

March 26, 2008

Sheriff Gary Philp
Humboldt County Sheriff's Office
826 Fourth St.
Eureka, CA 95501

Chief Garr Nielsen
Eureka Police Department
604 C Street
Eureka, CA 95501

Dear Sheriff Philp and Chief Nielsen:

Re: *In Custody Death of Martin Cotton: October 3, 2007*
Agencies: Eureka Police Department/Humboldt County Sheriff's Office
Injured Person: Martin Frederick Cotton II
Location: Humboldt County Correctional Facility-Eureka, CA

Dear Sheriff Philp and Chief Nielsen:

This concludes our independent review into the in-custody Death of Martin Cotton II (hereinafter referred to as "Cotton"). As you know, our review does not and cannot address issues of civil liability, tactics, or department policies or procedures. The review addresses only whether there was a basis for criminal prosecution against any of the officers involved in Cotton's arrest and/or detention.

In independently determining whether to file criminal charges a prosecutor should charge only if the following four basic requirements are satisfied:

1. Based on a complete investigation and a thorough consideration of all pertinent data readily available, the prosecutor is satisfied that the evidence shows that the suspect is guilty of the crime to be charged;
2. There is legally sufficient, admissible evidence of the corpus delicti;
3. There is legally sufficient, admissible evidence of the suspect's identity as the perpetrator of the crime charged; and

4. The prosecutor has considered the probability of a unanimous finding of guilt beyond a reasonable doubt by a reasonable and objective fact-finder hearing the admissible evidence.

The admissible evidence should be of such convincing force that it would warrant conviction of the crime charged by a reasonable and objective fact-finder after hearing all the evidence available to the prosecutor at the time of charging and after hearing the most plausible, reasonably foreseeable defense that could be raised under the evidence presented to the prosecutor. See generally, *California District Attorneys Association, Uniform Charging Standards*.

Inconsistencies contained in witness statements and/or inconsistencies and/or discrepancies between various witnesses' statements were considered and evaluated pursuant to law. What each witness was able to see, hear or otherwise perceive, as established by the reports, was also considered and evaluated pursuant to law. Evidence of alcohol and/or drug ingestion or the lack of it was also considered and evaluated pursuant to law.

I

CALIFORNIA LAW

The District Attorney's Office investigates in-custody deaths to determine whether the acts of an officer or officers violated state criminal laws. As with all criminal cases, in making that determination, the evidence is reviewed to determine whether the investigation presents sufficient evidence to establish a reasonable probability of a finding of guilt beyond a reasonable doubt by a neutral fact-finder. Such investigations and evaluations are authorized and required by law. *California Constitution*, Article III, § 3; *Government Code* § 26500; *Hicks v. Board of Supervisors*, (1977) 69 Cal.App.3d 228, 138 Cal.Rptr. 101.

Penal Code § 835a states:

“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 overcome resistance.

“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 of self defense by the use of reasonable force to effect the arrest or the prevent the escape or to overcome resistance.”

Penal Code § 834a states:

“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.”

A “...police officer in California may use reasonable force to make an arrest, prevent escape, or overcome resistance, and need not desist in the face of resistance....” *Edson v. City of Anaheim* (1998) 63 Cal.App.4th 1269. “... The reasonableness of an officer’s 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...”. *Graham v. Conner*, 490 U.S. 386, 109 S.Ct. 1865 (1989). “... ‘[R]easonableness’ means the ‘standard of reasonableness at the moment,’ and that the calculus of reasonableness must embody allowance for the fact that public 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...” *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct 1694 (1985)

The Supreme Court in *Garner*, held that the determination of whether the force used was unlawful or unconstitutional is based upon the “information possessed” by the involved police officer and what a reasonable police officer would believe to be lawful [i.e. objective belief] under the circumstances and based upon the information then possessed, not what the officer may have believed. *Anderson v. Creighton*, 48 U.S. 635, 641, 107 S.Ct. 3034 (1987). The Fourth Amendment does not require the use of the least amount of force or even a less deadly alternative so long as the use of force is reasonable under *Garner v. Tennessee* and *Graham v. Conner*.

In determining the ‘reasonableness’ of the force used to effect an arrest or seizure courts look to the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene. 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. *Ting v. United States*, 927 F.2d 1504 (9th Cir. 1991). (Holding that an officer could use deadly force to effect arrest if, under the circumstances, he reasonably believed such force was necessary to protect himself or others from death or serious bodily harm.)

In *Sherrod v. Berry*, 856 F.2d 802 (7th Cir. 1988), police officers approached a car after a robbery had occurred and thought the suspects were “probably armed.” The officers ordered the suspects to raise their hands three times before the suspects complied. This

recalcitrance on the part of the suspects further aroused the officers' suspicion as to the imminent danger confronting them. An officer approached the deceased's car with his gun pointed at the occupants of the car. As he approached the car, he observed the driver make a "quick movement with his hand into his coat ... [as if] he was going to reach for a weapon." The officer shot the suspect, killing him. Citing *Tennessee v. Garner*, supra, and *Ford v. Childers*, 855 F.2d 1271 (7th Cir. 1988), the *Sherrod* Court stated that "it is not necessary that the danger which gave rise to the belief actually existed [whether or not the suspect was armed], it is sufficient that the person resorting to the self defense involved reasonably believed in the existence of such danger, and such reasonable belief is sufficient even where it is mistaken. In forming reasonable belief, a person may act upon appearances. See also, *Davis v. Freels*, 583 F.2d 337 (7th Cir. 1978), (Upholding the shooting of a detained suspect who made a sudden and suspicious movement with his right elbow in a backward direction.)

II

SUMMARY OF EVIDENCE OBTAINED FROM INVESTIGATION

At approximately 1515 hours on August 2, 2007, Eureka City Police of Officer Braud made contact with Cotton near 2nd & 'A' Streets in Eureka. Officer Braud discovered Cotton had an outstanding warrant for his arrest,¹ issued by the Stanislaus County Superior Court. Cotton was arrested, transported to the Humboldt County Correctional Facility (hereinafter referred to as "HCCF") by Eureka Police Department (hereinafter referred to as "EPD") Sergeant. O'Neil, and booked.

Stanislaus County failed to transport Cotton and he was released from the HCCF at approximately 1431 hours on August 9, 2007. When he was released, he was provided paperwork that ordered him to appear in Stanislaus County Superior Court, 800 11th Street, Modesto, Ca., on September 6, 2007 at 0830 hours.

At approximately 1642 hours that same day EPD Dispatcher Jenifer Hanson received an incoming 911 call stating that Cotton was involved in a physical altercation with an unknown number of subjects at the Eureka Rescue Mission. The unknown caller said "Get here fast" and disconnected the line.

EPD Officers Laird and Winkle were dispatched to the Eureka Rescue Mission. They arrived almost simultaneously at approximately 1643 hours.

On arrival, Officer Laird saw Cotton pushing Brian Hall, the manager of the Eureka Rescue Mission, in the upper chest area. Cotton then "backed off" near the entrance to the day use area, commonly referred to as "The Cage." Cotton was "sweaty" and took a "strange fighting stance" as Officers Laird and Winkle approached him.

¹ Penal Code § 487, Grand Theft.

Officer Laird later told EPD Detective Hubbard that Cotton's eyes were "wide open", his clothing was disheveled, and he continually made nonsensical comments such as, "My fucking children", "Am I fucking children", etc., Officer Winkle later described similar comments made by Cotton, such as "Child fucker" and "Have a nice day."

Officer Laird was familiar with Cotton. He believed Cotton had "issues," but thought Cotton's behavior was outside the range of what he would identify as normal behavior for Cotton. He thought Cotton was under the influence of "something".

Officers Laird and Winkle ordered Cotton to turn around and place his hands behind his back. Cotton did not comply. Both Officers sprayed department issued Oleoresin Capsicum spray (hereinafter referred to as "O.C." or "Pepper Spray") at him. Officer Winkle approached COTTON to take him to the ground. Cotton resisted and a physical struggle between Cotton and the Officers ensued. During the struggle, Officer Winkle applied several knee strikes to Cotton's lower body to overcome his resistance. Cotton did not stop resisting.

Because he and Officer Winkle were unable to overcome Cotton's resistance, Officer Laird radioed for additional Officers at approximately 1645 hours. Soon thereafter, Officer Whitmer arrived, picked up Officer Winkle's side handle baton, which had fallen to the ground during the altercation, and struck Cotton in the lower legs 2-3 times. The baton strikes did not overcome Cotton's resistance so he discarded it and assisted Officer Winkle's attempts to pull Cotton's arms from beneath his body so the handcuffs could be applied. At this time, Cotton was lying on the sidewalk with his head facing west and his body up against the chain link fence surrounding "The Cage".

Officer Laird kicked Cotton in the lower legs 2-3 times, but this also had no effect on him. He then retrieved Officer Winkle's baton, which had earlier been used by Officer Whitmer, and struck him again, 2-3 times in the lower legs.

Only after the arrival of Officers Watson, Siipola, Franco, and Officer Baird was Cotton controlled enough to be handcuffed. The Officers stated that Cotton was extremely strong and had an extremely high pain tolerance, as if he were under the influence of drugs. None of the Officers involved stated that Cotton was struck in the head or that his head violently impacted the ground during the altercation.

EPD Dispatch log indicates that the situation was "Code 4" (under control) at approximately 1647 hours and that Cotton was reported to be "In Custody" at approximately 1650 hours.

At approximately 1655 hours, Officer Laird transported Cotton to the HCCF for booking, followed by Officer Winkle. While en route to that facility, Officer Laird requested that

EPD Dispatch notify the HCCF staff that they were en route with a "very combative" subject. The Officers arrived at the HCCF at approximately 1658 hours.²

Upon arrival at the HCCF, Cotton would not step out voluntarily so he was removed from the rear of the EPD unit and was taken to the pre-booking area. He continued to be resistive and to "talk gibberish". Due to his uncooperative nature, it was decided that he would be taken to a "sobering cell" (also referred to as a "detox cell") where the pat-down process could be completed. Upon arrival at the "sobering cell", Cell #N144, Cotton was placed in a prone position.

Cotton continued to be uncooperative and was described as having extraordinary strength. Due to this, several Correctional Officers were required to keep control of Cotton so the task of searching him and removing his outer layers of clothes could be completed.^{3 4}

Records obtained from the HCCF list Cotton's booking time as being 1715 hours. The observation log entry, made by Corporal Griffin, indicates that he was "extremely combative" and that medical staff was notified of his placement in a sobering cell. Pursuant to HCCF procedure, several cell checks were then made to confirm his well-being while alone in the cell. Those cell checks are detailed below.

<u>Time:</u>	<u>Notation:</u>	<u>Officer/Pin Number</u>
1715 hours	Admitted – Extremely Combative	Griffin/1033
1738 hours	Moving – OK	Cangas/1604
1752 hours	Talking / Moving OK	Cangas/1604
1755 hours	Moving	Christensen/1630
1807 hours	Breathing / Moved	Morgan/1608
1821 hours	On Stomach / Breathing	Rossiter/1349
1834 hours	On Stomach / Breathing	Strong/1080
1848 hours	On Stomach / Breathing	Rossiter/1349
1902 hours	Breathing Shallow – Medical called	Strong/1080

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At approximately 1902 hours, Correctional Officer Strong saw that Cotton's breathing was "shallow" and summoned assistance from other Officers and medical staff. CPR

² Cotton's behavior at the HCCF, including his interactions with HCCF staff and while alone in his cell, were recorded via motion sensitive cameras mounted in several locations throughout the facility. The recordings were later transferred to a CD.

³ Normally, this procedure only requires the efforts of 1-2 Correctional Officers.

⁴ HCCF Corporal Griffin, stated that he was present in the hallway near Cell #N144, when Cotton was searched in the prone position and he did not see any inappropriate or excessive use of force during this incident.

⁵ HCCF records indicate that medical staff evaluated Cotton at 1815 hours with the notation, "Asleep on floor RR (respirations) reg (regular)".

efforts began immediately and a request for assistance from City Ambulance of Eureka and the Eureka Fire Department (hereinafter referred to as "EFD") was made.^{6 7}

When EFD arrived on scene, they assumed primary life-saving efforts of Cotton. EFD was relieved by City Ambulance personnel when they arrived approximately one minute later.⁸ Cotton was placed on a gurney, loaded into the ambulance, and transported to St. Joseph Hospital for additional treatment. The ambulance, with two EFD Firefighters aboard to continue CPR enroute to the hospital, left the HCCF at approximately 1928 hours. Upon arrival at St. Joseph Hospital,⁹ Cotton was released to Emergency medical staff. He remained unresponsive to life saving efforts and was pronounced deceased at approximately 1940 hours.

Humboldt County Deputy Coroner Charles Van Buskirk was notified of Cotton's death at approximately 2045 hours. He responded to St. Joseph's Hospital, took custody of his body, and transported it to the Humboldt County Morgue.

On 08-10-07, Van Buskirk collected blood and urine samples from Cotton's body, that were later submitted to Central Valley Toxicology for drug screening. On 08-29-07, Van Buskirk received the drug screening results, which indicated a high level of Lysergic Acid Diethylamide (LSD) in Cotton's system at the time of his death.^{10 11}

On 08-13-07 at approximately 1000 hours, Dr. K.W. Falconer, assisted by Ariel Gruenthal, performed an autopsy of Cotton's body. While doing so, he located a subdural hemorrhage, with no corresponding skull fracture, amounting to approximately 50ccs of blood that covered both sides of the brain. His report also documents several bruises and

6 EFD reports indicate that Engine 4 was dispatched to the HCCF at approximately 1911 hours, arriving at 1915 hours.

7 City Ambulance reports show a dispatch time of approximately 1912 hours, with an arrival time at the HCCF of approximately 1916 hours.

8 The City Ambulance report, prepared by Paramedic Luke Hayden, indicates that COTTON was "unresponsive, pulseless, and apnic". Additionally, it states that his pupils were "dilated and fixed" and that COTTON had "negative signs of trauma"

9 Approximately 1933 hours.

10 The level of LSD found in Cotton's blood was 10.6 nanograms per milliliter (ng/mL) and the level in his urine was 7.3 ng/mL. The toxicology report indicates that the effective level of LSD is 0.5 – 5 ng/mL with a potentially toxic level of 1 ng/mL.

11 Bill Posey of the Central Valley Toxicology explained that there is a distinct difference between "toxic" levels of drugs (including LSD) and "lethal" levels of drugs. The "toxic" level of a drug is that amount which, when ingested, may cause "adverse affects" (ie: hallucinations). The "lethal" level of a drug is that amount which, when ingested, may cause death. To his knowledge, there is no known "lethal" dose of LSD. LSD is considered to be "fairly non-lethal" in that most deaths associated with its abuse are due to the self-destructive behavior of the person who used the drug (ie: jumping out of a window, standing in front of a train, etc.). When checking his reference books, he was able to locate only one case (in 1985) where a person's death was solely attributed to LSD intoxication. He also found reference to several people who survived after ingesting a "toxic" amount of LSD, with one of those persons having a blood level of 26.0 ng/mL.

abrasions that were present on Cotton's body (mostly to the lower body and extremities), but no external injuries to Cotton's head were noted.¹²

Doctor Falconer's report lists the cause of death as "Acute Subdural Hematoma due to Blunt Force Trauma," with contributing factors of "Excited Delirium Syndrome and LSD Intoxication." Deputy Coroner Van Buskirk's report, dated 09-12-07, states that he, Coroner Jager, and Doctor Falconer discussed the manner of Cotton's death (ie: how/where did Cotton sustain the injury that caused the subdural hematoma). The report indicates that they were unable to determine where/when the injury occurred and that COTTON's manner of death was an "Accident." The location where the injury occurred was determined to be "Unknown, Eureka, CA. 95501."

On page 28 of Detective Schlesiger's report, he documented a meeting he had with Coroner Jager on 09-12-07 at approximately 1600 hours. During that meeting, Det. Schlesiger stated that he was aware that Coroner Jager had shown the "video" of Cotton while at the HCCF to Doctor Susan Comfort of the Shasta County Coroner's Office and Doctor Mark Super of the Forensic Medical Group in Fairfield California. Coroner Jager told Detective Schlesiger that both Doctors felt Cotton had not sustained the head injury which resulted in the subdural hematoma while in custody at the HCCF. Detective Schlesiger asked if Doctor Comfort or Doctor Super had prepared reports and he said they had not. He then described his discussions with them as "courtesy consultations" only.

On 09-27-06 at approximately 1030 hours, District Attorney Investigator Wayne Cox called Coroner Jager to inquire about the "courtesy consultations" with Doctors Comfort and Super. Coroner Jager said they had not seen the "video," but he described it to them. He said further that he and the doctors went over "some reports and photographs" and that they both believed that it was "possible" for Cotton to have sustained his injury while in custody at the HCCF, but "not likely." District Attorney Investigator Cox asked if he could prepare a report documenting what the doctors told him and he stated that it would be better if District Attorney Investigator Cox spoke with them himself, adding that he didn't want to "drag them into this" since they'd provided their "courtesy consultations" as a "favor" to him.

District Attorney Investigator Cox then called Doctor Comfort and arranged a meeting with her at her office in Redding on 10-10-07.

On 10-10-07 at approximately 1115 hours, Chief District Attorney Investigator Mike Hislop and District Attorney Investigator Wayne Cox met with Doctor Comfort. Doctor Comfort was provided a copy of the video, which was obtained from the HCSO, and a CD containing photographs of Cotton's autopsy, the scene of Cotton's altercation with EPD Officers, and the inside of HCCF cell #N144.

¹² HCDA Chief Investigator Mike Hislop, HCSO Detective Rich Schlesiger, and HCSO Evidence Technician Karen Quenell attended the autopsy. All stated that during the autopsy, Doctor Falconer did not shave Cotton's head, which may have revealed external injuries overlying the internal hemorrhaging.

In Custody Death of Martin Cotton: August 9, 2007

Agencies: Eureka Police Department/Humboldt County Sheriff's Office

Injured Person: Martin Frederick Cotton II

Location: Humboldt County Correctional Facility-Eureka, CA

She stated that she had never seen the video or photographs before¹³ but remembered discussing the matter with Coroner Jager "over the phone." She was shown the portion of Detective Schlesiger's report which indicated she had formed the opinion that Cotton did not sustain his injury while in custody at the HCCF. After reading it, she stated, "I never gave an opinion on where he sustained the injury."

After viewing the video, photographs, and Doctor Falconer's report, Doctor Comfort told District Attorney Investigator Cox that the subdural hematoma combined with LSD intoxication (and the possibility of Excited Delirium Syndrome) was "severe enough to cause death." They then spoke about the manner in which he sustained the injury that resulted in the subdural hematoma.

Doctor Comfort stated that she was unable to accurately determine where the injury took place. She stated it was "possible" that he sustained the injury while fighting with EPD Officers (or others prior to their arrival), but "somewhat unlikely" due to the fact that approximately 2/3rds of people who sustain an injury that results in a subdural hematoma immediately lose consciousness¹⁴. The materials she referred to indicate that only 1/3rd of people who sustain an injury of that type have a lucid period ranging from minutes to hours before succumbing to their injuries.

She also believed it was possible that Cotton self-inflicted his injuries while thrashing about inside the cell at the HCCF. To further articulate why she couldn't accurately determine where Cotton sustained his injury, she referred to the time period between when he was released from custody until becoming involved in an altercation at the Eureka Rescue Mission (approximately 2 hours 11 minutes). She stated that she most commonly sees subdural hematomas in fall victims where the head makes a violent impact against an unyielding solid object such as the ground. She stated that it was possible that Cotton had fallen during the time period where his whereabouts/actions are unknown, or had sustained his injury in some other manner during that time period¹⁵.

The video of Cotton while within the HCCF depicts his violent behavior and documents that it took several Correctional Officers to control him, but does not provide any evidence of any significant force being used against him.

¹³ On 10-12-07 at approximately 1120 hours, District Attorney Investigator Wayne Cox again spoke with Coroner Jager. He advised him that there was some confusion as to whether or not he showed the video and photographs to Doctors Comfort and Super and asked him to clarify the "courtesy consultations" he made with them. Coroner Jager stated that he personally met with both doctors at their respective offices. While there, he discussed the case with them, but did not show them the video or photographs.

¹⁴ There is no indication in any of the police reports that Cotton ever lost consciousness. Rather, they document his behavior as combative from the time he was contacted by EPD Officers until being placed in cell #N144 at the HCCF.

¹⁵ A copy of Doctor Comfort's report is attached as "Exhibit A".

The exact time and location where Cotton sustained the injury that resulted in his subdural hematoma cannot be accurately determined. There are several possibilities, listed below, but no known evidence that proves any "theory" beyond a reasonable doubt.

Cotton sustained the injury at an unknown time/place during the 2 hours 11 minutes between his release from the HCCF and his altercation with others at the Eureka Rescue Mission.

Cotton sustained his injury during his altercation with several others in "The Cage" at the Eureka Rescue Mission.

Cotton sustained his injury during his altercation with EPD Officers while resisting arrest.

Cotton self-inflicted his injury due to his violent self-destructive behavior while alone in HCCF cell #N144.¹⁶

CONCLUSION

There is insufficient evidence to determine when Cotton sustained the injuries to his head or who caused those injuries. Without such evidence we do not have sufficient evidence to charge any person with causing Cotton's death.

Some concerns were raised regarding the excessive use of force by the EPD Officers. I reviewed this case for other possible criminal charges but did not find sufficient evidence that the Officers' or a particular Officer's conduct warranted filing criminal charges arising out of the arrest and detention of Cotton.¹⁷

Sincerely,

Paul V. Gallegos
District Attorney

¹⁶ Because most injuries of this type result in an immediate loss of consciousness.

¹⁷ See, pages 2 through 4: California Law