

# INTEROFFICE MEMORANDUM

**DATE:** February 24, 2012      **PHONE:** (760) 552-6960

**FROM:** Reid L Robsahm  
Lead Deputy District Attorney  
Victorville Juvenile Division

**THRU:** Karen Bell  
Chief Deputy District Attorney  
Juvenile Division

**AND:** Clark Hansen  
Chief Deputy District Attorney  
Central Division

**TO:** Dennis Christy  
Assistant District Attorney-Criminal Operations



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**SUBJECT: Officer Involved Fatality:** Frank Cleo Sutphin; 9-13-1990; Age 19  
**Location:** 307 S. Arrowhead Ave, San Bernardino, CA, 92410.  
**Date of Incident:** October 16-17, 2009.  
**San Bernardino City Police Case #:** 2009-33411  
**San Bernardino County District Attorney Star:** 2011-45777  
**Investigated by:** San Bernardino City Police, Homicide Unit; Sgt. Pete Higgins, Case Agent.  
**Involved officers:** San Bernardino City Police officers; Sgt. Travis Walker; Officer Joey Zink; Officer Von Verbanic; and Sgt Eric Fyvie.

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The following facts are derived from interviews of the Involved Parties, Witnesses, Emergency personnel, St. Bernadine's Hospital personnel; Pathologist Frank Sheridan and other information, including photos and interview discs, as gathered by the San Bernardino City Police Department, Detectives and Homicide Unit, during the course of their investigation.

## BACKGROUND INFORMATION

The deceased in this matter is Frank Cleo Sutphin; 9-13-1990; Age 19. He was a former resident of Lehman Board and Care and came to live at the incident location on August 10, 2009. He was diagnosed with Paranoid Schizophrenia and Depression and was to be taking Depakote and Risperidone.

Mr. Sutphin was born to a mother who used drugs while she was pregnant and then continued to use after he was born. He suffered severe neglect and was left alone for days at a time as an infant. He had been in and out of foster care since the age of four and had severe abandonment issues. He attended special education classes while in school. His medical record indicates that he has a history of anger outbursts, suicidal ideation and suicide attempts. Further, he made verbal threats of suicide and homicide but denied he ever had any intent / plan to follow through. (This last entry was dated March 12, 2009)

### SUMMARY OF INVESTIGATION

Multiple 911 calls were received by S.B.P.D. Dispatchers at approximately 23:31:45 hours from the Orchid Court Residential Board and care facility located at 307 South Arrowhead in San Bernardino California. The calls indicated that 3 patients (Witness One, Frank Sutphin and a black male adult, later identified as Witness Two) were fighting with each other and that one client was armed with scissors and whips. There was blood and it was unknown if it was stabbing. Later, it was noted in the call history that the client with the scissors was Frank Supton. (sp.) It was also noted in the call history that "Fire" was staging for a possible stabbing. Multiple officers were dispatched to the location.

As the investigation unfolded, the black male adult was identified as Witness Two and was detained without incident in a patrol car. Officers contacted Frank Sutphin at the front grass area of the Orchid Court Property and he became uncooperative and fought with the officers. Three or four officers were not able to subdue Mr. Sutphin with control holds because he was very strong. Officers used a Taser device to detain Mr. Sutphin and he was eventually subdued and handcuffed. The Taser initially did not have a significant effect on Mr. Sutphin and Officer Zinc felt that he did not have a good connection with one of the darts. In addition, the Taser was disengaged when Sgt. Walker was shocked by the wires that were crossing his arm, and then the Taser was re engaged.

After being taken to the ground and handcuffed it was observed that Mr. Sutphin was having trouble breathing. Officers prepared to do CPR and gave Mr. Sutphin a sternum rub, and he was observed breathing and had a carotid and radial pulse. Medical aid was initially requested and then asked to expedite because Mr. Sutphin was having labored breathing. Officers did not punch, kick or strike Mr. Sutphin. After being taken to St. Bernadine's Hospital, and receiving emergency treatment, Frank Sutphin was pronounced deceased at 0043 hours on October 17, 2009. Mr. Sutphin's rectal temperature taken about an hour after death was 106.2 degrees and a second post mortem temperature was taken at approximately 0300 hours and it was still elevated at 101 degrees. Sgt. Pete Higgins was assigned to be the Case Agent on this Death Investigation.

### SUMMARY OF OFFICER VON VERBANIC'S INTERVIEW

Officer Von Verbanic was interviewed and gave the following voluntary statement: He

stated that he was dispatched to an altercation involving three subjects, one was armed with a whip and scissors and one of the subjects was bloody or bleeding. Mr. Sutphin was identified by one of the employees at Orchid Court as being involved in the altercation and had left the area. Officer Verbanic then saw Mr. Sutphin walking toward him with a gas mask on his face. He was told to sit down and remove the mask and after doing so, blood was seen on the left side of his face beneath his eye. While talking to Mr. Sutphin, he then said **“fuck this, I am out of here,”** jumped up and started to walk away. Officer Verbanic grabbed Mr. Sutphin by the shirt to prevent him from leaving. Mr. Sutphin said **“fuck it, restrain me, do what you wanna do”** and **“do what you need to do”** while trying to pull away from Officer Verbanic.

Officer Verbanic then tried to control Mr. Sutphin’s left arm with a wrist twist and Sgt. Walker was trying to control the right arm. Mr. Sutphin was able to get his left arm up and away from Officer Verbanic. Officer Zink warned that he was going to deploy the Taser. Mr. Sutphin was still not complying, became more aggressive and the attempts to control his arms were not fully effective. As the Taser was deployed, Mr. Sutphin said **“I’m sadomasochistic [and] I like it.”** The Taser was deployed a second time and seemed to have an effect on Mr. Sutphin. He was lowered to the ground when his knees buckled. Officer Verbanic was able to maintain control of Mr. Sutphin’s left arm and a cuff was placed on it and then another officer was able to pull his right arm out and Mr. Sutphin was cuffed. Medical aid was immediately called and Mr. Sutphin was rolled to his side because he appeared to be holding his breath or not breathing. When Mr. Sutphin was rolled on his side he exhaled and started breathing and a pulse was located by Sgt. Fyvie.

#### SUMMARY OF SGT. FILSON’S INTERVIEW

Sgt. Filson was interviewed and gave the following voluntary statement: He responded to Orchid Court where other officers were already on scene. Mr. Sutphin was sitting on a planter and had an injury to his face. Mr. Sutphin suddenly got up, became more aggressive and tried to walk away during the investigation. Officer Verbanic grabbed Mr. Sutphin’s left arm and Sgt. Walker grabbed his right arm to control him. The resistance by Mr. Sutphin increased to such a point that Officer Zink pulled out his Taser and told him that he needed to calm down and sit down or he would be tased. Mr. Sutphin stated that he was a sadomasochist and that he liked it. The warnings by Officer Zink continued and Mr. Sutphin continued resisting, was tased and forced to the ground. Mr. Sutphin then started to resist again and was starting to overpower Officer Verbanic and Sgt. Walker. Mr. Sutphin was tased on the leg by a direct contact and handcuffed. Mr. Sutphin was rolled onto his side and medical aid was called due to his breathing difficulty. Sgt. Fyvie checked for a pulse and Sgt Filson observed Mr. Sutphin had labored breathing. Sgt Filson related that the only force used was the restraints and the Taser device.

#### SUMMARY OF SGT. TRAVIS WALKER’S INTERVIEW

Sgt. Walker was interviewed and gave the following voluntary statement: He was the first unit to arrive and spoke to a white male (Witness One) who stated he was assaulted by his roommate (a black male adult). Sgt. Walker then also saw Mr. Sutphin wearing the gas mask on his face and blood on his face. After detaining a black male

adult (Witness Two ) near the rear of the property, Sgt. Walker then returned to the front of the property and saw Mr. Sutphin walk toward Officer Verbanic. Officer Verbanic asked Mr. Sutphin to have a seat and he complied but as he was being questioned he sprang to his feet and said **“I’m not sticking around for this, I gotta go, if you want me to stay you’ll have to restrain me.”** Officer Verbanic reached out, grabbed him and Mr. Sutphin became very rigid taking a defensive posture [as if he] might strike Officer Verbanic. Sgt. Walker grabbed his right arm and Officer Verbanic grabbed his left arm. They tried to apply control holds and both had difficulty and it appeared that Mr. Sutphin was getting stronger. Officer Zink warned he was going to deploy the Taser and they were then able to get his arms behind his back. Sgt. Walker removed his cuffs when Mr. Sutphin rotated his arm and but were unable to cuff him.

Officer Zink deployed the Taser which had no effect on Mr. Sutphin and it appeared he was fighting the effects of the Taser. Officers were telling him to get on the ground and he said **“I’m a sadomasochist, give me more, I enjoy this.”** Sgt. Walker attempted a wrist lock hold but Mr. Sutphin pulled away until they were able to take him to the ground on his stomach with his right arm underneath him. (Mr. Sutphin did not strike his head and was not slammed to the ground) Mr. Sutphin was still resisting the effects of the Taser and grunting like he was fighting the effects. Sgt. Walker felt that the Taser was working intermittently and that perhaps one barb was not making good contact. Officer Zink then used the Taser to make a cross contact use but Sgt. Walker was accidentally shocked and caused him to disengage momentarily. It took a lot of effort to get Mr. Sutphin’s right arm from under his body and they were able to do so after the Taser was deployed another time and Mr. Sutphin was cuffed.

Mr. Sutphin was not responsive although his eyes were open and he was breathing heavily by gulping air. Mr. Sutphin appeared to calm down and an officer stated that he was not breathing. At first, a pulse was not located and officers were preparing to do CPR when both a radial and a carotid pulse were felt. Officer Zink did a sternum rub and Mr. Sutphin was breathing and he was placed on his side to maintain an open airway until paramedics arrived.

#### SUMMARY OF SGT. ERIC FYVIE’S INTERVIEW

Sgt. Fyvie was interviewed and gave the following voluntary statement: He responded to a call for service with three subjects, one armed with a pair of scissors. He saw Sgt Filson, Sgt. Walker and Officer Zink already on scene. (Officer Verbanic arrived after he did.) After Witness Two was detained, Sgt. Fyvie heard Officer Verbanic giving commands to Mr. Sutphin who had dried blood on his face by his nose. Mr. Sutphin was not obeying commands and attempting to pull away from Officer Verbanic. Mr. Sutphin said **“go ahead and do what you’re gonna do, restrain me.”** Sgt Walker then grabbed Mr. Sutphin’s right wrist and Sgt. Fyvie grabbed his right shoulder and bicep. Mr. Sutphin kept resisting, was able to raise his left arm and attempted to pull away from Officer Verbanic.

Sgt. Fyvie felt Mr. Sutphin was abnormally strong and then Mr. Sutphin said that he was a **“sadomasochist and that he liked this shit.”** Officer Zink deployed the Taser

which had no effect the first time. After being deployed a second time, Mr. Sutphin appeared shocked and was pushed to the ground facedown, handcuffed and then rolled over. Sgt. Fyvie then checked Mr. Sutphin's labored breathing, a pulse was found on the carotid artery. Medical aid responded and took possession of Mr. Sutphin.

#### SUMMARY OF OFFICER JOEY ZINC'S INTERVIEW

Officer Zink was interviewed and gave the following voluntary statement: He was dispatched to a fight at Orchid Court involving several subjects and weapons may have been used including a whip and scissors. He knew Orchid Court was a facility housing mentally challenged people and had been on previous 5150 calls there. Officer Zink was responsible for detaining a black male (Witness One ) and placing him in a patrol vehicle. Officer Zink saw Officer Verbanic with Mr. Sutphin who had been detained earlier and was seated near the front of the complex. Mr. Sutphin rose to his feet and appeared to quickly walk away after being told to remain there. Mr. Sutphin stated in a defiant voice something like **"you can cuff me."** Officer Verbanic grabbed Mr. Sutphin by his shirt to prevent him from leaving and tried a control hold. Sgt. Walker was on his right side attempting to place Mr. Sutphin in a control hold.

Officer Zink was not sure if Mr. Sutphin had been searched and feared that he may still have the reported weapons on him. Officer Zink went to assist the other officers, removed his Taser and warned Mr. Sutphin he would use the Taser. Mr. Sutphin did not respond so Officer Zink turned on the taser light, which is an LED light, to deter Mr. Sutphin and force compliance. It appeared to Officer Zink that the officers had control of Mr. Sutphin and he began to holster his Taser when Mr. Sutphin appeared to be escaping the control holds. Mr. Sutphin was not complying with commands or pain compliance holds. Officer Zink fired the Taser hitting Mr. Sutphin in the upper chest area. Officer Zink heard a loud arching sound indicating a poor attachment. Mr. Sutphin did not appear affected and was still attempting to pull away. Mr. Sutphin stated that he was a sadomasochist and **"I like this."**

Officers were able to put Mr. Sutphin on the ground when it seemed the Taser had a good reconnect and then it appeared that the Taser disconnected again. Mr. Sutphin was on the ground with his right arm underneath him and Officer Zink was still concerned that Mr. Sutphin may have a weapon. Officer Zink applied the Taser to the back of Mr. Sutphin's thigh directly and it was at this point that Sgt. Walker received a jolt. Officer Zink pulled the Taser away and reapplied it after Sgt. Walker was able to disengage the wires. The arm was removed from under Mr. Sutphin and he was cuffed. Officer Zink rolled Mr. Sutphin on his side so that he could breathe and straddled him to prevent him from moving. Officer Zink noticed Mr. Sutphin was not breathing and Sgt. Fyvie indicated that they would do CPR. Officer Zink did a sternum rub to stimulate breathing. Mr. Sutphin was breathing, was rolled on his side to avoid choking if he were to vomit. Paramedics were called to the scene. Officer Zink collected the wires and cartridge from the use of the Taser and turned the Taser and the wires over to Detective O'Neal.

#### STATEMENT BY WITNESS ONE

Mr. Sutphin was a friend and resided at the Orchid board and care facility. Witness One

had a roommate named Witness Two who threatened Witness One. Mr. Sutphin was helping Witness One move out of his room when Witness Two assaulted him and then got in a fight with Mr. Sutphin. After running to get help, Witness One observed Mr. Sutphin and Witness Two on the ground and saw Mr. Sutphin was bleeding near his eye. Mr. Sutphin appeared upset, kicked the walls and was extremely angry.

One of the staff members accused Mr. Sutphin of using a whip [during the fight] and Mr. Sutphin got frustrated and walked away. He and Mr. Sutphin were waiting for the police to arrive and as Mr. Sutphin was talking to the police a staff member interrupted and brought up his whips again. Mr. Sutphin got frustrated and started to walk away when he was instructed by an officer to stop and Mr. Sutphin said **“is walking illegal?”** The officer tried to restrain Mr. Sutphin but he was struggling and another officer tried to assist but Mr. Sutphin continued to resist and struggle with the officers.

Witness One believed that 5 officers were trying to subdue Mr. Sutphin and then an additional officer used a Taser on him. Mr. Sutphin was warned several times during the entire confrontation to stop resisting and if he stopped he would not be tased. Mr. Sutphin was tased three times (a long burst and two shorter bursts) but he continued to resist. The officers laid Mr. Sutphin carefully and softly on the ground. Since Mr. Sutphin continued to resist he was tased the two more times. After being tased Mr. Sutphin was unconscious and shaking.

#### STATEMENT BY WITNESS TWO

Witness Two explained that he is a resident of the Orchid Court Board and Care facility. He was rooming with Witness One and they were having a dispute over the cleanliness of the room they share. He tried to slap Witness One in the face. Mr. Sutphin came to the aid of his friend and said **“don’t fucking touch him.”**

Witness Two then hit Mr. Sutphin 3-4 times in the face with his fist, when staff came and separated them. Witness Two waited in his room until the police arrived and then was handcuffed and taken to a police unit. He did not see any incident between Mr. Sutphin and the police.

#### STATEMENT BY WITNESS THREE

She is employed by the Orchid Court as a mental health worker. She knows Mr. Sutphin; he is a schizophrenic, has suicidal tendencies and has whips and sex toys. She had been informed there was an argument and Witness One wanted to move into a room with Mr. Sutphin. Witness One reported that Witness Two and Mr. Sutphin were fighting and she saw Witness Two punch Mr. Sutphin in the face area. She yelled at them to stop and Witness Two ran into the room and locked the door. Mr. Sutphin was very angry and kept saying; **“look what the fuck he did to my face.”** Witness Three could see blood around the eye, nose and lip of Mr. Sutphin. She called the police and when they arrived she escorted them back to the room where Witness Two was located. As she returned to the front area she saw 4-5 officers trying to handcuff Mr. Sutphin. She could see that he was resisting them and trying to keep his arms from going behind his back. She heard the pop of the Taser, saw Mr. Sutphin shake and moan and he was

cuffed. Mr. Sutphin's eyes and mouth were open and he made a snorting sound. An officer stated that he thought he was ok and right after that an ambulance showed up. It appeared to her that the officers attempted to make sure that Mr. Sutphin was ok after he was Tased.

#### STATEMENT BY WITNESS FOUR

She is employed by Orchid Court as a mental health worker. She knows Mr. Sutphin and believes that he is a diagnosed schizophrenic and takes medication. There was a commotion in the gazebo area of the property and she observed Mr. Sutphin to be unusually agitated. He told her that there was a dispute and he wanted to change rooms. Mr. Sutphin was told that he would have to wait. After checking on the facility she returned to the front area and saw Mr. Sutphin lying on the grass area with an officer putting his hands behind his back. Mr. Sutphin's eyes were open and he appeared to snore. She saw the paramedics place him on a stretcher and begin CPR and take him away.

#### STATEMENT BY WITNESS FIVE

He is employed by Orchid Court as a cook. He heard Mr. Sutphin and Witness Two fighting and he went to the rear of the property. He did not see the fight but saw the two of them arguing and both appeared upset. Other staff took Mr. Sutphin to the office and Witness Two went back in his room. Mr. Sutphin was extremely upset because Witness Two was trying to kill him. Witness Five remained in the room with Witness Two and did not see the incident with Mr. Sutphin and the officers. When he returned to the front area Mr. Sutphin was being treated by paramedics and taken away.

#### STATEMENT BY WITNESS SIX

She is employed by Orchid Court as a mental health worker and was advised by Witness One that Mr. Sutphin and Witness Two were fighting. When she got to the unit other staff members were present and the fight was over. Mr. Sutphin had a bloody mouth with blood on his teeth and blood next to his nose by his left eye. Mr. Sutphin came up to the front area of Orchid Court and then he left the area for about 6-8 minutes. When the police arrived, Mr. Sutphin was arguing with them and not cooperating. The officers advised Mr. Sutphin he would have to cooperate or he would get tased. Mr. Sutphin's demeanor was angry and argumentative and when the officers tried to handcuff him he said "**No, No**" and started fighting and struggling. The officers were having a hard time trying to cuff Mr. Sutphin because he was fighting. He was pulling away and fighting. Witness Six did not see Mr. Sutphin get tased because she was dealing with other clients. She did see Mr. Sutphin handcuffed when she returned and he looked like he was sleeping.

#### STATEMENT BY WITNESS SEVEN

She is employed by the Orchid Court as program director. She was informed that there was a fight and she called the police. They arrived quickly and she directed them to the back of the property. She then saw Mr. Sutphin who was bleeding on his face near his nose and he was saying that he "**wanted that guy [Witness Two] arrested.**" Mr.

Sutphin wanted a room change but she would not allow it because Mr. Sutphin admitted to her that he used drugs and had a narcotic history.

After Witness Two was detained, Witness Seven informed a police officer that they needed to look into things further because Mr. Sutphin and Witness One conspire against Witness Two. Mr. Sutphin told her to mind her own business, tried to hit her, got upset and left the property. Witness Seven did not see Mr. Sutphin with any weapons but knows that he likes weapons. When Mr. Sutphin returned, the police informed him they needed to talk to him but he said “no.” Mr. Sutphin was told several times that the police needed to talk to him but he tried to walk away. Mr. Sutphin was grabbed by the police and he started pushing, pulling, and wrestling as hard as he could. He was very agitated, angry and out of control. It took three officers to control him as they were telling him to calm down. The officers could not handcuff him because of the way he was struggling.

Mr. Sutphin was warned over and over he would have to calm down or he would be tased. The whole time this was going on, Mr. Sutphin was hollering and objecting and he was then tased and handcuffed. The first time Mr. Sutphin was tased it did not work and one officer was tasered. She heard this black officer yell “oww,” and then Mr. Sutphin was tased again. The officers checked and watched Mr. Sutphin the whole time after being tased. They also checked his pulse and when they mentioned that he was not breathing, the ambulance was there within just a minute.

#### SUMMARY OF INFORMATION FROM LT ROBINSON REGARDING THE TASER REPORT OF USE AND DEPARTMENT POLICES

Officer Zink used an X26 Taser manufactured by Taser International. Lt. Dario Robinson trains S.B.P.D. officers. He received his training from Taser International. Lt. Robinson downloaded the Taser use information report from Officer Zink’s Taser. The Taser International Device in this case was a Model X26, Serial # X00-325422. It was activated during this incident with Mr. Sutphin four times for the duration of 5, 8, 5, and 5 seconds in sequence.

Lt. Robinson explained how the X26 operates and the training that officers receive. The X26 deploys two darts. Electricity flows between the two darts using the subject’s body to “complete the circuit.” The taser will operate even if attached only to clothing so long as both darts are within a combined 2-inches of the body—such as when both darts are attached to clothing but each dart is within one-inch of the body or such as when one dart is attached to the body and the other to clothing but within two-inches of the body. If a subject is moving, a dart may detach from the body or move beyond the combined two-inches. The taser is then ineffective unless the dart reattaches to the body or moves within the combined 2-inches. Each pull of the trigger gives a minimum 5-second charge. It is longer only if the officer keeps the trigger depressed. It is shorter only if the officer manually turns off the taser gun—which officers are normally advised not to do for safety purposes. A taser charge causes involuntary muscle spasms. There is no residual effect when the charge ends and the subject immediately and completely regains composure.

Taser International advises law enforcement to make reasonable efforts to minimize repetitive or continuous use of a taser but does not prohibit repetitive and continuous use. Taser International offers a general warning that adverse physiological or metabolic effect may increase the risk of death or serious injury but likens a 15 second charge as “comparable to or less than changes expected from physical exertion similar to struggling, resistance, fighting, fleeing, or from the application of some other force tools or techniques.” Taser International warns that prior alcohol or drug use may render a person physiologically or metabolically “compromised” and any change in their condition could contribute to death or serious injury.

Taser International issued training bulletin 12.0-04 in 2005 warning against repeated, prolonged, extended or uninterrupted discharges or extensive multiple discharges whenever practicable to minimize potential over-exertion or impairment of breathing, particularly to people showing signs of delirium. More recently, however, training bulletin 14.0-03, issued on April 28, 2008, superseded 12.0-04 and stated that there is no evidence that taser use impairs breathing or causes respiratory acidosis. Studies also showed that a 15-second exposure did not produce any metabolic acidosis and a preponderance of the data suggests that tasers do not cause ventricular fibrillation. These recent bulletins “remove[d] the prior warnings regarding breathing impairment and continuous exposure risks. These warnings continue to emphasize the importance of minimizing any application of force or restraint, cuffing under power, and minimizing objectively reasonable force and restraint to accomplish lawful objectives.”

The Policy in place at the time of Mr. Sutphin’s death was chp. 37, procedure 9, revised 10-23-03. This Policy stated, in part, that;

1. The taser is a less lethal weapon used to subdue physically combative persons in dangerous situations without serious injury to the subject, involved officers or other persons.
2. Dart contacts will not be intentionally aimed at or fired against the subjects head, neck, or genitals.
3. The Taser should be used only on combative subjects who manifest an danger to themselves or others and when;
  - a. Lethal force does not appear necessary or justified
  - b. Other attempts of control have been or are presumed to be ineffective.
  - c. Approaching and physically contacting the subject will be hazardous.
  - d. Use of the Taser will not create additional hazards to the suspect, involved officers or others.
4. Once in custody the subject shall be transported to the ...emergency room.

THE AUTOPSY REVEALS THE CAUSE OF MR. SUTPHIN’S DEATH TO BE: CARDIAC ARREST DURING PSYCHOTIC EPISODE AND STRUGGLE WITH POLICE OFFICERS INVOLVING USE OF CONDUCTED ENERGY DEVICE, MINUTES.

Mr. Sutphin was in full cardiac arrest when the paramedics arrived and advanced cardiac life support was initiated. He was transported to St. Bernadine’s Hospital without

change in condition. Mr. Sutphin was pronounced dead at St. Bernadine's at 0043 hours on October 17, 2009. An autopsy was performed on Frank Cleo Sutphin on October 21, 2009, by the San Bernardino County Sheriff's Department – Coroner's Division, by Forensic Pathologist Dr. Frank Sheridan. Attending the procedure were Sgt. Pete Higgins and Forensic Specialist Ricardo Tomboc from the San Bernardino City Police Department. The Diagnosis is:

- I. 19 year old male with long history of mental illness; cardiac arrest during altercation with Police officers.
  - A. Past history of schizophrenia and manic depressive disorder, on treatment with risperdal and depakote.
    1. Toxicological examination negative for these medications.
  - B. Abnormal and "borderline" ECG reports in medical records from 2009.
    1. Sinus bradycardia, premature atrial contractions, ST and T wave abnormalities reported.
    2. No evidence of cardiac disease at autopsy.
  - C. Conducted energy device used during altercation, per reports (four shocks delivered).
    1. Two punctuate marks, left anterior chest wall consistent with ECD darts.
    2. Penetration of darts through skin, subcutaneous fat and partially into chest musculature.
    3. No penetration of darts into chest cavity.
  - D. Pericardiocentesis performed in emergency department.
    1. Punctuate mark in skin of upper epigastrium.
    2. Two punctuate wounds through anterior pericardium and into the right ventricular wall.
    3. Bloodstained pericardial effusion.
  - E. Rectal temperature of 106.2 degrees Fahrenheit recorded in the emergency room about an hour after pronouncement of death.
  - F. Blunt force trauma.
    1. Superficial contusions/abrasions of face, abdomen, left upper extremity and lower extremities.
    2. No evidence of neck compression, compressional asphyxia, or other significant blunt force trauma.
  - G. Toxicological examination (antemortem blood) negative for alcohol and drugs (apart from lidocaine administered during ACLS procedures).
  - H. Microscopic examination negative.

NOTE: THE MANNER OF DEATH WAS UNDETERMINED AND THE FOLLOWING COMMENT WAS ATTACHED; The exact cause and mechanisms of death are not determined with certainty. Multiple factors are involved in this case, including psychotic illness with poor compliance with medication, hyperthermia, a physical struggle and use of a conducted energy device, and a history of possible cardiac disease. Also, and for the same reasons, the manner of death cannot be determined.

Further discussion with the Pathologist revealed that he felt that there was a “multiplicity of factors that lead to this death and there was no way to find out the cause of death.” It would be “impossible to pin it down.” Dr. Sheridan said that the decedents past EKG’s were relevant because they revealed that Mr. Sutphin had a potential conduction disorder with the electrical impulses that his heart receives. He also stated that it is not something that can be seen and we will never know. Finally, the Dr. stated that we “don’t know if the taser contributed [to the death] or not.”

Dr. Sheridan felt that Mr. Sutphin may have been suffering from a condition known as “Excited Delirium.” He explained that there is some controversy with the use of this term and in fact it is not listed in the DSM IV. Some MD’s recognize it when a subject is very agitated, delirious, violent, and hypothermic and needs to be restrained. It would not be uncommon to see an “Excited Delirium” in a patient with a history of schizophrenia and not on medications. Dr. Sheridan did mention that it is much more common in patients that have also been using cocaine and methamphetamine.

Dr. Sheridan noted that this case may have been much more complicated because the taser darts hit the chest and his autopsy revealed that there were punctures of the heart. The darts did not puncture the heart, and in fact the Pericardiocentesis procedure done at the hospital was the cause of the heart injuries. These injuries were potentially fatal and Mr. Sutphin was on his last legs and was going to die anyway. The Pericardiocentesis procedure was a desperate last ditch maneuver to try and save Mr. Sutphin’s life.

#### STATEMENT OF APPLICABLE LAW

Involuntary Manslaughter---PC Section 192(b) - Cal Crim Section 581 defines Involuntary Manslaughter as follows:

1. A Person committed a crime that posed a high risk of death or great bodily injury because of the way in which it was committed or committed a lawful act, but acted with criminal negligence, AND
2. A Person’s acts caused the death of another person

An act cause the death if the death is the direct, natural, and probably consequence of the act and the death would not have happened without the act. A natural and probably consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes.

Assault and Battery by Officer---Third Degree-----Penal Code 149 states in relevant part: Every public officer who, under color of authority, without lawful necessity, assaults or beats any person is...

#### Penal Code section 834a: Duty to Refrain From Resisting Arrest

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

Penal Code section 835: Restraint Limited to Necessity

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

Arrest or Detention-Duty to Submit. Penal Code section 835a: Use of Reasonable Force

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

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

Penal Code section 836(a): Peace Officer's Authority to Arrest . . . .

A peace officer may arrest a person . . . without a warrant, may arrest a person whenever any of the following circumstances occur:

- (1) The officer has probable cause to believe that the person to be arrested has committed a public offense in the officer's presence.
- (2) The person arrested has committed a felony, although not in the officer's presence.
- (3) The officer has probable cause to believe that the person to be arrested has committed a felony, whether or not a felony, in fact, has been committed.

If a person knows, or reasonably should know, that a peace officer is arresting or detaining him or her, the person must not use force or any weapon to resist an officer's use of reasonable force. CALCRIM No. 2670. Modified.

Penal Code section 148(a)(1): Resisting or Obstructing a Peace Officer

Every person who willfully resists, delays, or obstructs a . . . peace officer . . . in the discharge or attempt to discharge any duty of his or her office . . . shall be punished [as a misdemeanor].

Police Power to Detain Individual:

An officer has the right to temporarily detain a person when the officer has a reasonable suspicion of that person's involvement in criminal activity. Reasonable suspicion demands some minimum level of objective justification, but considerably less than is required for probable cause to arrest. (*United States v. Sokolow* (1989) 490 U.S. 1, 7; *Terry v. Ohio* (1968) 392 U.S. 1, 22.)

Whether reasonable suspicion exists depends upon a consideration of the totality of circumstances. (*United States v. Sokolow, supra*, 490 U.S. at pp. 8-9; see also, *United States v. Arvizu* (2002) 534 U.S. 266, 277-278.) It is immaterial that there might be a possible innocent explanation for the activity witnessed by the police officer. Even

innocent behavior will frequently provide a showing of reasonable cause to detain. (*United States v. Sokolow*, *supra*, 490 U.S. at pp. 9-10.)

One function of a temporary detention is to resolve any ambiguity in the situation to find out whether the activity was in fact legal or illegal. (*People v. Souza* (1994) 9 Cal.4<sup>th</sup> 224, 242.) A detention is intended “to permit a speedy, focused investigation to confirm or dispel [the] individualized suspicion of criminal activity” “justifying it. (*People v. Soun* (1995) 34 Cal.App.4<sup>th</sup> 1499, 1516.) Indeed, an officer would be derelict in his duty if he did not investigate any suspicious circumstances confronting him. (See *People v. Higgins* (1994) 26 Cal.App.4<sup>th</sup> 247, 250.)

#### Police Use-of-Force to Detain:

An officer attempting to enforce a lawful detention or arrest may use an amount of force that is reasonably necessary. (*People v. Brown* (1985) 169 Cal.App.3d 159, 167.) The right to verify or dispel suspicion is meaningless unless officers may, when necessary, forcibly detain a suspect. (*People v. Johnson* (1991) 231 Cal.App.3d 1, 12.) “Levels of force and intrusion in an ‘investigatory stop’ may be legitimately escalated to meet supervening events, such as attempted flight. . . . [¶] A ‘reasonable’ reaction in this context, like ‘probable cause,’ turns on ‘the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.’” (*Id.* at 13, citing *United States v. White* (D.C. Cir. 1981) 648 F.2d 29, 40.)

#### ANALYSIS

Because, unfortunately, this incident resulted in the death of Mr. Sutphin, the issue of potential criminal responsibility on the part of the officers must be addressed. The question is whether the officers’ actions were a lawful use of force and therefore justified? Their conduct cannot be judged in hindsight but must be looked at from the perspective of what was reasonable at the time and according to applicable law.

Officers arriving at Orchid Court were told a fight had occurred and the three participants may have a whip, scissors or a knife. Mr. Sutphin was one of the participants and refused to comply with their commands to remain at the scene and be questioned. Faced with these facts the officers were entitled to use reasonable force to detain him to conduct an investigation. The officers had a duty to detain Mr. Sutphin to complete their investigation and to prevent him from either harming himself or others. Physical restraint was the first step to control Mr. Sutphin and when that failed they chose to use a taser, a non-lethal weapon.

Clearly, Mr. Sutphin’s mental health issues contributed to his lack of cooperation but he knew police officers were present and understood their demands to remain at the location. His conduct escalated a simple investigation into a physical confrontation requiring multiple officers and ultimately the use of a taser. His resistance continued until he had trouble breathing. With all the energy Mr. Sutphin was expending struggling with several officers, he ultimately suffered cardiac arrest. Unfortunately, Mr. Sutphin did not respond to the medical treatment provided and expired at Saint Bernadine’s Medical Center.

The officers were justified in contacting Mr. Sutphin, detaining him to investigate the fight and when he refused they were legally entitled to use reasonable force. When physical force by several officers failed they used the next level of non lethal force. They were not required to retreat nor did they immediately use lethal force. They attempted to use progressive force to control Mr. Sutphin. His death was not intentional or something that they might have anticipated.

### CONCLUSION

The officers' actions were reasonably tailored to effectuate a lawful detention and were in response to Mr. Sutphin's defiant, resisting and irrational behavior. The officers exercised restraint in handling this matter. It was Mr. Sutphin's conduct, in not only verbally resisting the officers, but physically resisting them as well, which led to his being physically restrained and tased. Recall that Mr. Sutphin appeared to egg them on by saying things such as "I'm sadomasochistic [and] I like it."

Officer Zink wanted to deter Mr. Sutphin and warned him repeatedly that he needed to comply or he would be tased. Mr. Sutphin did not comply and Officer Zink used "less than deadly force" only after other officers were not able to physically detain him. Mr. Sutphin died as a result of undetermined causes that included cardiac arrest, not the officers' use of the non-deadly force. The pathologist stated that it cannot be determined how Mr. Sutphin died and that we "don't know if the taser contributed [to the death] or not."

The use of the non lethal force, which preceded the death of Mr. Sutphin, is justified and no criminal liability attaches to the conduct of any involved officer.

Respectfully Submitted,

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