

DISTRICT ATTORNEY'S REPORT

IN CUSTODY DEATH

OF

JACOB JOHN BAUER



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Critical Incident Team

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**INVESTIGATION OF THE IN CUSTODY DEATH OF
JACOB JOHN BAUER**

INTRODUCTION:

The Alameda County District Attorney's Office has assembled a Critical Incident ("CI") Team. The CI Team consists of experienced Senior, Assistant, and/or Deputy District Attorneys as well as experienced District Attorney Inspectors, who are sworn peace officers. The CI Team conducts an investigation involving any death of a person in police custody in Alameda County. The CI Team is authorized by agreement with each local law enforcement agency serving Alameda County to conduct a separate, but parallel, investigation into the circumstances leading to the in custody death.

The CI Team focuses exclusively on the question of whether there is sufficient evidence to prove beyond a reasonable doubt that a law enforcement official committed a crime in connection with the in custody death. The CI Team does not examine collateral issues such as whether law enforcement officials complied with internal policies, used appropriate tactics, or any issues that may give rise to civil liability. This report should not be interpreted as expressing any opinions on non-criminal matters.

The CI Team prepares a report documenting the investigation, factual background and legal conclusions. The prosecutor supervising the CI Team reviews materials from the investigation and the CI Team report. The case is reviewed by multiple veteran prosecutors, including the Chief Assistant District Attorney and the District Attorney. When the report has been completed and approved, it is delivered to the Chief of Police or Sheriff of the involved law enforcement agency. Thereafter, the report is made available to the public.

SCOPE OF THE INVESTIGATION:

On August 1, 2018, at 2:42 p.m., employees of a Raley's Supermarket in Pleasanton summoned police because Jacob Bauer was acting erratic and damaging property. Pleasanton Police Department (PPD) Officers Bradlee Middleton and Jonathan Chin responded and attempted to contact Mr. Bauer a short distance from the store. When the officers attempted to detain Mr. Bauer to investigate, Mr. Bauer resisted. A physical struggle ensued that required the assistance of six to seven additional officers before Mr. Bauer was able to be handcuffed and restrained. At that point, Livermore Pleasanton Fire Department (LPPFD) personnel began to treat Mr. Bauer. He was placed in an ambulance. Shortly thereafter, medical personnel determined that Mr. Bauer had stopped breathing and no pulse was detected. CPR was administered immediately and continued until Mr. Bauer was transferred to Stanford Valley Care Medical Center, where he was pronounced dead approximately 30 minutes after arrival.

PPD detectives assigned to the investigation notified the CI Team. The CI Team conducted a parallel investigation. As part of its investigation, the CI Team responded to the scene of the incident. The CI Team participated in interviews with subject officers who applied various degrees of force in their efforts to detain Mr. Bauer. The CI Team reviewed, among other things, police reports, dispatch recordings, body worn camera footage, recorded interviews, medical records, lab reports, and photographs. The CI Team also reviewed the Coroner Investigator's Report, autopsy protocol, and toxicology report relating to Mr. Bauer.

FACTUAL SUMMARY:

On August 1, 2018, at approximately 11:40 a.m., employees of the Raley's Supermarket on Sunol Boulevard in Pleasanton noticed that Mr. Bauer was acting strangely. He was walking in circles and mumbling to himself as he laid out the contents of his wallet near the checkout stand where he had just purchased a soft drink. Mr. Bauer was approached by management and eventually left the store. The employee who contacted him noticed that Mr. Bauer appeared agitated, as if under the influence of drugs or mentally ill.

Mr. Bauer was later seen in the parking lot of the store by a civilian witness, who observed him with two cell phones, both with lit screens, moving his arms from side to side as if directing traffic and he appeared to be talking to himself.

At approximately 2:20 p.m., Mr. Bauer re-entered Raley's Supermarket and approached a check stand. He was growling as he lifted a shopping cart chest-high and slammed it on the ground. Mr. Bauer began to walk around the store with a store manager following him from a safe distance. Mr. Bauer was talking loudly to himself in a nonsensical manner, banging his cell phone sharply on the shelves in different aisles, and drinking small amounts from bottled beverages on the shelves and replacing them or breaking them on the floor. Store security footage showed Mr. Bauer selecting approximately 10 bottles from the shelves and drinking a small amount from each before replacing them or tossing them in the aisle. A store manager and employee continued to monitor Mr. Bauer inside the store for approximately 20 minutes and then called police.

At approximately 2:42 p.m., PPD dispatch received a 911 call from a Raley's Supermarket employee. She described Mr. Bauer as deranged and causing a scene. She further reported that they were unsuccessful in removing him from the store and requested assistance. PPD Officers Middleton and Chin responded approximately nine minutes later, arriving at the Raley's Supermarket at 2:51 p.m. Store employees confirmed that Mr. Bauer was acting strangely and had committed vandalism inside the store. They reported that he had left the store, and pointed out the location they had last seen Mr. Bauer, just beyond the store's parking lot.

The officers observed Mr. Bauer walking on Mission Drive toward Sunol Boulevard. At approximately 2:52 p.m., Officer Middleton attempted to verbally contact Mr. Bauer from approximately 25 to 30 yards away. Mr. Bauer stopped and acknowledged Officer Middleton. The officer questioned him about what had happened inside Raley's Supermarket. He asked Mr. Bauer for identification. Mr. Bauer replied that he had left it at home, but gave his full name and date of birth. With that information, Officer Middleton was able to determine that Mr. Bauer had a valid driver's license and did not have any outstanding arrest warrants. Officer Middleton explained to Mr. Bauer that the reason for the contact was that Raley's Supermarket employees had called and said that someone inside the store had damaged some property and caused a disturbance. Mr. Bauer denied having broken anything or having any kind of disagreement with Raley's Supermarket employees.

Officer Middleton next asked if Mr. Bauer was in possession of anything illegal. At this point, Officers Middleton and Chin flanked Mr. Bauer directly to his left and right, respectively. Mr. Bauer did not answer and continued to stare straight ahead, not making eye contact with either officer. He had a cell phone in each hand. Officer Middleton communicated non-verbally with Officer Chin to let him know that he was going to attempt to physically detain Mr. Bauer. It was approximately 2:56 p.m.

The two officers simultaneously grabbed Mr. Bauer's arms and wrists, one on each side. Mr. Bauer – 5'9", 274 pounds – immediately resisted. The officers repeatedly told Mr. Bauer to calm down. The officers were not able to bring Mr. Bauer's wrists close enough to apply handcuffs. Mr. Bauer was tense and not moving, but all three men were on their feet. Mr. Bauer then attempted to pull his arm free of Officer Middleton's grasp. In response, the officers used a leg sweep to get Mr. Bauer to the ground and the officers went to the ground with him. Officer Chin had control (via handcuff) of Mr. Bauer's right wrist, but Officer Middleton was struggling to control Mr. Bauer's left arm. Officer Chin called for backup at approximately 2:57 p.m.

The officers urged Mr. Bauer to relax and stay calm multiple times, but Mr. Bauer continued to resist while on his back on the ground. During the struggle, Mr. Bauer's left side became exposed, thereby giving Officer Middleton the opportunity to deploy his Taser at close range. The prongs struck Mr. Bauer in the area of his left hip but did not have any appreciable effect, as Mr. Bauer continued to resist and ignore the officers' commands. Officer Middleton used the Taser again, a "drive-stun" technique to Mr. Bauer's left shoulder, again with no apparent results. Mr. Bauer was now on his stomach, his right wrist still handcuffed, but his left arm pinned beneath his body. Up to this point, the officers had been struggling with Mr. Bauer for approximately two minutes.

About 30 seconds later, multiple additional officers arrived on scene in quick succession. The officers' efforts were directed at unpinning Mr. Bauer's left arm from underneath his body so that he could be handcuffed and his legs restrained, which he was using to violently kick at the officers. Mr. Bauer scratched Officer Chin several times, causing Officer Chin to yell at Mr. Bauer to stop scratching him and deliver several distraction blows to Mr. Bauer's back in order to gain compliance. The officers used a combination of baton thrusts, hand strikes, and at least two other "drive stun" applications that had little or no effect, in order to get Mr. Bauer to comply with commands to release his left arm. Officers then tried using a baton as a lever to get his left arm out from underneath his body. Other officers used their own body weight, coupled with various holds to restrain Mr. Bauer's legs in anticipation of applying the leg portion of a restraint wrap. Within approximately a minute and a half after other officers had arrived to actively assist Officers Middleton and Chin, Mr. Bauer's left arm was released from underneath him and he was subsequently handcuffed using multiple sets of handcuffs linked together. It was approximately 3:01 p.m.

At approximately 3:02 p.m., officers began to apply the leg portion of a wrap restraint device to Mr. Bauer. The process took a little over four minutes, as Mr. Bauer continued to resist the officers' efforts. During this time, Mr. Bauer was loudly yelling statements such as: "They're trying to kill me and rape me, Mr. Trump" and "Mr. Trump, please, they're trying to kill me." The officers noticed blood in the area of Mr. Bauer's face and applied a "spit mask" at approximately 3:09 p.m. After the leg portion of the wrap restraint was applied, officers maneuvered Mr. Bauer into a seated position and applied the upper portion of the wrap. The wrap was fully applied at approximately 3:10 p.m. Mr. Bauer was still agitated and loudly yelling about "Mr. Trump" after being placed in a seated position. He also attempted to throw his upper body weight backward from a seated position, causing officers to brace him from behind with either their arms or legs to prevent him from doing so.

At about 3:11 p.m., LPPD personnel were waved in from a nearby staging area. LPPD personnel checked Mr. Bauer's physical condition, noting a minor injury to his head. Mr. Bauer continued to yell about "Mr. Trump." Paramedics Plus personnel also arrived a few minutes later, at approximately 3:14 p.m. The paramedics deployed a gurney in preparation of transporting Mr. Bauer to a medical facility. At 3:19 p.m., one of the paramedics administered a sedative, Midazolam (Versed), to Mr. Bauer and, with the help of police and fire department personnel, began the process of moving Mr. Bauer onto the

gurney. They replaced the handcuffs with soft restraints attached to the gurney. During the process, Mr. Bauer's breathing and carotid pulse were checked and confirmed, and it was observed that Mr. Bauer's pupils were extremely dilated. The process was completed at approximately 3:27 p.m.

At approximately 3:28 p.m., Mr. Bauer was wheeled to the ambulance and placed inside. Once in the ambulance, the "spit mask" was removed and the paramedics noticed that Mr. Bauer's face was a bluish color. The attending paramedic could no longer find a pulse. It was 3:30 p.m. The top portion of the restraint device was loosened and CPR was immediately begun. At approximately 3:35 p.m., Mr. Bauer was transported from the scene. CPR continued until arrival at Stanford Valley Care Medical Center at approximately 3:46 p.m. Medical personnel at the hospital continued resuscitation efforts. Mr. Bauer was pronounced deceased by hospital staff at approximately 4:15 p.m.

TOXICOLOGY REPORT/AUTOPSY PROTOCOL:

On August 2, 2018, Dr. Michael Ferenc performed an autopsy on Mr. Bauer at the Coroner's Bureau. Externally, Dr. Ferenc found minor injuries – small abrasions and contusions – to Mr. Bauer's head/neck, torso and upper limbs, conjunctival petechiae, and two, firmly embedded Taser-type barbs on the left side of his mid to lower abdomen. Internally, Dr. Ferenc found no significant injuries to the internal organs.

A sample of Mr. Bauer's femoral blood was collected and sent for toxicological analysis. The toxicology results detected the following drugs in Mr. Bauer's blood sample: methamphetamine 0.42 mg/L, and amphetamine 0.04 mg/L. Methamphetamine is effective when present in the blood at a range of 0.01 to 0.05 mg/L. It is potentially toxic when at levels between 0.2 to 5 mg/L. Dr. Ferenc fixed the cause of death as acute methamphetamine toxicity. Other significant conditions contributing to Mr. Bauer's death, but not resulting in the underlying cause, included probable mechanical asphyxia while being placed in the restraint device by police, cardiac hypertrophy, and morbid obesity (a body mass index of 40.5).¹

APPLICABLE CALIFORNIA LAW:

The sole question addressed by the District Attorney's investigation was whether any PPD personnel violated any applicable criminal laws. Whether or not any of the officers are criminally liable depends upon (1) the facts of the case, and (2) whether these facts constitute any criminal violations under existing statutory law. The quality of the evidence, if any, showing a criminal act or acts must be measured against the standards used by the District Attorney's Office in deciding whether or not to charge anyone with a crime.

The California District Attorney's Uniform Crime Charging Standards Manual directs that criminal charges shall not be brought unless the prosecutor, based upon a complete investigation and thorough consideration of all the pertinent information readily available to him or her, believes there is evidence that proves beyond a reasonable doubt, that the accused is guilty of the crime to be charged. Additionally, the charging standards direct that there must be legally sufficient admissible evidence to prove each element of the crime. The admissible evidence must be of such convincing force that it would warrant conviction of the crime charged by a reasonable and objective fact finder after the fact

¹ Dr. Ferenc also noted that the toxicological analysis found no Midazolam in Mr. Bauer's post-mortem blood, suggesting to him that Mr. Bauer's "circulatory system already had collapsed or was [in] the process of collapsing when the dose was administered."

finder has heard all the evidence and after considering the most plausible, reasonable, and foreseeable defenses that could be raised under the evidence.

To prove the crime of involuntary manslaughter in violation of Penal Code Section 192(b), the People must prove that: (1) A person committed a crime or a lawful act in an unlawful manner; (2) The person committed the crime or act with criminal negligence; and (3) The person's acts caused the death of another person. Penal Code Section 192(b); CALCRIM No. 581.

Therefore, to establish that an officer committed the crime of involuntary manslaughter as a result of the use of force in the course of employment, the People would need to prove either that the officer committed an assault under the color of authority, or used force that, while lawful, was done in a criminally negligent manner.

To prove an officer committed an assault under color of authority, the People must prove beyond a reasonable doubt that: (1) The defendant was a police officer; (2) The defendant assaulted or beat another; (3) The assault took place while the defendant was engaged in the performance of his duties; and (4) The force used was not lawfully necessary. Penal Code Section 149. An officer's use of force is not lawfully necessary when it is proven that the officer used more force than was necessary under the circumstances. *People v. Mehserle* (2012) 206 Cal.App.4th 1125, 1140.

Criminal negligence involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with criminal negligence when: (1) He or she acts in a reckless way that creates a high risk of death or great bodily injury; and (2) A reasonable person would have known that acting in that way would create such a risk. CALCRIM No. 581. A person acts with criminal negligence when the way he or she acts is so different from the way an ordinarily careful person would act in the same situation that his or her act amounts to disregard for human life or indifference to the consequences of that act. *Id.*

The California Supreme Court, in initially defining criminal negligence, explained how criminal negligence differs from civil negligence: "[T]here must be a higher degree of negligence than is required to establish negligent default on a mere civil issue. The negligence must be aggravated, culpable, gross, or reckless, that is, the conduct of the accused must be such a departure from what would be the conduct of an ordinary prudent or careful [person] under the same circumstances as to be incompatible with a proper regard for human life, or, in other words, a disregard of human life or an indifference to the consequences." *People v. Penny* (1955) 44 Cal.2d 861, 879.

A peace officer may use reasonable force to arrest or detain someone, to prevent escape, to overcome resistance, or in self-defense. Penal Code Section 835a; CALCRIM No. 2670. A peace officer who makes or attempts to make an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested, nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect an arrest or to prevent escape or to overcome resistance. Penal Code Section 835a.

"When a person, as a result of a mental health disorder, is a danger...to himself, a peace officer...may, upon probable cause, take...the person into custody...for assessment, evaluation, and crisis intervention." (Welfare & Institutions Code §5150, subd. (a).) The statute contemplates that a person may need to be involuntarily restrained and taken into custody for their own protection or for the protection of others. It is recognized that a peace officer may use force to take someone into custody, so long as that force is reasonable. (See Pen. Code, §§ 835, 835a.)

In *Graham v. Conner* (1989) 490 U.S. 386, 396-397, the United States Supreme Court held that use of force cases are to be reviewed using an objective standard of the reasonable officer: "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. [Citation]... With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: 'Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chamber,' [Citation] violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation."

An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. CALCRIM No. 581.

ANALYSIS AND CONCLUSION:

In this case, Mr. Bauer was acting erratically and speaking nonsensically while inside the Raley's Supermarket, creating a disturbance and damaging items inside the store. Based on witness reports, confirmed by Officers Middleton and Chin when they first arrived on scene, and before attempting to contact Mr. Bauer, the officers had sufficient cause to detain Mr. Bauer for vandalism and to determine whether he should be taken into custody for "assessment, evaluation and crisis intervention" under Welfare and Institutions Code section 5150.

When the officers first contacted Mr. Bauer, he denied that anything had occurred inside Raley's Supermarket, and then became non-responsive. The officers then acted lawfully in an attempt to physically detain Mr. Bauer in order to investigate. Mr. Bauer immediately resisted. Because of his size and strength, the two officers were not able to take him into custody by themselves. They requested assistance and multiple officers responded. At one point, no less than six officers were directly engaged with Mr. Bauer, who had only one wrist handcuffed and was still violently resisting. Throughout the struggle, Mr. Bauer refused to comply with verbal commands to calm down and stop resisting. All officers involved described the extreme difficulty they had in controlling Mr. Bauer, which required the use of batons, Tasers, hand strikes, and other pain compliance measures. The use of these measures was reasonable and appropriate under the circumstances. Because the officers used objectively reasonable force to overcome Mr. Bauer's intense resistance to their lawful attempt to detain him, their actions did not constitute an unlawful assault under color of authority.

Nor is there evidence that the officers were criminally negligent, i.e., acted recklessly in a way that created a high risk of death or great bodily injury, and that they knowingly disregarded that risk. As noted above, the officers used only that degree of force that appeared to them to be necessary to respond to the strength and intensity of Mr. Bauer's resistance. Objectively, it appears that the degree of force used was reasonable under the circumstances.

Additionally, the forensic pathologist who performed the autopsy upon Mr. Bauer concluded that his death was caused by complications of acute methamphetamine poisoning. There was no assertion by Dr. Ferenc that the physical injuries he observed contributed to Mr. Bauer's death, although other significant conditions found by Dr. Ferenc, but not amounting to a cause of death, included probable mechanical asphyxia while being placed in the restraint device by police, cardiac hypertrophy, and morbid obesity. Cardiac hypertrophy is a thickening of the heart muscle that can compromise a person's health and ability to breathe, especially during physical exertion. Mr. Bauer was 5' 9" tall

and 274 pounds with a Body Mass Index (BMI) of 40.5. A BMI of 40 or above is considered morbidly obese. It is reasonable to infer that these factors increased Mr. Bauer's risk of intense physical exertion, over and above acute methamphetamine toxicity, as compared to a person of average weight and health.

CONCLUSION:

We conclude that none of the officers involved in this incident are criminally liable. There is no evidence that any of the officers committed a crime related to the level of force use. Rather, their use of force appears to have been objectively reasonable given the level of Mr. Bauer's resistance. Nor is there evidence of criminal negligence on the part of the involved officers. Finally, Mr. Bauer's death was not proximately caused by the officers' actions, but rather his own ingestion of a toxic amount of methamphetamine.

A prosecutorial decision must rest squarely on the ability to establish the elements of a crime beyond a reasonable doubt. Applying the high charging standards by which the District Attorney's Office is ethically bound, we can only conclude that the officers involved in this incident are not criminally liable. We are closing our file and will take no further action in this matter.