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FILED
ALAMEDA COUNTY

JAN 29 2009

CLERK OF THE SUPERIOR COURT
By Wen L. Jiao Deputy

7 SUPERIOR COURT OF THE STATE OF CALIFORNIA
8 IN AND FOR THE COUNTY OF ALAMEDA

9
10 PEOPLE OF THE STATE OF CALIFORNIA)
11)
12 Plaintiff)
13)
14 v.)
15 JOHANNES MEHSERLE)
16)
17 Defendant)

Case No. 547353

Dept. 11

18 MOTION IN OPPOSITION TO DEFENDANT'S RELEASE ON BAIL

19 Statement of Facts

20
21 On January 1, 2009, at approximately 2:00 AM, a Dublin bound BART train operator alerted
22 central dispatch to a complaint of a fight that was taking place onboard the train's leading car
23 involving five African American males. Members of the BART Police Department were advised of
24 the call. Officers Tony Pirone and Marysol Domenici were at the Fruitvale BART station when the
25 call was broadcast. Officer Pirone walked upstairs to the Fruitvale station's boarding platform and
26 saw five African American males on the platform near the lead car of the train. Pirone approached
27 this group of men and advised them that he wanted to speak with them about a report of a fight on
28 the train. Two of the individuals reboarded the train and the other three attempted to walk past
29 Officer Pirone to the exit. Officer Pirone detained the latter three individuals and directed them to

1 sit down on the platform against the wall. When Officer Domenici arrived on the boarding platform
2 a few minutes later, she was directed by Pirone to watch these three men. Officer Pirone then
3 returned to the train and demanded that the other two individuals off-board the train. One of these
4 individuals, later identified as Oscar Grant, voluntarily off-boarded the train and was escorted by
5 Pirone to the location of the other detainees. Officer Pirone then returned to the train and ordered
6 the remaining individual, later identified as Michael Greer, to get off the train. When he did not
7 comply, Officer Pirone entered the train car and physically removed Greer from the train. Greer
8 resisted Pirone's attempt to walk him toward the platform wall and became combative. Pirone
9 forced Greer to the floor of the platform near the other detainees and handcuffed him. At this point,
10 Oscar Grant and some of the other detainees stood up and became verbally abusive toward Pirone
11 and his partner Domenici. Pirone approached Grant and forced him to the floor of the platform.

12
13 At this point several additional officers, including Officer Mehserle, arrived on the platform.
14 These additional officers assisted in controlling the detainees and a number of persons who had
15 gotten off the train and were yelling at the police and approaching the detainees' location on the
16 platform. Officer Pirone walked to the lead car and spoke to the train operator to determine if she
17 was aware of the identity of any victims or persons involved in fighting on the train. The train
18 operator said the detainees had caused a disturbance on the train but she was unable to see any of
19 the actual fighting because the car was so crowded. She also said no one had identified themselves
20 to her as a victim of a battery.
21

22
23 Pirone walked back to where the detainees were located, pointed to both Greer and Oscar
24 Grant, and told Officer Mehserle that both men were under arrest for 148 P.C. Oscar Grant
25 attempted to stand up. Officer Mehserle grabbed Grant and forced him to the platform floor, face
26 down. Both Pirone and Mehserle told Grant he was under arrest and to put his hands behind his
27 back. Grant resisted and Pirone knelt in front of Grant's head and put his hands on Grant's neck
28 and back in an effort to forcibly hold Grant down. Mehserle straddled Grant's lower body, bent
29 over, and began pulling on Grant's arms. According to Pirone, Mehserle told Grant to "stop

1 resisting” and “put your hands behind your back.” Pirone heard Mehserle say, “I’m going to Tase
2 him. I can’t get his arms.” Pirone then heard Mehserle say, “He won’t give me his arms. His
3 hands are going for his waistband.” Pirone then heard Mehserle say, “Tony, get away. Back up”
4 As Pirone released his grip on Grant and began to stand up, he heard a single gunshot. Pirone saw
5 Mehserle’s unholstered handgun and observed that Grant was lying face down on the platform with
6 a single gunshot wound in the middle of his back. Grant was handcuffed after he was shot.

7
8 Officer Pirone said he did not immediately react to Mehserle’s warning to “back up” and
9 was still holding onto Grant’s upper body when Mehserle stood up and drew his firearm. Pirone
10 said he was “surprised” by Mehserle’s act of drawing and firing his weapon. Pirone also said that
11 Mehserle approached him several minutes after Grant had been shot and told him, “Tony, I thought
12 he was going for a gun.” However, Mehserle never said anything to Pirone about a gun during his
13 attempt to to gain control of Grant’s hands and Grant was unarmed when he was shot.

14
15 Several passengers on the train video taped portions of the events that transpired on the train
16 platform. The video tapes vary in quality and some were recorded from vantage points which do
17 not afford a clear view of the deceased at the time he was shot by Officer Meshlerle. However, two
18 of the video tapes show Officer Mehserle straddling Mr. Grant’s prone body and pulling first on
19 Grant’s left arm and then his right arm. Grant’s right arm is extended along and close to the right
20 side of his prone body. It appears that Grant is resisting Mehserle’s attempts to pull his arm up and
21 behind his back. Mehserle then released his grip on Grant’s arm, straightened up, drew his pistol
22 from its holster and fired a single shot in the direction of Grant’s prone body. One video tape shows
23 that both of Grant’s arms are visible behind his back when the gunshot is heard on the video tape.

24
25 Officer Mehserle resigned from the police department on January 7, 2009, and his
26 whereabouts were unknown until police were able to locate him as a result of his cell phone
27 activity. He was arrested on January 13, 2009, in Douglas County, Nevada, by members of the
28 Oakland Police Department.
29

1 Argument

2 A charged defendant shall be released on bail by sufficient sureties, except in cases where
3 the crime is a capital offense, or in felony offenses involving acts of violence on another person
4 when the facts are evident or the presumption great and the court finds, based on clear and
5 convincing evidence, that there is a substantial likelihood the defendant's release would result in
6 great bodily harm to another person. *Constitution of the State of California Article 1 Section 12.*
7 In setting bail, the judge shall take into consideration the protection of the public, the seriousness of
8 the offense charged, and the probability of defendant appearing at trial or hearing of the case. The
9 public safety shall be the primary consideration. *Cal. Penal Code section 1275(a); In re Christie*
10 *(2001) 92 Cal.App.4th 1105, 1109.* In considering the seriousness of the offense charged, the judge
11 shall include consideration of the alleged injury to the victim, and the alleged use of a firearm or
12 other deadly weapon in the commission of the crime charged. *Cal. Penal Code section 1275(b).*
13 Before a court reduces bail below the amount established by the bail schedule approved for the
14 county, in accordance with subdivisions (b) and (c) of section 1269b, for a person charged with a
15 serious or violent felony, the court shall make a finding of unusual circumstances and shall set forth
16 those facts on the record. *Cal. Penal Code section 1275(c).*

17
18 Defendant concedes that that the offense he is charged with is both a serious and violent
19 felony. Defendant concedes, as he must, that his use of a firearm in the commission of the offense,
20 and the death of the victim as a result of a gunshot wound, are aggravating factors in determining
21 the seriousness of the offense.
22

23
24 Defendant asserts that he is not a threat to public safety because he has always been a well-
25 adjusted, mature individual with a commitment to following the law. The facts in this case, even if
26 construed in favor of the defendant, show otherwise.

27 Defendant and his fellow officer Pirone attempted to arrest and handcuff Oscar Grant after
28 forcing him into a prone position on the train platform. Both officers are over six feet tall and each
29 weighs in excess of 200 pounds. They had physical control of the victim. Defendant's suggestion

1 that he may have discharged his firearm in the mistaken belief that he was deploying his Taser is
2 disingenuous in light of his claim that he thought the victim was "going for a gun." Defendant
3 would not and should not have have deployed a Taser if he believed he and his fellow officer were
4 exposed to the use of deadly force by the victim. Moreover, the position of defendant's Taser in
5 relation to his duty weapon, combined with the different 'feel' and color of the two weapons makes
6 it highly unlikely that he would have mistaken one for the other.
7

8 The video shows that the victim initially resisted defendant's efforts to secure his hands.

9 Defendant then stood up and intentionally drew his firearm. The video demonstrates that Grant's
10 voluntary display of his empty hands behind his back coincides with Mesherle's precipitate and
11 intentional discharge of his weapon. When it is shown that defendant assaulted the victim with a
12 deadly wepon in a manner endangering life and resulting in death, malice is implied and the killing
13 is presumed to be an act of murder, in the absence of justifying or mitigating circumstances. *See*
14 *People v. Lines* (1975) 13 Cal.3rd 500; *Jackson v. Superior Court* (1965) 62 Cal.2nd 521.
15

16 Defendant was a police officer entrusted with the power to use deadly force in appropriate
17 situations. He was trained in the use of nonlethal methods of subduing and controlling individuals
18 suspected of committing crimes and in the appropriate use of lethal force when confronted with the
19 threat of deadly force. However, his behavior in the instant case evidences poor professional — set up
20 judgement, emotional immaturity, and a lack of impulse control. Defendant's actions in the for temp.
21 insanity ple
22 aftermath of the homicide are consistant with this assesment. Defendant quit his job and
23 dissappeared from the area without explanation. He has been and remains the subject of intense
24 public scrutiny and vilification. As a former police officer he presumably owns or has access to
25 deadly weapons. His lack of maturity and judgement when faced with a perceived threat to his
26 safety combined with his access to deadly weapons may pose a risk to public safety should he be
27 released on bail.
28

29 Moreover, he is now faced with serious felony charges that carry the possibility of
30 confinement in state prison for life. This possibility alone poses a significant temptation to flee the
31

1 jurisdiction. When viewed in combination with his notoriety and the threats of harm to him and his
2 family the temptation may be overwhelming. He has contacts outside this state and it is not
3 unreasonable to suppose that he has additional contacts out of the country (defendant acknowledges
4 that he was born in Germany and may have relatives or friends living overseas). If bail is set in this
5 case it should be in an amount that is significant enough to forstall the strong impulse to flee.
6

7 In determining bail, it is assumed that the defendant committed the crime with which the
8 defendant is charged. *See In re Nordin (1983) 143 Cal.App.3rd 538, 546; In re Horiuchi (1930)*
9 *105 Cal.App. 714, 715.* In setting of bail the court may consider the penalty faced by the defendant.
10 *In re Alberto (2002) 102 Cal.App.4th 421, 430.* The setting of bail will not be viewed as an abuse
11 of discretion unless it is "per se unreasonably great and clearly disproportionate to the offense
12 involved." *Ex parte Duncan (1879) 53 Cal. 410, 412.* Bail is not excessive just because it is
13 beyond the financial means of the defendant to post the amount set. *Ex parte Ruef (1908) 7*
14 *Cal.App. 750, 752.*
15

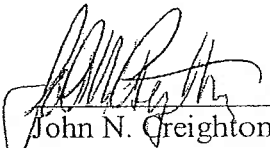
16 Alameda County's 'Schedule of Bail' sets the bail for murder at 'no bail'. If the court is
17 inclined to set a bail at variance from the Schedule of Bail, the People ask that the court consider the
18 very serious nature of the crime charged and the probability that this defendant might not appear
19 for trial unless the court sets a very substantial amount of bail to ensure his appearance at trial.
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21 Dated: January 29, 2009

22 Respectfully submitted,

23 THOMAS J. ORLOFF
24 DISTRICT ATTORNEY

25 By:

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27 John N. Creighton
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