RESEARCH MEMORANDUM

Subject:
Should the RCSD continue the practice of compelled blood draws following an officer-involved shooting ["OIS"].

Findings:
It is not recommended that compelled blood draws be part of the OIS protocol in any agendy.

There are very few agencies that impose the requirement of a blood draw following an OIS without any suspicion whatsoever and where no discretion is employed.

The rationale against a compelled blood draw without a reasonable suspicion that the blood will yield evidence of use, impairment or ingestion include:

- Invasion of the deputy's medical privacy (i.e., what prescription drugs might be in the deputy's system and if discovered what medical information is therefore in the Department's hands)
- In violation of *Jackson v. Gates* 975 F.2d 648 (9th Cir. 1992)

The rationale in favor of a compelled blood draw include:

- Civil litigation defense in providing evidence that the officer was not impaired at the time of the shooting
- So-called "transparency"
- "Limited intrusion"
- "Past practice"

The harm to the deputy's right of privacy and 4th Amendment rights outweigh the benefits. Upon information and belief, the County of Riverside has never been sued for an on-duty shooting based on a claim that the deputy was impaired.

While a compelled blood draw may be permissible under the 4th Amendment as an event-triggered, non-discretionary element of the investigation that is not suspicion-based, it is still extremely invasive. In RCSD, no MOU provision exists justifying or delineating the need for and requirement to provide a blood draw from deputies

involved in an OIS. Locally, none of the larger agencies require a blood fluid draw or testing absent good cause. These include LAPD and LASD. Michael P. Stone argued the case of *Johnny Lee Jackson v. Daryl F. Gates, et al* through the 9th Circuit to the U.S. Supreme Court. At issue in that case was the *jury instruction he drafted and the City of Los Angeles objected to in all courts*, which stated that a compelled body extraction and examination must be based upon, "A reasonable, individualized and articulated suspicion, based on objective facts, that the search (of bodily fluids by testing) will reveal evidence of drug or alcohol use, impairment or ingestion." *Jackson* is still the leading case in the United States involving officer drug-testing. All courts accept this standard jury instruction.

In *Roberts v. City of Newport News*, the 4th Circuit Court of Appeals held that the government employer must have reasonable, articulable grounds to suspect an employee of being under the influence (of drugs or alcohol) prior to ordering the employee to submit a sample of bodily fluid for testing. 36 F.3d 1093, 1994 WL 520948 (C.A.4 (Va.)). [Unpublished Opinion].

In *Roberts*, the appellant was a 14-year emergency medical technician who was terminated when he refused to submit to a urinalysis test for drugs. The court ruled that the government employer did not have "reasonable suspicion" that the appellant was under the influence of drugs or alcohol. It was not disputed that the employer's demand to provide a urine sample for urinalysis constituted a search within the meaning of the Fourth Amendment (*See*: *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989)). In *Skinner v. Railway Labor Executives' Ass'n* 489 U.S. 602 (1989), the court determined that in limited circumstances where the privacy interest implicated by such a search were minimal and important government interests furthered by the intrusion would be placed in jeopardy by requiring individualized suspicion, a search would be reasonable despite the absence of individualized suspicion. *Id.* at 624. The Court noted that though tests of blood, urine and breath are "searches" for Fourth Amendment purposes, the government's interest in public and employee safety could justify departures from the usual warrant and probable cause requirements for a search. *Id.* at 617. However, the government order for the search must be reasonable. *Von Raab, supra*, 489 U.S. at 665-66; *Skinner*, 489 U.S. at 618-19.

The court in *Roberts* held that "[r]egardless of whether any drug testing plan is in place, a government employer may require an employee to submit to an urinalysis where the

employer has reasonable, articulable grounds to suspect an employee of illegal drug involvement. This would require individualized suspicion, specifically directed to the person who is targeted for the . . . test." *See*: *Jackson v. Gates,* 975 F.2d 648m, 653 (9th Cir. 1992); *Ford v. Dowd*, 931 F.2d 1286, 1289-90 (8th Cir. 1991); *Penny v. Kennedy*, 915 F.2d 1065, 1067 (6th Cir. 1990).

Similarly, in the typical OIS case, there is no reasonable suspicion whatsoever of drugs or alcohol use, impairment, or ingestion. Therefore, a blanket demand that all deputies submit to blood seizure and examination is arbitrary, capricious and violative of the deputies' privacy and rights to be free from unreasonable searches and seizures.

That RSA has permitted this practice in the past does not foreclose a deputy's complaint that *his individual rights have been violated by this practice.* It is imaginable that the blood of a deputy involved in a shooting indicates some the ingestion of a narcotic, for example. It is unimaginable that after a deputy performed heroically to protect lives in a violent event, he is then potentially investigated by his employer and forced to defend why his blood tested positive for an element, all in violation of the deputy's privacy rights.

The California Police Chiefs' Association website posted an inquiry by Captain Tim Newsome of Fontana Police Department:

"Do agencies require a blood draw when officers are involved in an officer-involved shooting."

Captain Newsome's survey involved responses from 29 agencies in California. The majority of the surveyed agencies, 17, compel blood ONLY with reasonable suspicion or cause. Six of the agencies polled do not take blood under any circumstances, three do not require blood draws in OIS and three agencies have no policy for blood draws.

Conclusion - blanket compulsion of blood draws following an OIS is not recommended.