

REPRESENTING:

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Stephen B. Russell

State Attorney

May 22, 2009

Sheriff Mike Scott
Lee County Sheriff's Office
14750 Six-Mile Cypress Parkway
Fort Myers, FL 33912

Re: Officer Involved Shooting Death of
Guy Howard Petrey by Sgt. Eric Nalewaik

Dear Sheriff Scott:

My office has completed the review of the Lee County Sheriff's Office investigation into the shooting death of Guy Howard Petrey on February 12, 2009, by Lee County Sheriff's Sergeant Eric Nalewaik.

Based upon the evidence submitted, and the applicable law, I am convinced that the actions of Sergeant Nalewaik were in self-defense, and a legally justifiable use of deadly force. Therefore, my office will not be filing any criminal charges in this matter.

Enclosed are copies of two memoranda, one submitted by State Attorney's Office Chief Investigator Kevin L. Smith, and one by Assistant State Attorney Dean R. Plattner, which summarize the legal review of this incident.

Thank you for your cooperation with the investigation and review of this case.

Sincerely,

A handwritten signature in blue ink that reads "Stephen B. Russell".

Stephen B. Russell
State Attorney

SBR/dlt
Enclosure

CASE REPORT / CLOSING

CASE NO: 2009-008
DATE: April 30, 2009
INVESTIGATOR: Kevin L Smith
SUBJECT: Officer Involved Shooting, Lee County Sheriff's Office
Sgt. Eric Nalewaik
Guy Howard Petrey, Deceased

On Thursday February 12th, 2009, Deputy Sergeant Eric Nalewaik of the Lee County Sheriff's Office used Deadly Force by discharging his issued firearm causing the immediate death of W/M Guy Howard Petrey. This incident occurred at 11102 Torchfire Trail, Bonita Springs, Lee County, Florida 34135.

Chief Investigator Kevin Smith has reviewed the investigative report conducted by the Lee County Sheriff's Office completed March 5th, 2009, as well as additional requested items received through April 29th, 2009. The report is representative if a thorough and complete investigation as required for our purposes of a legal review.

In summary, the report indicates that on February 12th, 2009 at 6:39am, the Lee County Sheriff's Office Began receiving disturbing, belligerent, and delusional phone calls from a caller who identified himself as Guy Petrey. Out of concern for the welfare of the caller, the Lee County Sheriff's Office attempted to locate and make personal contact with Mr. Petrey.

After compiling intelligence based on the address and caller information, Sgt. Nalewaik, Deputy Dektas, Lt, Sonier, and Captain Allen arrived in the area of 11102 Torchfire Trail, in Bonita Springs (Guy Petrey's residence). As Sgt. Nalewaik and Deputy Dektas approached the front yard they were confronted by Guy Petrey standing in the threshold of his front porch. Sgt. Nalewaik called out saying "Guy", to which Petrey responded "I've got something for you" picking up a silver handgun and pointing it at Sgt. Nalewaik.

Sgt. Nalewaik drew his service weapon as Petry was reaching for the pistol and commanded "Drop your weapon". As Petry pointed the pistol at Sgt. Nalewaik, Nalewaik believed Petry intended to kill him. Fearing for his life, Sgt. Nalewaik discharged his agency issued 45 caliber Glock pistol three times at Guy Petry. Petry died on the scene as a result of his injuries.

At the scene, investigators discovered the weapon pointed at Sgt. Nalewaik was a Daisy brand BB gun fashioned as an exact replica of a real Smith and Wesson model 659 9mm handgun.

On February 13th, 2009, an Autopsy of Guy Howard Petry was conducted by Robert R. Pfalzgraf, MD. The report indicates that the deceased died of a result of "Gunshot wounds (2) of the torso with perforation of the heart and aorta". Petry had a third gunshot wound to his right arm. The Toxicology report indicated the presence of Marijuana in Petry's blood.

Based on the contents of this report it is my opinion that Deputy Sergeant Eric Nalewaik used deadly force as justified by law in order to defend his own life. The later determined fact that the threatened weapon was a BB gun in no way changes the fact that the presented events could only be treated as a lethal threat to his own life.

This Investigation is closed.



Kevin L. Smith
Chief Investigator

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20TH JUDICIAL CIRCUIT
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Stephen B. Russell, State Attorney

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MEMO

TO: Stephen B. Russell, State Attorney
FROM: Dean R. Plattner, Assistant State Attorney
DATE: May 14, 2009
RE: LCSO Shooting Incident, death of Guy Petrey
LCSO # 09-062219
SAO Inv. # 2009-008

Chief Investigator Kevin Smith and I have completed our review of the Lee County Sheriff's Office investigation into the shooting death of Guy Petrey. Mr. Petrey was shot by Sgt. Eric Nalewaik on February 12, 2009.

Petrey had made numerous belligerent and hostile phone calls to the LCSO on the morning of February 12th. Due to this and previous incidents, LCSO had questions regarding Petrey's mental health and whether he was a danger to himself or others. Sgt. Nalewaik was specifically called by a communications supervisor, due to Nalewaik's previous attendance at Crisis Intervention Training.

After determining where Petrey lived, Sgt. Nalewaik and several other members of the LCSO went to his residence in Bonita Springs. Sgt. Nalewaik and another Deputy first approached a neighboring residence owned by Petrey's father, hoping to talk to him about his son. There was no response at the father's home, so they then walked toward Petrey's home, approaching it on foot, from the rear. They then walked around the side of the house until they saw Petrey standing in a screened porch.

Sgt. Nalewaik called to Petrey. Petrey's response was "I've got something for you", and he reached down to pick up what appeared to be a handgun on a table. Sgt. Nalewaik

then drew his gun and told Petrey “drop your weapon”. Instead, Petrey raised it and pointed it at Sgt. Nailwaik. Sgt. Nailwaik then fired three shots, 2 of which struck Petrey’s torso, killing him.

It turns out that the weapon held by Petrey was BB gun, but it was designed to look like a real Smith and Wesson 9mm pistol. It does, in fact, look like a real firearm.

Our legal review of this matter is limited by our jurisdiction to the issue of whether or not a criminal violation of law has occurred. Issues relating to agency policy or procedure are reviewed in other forums. For our review in this case, a portion of the jury instructions is helpful:

In deciding whether the person using the deadly force was justified in the use of force likely to cause death or great bodily harm, he must be judged by the circumstances by which he was surrounded at the time the force was used. The danger facing the person using the deadly force need not have been actual; however, to justify the use of force likely to cause death or great bodily harm, the appearance of danger must have been so real that a reasonably cautious and prudent person under the same circumstances would have believed that the danger could be avoided only through the use of that force. Based upon appearances, the person using the deadly force must have actually believed that the danger was real. *Florida Standard Jury Instruction in Criminal Cases 3.6(f), issued by the Supreme Court of Florida.*

Petrey’s weapon might not have actually caused harm to the deputies, although a BB gun can in certain cases be considered a “deadly weapon”. See *Mitchell v. State*, 698 So.2d 555 (Fla. 2nd DCA 1997). Nevertheless, the law requires that case be reviewed based upon the appearance of danger to Sgt. Nalewaik. Clearly, the situation was one in which Sgt. Nalewaik reasonably believed that Petrey presented an immediate threat to himself and other deputies. Sgt. Nalewaik indicated that he was in fear for his life and the lives of his fellow deputies when he shot Petrey.

The actions of Sgt. Nalewaik were a justifiable use of deadly force under Florida law. Therefore, I recommend that this case be closed without further action.

Cc: Randall B. McGruther, Chief Assistant State Attorney
Kevin Smith, Chief Investigator