime because he mistakenly believed a fact, namely, that he had drawn his taser and not his firearm."

Likewise, the jury should have been told, "If you find that the defendant believed he had drawn his taser and not his firearm, he did not have the specific intent or mental state required [for a 'true' finding on the gun use allegation.] If you have a reasonable doubt about whether the defendant had the specific intent or mental state required for [a 'true' finding on the gun use allegation you must find that allegation to be false.]" (RT 5788)

The error was prejudicial. "The right to have the jury instructed as to the defendant's theory of the case is one of those rights 'so basic to a fair trial' that failure to instruct where there is evidence to support the instruction can never be considered harmless error." *United States* v.

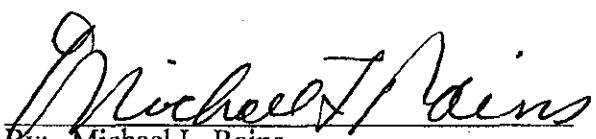
Escobar de Bright (9th Cir. 1984) 742 F.2d 1196, 1201. Under *Neder v. United States* (1999) 527 U.S. 1; *see also California v. Roy* (1996) 519 U.S. 2 (instructional error is harmless only if the court finds beyond a reasonable doubt that the result "would have been the same absent the error."); *Chapman v. California* (1967) 386 U.S. 18.

In this case, there is nearly proof beyond a reasonable doubt that the error *did* influence the verdict. As appears, the jury seems to have arrived at logically irreconcilable conclusions: Mehserle did not intend to draw or fire his gun (thus the acquittals on murder and voluntary manslaughter) and Mehserle did intend to use his gun (thus the finding of true on the enhancement). But the conclusions are entirely reconcilable by reference to the error—the jurors acquitted as to murder and voluntary because they were expressly told the mistake of fact defense applies; but by omission of reference to the enhancement allegation in the mistake of fact instruction, the jurors were effectively told the mistake of fact defense *does not apply* to §12022.5. At a minimum, the jurors were never expressly told, as the law requires, that the mistake of fact instruction *does* apply to the enhancement, and thus were left without the guidance they needed to consider Mehserle's defense as it applied to §12022.5. The error deprived Mehserle of due process. The Court should grant a new trial as to the enhancement.

Dated: October 1, 2010

Respectfully submitted,

RAINS LUCIA STERN, PC



By: Michael L. Rains
Attorneys for Defendant Johannes Mehserle

Exhibit A

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. JOHANNES MEHSERLE, Defendant.	AOC# 1009606-10 Alameda County Superior Court Case #161210 DECLARATION OF LIEUTENANT WILLIAM JONES

I, Billy Jones, declare under penalty of perjury as follows:

1. I am a police Lieutenant for the Nicholasville Police Department, in Nicholasville, Kentucky. At the time of the shooting described below, I had been with the Nicholasville Department for 13 years. I had five years prior law enforcement in the US Air Force.

2. On April 24, 2008, I shot Michael McCarty, a White male, in the back with my department-issued Springfield semi-automatic pistol.

3. The incident occurred in the Nicholasville Police Department parking lot during a child custody dispute. McCarty had just punched a male in the face and knocked him to the ground. I intended to tase McCarty and place handcuffs on him. Another officer was on the scene at the time as well as several civilian witnesses.

4. The single shot I fired at McCarty hit his liver, critically wounding him, although he did not die as a result of the incident.

5. At the time of the shooting I was carrying a yellow X26 Taser in a strong hand, cross-draw position on my duty belt. The taser was fastened on my duty belt, left of my buckle, adjacent to my ammunition pouches.

6. My right hand is my dominant hand and my service weapon was carried on the right side of my duty belt in a Safariland Automatic Locking System (ALS) Level III holster.

7. I did not announce to officers or citizens that I was going to tase McCarty. I just thought to myself, "Tase him. Tase him. Tase him." I got within ten feet of McCarty and I heard a pop. I looked at him for the taser wires and I did not see them. I looked in my right hand and I saw I was holding my gun.

8. I have no conscious recollection of making the necessary movements to draw my handgun from his ALS holster.

9. On my duty belt, in addition to my service weapon and taser, I carried Oleoresin Capsicum (OC) spray, a magazine pouch, flashlight, radio, baton and handcuffs.

10. I received training on the X26 in a ten-hour class five weeks prior to the shooting.

11. In the taser training class, each member fired the taser once at a cardboard target and each member was tased once. A considerable portion of the training concentrated on the nomenclature of the X26 Taser and Taser Policy. Practice draws were not a significant part of the training.

12. Every member of my department who completed the taser training was issued a taser, taser cartridges, and a taser holster to maintain permanently. I had no prior taser use of force incidents and I have not had any since.

13. Kentucky State Police Detective Bill Collins conducted the criminal investigation. I was informed that no charges would be filed against me as the case was determined to be "a muscle memory accident."

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14. Following the incident, and as a result of an internal investigation, I received a three-week unpaid suspension. I remain employed as a lieutenant with the Nicholasville Police Department.

15. As a result of the incident, the Nicholasville Police Department implemented increased taser refresher training for officers. The Department has also incorporated Firearms Simulation Training (FATS[1]) and added actors to participate real-life stressful situations during use of force training.

I declare under penalty of perjury that the information in this Declaration is true and correct to the best of my knowledge.

Executed this 1 day of September, 2010, at Nicholasville, Kentucky.

Billy Jones LT

[1] The FATS system is a fully functional Firearm Training Simulator designed to place students in realistic confrontations where the students make decisions concerning the use of force.

Exhibit B

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Attorneys for Defendant
JOHANNES MEHSERLE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff,** **v.** **JOHANNES MEHSERLE,** **Defendant.**	**AOC# 1009606-10** **Alameda County Superior Court Case #161210** **DECLARATION OF MICHAEL L. RAINS IN SUPPORT OF MOTION FOR NEW TRIAL**

I, Michael Rains, declare under penalty of perjury as follows:

1. I am an attorney at law licensed to practice before the courts of the State of California and the attorney for Defendant Johannes Mehserle in the above-entitled case.

2. Shortly after being retained to represent the defendant I retained Greg Meyer to serve as my use of force and taser expert.

3. Having reviewed the relevant published opinions, I was aware that there had been other weapons confusion cases involving tasers. I believed that evidence of other cases that had not resulted in published legal opinions would be available to an expert like Meyer.

4. I tasked Meyer with reviewing the relevant literature and media reports and compiling a complete and detailed list of the taser cases. Meyer prepared such a list and relayed it to me. I provided that information in discovery to the District Attorney.

5. Evidence of the six such weapon confusion cases was presented at trial. (Defense Exhibit HHH)

6. Prior to trial Meyer informed me that having searched the relevant literature and discussed the matter with colleagues, he believed there were no other reported taser cases.

7. On July 17, 2010, Meyer forwarded to me an electronic message he had received the same day from TASER, Inc., the manufacturer of the X26, which referred him to the Jones case from Kentucky. The message indicates that TASER, Inc., was unaware of the April 2008 Kentucky case until recently.

8. It appears the Jones case was not the subject of any significant reporting in the law enforcement media and was not the subject of any published legal opinion.

9. I made every effort and exercised due diligence in my attempt to discover and present at trial all relevant incidents of taser-gun confusion. The Kentucky case would have been of particular significance because it involved the same taser and holster configuration involved in this case, and therefore would have made impossible Mr. Stein's argument that the accident here had never happened in more than a million taser draws.

10. I therefore had no strategic reason not to discover and present the Kentucky incident to the jurors in this case.

11. I believe at least one juror would have voted to acquit had evidence of the Jones case been presented at trial.

Executed this 1st day of October, 2010, at Pleasant Hill, California.

Michael L. Rains

Exhibit C

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff,** **v.** **JOHANNES MEHSERLE,** **Defendant.**	**AOC# 1009606-10** **Alameda County Superior Court Case #161210** **DECLARATION OF ROBERT MCFARLANE**

I, Robert McFarlane, declare under penalty of perjury as follows:

1. I am employed as an investigator for the firm of Rains Lucia Stern, PC. I am a licensed Private Investigator. Prior to obtaining my license, I spent eight years in the Air Force as a Security Specialist, which involved a wide variety of duties involving Resource Protection and Law Enforcement assignments. I am also a retired Police Officer from the City of Oakland, where I spent twelve years, serving in Patrol, the Crime Reduction Team (CRT) and Vice/Narcotics.

2. The purpose of this declaration is to describe the results of my investigation regarding seven Officer Involved Shootings (OIS) which, upon the completion of individual criminal investigations and/or grand jury proceedings, were determined to have been accidental shootings

as a result of taser/gun confusion or mistakes.

3. The information contained in this memo is based on; 1) communications with attorneys who represented the officers; 2) published legal documents and judicial filings; 3) the involved officer and/or Public Information Officers; 4) police reports; 5) transcripts of subject officer and witness interviews; and 6) confirmed news reports.

4. There are seven reported mistaken firearm cases in North America. The first incident occurred in Sacramento, California, in 2001, and the most recent in Nicholasville, Kentucky, in 2008. In all of the occurrences, the involved officer meant to use his/her taser to subdue a resisting subject, but shot the subject with his/her handgun instead. All of the involved officers were wearing full police uniforms at the time, and in only one occurrence was the involved-officer solo[1]. With two exceptions[2], each of the individuals was shot in the back of their bodies.

5. In none of the cases were the officers aware of the fact that they were holding a handgun instead of a taser at the time of the shooting. In every case, including the case at hand, each officer fired a single shot. In two of the incidents, the officers had an X26 Taser and holster attached to his duty belt in the strong hand cross-draw configuration[3]. In two of the accidental shootings[4] the subject was shot while handcuffed/hobbled behind his back.

6. Internal investigations by the officers' department or an outside agency followed each occurrence and all but two of the involved officers received administrative discipline. Of the two officers who did not receive discipline, one resigned[5] and the other remained as an officer[6]. The five officers who received administrative discipline continue, to this date, to work in law enforcement for the agency at which they were employed at the time of the occurrence.

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[1] Deputy Purnell (2003), Somerset, Maryland

[2] (a) Constable Mike Miller (2005), Victoria, British Columbia - hot the subject in the stomach (b) Officer Marcy Noriega (2002), Madera Police, California - shot the subject in the chest

[3] Nicholasville Police Lieutenant Billy Jones (2008) and Victoria Police Constable Mike Miller (2005)

[4] Deputy Tiffany Dobbins (2006), Kitsap County , WA and Officer Thomas Shrum (2001), Sacramento Police

[5] Constable Mike Miller (2005), Victoria PD, British Columbia

[6] Officer Gregory Siem (2002), Rochester PD, Minnesota (retired five years after the shooting)

7. In chronological order, from the most recent event, the highlights of each of the seven mistaken firearms cases are as follows:

A. April 2008: Nicholasville, Kentucky

- White male lieutenant shot White male subject in back
- Subject survived
- One additional officer present at the time of the shooting
- Lieutenant received three week suspension and is still employed
- No criminal charges filed against officer
- Civil settlement: $150,000

B. June 2006: Kitsap County, Washington

- White female officer shot White male subject in leg
- Subject survived
- Several additional officers present at the time of the shooting
- No criminal charges filed against officer
- Officer received five day suspension and is still employed
- Civil settlement: $100,000

C. September 2005: Victoria, British Columbia

- White male officer shot White male subject in stomach
- Subject survived
- Another officer present at the time of the shooting
- No criminal charges filed against officer
- Officer resigned
- Civil case is still in litigation

D. October 2003: Somerset County, Maryland

- White male officer shot Black male subject in back of elbow
- Subject survived
- Officer was solo at the time of the shooting
- No criminal charges filed against officer
- Officer was not formally disciplined - as an informal discipline, he was reassigned to a detention facility as a Warden
- Civil case is still in litigation (4th Circuit)

E. October 2002: Madera, California

- Hispanic female officer shot a handcuffed Hispanic male subject in chest while he was in the backseat of her patrol car
- Eight additional officers, including two deputies were present at the time of the shooting
- Subject died
- No criminal charges filed against officer
- The officer, now Sergeant, received a 30 day suspension and is still employed
- Civil case is still in litigation

F. **September 2002: Rochester, Minnesota**

- White male officer shot Black male subject in back
- Subject survived
- One additional officer present at the time of the shooting
- No criminal charges filed against officer
- No discipline was issued – officer remained employed
- Civil settlement: $960,000

G. **March 2001: Sacramento, California**

- White male officer shot White male subject in the buttock/hip while he was handcuffed and hobbled
- Subject survived
- Three additional officers present at the time of the shooting
- No criminal charges filed against the officer
- Discipline is "confidential" per Attorney Marcos Kropf
- Civil settlement: $300,000[7]

DISCUSSION OF THE INCIDENTS

April 24, 2008: Nicholasville, Kentucky

8. I was first alerted to this case on July 21, 2010 as a result of an e-mail forwarded to me from Greg Meyer, who received the information from TASER International on July 17th.

9. Nicholasville Police Lieutenant Billy Jones shot Michael McCarty, a White male, in the back with his Springfield[8] pistol on April 24, 2008. Because there were no published court documents and only one news report, I phoned Lt. Jones and interviewed him. He explained the details of his shooting and the events that followed. The incident occurred at the Nicholasville PD parking lot during a child custody dispute. Mr. McCarty had just punched a male in the face and knocked him to the ground. Lt. Jones intended to taser McCarty and place handcuffs on him. Lt. Jones had another officer with him, as well as civilian witnesses, at the time of the incident.

10. The single shot Lt. Jones fired traveled through McCarty's right side of his rib cage and into his liver. Lt. Jones was carrying a yellow X26 Taser in a strong hand cross-draw position on his duty belt at the time of the occurrence. The taser was fastened on his duty belt,

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[7] http://www.kcra.com/news/24188631/detail.html

[8] Semiautomatic, XD model, .45 caliber (no laser)

left of his buckle, adjacent to his ammunition pouches. His right hand is his dominant hand and his service weapon was carried on the right side of his duty belt in a Safariland Automatic Locking System (ALS) Level III holster.

11. Lt. Jones did not announce to officers or citizens that he was going to tase McCarty. Lt. Jones just thought to himself, "Tase him. Tase him. Tase him." Lt. Jones said, "I got within ten feet of the guy and I heard a pop. I looked at him for the taser wires and I didn't see them. I looked in my right hand and I saw I was holding my gun." Lt. Jones had no conscious recollection of making the necessary movements to draw his handgun from his ALS holster. He just knew in his mind that he intended to tase McCarty.

12. At the time of the shooting, Lt. Jones had 13 years with the Nicholasville Police Department and five years prior law enforcement in the US Air Force. On his duty belt, in addition to his service weapon and taser, he carried Oleoresin Capsicum (OC) spray, magazine pouch, flashlight, radio, baton and handcuffs.

13. He received training on the X26 in a ten-hour class five weeks prior to the shooting. In the taser training class, each member fired the taser once at a cardboard target and each member was tased once. A considerable portion of the training concentrated on the nomenclature of the X26 Taser and Taser Policy. Practice draws were not a significant part of the training. Along with each member of the department who completed the taser training, Lt. Jones was issued a taser, taser cartridges, and taser holster to maintain permanently. He had no prior taser use of force incidents and has not had any since.

14. Lt. Jones had six years experience on the department's Emergency Response Team (ERT) and was/is currently a canine instructor. In the past, he has carried the Sig Sauer P226 and Berretta 92F pistols and numerous types of handgun holsters during his tenure as a law enforcement officer.

15 Kentucky State Police Detective Bill Collins conducted the criminal investigation. Lt. Jones was informed that no charges would be filed against him as the case was determined to be "a muscle memory accident." McCarty filed a civil suit after the shooting and received $150,000 as the result of a settlement.

16. Following the incident, and as a result of an internal investigation, Lt. Jones received a three-week unpaid suspension. Lt. Jones continues to carry out his duties as a lieutenant with the Nicholasville Police Department.

17. The Nicholasville PD reacted to Lt. Jones's incident by implementing increased taser refresher training for officers. They have also incorporated Firearms Simulation Training (FATS[9]) and added actors to participate real-life stressful situations during use of force training.

June 22, 2006: Kitsap County, Washington

18. Kitsap County Deputy Sheriff Tiffany Dobbins shot William Jones, a White male, in the leg with her Heckler and Koch[10] pistol on June 22, 2006. Jones was a mentally ill individual who had climbed a tree and remained there for hours. While in the tree he was hearing imaginary voices and imagining people were in the tree with him. A Kitsap County Deputy tried to coax Jones down from the tree. Once the negotiator was able to get Jones within range of his taser, he fired it toward him in an attempt to subdue him. The taser shot was not successful, so the negotiator commanded Deputy Dobbins to fire her taser at Jones. Deputy Dobbins complied, but shot Jones with her handgun instead. The single shot Deputy Dobbins fired was a through and through to Jones's leg. He was treated and released from the hospital the same day of the incident.

19. Kitsap County Sheriff Steve Boyer made this statement the following day: "At approximately 1:25 p.m. as the situation intensified, a decision was made to employ Taser to gain control of the man. The initial taser application by a deputy was unsuccessful, for reasons yet unknown. The first deputy requested that a second deputy, in close proximity, also deploy a Taser to the man. The second deputy was equipped with an M26 Advanced Taser (system) and a .40 caliber semi-automatic handgun (duty weapon). Both were positioned on the second deputy's strong side. The second deputy reacted immediately to the first deputy's instruction but drew the firearm out of its holster, instead of the Taser (from a separate holster), and fired at the man. . . .

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[9] The FATS system is a fully functional Firearm Training Simulator designed to place students in realistic confrontations where the students make decisions concerning the use of force.

[10] Semiautomatic, Model USP compact, .40 caliber (no laser)

The second deputy reacted instantaneously to the first deputy's command, per past training, but mistakenly unholstered a firearm instead of the taser. That, unfortunately, is human error."

20. Deputy Dobbins told me she was carrying a black M26 Taser in a thigh holster below her service weapon, on her right side. Deputy Dobbins did not know the make and model of her duty weapon holster. I have since obtained a photograph of Deputy Dobbins right after the incident. The photo shows her wearing a Safariland ALS level 3 Holster.

21. At the time of the shooting, Deputy Dobbins had been employed just over five years with the Kitsap County Sheriff's Office and was a Defensive Tactics Instructor. She had no prior law enforcement experience. On her duty belt, in addition to her service weapon, she carried OC, double magazine pouch, flashlight, radio, asp with flashlight, and double-handcuff pouch.

22. Deputy Dobbins's initial Taser training in 2002 occurred in a four hour class she attended at the department. She could not recall who the instructor was. Her annual refresher training consisted of a one-hour block of instruction via a PowerPoint presentation and firing the taser once at a piece of cardboard.

23. Deputy Dobbins's firearms training in the academy was conducted with a Glock .40 caliber semiautomatic pistol and she was not able to recall the holster she trained with. When the Kitsap Sheriff's Department hired her she was issued a Heckler and Koch pistol as her duty weapon and a holster she described as one that "had two snaps."

24. In a press release dated February 9, 2007, Kitsap County Sheriff Steve Boyer said this: "As of June 22, 2006, Deputy Dobbins had used the Taser on nine previous occasions; the most recent occurrence on July 31, 2005. She qualified initially with the Taser on February 22, 2002 and re-qualified with the Taser periodically as stipulated by agency training requirements. At the time of the incident Deputy Dobbins had served with the Sheriff's Office for five years and four months."

25. Deputy Dobbins could not recall the circumstances of all of her nine previous taser instances that were mentioned in Sheriff Boyer's press release. Dobbins told me she was informed by her Guild Attorney that she was not to disclose any more information to me without

prior authorization from her department. She is currently appealing a five-day suspension she received for a violation of the Departmental Use of Force Policy.

26. Sheriff Steve Boyer made this statement regarding criminal charges against Deputy Dobbins: "The recommendation of the Attorney General is that the Attorney General's Office decline to file criminal charges against Deputy Tiffany Dobbins, stemming from her involvement in the discharge of her duty weapon on June 22, 2006, in Navy City, Bremerton. . . . I am very pleased with the thoroughness of the review and I concur with the decision of the Attorney General. The overall factual question to be answered was whether the deputy acted with criminal culpability. The review shows, clearly, that it was a mistake; the deputy had no intent to shoot the victim with a firearm."

27. I spoke with Kitsap County Public Information Officer, Deputy Scott Wilson, who explained some details that he was authorized to release. Following the incident, all of the M26 Tasers were pulled from the field and the department retrained officers with the X26 Taser. All refresher-training classes have been changed to reflect the full-length of the initial certification class. The department amended the Taser Policy to prohibit officers from carrying their tasers on the same side of their body as their firearm in order to avoid confusion. Deputy Dobbins continues to perform her duties as a law enforcement officer and Defensive Tactics Instructor for the Kitsap County Sheriff's Office.

28. I have reviewed the report of investigation and supporting documents from the Washington State Patrol. I discovered that there were five deputies and two sergeants on the scene prior to the shooting. Dobbins drew her gun with her right hand and held it outstretched in both hands and took aim at Jones. A deputy standing next to Dobbins said, "Not that one, no!" just before she shot. His comments were heard by a third deputy. This Deputy saw Dobbins holding her handgun as well and he said "No!" or words to that effect[11].

29. On September 29, 2010, I spoke with Deputy Dobbins over the phone and she told me that she did not hear the aforementioned comments made by other deputies at the time of the

[11] These remarks are noted in the investigation report as audible over the police radio recording (Track 45)

shooting. She said that until I mentioned it to her, she was completely unaware that those comments were made or even mentioned in a report. She added that she thought she discharged her Taser at Jones and when she saw Jones's leg bleeding; she thought the blood was caused by a cut from a branch of the tree. It wasn't until she looked at her hand that she realized she was holding her handgun. Deputy Dobbins told me that she was asked to give a statement to the Washington State Police and she declined. To this date, she has not provided a criminal interview.

30. Dobbins's nine Taser incidents stretch from July 2002 to July 2005. In one of the incidents, she deployed her Taser on an individual armed with a knife.

31. In a letter to the Honorable Judge Russell D. Hauge, dated February 7, 2007, Chief Criminal Prosecutor Lana Weinmann concluded that the shooting was "...an accidental *and unknowing* use of a firearm. (Attached hereto as Exhibit A).

September 2005: Victoria, British Columbia

32. Constable Mike Miller shot Daniel Hammond, a White male, in the stomach with his Glock[12] pistol during an arrest in Victoria, British Columbia, on September 10, 2005. I interviewed Public Information Officer Sergeant Grant Hamilton over the phone. He provided some of the details of the incident and referred me to their Legal Department for specific details.

33. Sergeant Hamilton recalled that Constable Miller had a yellow X26 Taser attached to the left side of his duty belt in a strong hand cross-draw configuration. He said he knew that Constable Miller responded to a call of an unwanted person at a local business. Upon arrival, Constable Miller began wrestling with Hammond in an attempt to arrest him. At some point during the altercation, Constable Miller drew his taser from his gun belt and intended to tase Hammond. For unknown reasons, Constable Miller did not tase Hammond and placed his taser in the right cargo pocket of his pants. When Constable Miller decided he was going to tase Hammond, he drew his handgun from his holster and fired a single shot at Hammond, striking him in the stomach instead.

[12] Semiautomatic, .40 cal (no laser)

34. Sergeant Hamilton told me that criminal charges were not filed against Constable Miller because the investigation revealed the incident was an accident that was caused by weapons confusion. Sergeant Hamilton is unaware of the status of the civil settlement that followed. There was no discipline issued as a result of the incident since Constable Miller had resigned. Sergeant Hamilton referred me to Debra Taylor, Information and Privacy Manager, at the Victoria Police Department in order to obtain records of the incident and any records relating to Constable Miller's law enforcement experience and training. I have spoken with Ms. Taylor on two occasions and I have not received any records or incident related documents.

October 23, 2003: Somerset County, Maryland

35. Deputy Robert Purnell shot Frederick Henry, a Black male, in the back of his elbow with his Glock[13] pistol during an arrest in Somerset County, Maryland, on October 23, 2003. I phoned Deputy Purnell who told me that he would like to share details of his incident; however, his attorney John Breads advised against it as the case is currently on appeal. Deputy Purnell provided me with Mr. Breads's phone number. Deputy Purnell said he retired from the Maryland Natural Resources Police after more than twenty years and he had just over eight months as a Sheriff's Deputy with Somerset County. He said that after the incident, he was transferred to the Sheriff's Detention Facility to perform duties as a Warden. He carried his duty weapon in an ALS Level III holster[14].

36. I contacted Mr. Breads and he shared the details of Deputy Purnell's incident. Mr. Breads provided me with a legal brief[15] he filed on behalf of Deputy Purnell in the Court of Appeals for the Fourth Circuit that contains the relevant facts.

37. Deputy Purnell attempted to arrest Henry for an outstanding warrant when Henry pushed Deputy Purnell and fled on foot to the rear of a house. Deputy Purnell, fearing that Henry was going to arm himself, decided to deploy his M26 Taser from his thigh holster and tase Henry

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[13] Semiautomatic, .40 cal (no laser)

[14] Deputy Purnell could not recall the make and model, but he described the holster as "One with a hood and inside catch you slide with your thumb." He said the ALS Level III sounded correct.

[15] APPELLE'S BRIEF, United States Court of Appeals for the Fourth Circuit, No. 08-7433

in the back. He grabbed his Glock pistol from his duty belt by mistake and fired it once, striking Henry in the back of his right elbow. Deputy Purnell called for an ambulance.

38. Deputy Purnell received a 3 to 3.5-hour taser training class approximately two months prior to the occurrence. He was certified to use a black M26 Taser that had two yellow stripes and a laser sight. He carried the taser on his right side in a thigh holster, below his duty weapon. The incident involving Henry was Deputy Purnell's first time deploying a taser.

39. Mr. Breads told me that Purnell did not receive any formal discipline in this matter. He said the transfer to the detention facility was an informal way of removing him from law enforcement duties. Beads said the Maryland State Police conducted a criminal investigation and made no recommendations for the prosecution of Deputy Purnell. Deputy Purnell continues to work for the Somerset County Office of the Sheriff.

October 27, 2002: Madera, California

40. Madera Police Officer Marcy Noriega shot Evardo Torres, a Hispanic male, in the chest with her Glock[16] pistol while he was handcuffed in the back seat of her police vehicle on October 27, 2002. The single shot Officer Noriega fired entered the Torres's chest and killed him. Torres had been tased once inside a residence by a fellow officer that evening. Officer Noriega was on the scene with six officers and two deputies at the time she shot him.

41. I telephoned Bruce Praet, Sergeant Noriega's attorney who represented her in the civil matter. Mr. Praet shared with me some of the details of her incident. He expailned the case is in civil litigation and has not been resolved.

42. Officer Noriega carried a black M26 Taser at the time of the incident. She received a 4-hour block of instruction in late 2001. Her service weapon was a Glock, Model 23, which had a laser sight attached. He said the laser was activated by an on/off switch that was along the rear of the pistol grip of her handgun. The laser was activated from pressure applied by the web of her hand. Her duty belt had an ASP, OC, two sets of handcuffs, flashlight, service weapon and a

[16] Semiautomatic, .40 caliber, with a laser

magazine pouch. Officer Noriega is right handed. She had one prior taser use of force incident and the taser was used in the "drive stun" mode.

43. Madera Police Department changed the Taser Policy immediately after the shooting. Officers can only carry their tasers in the following configurations: 1) weak-side, weak-hand draw; 2) or weak-side, strong-hand, cross-draw; or 3) strong-side, weak-hand, cross-draw. Officer Noriega had one prior taser confusion incident while carrying the M26 Taser. Approximately one year prior to the Torres incident, shortly after receiving initial taser training, she intended to tase a resisting suspect utilizing the "drive-stun" mode. During that incident, she removed what she thought was her taser from her thigh holster and pulled at the tip in order to remove the taser probes only to discover that she had removed her Glock and was tugging at the slide of the weapon instead. Officer Noriega was instructed to practice taser draws on her own time in order to improve her muscle memory to avoid weapons confusion.

44. On March 3, 2003, the Madera County District Attorney's Office issued the following statement: "In a 1,100-page count report, District Attorney Ernest LiCalsi told Police Chief Kime . . . [the DA's office] would not be filing charges against Marcie [sic] Noriega." The statement added: "There is not a single piece of evidence showing intent on the part of Marcie [sic] Noriega."

45. Mr. Praet told me that the Madera PD Internal Affairs Division conducted a lengthy investigation into the OIS and as a result, Officer Noriega received a 30-day suspension for negligence in the performance of her duties. Officer Noriega had approximately five years as a police officer at the time of the incident. She is now a sergeant with the Madera Police Department.

September 2, 2002: Rochester, Minnesota

46. Rochester Police Officer Gregory Siem shot Christofar Atak, a Black male, in the back with his Glock[17] pistol on September 2, 2002. The single shot travelled through Atak's back and damaged his kidneys, intestines and liver. I made several attempts, via email and telephone,

[17] Model 22, .40 caliber (no laser)

to contact Officer Siem without success. According to a City of Rochester, Minnesota, press release, Officer Siem retired from the PD in 2007. He became a Minnesota Licensed Peace Officer in 1995.

47. I have looked at a transcript of Officer Siem's recorded interview of the incident. In that interview, Officer Siem explained that he had been a Field Training Officer for three years and he was a member of the Department's Emergency Response Unit (ERU), as well as a less than lethal force instructor. He had six years as a police officer at the time of the incident. Siem told investigators that he was P.O.S.T. certified with the taser, but he could not recall the training dates and/or hours trained[18].

48. I contacted John Iverson, Officer Siem's attorney, and spoke with him about the incident and the events that followed. Mr. Iverson also provided judicial filings and other documents to support the facts of the case.

49. Officer Siem carried an M26 Taser, black in color, with two yellow stripes along the side. The taser was kept in a fanny pack that was not secured on the officer, as the Police Department did not have (or issue) taser holsters. Officers were required to carry the taser in their police vehicle and place it in their cargo pocket until arrival at an incident. Officer Siem carried his pistol in a holster that had a thumb release and a tilt and rock forward motion to remove.

50. Prior to the shooting, Officer Siem and one other officer struggled to handcuff Atak, who was resisting handcuffing. Officer Siem was unclear if he placed his taser in his cargo pocket of his pants or on the hood of a police vehicle. Officer Siem intended to tase Atak when he removed his Glock from his holster and pressed it against Atak's back and shot from a distance of less than one foot.

51. In a criminal investigation by the Minnesota Bureau of Criminal Apprehension and subsequent Grand Jury proceedings, Officer Siem was cleared of any criminal charges as the incident was determined to have been an accident.

[18] The M26 was first introduced to the Rochester Police Department in 2001.

52. Officer Siem did not receive any administrative discipline as an outcome of an internal investigation due to the accidental nature of the incident. Officer Siem continued to work for the Rochester PD until his retirement on January 3, 2007.

March 10, 2001: Sacramento, California

53. Sacramento Police Officer Thomas Shrum shot Steven Yount, a White male, in the buttock with his Glock[19] pistol on March 10, 2001. Shrum's lawyer, Marcos Kropf, provided some of the details of the incident. The description below is taken from that conversation and a review of court documents[20].

54. Officer Shrum responded to assist another officer (Davis) who was flagged down by a 7-11 security guard, Daniel Powell. Mr. Powell directed Officer Davis to an apparent intoxicated individual, later identified as Steven Yount (white male), who was attempting to drive off in his vehicle.

55. Officer Davis observed that Yount displayed the objective symptoms of being under the influence of an alcoholic beverage so he detained him for further investigation. Officer Davis had Yount exit his vehicle, and as he did, he lost his balance and fell to the ground. Officer Davis directed Yount to get into the backseat of his police car. Yount walked over to Officer Davis's police car but refused to get into the backseat. With Officer Davis's assistance, Yount was finally placed into the back seat, unhandcuffed.

56. Yount banged around in the backseat of the police car, screaming obscenities and directing racial slurs at Officer Davis, who is black. Yount continued to resist for three to five minutes.

57. Finally, Officer Davis pulled Yount out of the police car, got him to the ground, and with the assistance of security guards, managed to place him in handcuffs. As far as Officer Davis was concerned, Yount was formally under arrest at this point. Minutes later, Sacramento Police Officers Daniel Swafford and Thomas Shrum (white male) and California State University

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[19] Semiautomatic, 9mm (no laser)

[20] Steven Yount, Plaintiff and Appellant v. City of Sacramento et al, Defendants and Respondents, C046869, November 9, 2005; *Summary of the Evidence*

Police Officer Debra Hatfield arrived to provide backup and assistance. As the officers were filling out paperwork for a DUI[21] report, Yount again became hostile in the back of the police car. He was kicking, screaming, yelling obscenities and banging his head against the passenger window. Officers Shrum, Swafford and Hatfield opened the door and tried to get Yount to calm down, but he was uncooperative, hostile and irrational. At one point Yount put his legs outside the police car, prompting Officer Swafford to apply his taser gun, which calmed Yount temporarily and enabled officers to get him back inside the car.

58. Soon, however, Yount resumed kicking, screaming and banging in the back of the patrol car. Just as Officer Davis walked toward the rear door of the car, Yount kicked the window out, causing glass to explode and shatter.

59. For safety reasons, the officers decided to transfer Yount to another patrol car. They tried to get him out voluntarily, but he would not cooperate. Finally, the officers forcibly extricated Yount from the back seat. As he fell out of the car, Yount landed on top of Officer Davis, injuring Davis's elbow. The officers then tried to pick Yount up and carry him to another patrol car. The task was difficult, because Yount kicked, screamed and spat on the officers.

60. Officer Davis rolled Yount over on the ground and put his knee into Yount's back while the other officers held him down and applied leg restraints. Because Yount continued to resist and thrash about, Shrum decided to apply his Taser. Shrum told other officers to "hold on", that he was going to "tase him." Shrum reached into his holster and drew what he thought was his Taser gun. Aiming it toward the back of Yount's thigh, Shrum pulled the trigger and heard a pop. He looked at his hand and realized he had discharged his pistol.

61. Shrum attended a ten-hour taser training and certification class approximately one week prior to the incident. His duty weapon did not have a laser sight. The taser was an M26, black with two yellow stripes alongside and it was carried in a leg holster that was worn just inches below the duty weapon. Shrum's duty weapon was a Sig Sauer P226[22] pistol that he

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[21] Driving Under the Influence (DUI)

[22] Semiautomatic, 9 millimeter (no laser)

carried in an unknown make and model holster. Shrum had the following items on his duty belt, in addition to his duty weapon, at the time of the incident: CS, dual magazine pouch, handcuff case, baton ring (without baton), radio and Sig Sauer P226.

62. Officer Shrum did not have any prior taser use of force incidents. Following the incident, the Sacramento PD Taser Policy was amended to reflect the taser can only be carried on the non-dominant side opposite the duty weapon. Yount was hospitalized and subsequently convicted in court of Felony DUI and Resisting Police[23]. The civil case settled and the terms are confidential. Any discipline Shrum received as a result of an internal investigation is confidential.

63. On September 21, 2010, I received the report of investigation and supporting documents of the incident. In the documents, I discovered a letter dated September 6, 2001, addressed to Sacramento Chief of Police Arturo Venegas. The letter was from Sacramento County Supervising District Attorney Jean Williamson and she concluded the letter with the following statement, "Since the shooting of Steven Yount by Officer Shrum was accidental and without criminal negligence, it is not a crime. Thus, we take no action against Officer Shrum in connection with this incident." (Attached hereto as Exhibit B).

64. Officer Shrum did not have prior law enforcement experience and he was a police officer for four years at the time of the incident. Officer Shrum continues to carry out his law enforcement duties at the Sacramento Police Department.

I declare under penalty of perjury that the information in this Declaration is true and correct to the best of my knowledge.

Executed this 1st day of October, 2010, at Pleasant Hill, California.

Robert McFarlane

[23] Resist Obstruct Deter a Peace Officer in the Performance of his Duties (Section 148 of the CA Penal Code)

Exhibit A to McFarlane Declaration

Rob McKenna
ATTORNEY GENERAL OF WASHINGTON
800 Fifth Avenue #2000 • Seattle WA 98104-3188

February 7, 2007

The Honorable Russell D. Hauge
Kitsap County Prosecuting Attorney
614 Division Street, MS-35
Port Orchard, WA 98366-4681

Re: *Case Review of the Investigation of*
Kitsap County Sheriff's Office Deputy Tiffany Dobbins.
Washington State Patrol Case Nos. 06CR 169603-01 and 06CR 169604-01

Dear Mr. Hauge:

On August 23, 2006, we received your request to review the above investigation conducted by Det. Steven Stockwell of the Washington State Patrol. The investigation was concerning an officer-involved shooting that occurred on June 22, 2006. On that date, Kitsap County Sheriff's Deputy Tiffany Dobbins shot William A. Jones as officers attempted to get Jones out of a tree. You forwarded the matter to this office on August 18, 2006 and asked that we determine whether the matter warrants filing criminal charges and if appropriate make the charging decision, and conduct any subsequent prosecution. I have now finalized my review of this investigation.

This review was conducted by the guidelines imposed under RCW 9.94A.401 and .411, the Rules of Professional Conduct specifically governing prosecutors, and filing guidelines used by my office. The Attorney General's Office will not be filing criminal charges arising from the matter you referred because we would be unable to prove any relevant potential crimes beyond a reasonable doubt. I think under the circumstances, it is important to point out the facts I considered in making my determination.

I. FACTUAL BACKGROUND

On June 22, 2006 at 11:40 a.m., Kitsap County Sheriff's Deputy Tiffany Dobbins was dispatched to the location of a man who was reportedly in a tree wearing only tennis shoes and shorts. This man was thirty-two year old William A. Jones. Jones had been in the tree for approximately five hours by the time Deputy Dobbins was called. Police were called by a neighboring business owner who expressed concerns for Mr. Jones' safety given his odd behavior. Mr. Jones was reportedly up to 25 feet high in the tree, located on a vacant lot, and Mr. Jones appeared to be talking to himself as if he believed there were other people in the tree with him. The caller also

expressed concern for the private property owner in the event Mr. Jones fell from the tree and injured himself. Upon arrival, Dobbins first spoke to the reporting parties at an adjacent business. She next radioed a senior deputy, David Anderson, and advised him that she would stand by until he arrived.

Deputy Anderson arrived at 12:11 pm, and the two deputies approached Jones. Jones was still in the tree. Jones told the officers that he had escaped from some Bremerton police officers who wanted to arrest him for a probation violation. Jones had a leather belt wrapped around a tree limb and around his neck. Jones appeared to be a bit delusional. For example, he claimed the belt was there to keep him from falling out of the tree. Jones also told the officers there were other people in the tree wearing camouflage that were waiting to tranquilize him. Jones was alone in the tree. Upon request, Jones provided the officers with his name and date of birth. The date offered was off by three months to his actual date of birth. While observing Jones, Deputy Anderson formed the opinion that Jones was under the influence of drugs.

At 12:17 p.m., Deputy Rob Corn arrived at the scene. Jones continually asked the deputies for a match or lighter so he could smoke his last cigarette. Deputy Corn borrowed a lighter from a neighboring business. While Corn was doing so, Jones climbed higher into the tree.

Deputy Jon Johnson arrived at the scene at 12:36 p.m. to act as a negotiator and speak with Jones. Jones made statements about wanting to be a sniper, and his feeling that police officers lied to him. Mr. Jones referred to "the green people" hiding in the tree, and he would occasionally become enraged because he felt there were police officers in the tree trying to "get" him. Jones also continued to demand a light for his cigarette, but would not take one when offered. Jones asked Deputy Johnson several times whether he would be arrested. Deputy Johnson advised Jones that he would not. Throughout the conversation, Jones climbed about the tree, refastening the belt around his neck at each stop. His legs trembled when he wasn't climbing the tree.

KCSO Sergeant Jon Brossel next arrived and assumed command of the scene. At approximately 1:00 p.m., the fire department arrived. Upon his arrival, Sergeant Brossel discussed with Deputy Johnson using a taser if the opportunity presented itself. Deputy Johnson continued to try and convince Jones to come out of the tree. At one point, Jones had removed the belt and came down to a lower branch to take the lighter from Deputy Johnson. Seizing the opportunity, Deputy Johnson shot Jones in the chest with his taser. Although the taser did shock Jones, he was able to pull it from his chest and attempt to climb back up the tree. Deputy Johnson then yelled at Dobbins to use her taser on Jones. Deputy Johnson's specific command was "get another one!" In response, Deputy Dobbins drew her sidearm from her belt, aimed, and fired a single round striking Jones in the leg. Jones climbed out of the tree and was immediately treated by medical personnel.

It is unclear whether Deputy Dobbins was aware of the plan to use tasers prior to Deputy Johnson's use. When asked if Dobbins had been advised in advance of the taser use, Deputy

Johnson states, "I thought she had." According to Deputy Anderson, who was standing a few feet behind Dobbins when the shot was fired, less than four seconds elapsed between the time Deputy Dobbins pulled her gun and the time she fired it. However, one of the officers standing by, Sergeant Merrill, did yell "not that one, no!" when Dobbins drew her sidearm. It's important to note that Deputy Dobbins did have a taser and wore it on her belt in a gun-like holster. Her taser is roughly gun shaped and could be mistaken for a gun. Dobbins immediately reacted to the shooting, by exclaiming, "Oh my God, oh my God, what did I do?" She was described by witnessing officers as very distraught, and in a state of emotional shock.

The KCSO Taser Policy is also included in the received discovery. The policy states, in pertinent part, "The AIR TASER will only be carried in the department approved holster and in the manner as trained during the approved training course." As of June 22, 2006, Deputy Dobbins had used her taser on nine previous occasions. The most recent incident occurred on July 31, 2005. She completed the taser training course on February 22, 2002, as well as several firearms training courses throughout her tenure. Deputy Dobbins was hired as a Kitsap County Sheriff's Deputy on February 23, 2001.

Jones now claims he was in the tree hiding from two men that had attacked him earlier in the evening. According to Jones, the fight carried him into the water. His clothes became wet and torn, so he discarded them while fleeing his two attackers. Jones states he first tried to go to his cousin's home, but no one answered the door. He then resorted to climbing a tree. Regarding his reluctance to come down from the tree, Jones states that he actually was out of the tree, standing on the ground with his hands up when he was tased. After Deputy Johnson's taser failed to subdue Jones, Jones claims he started climbing back up the tree and was shot.

Mr. Jones' account of the incident lacks credibility under the circumstances, since Mr. Jones was clearly not acting rationally at the time of the incident. His version of the events is contrary to that of every other witness.[1]

II. LEGAL ANALYSIS

There are several possible charges that warrant consideration under the above facts. The critical factual question to be answered prior to making a charging decision is whether Deputy Dobbins acted with criminal culpability. The types of criminal culpability applicable to most crimes in Washington are set forth in RCW 9A.08.010, and this analysis proceeds though each of the possibilities listed therein.

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[1] Mr. Jones has since engaged in similar behavior. According to an October 17, 2006 article in the Kitsap Sun, on October 16, 2006, Mr. Jones climbed onto the roof of a stranger's home on Madrona Point Drive in Bremerton. Bremerton Police officers responded to multiple 911 calls and found Mr. Jones on the roof, wearing nothing but a T-shirt he had fashioned into a loincloth and wrapped around his waist. Mr. Jones had been on the roof for at least an hour before police arrived, but was eventually talked down by the responding officers. Officers reported that Mr. Jones appeared to be on drugs, and they transported him to Harrison Medical Center.

1. **Intent** - A person acts with intent or intentionally when she acts with the objective or purpose to accomplish a result which constitutes a crime. RCW 9A.08.010(1)(a).

Applicable crime(s): *Assault in the First Degree* (RCW 9A.36.011(1)(a) – with *intent* to inflict great bodily harm assaults with firearm)

Assault in the Second Degree (RCW 9A.36.021(1)(c) – *intentional* assault with a deadly weapon)

Assault in the Fourth Degree (RCW 9A.36.041 – *intent* is an implied element of fourth degree assault; State v. Stevens, 127 Wn.App. 269, 110 P.3d 1179 (2005))

Official Misconduct (RCW 9A.80.010(1)(a) – with *intent* to obtain a benefit or to deprive another person of a lawful right or privilege, she intentionally commits an unauthorized act under color of law)

Each of these crimes can be ruled out here. There is no evidence that Deputy Dobbins intended to fire her sidearm at all. It is clear from the emotion shown in her reaction to the shooting, and the instruction she was given by her fellow officers at the scene, that the use of her firearm, rather than her taser, was unintended. Even Mr. Jones, when asked why officers would fire a gun at him, stated, "No clue. Maybe they don't have enough taser pistol training." *See* July 10, 2006 Recorded Statement of William Jones at p. 7. For similar reasons, there is no evidence supporting the conclusion that Deputy Dobbins was acting with the intention of inflicting great bodily harm upon Mr. Jones.[2]

2. **Knowledge** – A person knows or acts knowingly or with knowledge when: (i) he is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or (ii) he has information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by a statute defining an offense. RCW 9A.08.010(1)(b).

Applicable crime(s): *Assault in the Second Degree* (RCW 9A.36.021(1)(f) – *knowingly* inflicts bodily harm which by design causes torture-like pain or agony)

While shooting Mr. Jones in the leg undoubtedly inflicted severe pain, the language of the statute implies that Deputy Dobbins must have known her action would result in the infliction of that harm. Again, since Deputy Dobbins was under the mistaken belief that she was about to use her

[2] Chapter 9.41 RCW regulates the use of firearms and other dangerous weapons. Although not always clearly stated, the crimes defined within that chapter also fall into the "intentional" category. However, the pertinent criminal provisions of that chapter either do not apply to police officers who are discharging their official duties (*See* 9.41.060, .190 and .270), or alternatively, to circumstances that result in injury to another person (RCW 9.41.230). Thus, those crimes should also be removed from consideration here.

taser, she could not have known such severe harm would, "by design," result from her actions. Thus, there is insufficient evidence to support this charge of Assault in the Second Degree.

3. **Recklessness** – A person is reckless or acts recklessly when she knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation. RCW 9A.08.010(1)(c).

Applicable crime(s): *Assault in the Second Degree* (RCW 9A.36.021(1)(b) – assaults and *recklessly* inflicts substantial bodily harm)

Reckless endangerment (RCW 9A.36.050 – *recklessly* engages in conduct that creates a substantial risk of death or serious physical injury)

Critical to the facts of Deputy Dobbins' case is the portion of the definition that reads, "knows of and disregards a substantial risk." To prove recklessness here, the State would have to show that Deputy Dobbins became aware that she had mistakenly drawn her sidearm, and then fired it anyway. Such an interpretation of these facts is quickly refuted by Dobbins' immediate, emotional reaction to the shot she fired. Although, other officers at the scene realized that she had drawn her gun, and yelled to Dobbins that she had pulled the wrong weapon, it is not necessarily uncommon for a person acting quickly while in the midst of a volatile situation to fail to hear or respond to such outside commands. Additionally, it is clear from all those present that Deputy Dobbins did not realize she had drawn her firearm until after the shot had been fired.

Thus, it is reasonable to conclude for purposes of this analysis that what the deputy "knew" is that she was drawing and using her taser in response to the command of Deputy Johnson. A reasonable person in Deputy Dobbins' situation would have been justified in acting similarly. Her mistaken weapon choice was not the product of disregard for the risks associated with using her firearm. Consequently, neither of the above crimes can be proven here.

4. **Criminal Negligence** – A person is criminally negligent or acts with criminal negligence when she fails to be aware of a substantial risk that a wrongful act may occur and this failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable man would exercise in the same situation. RCW 9A.08.010(1)(d).

Applicable crime(s): *Assault in the Third Degree* (RCW 9A.36.031(1)(d) – with *criminal negligence*, causes bodily harm with a weapon)

Here, the infliction of an unnecessary gunshot wound upon Mr. Jones was a wrongful act. A substantial risk that the wrongful act would occur arose when Deputy Dobbins failed to recognize she had drawn her firearm, rather than her taser. However, in the context of this case, the risks associated with the carrying and use of firearms and tasers were known to Deputy Dobbins. She had received training on the use of both weapons, and was certainly aware of the

substantial risks of harm or other wrongful acts that may arise when these weapons are used. Consequently, there is insufficient evidence to prove that Deputy Dobbins failed to be aware of these risks for the purpose of establishing criminal negligence.

On the contrary, given the brief period of time that elapsed between the drawing of the gun and the firing of the shot, the comparable size of Dobbins' taser and sidearm, the close proximity of firearm to taser, the perceived need to act quickly before Jones could climb higher in the tree, and Dobbins' immediate emotional and remorseful reaction to the shooting, it is clear that the use of her sidearm was accidental. Since the weapon in her hand was there by mistake, it cannot be shown that Deputy Dobbins used that weapon in a criminally negligent manner. Rather, had the intended weapon (i.e. the taser) been used on Mr. Jones in the same way that the firearm was, a relatively uneventful arrest may well have followed.

III. USE OF FORCE (TASER) BY DEPUTIES DOBBINS AND JOHNSON

The official referral in this case was for "KCSO Deputy Tiffany Dobbins, Our File No. 06CR 169603-01; KCSO Deputy John Johnson, Our File No. 06CR 169604-01". As such it is important to address whether there is any criminal liability for the use of force employed by Deputy Johnson, and the intended use of force by Deputy Dobbins, that is the use of the taser, to subdue Mr. Jones under these circumstances. I have concluded that the intended use of force under these circumstances was necessary and did not give rise to criminal liability as contemplated by RCW 9A.16.020.

> RCW 9A.16.020 defines lawful use of force and reads in pertinent part as follows:
>
> The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:
>
> (1) Whenever necessarily used by a public officer in the performance of a legal duty, or a person assisting the officer and acting under the officer's direction;
>
> ...
>
> (6) Whenever used by any person to prevent a mentally ill, mentally incompetent, or mentally disabled person from committing an act dangerous to any person, or in enforcing necessary restraint for the protection or restoration to health of the person, during such period only as is necessary to obtain legal authority for the restraint or custody of the person.

Kitsap County Sheriff's deputies were faced with a man who was clearly not acting rationally, had exhibited signs of mental impairment, and was engaging in activity that threatened his own safety. Having attempted and failed to gain Mr. Jones' compliance for some time, the deputies use and intended use of their tasers under these circumstances was a reasonably necessary use of force under RCW 9A.16.020.

IV. CONCLUSION AND RECOMMENDATION

Nothing in this memorandum should be interpreted to minimize the harm suffered by Mr. Jones as a result of this incident. However, my sole responsibility in this situation is to decide whether criminal charges are appropriate under the facts presented. Given the facts presented, and consideration of the possible criminal charges, I must recommend that this office decline to file criminal charges. The accidental *and unknowing* use of a firearm is not an act that can form the basis of a successful prosecution. Even when applying the standard of criminal negligence, the State would be unable to prove that a crime was committed beyond a reasonable doubt to an objective and reasonable trier of fact. For these reasons, it is recommended that criminal charges not be filed.

Thank you for referring this case to my office. I hope my review was helpful to you. If you have any questions, please feel free to call me at (206)389-2022.

Sincerely,

Lana Weinmann

LANA WEINMANN
Chief Criminal Prosecutor
Assistant Attorney General

Cc: Det. Steven Stockwell, Washington State Patrol
Chief Gary Simpson, Kitsap County Sheriff's Office
Anthony Otto, Attorney at Law

Exhibit B to McFarlane Declaration

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OFFICE OF THE

DISTRICT ATTORNEY

SACRAMENTO COUNTY

JAN SCULLY
DISTRICT ATTORNEY

CYNTHIA G. BESEMER
CHIEF DEPUTY

September 6, 2001

Arturo Venegas
Chief of Police
Sacramento Police Department
900 Eighth Street
Sacramento, CA 95814

Re:	Officer-involved shooting:	SPD case number 01-19426
	Shooting officer:	Officer T. Shrum #0362
	Person shot:	Steven Ray Yount

Dear Chief Venegas:

I have received the reports in this case, together with the audio/video tapes and photographs. Having reviewed the materials, I have concluded that the shooting was an accident. Consequently, criminal charges will not be filed against Officer Shrum.

FACTS:

On March 10, 2001, at approximately 3:35 in the morning, Sacramento Police Officer Sam Davis was working uniformed patrol in a marked black and white police car when he pulled into the parking lot of a 7-11 convenience store at 7700 La Riviera Drive in the City of Sacramento. Private Security Guard Dan Powell, standing outside the 7-11, flagged Officer Davis down. Powell pointed out an individual he believed to be drunk who was sitting in the driver's seat of a white Chrysler sedan. The individual began backing the Chrysler out of the parking space. As he did so, the vehicle swerved from side to side as it backed up about eight or ten feet.

Officer Davis blew his horn to get the driver's attention and the driver stopped backing up. Davis told the driver to pull forward into the parking space. The driver did so and Officer Davis positioned his patrol car directly behind the Chrysler. Officer Davis approached the driver's side window. The driver rolled down the window and Davis smelled the odor of an alcoholic beverage coming from the driver. Davis asked the driver to step out of the car. As the driver got out of the car, he staggered backwards and fell back against the car.

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Officer Davis had some conversation with the driver and, believing him to be under the influence of alcohol, walked him back to the patrol car and asked him to get into the back seat. Officer Davis wanted to detain the (DUI) suspect until he could get an additional officer to respond to the scene for assistance. The suspect became agitated, continually saying to the officer, "You're going to take me to jail, aren't you?" The officer tried to calm the suspect down and, eventually, the suspect got into the back seat of the patrol car. Officer Davis closed the door.

Officer Davis got into the driver's seat of the patrol car. At this point, the suspect became verbally abusive. The suspect's verbal abuse included racial epithets directed at Officer Davis, who is African American. The suspect then began banging on the metal screen inside the patrol car with his hands and kicking at the doors and the screen. The patrol car was rocking back and forth.

Officer Davis, afraid the suspect would hurt himself or damage the car, decided he should handcuff the suspect. Davis got out of the patrol car and asked Security Guard Powell and Powell's partner, Peter Jones, for assistance. Davis and the two security guards were able to get the suspect out of the back seat, but only after a struggle during which the suspect kicked at them and struggled with them. They then put him down on the ground on his stomach and were eventually able to handcuff him as he continued to struggle and kick. They stood him up and, although he resisted and tried to pull away, Officer Davis was able to get him back into the back seat of the patrol car and close the door. The suspect immediately began to kick the door.

Other officers began to arrive on the scene at this point. Officer Debra Hatfield from the Sacramento State University Police arrived, as did Sacramento Police Officers Swafford (#796) and Shrum. As Officer Hatfield approached Officer Davis, she observed that the suspect was angry, hostile and belligerent and he yelled profanities at her. The suspect was banging his head on the metal cage, kicking the window of the patrol car and spitting.

Officer Shrum opened the back door of the patrol car and asked the suspect for his identification and driver's license. As the suspect directed profanity at Officer Shrum and called him names, Shrum reached in the suspect's pocket and removed a wallet. Shrum searched the wallet for a driver's license. Not finding the license, Shrum patted the suspect's pockets. The suspect became louder and began attempting to get out of the patrol car. Shrum tried to push him back inside the car but could not shut the door.

Shrum got out his taser and told the suspect he would "tase" him if he did not get back in the car so that Shrum could close the door. The suspect told Shrum to go ahead and tase him in the forehead, he didn't care. The suspect continued to struggle, at one point kicking at Officer Shrum. Shrum attempted to tase the suspect, moving the taser toward the suspect's chest and

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firing it. The suspect leaned back as Shrum moved toward him and it did not appear to witness officers that the taser made contact with the suspect. The suspect did not react like he had been tased.

In the meantime, Officer Swafford had gone around to the passenger side of the patrol car with his taser out and opened the passenger side rear door. As the suspect slid over to the passenger side with his back to Swafford, Swafford used his taser in the "contact" mode against the suspect's lower back. When the suspect jumped away, breaking contact with the taser, Shrum and Swafford were able to shut patrol car doors.

Shortly thereafter, the suspect kicked out the rear driver's side window of the patrol car and resumed banging his head against the interior of the car. When the window shattered, broken glass flew onto Officer Davis. As the suspect began kicking at the door, Shrum, Davis, Hatfield and Swafford talked about getting the suspect out of the car and hobbling him. Officer Shrum suggested tasing the suspect with the darts and leaving the darts in him as a means of control. Swafford did not agree, believing that the wires would break and it would be ineffective. The officers did agree to remove the suspect from the patrol car he was in, hobble him, and transfer him to an intact patrol car for transport to jail.

The officers reached into the backseat in an attempt to grab the suspect and pull him out. Officer Davis latched onto the suspect and pulled him out, falling backward with the suspect onto the pavement. Davis sustained minor injuries (pain and swelling to his elbow and hand, a pulled calf muscle as well as abrasions and bruises). The suspect continued to kick and move around on the ground as the officers tried to get him in position to hobble him. Shrum finally succeeded in hobbling the suspect. Officer Davis had moved away at this point. Hatfield, Shrum and Swafford then began to walk the suspect to Shrum's patrol car. They got to the rear of Officer Davis's car when the suspect began struggling again and kicking and spitting at the officers. They held him face down as he tried to pull free from their grasp. As officers struggled to gain control of the suspect, Officer Shrum reached for his taser but, instead, grabbed his firearm and fired one round, which struck the suspect in the left buttocks/hip.

According to witness accounts, Officer Shrum seemed as surprised as everyone else at the scene that the suspect had been shot. Officer Shrum made various statements in the initial aftermath of the shooting. Officer Davis heard Shrum say, "Fuck, I shot him...I thought I was grabbing my taser, but I grabbed my gun..." Officer Swafford heard Shrum say, "Oh my god. Oh my god....I'm sorry for ruining the tasers for you guys." To Lt. Callender, Shrum stated he was holding the suspect by the feet when he (Shrum) reached for his taser but removed his gun and shot the suspect. Security Guard Powell heard Shrum say, "Oh shit. I didn't shoot him, did I? I shot him." Powell said Shrum was upset and emotional after the shooting. Powell said Shrum

was going for his stun gun, not his firearm. Powell said he did not believe Shrum intentionally shot the suspect. Security Guard Jones said he thought Shrum was going to use his stun gun but he accidentally pulled out his gun. Jones said it appeared to be an accident.

Officer Shrum called for Code 3 fire and ambulance. The suspect, determined to be Steven Yount, was transported to the hospital for treatment. Blood was drawn at the hospital which revealed his blood alcohol level at the time of the blood draw to be .22% Yount spoke with Detective Sall a few hours after being admitted to the hospital. He told Detective Sall that he had been drinking vodka prior to the incident. When asked by the Detective whether he thought he had a drinking problem, he answered in the affirmative.

Subsequent checks of Mr. Yount's past driving record revealed that he has suffered three prior convictions in Virginia for driving under the influence. Also, in an incident in Virginia in early 1999 when Yount was arrested for being drunk in public, reports indicate he called the arresting officer names, spit in the patrol car, kicked out a window of the patrol car, pounded his head on the inside of the patrol car, and was combative with officers.

ANALYSIS:

The shooting in this case was accidental. The evidence is clear that Officer Shrum meant to grab and fire his taser, but mistakenly grabbed his gun and fired it. Not only did Shrum make statements to that effect, but also his reaction to the gun going off (as recounted by all the witnesses) was consistent with an unintentional shooting. Moreover, the fact that only one shot was fired further supports the accidental or unintentional nature of the act.

When a person commits an act (such as the shooting in this case) unintentionally, as long as there is no criminal negligence, it is not a crime. CalJic4.45. Ordinary negligence is the failure to exercise ordinary or reasonable care. Criminal negligence exceeds ordinary negligence, and requires gross negligence – a negligent act which is aggravated, reckless or flagrant, and such a departure from what would be the conduct of an ordinarily prudent, careful person under the same circumstances as to be contrary to a proper regard for human life or to constitute indifference to the consequences of those acts. CalJic3.36.

It cannot be said that Officer Shrum's conduct in this case, which resulted in the shooting, constituted a criminally negligent act. In the heat of the moment and without realizing it, he simply grabbed the wrong weapon and pulled the trigger. He was attempting to control a subject who was combative and resistive. He meant to use the taser on the subject, who was struggling, kicking and spitting at officers and attempting to break free. The use of the taser at that point would have been reasonable, as it might have given the officers a few moments without the

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subject struggling to get the subject into the patrol car. Unfortunately, Shrum grabbed the wrong weapon and the unintentional shooting resulted.

CONCLUSION:

Since the shooting of Steven Yount by Officer Shrum was accidental and without criminal negligence, it is not a crime. Thus, we will take no action against Officer Shrum in connection with this incident. Thank you for referring the matter for our review.

Very truly yours,

JAN SCULLY
DISTRICT ATTORNEY

Jean Williamson

JEAN WILLIAMSON
Supervising Deputy District Attorney

cc: √Sgt. Lance McHenry
Detective Kingsbury
Detective Sall
Officer Shrum
Don Casimere, Director, Office of Police Accountability

Exhibit D

SUPERIOR COURT OF CALIFORNIA, ALAMEDA COUNTY

The People of the State of California **Plaintiff** vs. JOHANNES MESHERLE **Defendant**	**Case Number** 161210 - AOC#109606-10 **Department** 104 **VERDICT (Guilty) - Lesser**

We, the Jury in the above-entitled action, find the Defendant, JOHANNES MESHERLE, guilty of the crime of INVOLUNTARY MANSLAUGHTER of OSCAR GRANT, in violation of Penal Code Section 192(b), a felony, a lesser included offense to that charged in Count 1 of the Information.

We further find the allegation that in the commission and attempted commission of the above offense, the defendant, JOHANNES MESHERLE, personally used a firearm, namely: A HANDGUN, within the meaning of Penal Code Section 12022.5(a) to be TRUE.
("TRUE" or "NOT TRUE")

FILED
ALAMEDA COUNTY
JUL 08 2010
CLERK OF THE SUPERIOR COURT
By

This 8th day of July 2010, Juror# 6 /s/.