



DISTRICT ATTORNEY'S OFFICE

COUNTY OF TUOLUMNE

CASSANDRA ANN JENECKE
DISTRICT ATTORNEY

DATE: September 1, 2023

TO: Sheriff Bill Pooley
Tuolumne County Sheriff's Office
28 North Lower Sunset Drive
Sonora, CA 95370

FROM: Tuolumne County District Attorney Cassandra Jenecke

SUBJECT: Officer-Involved Shooting Case No. 20001541

Use of Force Officers: TCSO Deputy Daniel Newman (less-lethal)
TCSO Deputy Terry Knapp (lethal)
TCSO Deputy Cody Stephens (lethal)

Person Shot: Richard Martin Councilman Jr. (DOB 8/26/63)

Sheriff Pooley:

As an independent agency, the Tuolumne County District Attorney's Office has completed its investigation and review of the above-referenced officer-involved shooting, which occurred on May 26, 2020, in Jamestown, California, and within the Sheriff's jurisdiction. It is reported that Richard Martin Councilman Jr. died from gunshot wounds sustained during a use of force incident related to the investigation of a May 25, 2020 domestic violence dispute.

The actions of the involved deputies do not rise to the level of criminal conduct that would warrant the filing of criminal charges. We explain our reasoning below and are required to address changes in the law that impact our discretionary processes. Charges related to this incident will not be filed. We now view this matter as closed.

EVIDENCE REVIEWED

The District Attorney's Office received and reviewed written reports and other evidentiary items related to this case. These items included:

- Tuolumne County Sheriff's Office Report No. 20001541, including the narrative report, thirty-six supplemental reports, and forty attachments;
- Tuolumne County Sheriff's Office Coroner's Report No. 20001542;
- Stanislaus County Sheriff's Department Coroner's Case No. C20001266;
- Central Valley Toxicology Report CVT-20-5232;

- Video recordings, audio recordings, and transcripts of interviews with Confidential Victim, Confidential Victim 1, and Confidential Victim 2;
- Video recordings, audio recordings, and transcripts of interviews with civilian witnesses Hannah Mattingly, Nicole Wilkins, Robert Rice, Christian Standers, Abigail Standers, and Kimana Councilman;
- Video recordings, audio recordings, and transcripts of interviews with law enforcement witnesses, including:
 - Tuolumne County Sheriff's Office Sergeant Romel Cuellar, Deputy Eric Worthington, Deputy Oliver Imlach, Deputy Michael O'Brien, Deputy Shane Tholcke, Dispatcher Terri Farrell, and Dispatch Nicolas Olson
 - Tuolumne County Probation Office Supervising Probation Officer Anthony Johnson;
- Video recordings, audio recordings, and transcripts of interviews with Tuolumne County Sheriff's Office Deputy Daniel Newman, Deputy Terry Knapp, and Deputy Cody Stephens;
- Audio recordings of 9-1-1 call from Confidential Victim and dispatch communications during incident and investigation;
- Scene diagrams;
- Photographs of scene, apartment, round count, decedent, and weapons confiscated from decedent.

FACTS

On May 25, 2020, at 1642 hours, Confidential Victim 2 (CV2) reported that her father Richard Martin Councilman, Jr. had kicked their dog and then started choking her mother Confidential Victim (CV). She further reported that Councilman had left the scene on foot. Deputy Eric Worthington responded to the scene along with Corporal Carl Benson and Deputy Oliver Imlach.

Deputy Worthington investigated the reported domestic violence incident by interviewing CV and the children present during the altercation. Deputy Worthington learned from CV2 and CV that Councilman and CV were a married couple with several children in common. They each reported that earlier that evening during a verbal argument, Councilman grabbed CV by the face and choked her around the neck. CV had difficulty breathing, but did not lose consciousness, and was able to kick Councilman off her to stop him from choking her. Councilman then left the scene prior to deputies arriving. CV further informed Deputy Worthington that Councilman was a trained martial artist who knew how to use weapons in personal combat to include the use of knives and kubatons¹ in personal combat. CV also told Deputy Worthington that Councilman was not known to possess guns as he was felon and those had been taken from him during a domestic violence

¹ A kubaton is a five- to six-inch-long stick-shaped weapon with a pointed end that is made of either steel, wood, strong plastic, or other durable material for use in close-quarter self-defense.

incident many years prior. Moreover, CV explained to Deputy Worthington that Councilman had said he would fight law enforcement if contacted.

Based on the information gathered during his investigation, Deputy Worthington believed there was probable cause to arrest Councilman for felony domestic violence. Corporal Benson and Deputy Imlach searched the area for Councilman but were unsuccessful in locating him. An Emergency Protective Order (EPO) was granted by the on-call judge but could not be served on Councilman because he could not be found. Deputy Worthington completed an Information and Belief (I&B) and Probable Cause Declaration for the arrest of Councilman for felony domestic violence. Information related to this event was also included in the Watch Report for May 25, 2020. The Watch Report also included an officer safety warning related to Councilman's practice of martial arts, his habitual carrying of a knife, and his threats to fight law enforcement if he were contacted.

On May 26, 2020, at 1308 hours, Confidential Victim (CV) called 9-1-1 and reported to Tuolumne County Sheriff's Office Dispatch Nicolas Olson that her husband – later identified as Richard Martin Councilman – had returned to their home and refused to leave their home located at 10222 Preston Lane, Apartment 303, Jamestown, California. The apartment building is directly adjacent to Highway 108.

She further explained that Councilman had assaulted her the previous day and responding deputies received, but were unable to serve, an emergency protective order related to that event. CV further stated, "He [Councilman] threatened to hurt you guys or to have you guys kill him." CV reported that Councilman had returned the night before, agreed to pack his stuff and leave, but then refused to leave. Councilman instructed CV to call the police.

CV told Dispatcher Olson that Councilman's threats against law enforcement had been made that day, and reported that Councilman told her, "Yes, he said, 'Call the police. I am ready to die,' which means he is going to try and fight you guys." CV reported that Councilman told her that he would not be going back to jail and that he would "try to hurt them [law enforcement]" if they tried to approach him. CV told Dispatcher Olson that Councilman was armed, but she did not know with what type of weapon and Councilman refused to tell her when she asked. Councilman told her, "It doesn't matter."

Dispatcher Olson requested that CV gather herself and her children and leave the residence. As they were preparing to leave, CV continued to speak with Dispatch Olson and Councilman. She reported that Councilman "told the baby that he doesn't want her [the baby] to get shot by accident." CV yelled at Councilman, "Hope I can live with myself, how about you don't fight the cops." Dispatcher Olson told CV to not engage with Councilman and to leave the home. CV informed Dispatcher Olson that she and her twelve-year-old daughter Confidential Victim 1 (CV1) were leaving their home with their dog at 1317 hours. While walking to contact responding deputies, CV reported to Dispatcher Olson that Councilman had told their daughter that "he is going to die."

During CV's 9-1-1 call with Dispatcher Olson, Dispatcher Terri Ferrell dispatched deputies and provided information updates to those deputies based on the information provided in the 9-1-1 call. Updates included the whereabouts of Councilman, information about his threats towards law enforcement, and the location of CV and CV2.

Responding law enforcement personnel included Tuolumne County Sheriff's Office Deputies Terry Knapp, Cody Stephens, Daniel Newman, Shane Tholcke, Eric Worthington, Michael O'Brien, and Oliver Imlach, along with Sergeant Romel Cuellar and Supervising Probation Officer Anthony Johnson. All responding law enforcement officers were wearing a form of uniform that identified them as law enforcement personnel and their respective agencies. Additionally, responding vehicles were marked patrol vehicles.

At the initiation of the incident, Deputy Knapp was acting as the Officer-In-Charge (OIC) for the Sheriff's shift and acted as initial incident commander when he arrived on scene at 1317 hours. Deputy Knapp had also acted as OIC on May 25, 2020, and was familiar with the information related to the May 25, 2020, domestic violence incident summarized above. Additional support arrived on scene as follows:

- Deputy Worthington at 1317 hours
- Deputies Stephens and Tholcke at 1319 hours
- Deputy Imlach at 1321 hours
- Deputy Newman at 1324 hours

Deputy Knapp and other responding law enforcement support began establishing a perimeter around the apartment building and started evacuating of residents in apartments near Unit 303. Residents from Units 301, 302, and 304 were evacuated and cleared from their apartments by 1330 hours.

Sergeant Cuellar – then assigned to the Probation High Risk Supervision Team – had been monitoring the call and dispatched himself to the event along with Deputy O'Brien and Senior Probation Officer Johnson at 1312 hours. Sergeant Cuellar was a leader on the TCSO Special Weapons and Tactics (SWAT) team, a supervisor with a rank of Sergeant, and a Defensive Tactics (DTAC) Instructor. While enroute, Sergeant Cuellar contacted SWAT Commander Lieutenant David Vasquez and fellow SWAT Leader James Riley to advise them of the possible SWAT call-out. Sergeant Cuellar became OIC of the incident upon his arrival at the scene at 1332 hours.

Between 1317 and 1331 hours, Deputy Knapp and Deputy Worthington each contacted CV. During this time, they learned from CV that there was no phone inside the Councilman residence as Councilman had given the phone to CV when she was leaving the apartment. Moreover, Councilman was alone in the apartment when she and the child left. After arriving on scene, Sergeant Cuellar contacted CV at 1337 hours and began to gather additional information.

At 1338 hours, Deputy Knapp radioed that the Councilman apartment was covered, and deputies had not yet made announcements of their presence. At 1339 hours, Deputy O'Brien inquired over the radio if any responding units had a shield. Seconds later, Deputy

Tholcke responded that he had a shield in his vehicle. Deputy Worthington responded to Deputy Tholcke's car, retrieved the shield, and brought it to the deputies on the east side of the third-floor area outside of Unit 303.

Prior to and while establishing coverage, deputies strategized how to cover and approach the apartment. This strategic evaluation included consideration of the following issues:

- Positioning of law enforcement officers in relation to coverage of the Councilman apartment;
- Arming of law enforcement officers with less-lethal and lethal weapons; and
- Tactical and arrest-team assignments in the event of contact with Councilman at the apartment.

The breezeway outside Unit 303 was approximately 38 feet long and 10 feet wide. Deputies had to climb one or two flights of stairs to access the breezeway. Deputy Knapp stood with minimal coverage behind a foot-deep wall-outcropping. Deputy Knapp was in the front-lead position, with Deputy Imlach behind him, and Deputy Worthington behind Deputy Imlach. Deputy Stephens was behind a shield and Deputy Newman was behind Deputy Stephens. Deputies Stephens and Newman had the same type of foot-deep wall-outcropping for coverage beyond the shield. Deputy Tholcke and Supervising Probation Officer Johnson were posted on the ground floor breezeway directly below Unit 303. A view from the second-floor entrance to the stairwell featuring the wall-outcroppings behind which the deputies were able to take cover is below:



Deputies were armed as follows:

- Deputy Knapp was armed with his department-issued Colt AR-15 and Sig Sauer P320
- Deputy Imlach was armed with his department-issued less-lethal taser and handgun
- Deputy Worthington was armed with department-issued handgun
- Deputy Newman was armed with his department-issued less-lethal, 12-gauge beanbag stabilized shotgun and handgun
- Deputy Stephens was armed with his department-issued Sig P320 nine-millimeter subcompact and equipped with a tactical shield

Once positioned, the group determined the following tactical and arrest team assignments:

- Deputy Newman would provide less-lethal cover by being armed with and able to use his less-lethal beanbag shotgun if it became necessary, appropriate, and reasonable to do so;
- Deputy Imlach would provide less-lethal cover by being armed with and able to use his less-lethal taser and handcuff Councilman if it became necessary, appropriate, and reasonable to do so;
- Deputy Stephens would provide less-lethal and lethal cover by being armed with and able to use the shield, hand-to-hand combat, and his Sig P320 nine-millimeter if it became necessary, appropriate, and reasonable to do so;
- Deputy Stephens would make announcements, and
- Deputy Knapp would provide lethal cover be armed with and able to use his Colt AR-15 if it became necessary, appropriate, and reasonable to do so.

A tactical decision was discussed amongst the team regarding the use of available less-lethal options. Deputy Newman required 20 feet of space to deploy the less-lethal beanbag shotgun. From his position to the door of the Councilman apartment, Deputy Newman had sufficient space to use the beanbag shotgun. The concrete on the breezeway had a line of demarcation about ten feet from the Councilman apartment threshold. The team determined that If Councilman crossed over that line in the concrete, then the less-lethal option would shift from Deputy Newman's beanbag shotgun to Deputy Imlach's taser.

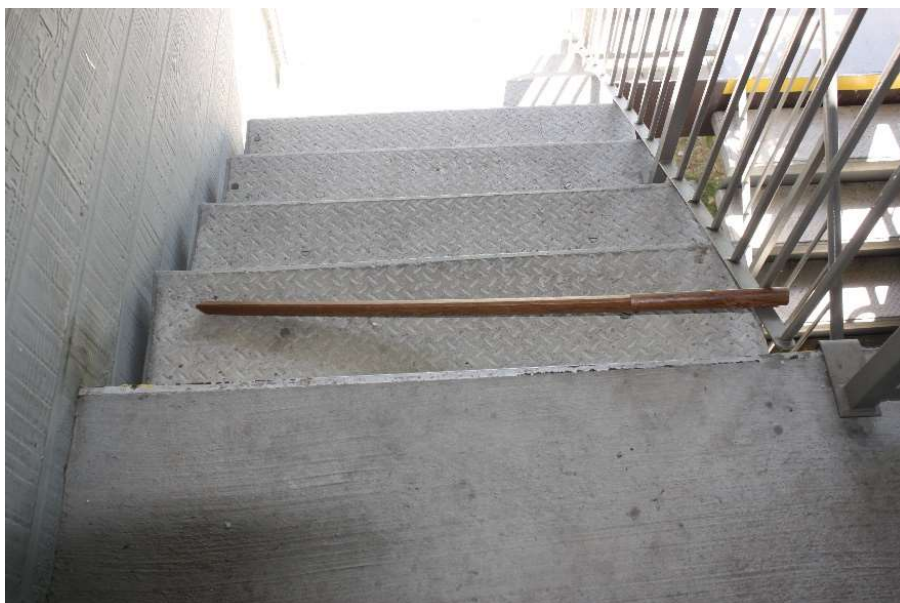
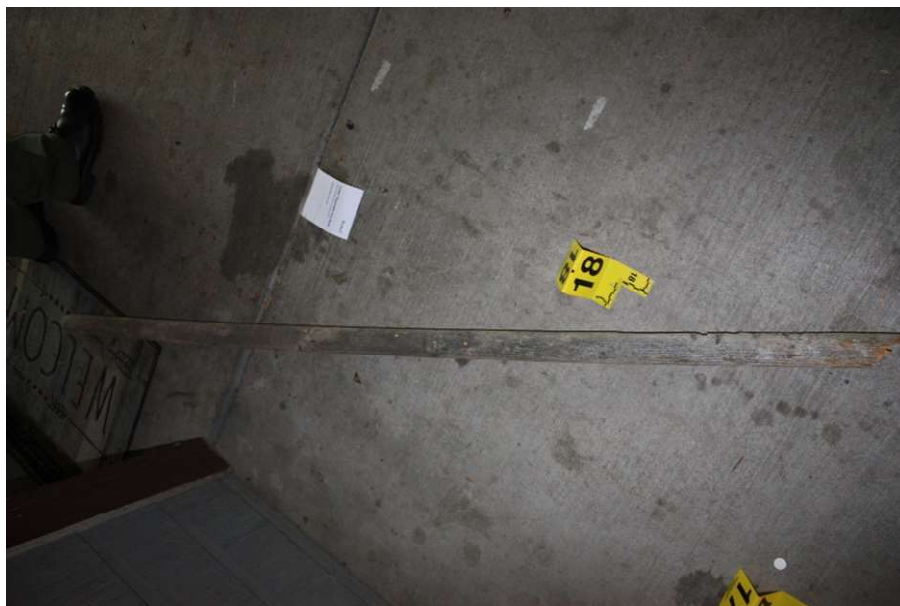
Deputies providing coverage on the Councilman apartment waited for direction from OIC Sergeant Cuellar before making announcements. OIC Sergeant Cuellar confirmed with CV that there was no phone inside the residence at 1352 hours. Deputies were directed to initiate announcements by OIC Sergeant Cuellar at 1353 hours. Deputy Stephens initiated announcements by yelling "Richard, Tuolumne County Sheriff's. Come to the front door with your hands up.

In his voluntary interview given on June 1, 2020, Deputy Stephens recalled making that announcement three or four times. Sergeant Cuellar was able to hear those

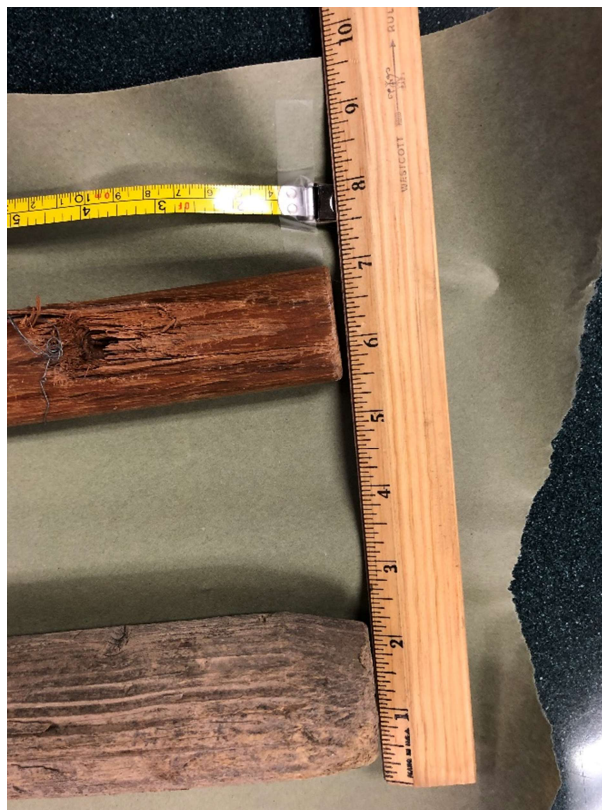
announcements from his position with CV outside the apartment building's laundry room and noted that to dispatch at 1353 hours.

Deputy Stephens made three or four announcements before Councilman opened the door of Unit 303 and exited his apartment onto the breezeway. Councilman took a few steps away from the door, near the center of the breezeway, and faced the deputies. Deputies observed that Councilman was holding a 6-foot-long wooden staff upright in his right hand. Deputies estimated the staff to have a circumference of two- to three-inches. Councilman also had a smaller stick, which was shorter and not as wide in his belt sheathed like a sword.

These weapons are pictured below as they were found on-scene during the investigation:



These weapons are pictured below during evidence processing for size, scale, and measurement purposes:



In separate interviews, all deputies recognized these items as weapons that could potentially cause great bodily harm or death to themselves or others if used in a violent way by Councilman.

Councilman made no verbal response to the deputies' announcements or presence. Councilman's demeanor upon exiting the apartment was stoic and lacked any visible facial expression or emotion. Councilman's body positioning was described and perceived as threatening and angry with his chest puffed out.

Multiple deputies ordered Councilman to put down the staff, put his hands up, and drop his weapons. Councilman did not comply and did not respond. This was noted in the dispatch log at 13:54:51 hours. At that time, Deputy Knapp ordered "less-lethal up" and Deputy Newman pointed his less-lethal beanbag shotgun at Councilman and stated, "Put everything down. Put your hands up or I will shoot you with a less lethal shotgun. It will hurt."

Councilman did not comply and did not respond to Deputy Newman's directive and continued to stand in a threatening manner in the breezeway while armed with the 6-foot-long wooden staff. As a result, Deputy Newman shot Councilman with a less-lethal beanbag round in the right hip. Councilman's body moved with the impact of the beanbag, but he remained standing, made no statements, and his facial expression did not change.

Sergeant Cuellar and Deputy O'Brien began running towards the other deputies upon the firing of the less-lethal beanbag shotgun.

After being hit with the beanbag round, Councilman reached into his right pants pocket, pulled out a firearm, and pointed the firearm in the direction of Deputies Stephens and Newman. Each deputies' statement about this portion of their interactions with Councilman was materially similar and are summarized below.

- **Deputy Newman:** Deputy Newman observed Councilman brandish an object that he recognized as a firearm. Deputy Newman perceived that Councilman was pointing the firearm directly at Deputy Newman's face. Deputy Newman feared that Councilman would cause death or great bodily injury to himself, his fellow deputies, and the public based on Councilman's actions. Deputy Newman ordered Councilman to drop the firearm. Councilman did not comply despite an opportunity to do so. Deputy Newman did not discharge his lethal firearm.
- **Deputy Stephens:** Deputy Stephens observed Councilman brandish an object that he recognized as a firearm. Deputy Stephen's perceived that Councilman was pointing the firearm directly at Deputy Stephen's person and face. Deputy Stephens felt that Councilman was going to shoot him or "the people that relied on me that were right behind me." Deputy Stephens feared that Councilman would cause death or great bodily injury to himself, his fellow deputies, and the public based on Councilman's actions. Deputy Stephens ordered Councilman to drop the firearm. Councilman did not comply despite an opportunity to do so. Deputy Stephens discharged his lethal firearm three times, striking Councilman three times. Deputy Stephens ceased firing at the point where he felt Councilman no longer posed a threat to life.
- **Deputy Knapp:** Deputy Knapp observed Councilman brandish an object that he recognized as a firearm. Deputy Knapp observed that Councilman was pointing the firearm directly at Deputies Stephens and Newman. Deputy Knapp felt that Councilman "was gonna shoot us." Deputy Knapp feared that Councilman would cause death or great bodily injury to his fellow deputies, himself, and the public based on Councilman's actions. Deputy Knapp ordered Councilman to drop the firearm. Councilman did not comply despite an opportunity to do so. Deputy Knapp discharged his lethal AR15 five times, striking Councilman five times. Deputy Knapp ceased firing at the point where he felt Councilman no longer posed a threat to life.
- **Deputy Imlach:** Deputy Imlach observed Councilman brandish an object that he recognized as a firearm. Deputy Imlach observed that Councilman was pointing the firearm directly at Deputies Stephens and Newman. Deputy Imlach transitioned

his less-lethal taser to his duty belt and drew his lethal handgun. Deputy Imlach perceived that Councilman was slowly moving his firearm and was then pointing the firearm at Deputy Imlach. Deputy Imlach took cover. Deputy Imlach feared that Councilman would cause death or great bodily injury to himself, his fellow deputies, the public based on Councilman's actions. Deputy Imlach heard other deputies order Councilman to drop the firearm. Councilman did not comply despite an opportunity to do so. Deputy Imlach did not discharge his lethal firearm.

- **Deputy Worthington:** Deputy Worthington observed Councilman brandish an object that he recognized as a firearm. Deputy Worthington observed that Councilman was pointing the firearm at the deputies. Deputy Worthington feared that Councilman would cause death or great bodily injury to himself, his fellow deputies, the public based on Councilman's actions. Deputy Worthington did not discharge his lethal firearm.

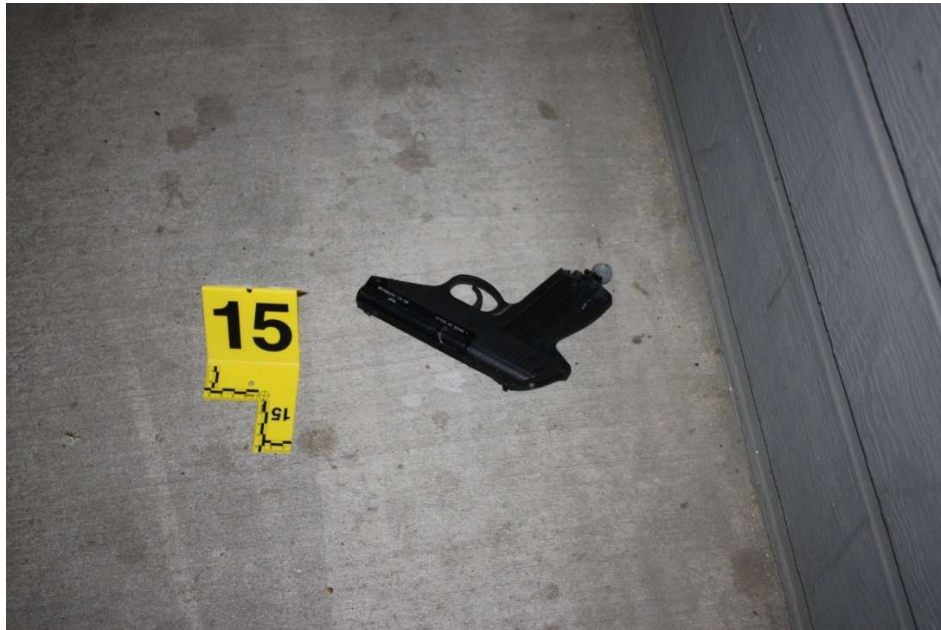
Each deputy noted during their voluntary interviews that they knew Councilman had made threats of injuring law enforcement or engaging in "suicide by cop." Moreover, each deputy stated that once (1) Councilman failed to respond to and comply with the deployment of a less-lethal weapon, (2) brandished his firearm, (3) pointed the firearm at deputies, and (4) failed to comply with orders to drop the firearm, they believed his intent was shoot one or more of the deputies present and they each felt the only way to stop Councilman from injuring them, their fellow deputies, or members of the public was to utilize lethal force.

Councilman was noted as "lying next to a gun" by Deputy Newman on the dispatch log at 13:55:41. Medics were started by dispatch at 13:56:20. Once Councilman was disarmed and handcuffed, deputies conducted a protective sweep of the apartment and provided Councilman with emergency medical aid including direct pressure and chest seals pending the arrival of medical personnel. Medical aid by deputies started after the apartment was cleared beginning at 13:59:02 and continued through 14:03:59 when medics arrived on scene. Chest compressions were noted as initiated in the dispatch log at 14:11:10. Councilman was pronounced dead on scene at 1419 hours.

Sergeant Cuellar began to preserve the scene while medical aid was being rendered. He separated each firing deputy – Newman, Knapp, and Stephens – and assigned them buddy partners per officer-involved shooting protocol. The scene was taped off and deputies initiated a crime scene log.

TCSO Investigations Unit was dispatched to conduct the OIS investigation. Members of the Tuolumne County District Attorney's Office Investigations Bureau were called to the scene to conduct a parallel investigation. This was in accordance with the local Tuolumne County Officer-Involved Shooting Memorandum of Understanding and Protocol.

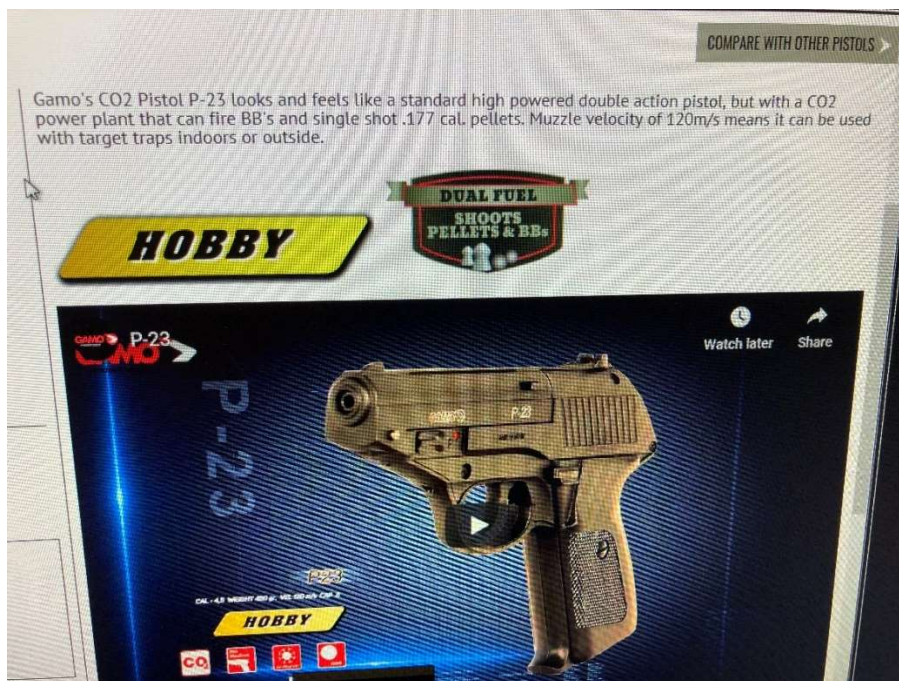
Subsequent investigation revealed that the firearm possessed and brandished by Councilman was an imitation CO2 handgun. The imitation firearm Councilman brandished at deputies pictured below at the scene:



The imitation firearm Councilman brandished at deputies pictured below during evidence processing.



During investigation of the shooting, detectives researched the imitation firearm used by Councilman. A website description of the imitation firearm is featured below, and we noted that the P-23 imitation CO2 Pistol is marketed as “looks and feels like a standard high powered double action pistol.” That description is pictured here:



Additionally, detectives researched real firearms with the same or similar appearance as the imitation firearm used by Councilman. A website photograph of the Sig P232 is featured below.



Interviews of CV, CV1, and CV2 were conducted by detectives. Through those interviews, detectives learned that Councilman had a history of threatening suicide by cop and threatening to shoot it out with law enforcement. CV also reported that Councilman had

ceased taking his mental health medications, had resumed the use of controlled substances, and had been increasingly violent and abusive in the year preceding the shooting.

The autopsy of Councilman found that the cause of his death was multiple gunshot wounds. Major findings included (1) multiple gunshot wounds to the right hand, chest, back, buttock, and calves, and (2) external blunt injury to his right and left thigh. Moreover, forensic pathologist Dr. Michael Ferenc opined that Councilman was holding something in his right hand when he was shot by deputies on scene based on shot trajectory and the injuries that Councilman sustained. Toxicology results showed no measurable amount of alcohol or any controlled substances in Councilman's blood at the time of his death.

All law enforcement officers and personnel who participated in this incident provided voluntary statements to investigators regarding the incident.

LEGAL ANALYSIS

This review was conducted pursuant to the joint protocol between this Office and all Tuolumne County law enforcement agencies, which calls upon the District Attorney to conduct an independent assessment of the circumstances surrounding the use of deadly force.

Possible criminal charges in this case against the involved deputies include murder (Penal Code section 187) or manslaughter (Penal Code section 192). To convict an officer of any of these charges, however, it would be necessary to prove beyond a reasonable doubt that no legal justification existed for the officer's actions. (*People v. Banks* (1976) 67 Cal.App.3d 379, 383 – 384.) Several justifications may apply in any given case, and they are set forth in Penal Code sections 196, 197, and 835a. The justifications pertinent to this case are the use of force by law enforcement officers in self-defense and defense of others, which are found in Penal Code section 196 and 835a.

A criminal complaint cannot be filed by the People unless the offenses alleged can be proved beyond a reasonable doubt. To convict any of the deputies involved in the shooting death of Richard Councilman on May 26, 2020, the People bear the burden of overcoming the presumption of innocence and proving the shooting was not in self-defense, or defense of others, beyond a reasonable doubt. Consequently, the ultimate question in this case is the following: "Can the People disprove lawful self-defense, or defense of others, beyond a reasonable doubt?" Based on the law and evidence in this case, the answer is no.

Applicable Law

Prior to the enactment of AB 392 (which amended Penal Code sections 196 and 835a beginning on January 1, 2020), this shooting would have been judged simply from the subjective belief of the officer at the moment of the shooting. The U.S. Supreme Court has repeatedly directed that we do not second-guess the officer when reviewing such

split-second decisions. However, that is exactly what AB392 and its amendments force us to do.

Penal Code section 835a(a)(1) states:

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

Penal Code section 835a(a)(3) recognizes:

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

Penal Code section 835a(c)(1)(A) permits officers to use deadly force when necessary to protect themselves and others from the “imminent threat of death or serious bodily injury.”

The imminency of the threat of death or serious bodily injury is defined in Penal Code section 835a(e)(2):

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

The totality of circumstances means all facts known to the peace officer at the time, including the conduct of the officer and the subject leading up to the use of deadly force. (Penal Code section 835a(e)(3)).

The applicable criminal jury instruction is set forth in Judicial Council of California Criminal Jury Instruction No. 507 (2020) (“Justifiable Homicide: By Peace Officer”). The instruction states that a peace officer kills, or attempts to kill, in lawful self-defense or defense of another if he or she: “Reasonably believed, based on the totality of circumstances, that the force was necessary to defend against an imminent threat of death or serious bodily injury to the defendant [deputy] or another person.” (CALCRIM No. 507.)

When determining whether the use of force was lawful, we consider “other available resources and techniques if reasonably safe and feasible to an objectively reasonable officer.” (Penal Code section 835a(a)(2).) However, Penal Code section 835a(a)(4) further explains that:

[T]he decision by a peace officer to use force shall be evaluated from the perspective of a reasonable officer in the same situation, based on the totality of the circumstances known to or perceived by the officer at the time, rather than with the benefit of hindsight, and the totality of circumstances shall account for occasions when officers may be forced to make quick judgements about using force.

An officer’s right to self-defense is the same whether the danger is real or merely apparent. (*People v. Jackson* (1965) 233 Cal.App.2d 639, 642.) If the officer’s beliefs were reasonable, the danger does not need to have actually existed. (CALCRIM No. 505.) What constitutes reasonable self-defense or defense of others is controlled by the circumstances. (*Id.*)

The question is whether action was instantly required to avoid death or great bodily injury. In this regard, there is no duty to wait until an injury has been inflicted to be sure that deadly force is indeed appropriate. In *People v. Reed* (1969) 270 Cal.App.2d 37, a robber pointed a gun at his victim and a deputy sheriff arrived on scene of the robbery. (*Id.* at 41.) Before the robber could get off a shot, the deputy fired his weapon, wounding the robber. (*Id.* at 42.) The appellate court remarked that “[s]uch aggressive actions required immediate reaction unless an officer is to be held to the unreasonable requirement that an armed robber be given the courtesy of the first shot.” (*Id.* at 45.)

Further, under Penal Code section 835(d), there is no requirement that a police officer retreat even if safety could have been achieved by retreating. (See also CALCRIM No. 505.) The California Jury Instruction for self-defense expressly states that “a defendant’s belief that he was threatened may be reasonable even if he relied on information that was not true.” (CALCRIM 505.)

Lastly, the California Legislature declared in SB230 that police training and policies “may be considered as a factor in the totality of circumstances in determining whether an officer acted reasonably.” Agency policies “shall not be considered as imposing a legal duty on the officer to act in accordance with such policies and training.” (Senate Bill No. 230 (2019-2020 Reg.Sess.) section 1(g).)

FINDING: THERE IS INSUFFICIENT EVIDENCE TO CHARGE THE INVOLVED DEPUTIES WITH MURDER OR MANSLAUGHTER.

There is insufficient evidence to prove deputies did not have an honest and reasonable belief that Richard Councilman was going to shoot them.

To convict any of the deputies in the death of Councilman, the People would have to prove beyond a reasonable doubt that the involved deputies did not reasonably believe force was necessary to defend against an imminent threat of death or great bodily injury. In this case, there is insufficient evidence to carry that burden for five reasons.

First, there is evidence to support the deputies' belief that Councilman had a proclivity for violence. All responding deputies knew of or were informed of the May 25 domestic violence incident. This information was included in the Watch Commander's Report and several deputies had reviewed Deputy Worthington's report prior to their arrival. In separate interviews, all deputies noted that they were aware that the basis for Councilman's arrest was a domestic violence incident against CV the day prior.

Second, there is evidence to support the deputies' belief that Councilman intended to use violence against responding deputies. Deputies were also aware of Councilman's threats of physical violence towards law enforcement. CV informed responding deputies on May 25 that Councilman had made threats against law enforcement. This information was included in the Watch Commander's Report.

Moreover, on May 26, 2020, CV informed Dispatcher Olson that Councilman "threatened to hurt you guys or to have you guys kill him." CV told Dispatcher Olson that Councilman's threats against law enforcement had been made that day, and reported that Councilman told her, "Yes, he said, 'Call the police. I am ready to die,' which means he is going to try and fight you guys." CV reported that Councilman told her that he would not be going back to jail and that he would "try to hurt them [law enforcement]" if they tried to approach him. This information was conveyed over dispatch to responding deputies. In separate interviews, all deputies noted that they were aware of Councilman's continued threats of violence against law enforcement.

Third, there is evidence to support the deputies' belief that Councilman was potentially armed with weapons before he exited his apartment. Deputies received information on May 25 that Councilman was known to be armed with a knife or a martial arts weapon on his person based on information provided by CV. Additionally, during her 9-1-1 call on May 26, CV told Dispatcher Olson that Councilman was armed, but she did not know with what type of weapon and Councilman refused to tell her when she asked. Councilman told her, "It doesn't matter."

Fourth, there is evidence to support the deputies' belief that Councilman was armed with potentially deadly weapons when he exited his apartment. Upon exiting his apartment, Councilman was observed by all deputies carrying a six-foot-long wooden staff. Moreover, he was observed to have a wooden sword sheathed on his belt. In separate interviews, each deputy noted that they perceived those weapons as ones that could be used to cause great bodily injury or death to them or others if used in a violent way by Councilman.

Fifth, there is evidence to support the deputies' belief that Councilman intended to use lethal force on them when he brandished the imitation firearm at them. Councilman knew

he was surrounded by deputies. He ignored loud and repeated warnings from multiple deputies to drop his weapons, put his hands up, and surrender. Instead, Councilman continued to stand armed with his staff and sword without speaking to deputies.

Councilman was warned that he would be shot with a less-lethal beanbag round, and he did not change his behavior, stance, or offer any communication with deputies. He was shot by the less-lethal beanbag round and his only reaction was a slight movement of his body with the impact of the round.

Then, Councilman reached into a pocket on his person, pulled out what was later discovered to be an imitation firearm, and pointed the imitation firearm in the direction of Deputies Stephens and Newman. Councilman failed to comply with orders to drop the gun. Deputies Stephens and Knapp shot Councilman, who later succumbed to his injuries from that shooting.

Pictures of the imitation firearm are included in the facts section above; however, it must be said that the resemblance of the imitation firearm to the Sig Sauer P232 is more than substantially similar. It is uncanny. Indeed, the P-23 imitation CO2 Pistol is marketed as “looks and feels like a standard high powered double action pistol.” Under Penal Code section 12550, an imitation firearm means “any BB device, toy gun, replica of a firearm, or other device that is so substantially similar in coloration and overall appearance to an existing firearm as to lead a reasonable person to perceive that the device is a firearm.” There was no evidence to suggest that the firearm Councilman pointed at Deputies Stephens and Newman was an imitation. Indeed, the similarity, coloration, and overall appearance of the imitation firearm would lead a reasonable person to perceive that the device was a firearm. All deputies on the breezeway perceived the imitation firearm as a real firearm at the time Councilman removed it from his pocket.

Deputies Stephens and Knapp needed to make a split-second, life-or-death decision based on the information available to them – that Councilman was a violent felon who had expressed his intent to harm or kill law enforcement multiple times that was armed with and pointing a real firearm at responding deputies.

When reviewing the totality of the circumstances here, it is also required that we review the pre-shoot tactical decisions of the deputies and determine whether those decisions and actions artificially and significantly increased the probability that unnecessary deadly force would be used.

In the present case, there is insufficient evidence to show that the pre-shoot tactical decisions of the deputies artificially and significantly increased the probability of deadly force. Indeed, the opposite is true. Deputies took a substantial amount of time making the area around the Councilman apartment safe including evacuating surrounding apartments. From the time of first arrival to the time of the making of announcements, approximately thirty-six minutes passed. During that time, deputies on the breezeway had tactical conversations about who would handle the less-lethal and lethal force options, which less-lethal force options would be used when, and where

Based on the totality of circumstances, there is insufficient evidence to prove Deputies Stephens and Knapp did not have an honest and reasonable belief that Councilman was going to shoot them or their fellow deputies.

There is insufficient evidence to prove the immediate use of force was not necessary to defend against the perceived danger that Councilman posed to the deputies.

There were no less-lethal options for Deputies Stephens and Knapp to defend themselves and their fellow officers from their perceived threat of being shot by Councilman, making the firing of their weapons reasonably necessary. Councilman had failed to comply with all lawful orders, which resulted in the deployment of a less-lethal beanbag shot. Councilman's failure to comply continued and he escalated the situation by pulling out an imitation firearm and pointing it at deputies. Less-lethal force like a beanbag gun or taser would have been ineffective against what they perceived as the threat of being shot by a firearm. Under the circumstances of this case, the use of firearms was reasonable, necessary, and proportional to any imminent threat the deputies may have perceived.

Additionally, any claims that the deputies could have retreated or reached a place of safety instead of shooting does not affect the conclusion of this report for two reasons. First, those who act in self-defense may stand their ground and are not required to retreat. (CALCRIM 505.) Moreover, the potential for the deputies to safely retreat is not supported by the evidence. The space in which this encounter occurred was relatively small and surrounded by apartments with, at the most, minimal of cover. Moreover, deputies would have had to flee down a flight of stairs to retreat from Councilman. Consequently, there is insufficient evidence to prove beyond a reasonable doubt that the officers did not reasonably believe the use of force was necessary.

There is insufficient evidence to prove the deputies used more force than reasonably necessary.

Councilman ignored repeated commands to drop his weapons, put his hands up, and surrender while facing uniformed police armed with handguns, tasers, and tactical rifles. Based on the circumstances, there could not have been any question in his mind that the police were there to arrest him and that they might use lethal force if he threatened them. Moreover, Councilman was present during the making of CV's 9-1-1 call and was aware that law enforcement would be responding to the scene.

Despite this knowledge, Councilman failed to comply with the deputies' orders and was shot by the less-lethal beanbag shotgun round. He had little to no reaction except to then pull out an imitation firearm from his pocket and point it at the deputies. Of note, Councilman would have needed to come closer to the deputies (within ten feet) while armed with what deputies perceived to be loaded and operable firearm to use Deputy Imlach's taser. At this point, Councilman had elevated the encounter to such an extent

that available less-lethal options (a taser and additional beanbag rounds) were not feasible to eliminate the imminent threat of great bodily injury or death.

Councilman failed to comply with deputies' orders to drop his gun and he was shot. Deputies Stephens and Knapp both demonstrated restraint when using their lethal weapons. Deputy Stephens fired only three of the twenty-one available rounds in his handgun while Deputy Knapp fired only five of the thirty available rounds in his rifle. Both noted in their interviews that they ceased firing when they believed Councilman no longer posed a threat.

Consequently, there is insufficient evidence to prove the deputies used more force than reasonably necessary.

Compliance with agencies policies as a factor in the totality of the circumstances in determining whether deputies acted reasonably.

Use of force by deputies employed by the Tuolumne County Sheriff's Office is governed by Policy 300 – Use of Force in the Tuolumne County Sheriff's Office Policy Manual.² Policy 300.4 and Penal Code section 835a note that where feasible, deputies shall make reasonable efforts to identify themselves as peace officers and warn that deadly force may be used, unless the deputy has objectively reasonable grounds to believe the person is aware of those facts.

In the present case, there is no evidence that Deputies Stephens and Knapp warned Councilman that they would use deadly force. However, there were objectively reasonable grounds to believe Councilman was aware of those facts. Deputies had identified themselves through announcements, a less-lethal weapon had already been deployed with no change in circumstance, and three other deputies were armed with weapons pointing at Councilman. Based on the circumstances, there could not have been any question in Councilman's mind that the police were there to arrest him and that they might use lethal force if he threatened them. Consequently, the failure of Deputies Stephens and Knapp to warn Councilman that they would use deadly force would not change the conclusion of this report.

A review of the other portions of Policy 300 did not reveal any other questions related to agency policy compliance. Policy 300 mirrors and is consistent with the law as it stands today. As such, it appears likely that a trier of fact (such as a jury in a criminal trial charging the involved officers with a crime), would find the operation to apprehend Councilman was consistent with Tuolumne County Sheriff's Office policies, mission, Penal Code section 835a, and Government code section 7268.

Based on the above information and analysis, the compliance of Deputies Stephens and Knapp with their agency's policies does not affect the evidence to establish the legal elements of self-defense.

² Policy 300, Tuolumne County So Policy Manual. Accessed at <https://www.tuolumnecounty.ca.gov/DocumentCenter/View/12131/TCSO-Policy-Manual>.

CONCLUSION

The deputies of the Tuolumne County Sheriff's Office, including those involved in this case, are dedicated public servants who work tirelessly to protect the public and regularly put their lives in harm's way to do so.

Deputies assigned to the apprehension of Richard Councilman faced a particularly difficult task. They knew he was a suspect in felony domestic violence case, they knew him to be regularly armed with a knife or some type of martial arts weapon, and they reasonably believed he would fight or gravely injure law enforcement officers to avoid being apprehended.

We know that domestic violence calls and threats of suicide by cop are some of the most dangerous for our law enforcement community. Indeed, a 2016 study found that 14% of fatalities resulting from the use of lethal force by on-duty law enforcement officers from 2009 to 2012 in 17 states involved intimate partner violence and 18% were suspected "suicide by cop" incidents.³

Our investigation has determined that Richard Martin Councilman Jr. was fatally shot by Tuolumne County Sheriff's Office Deputies Stephens and Knapp during the attempted apprehension of Councilman for felony domestic violence. Councilman exited his apartment armed with weapons, was noncompliant with less-lethal force efforts, and then brandished what deputies perceived as a real firearm and pointed it at the officers. He remained noncompliant to orders to drop his firearm and continued to point the firearm directly at deputies in a threatening manner. It was at this point that lethal force was used to end the imminent threat of great bodily injury or death to the deputies.

Under the totality of the circumstances known to Deputies Stephens and Knapp at that time of the shooting, the only reasonable interpretation of the evidence supports that the use of self-defense by Deputies Stephens and Knapp was lawful.

Their conduct under any interpretation of the law does not rise to the level of criminal conduct that warrants the filing of criminal charges. We now consider this matter closed.

Respectfully submitted,



CASSANDRA A. JENECKE
District Attorney

³ DeGue S, Fowler KA, Calkins C. Deaths Due to Use of Lethal Force by Law Enforcement: Findings From the National Violent Death Reporting System, 17 U.S. States, 2009-2012. Am J Prev Med. 2016 Nov. Accessed at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6080222/>.