

JESUS RODRIGUEZ
ASSISTANT DISTRICT ATTORNEY

OFFICE OF
THE DISTRICT ATTORNEY
COUNTY OF SAN DIEGO

San Diego
330 West Broadway
San Diego, CA 92101
(619) 531-4040

<http://www.sandiegoda.com>

BONNIE M. DUMANIS
DISTRICT ATTORNEY

March 3, 2016

Chief Shelley Zimmerman
San Diego Police Department
1401 Broadway, Mail Station 700
San Diego, CA 92101

**Re: Fatal shooting of Mr. Alberto Hernandez on September 28, 2015 by
San Diego Police Officers Jeffrey McCoy, Jonathon Wells, and Brandon Lull;
San Diego Police Department Case No. 15-042053; DA Special Operations
Case No. 15-148PS; Deputy District Attorney assigned: Paul Reizen**

Dear Chief Zimmerman:

We have reviewed the reports and other materials compiled by your agency's Homicide Unit concerning the circumstances leading to the fatal shooting of Mr. Alberto Hernandez by San Diego Police Officers Jeffrey McCoy, Jonathon Wells, and Brandon Lull on September 28, 2015. A District Attorney Investigator responded to the scene and was briefed by your detectives. This case was presented to the District Attorney's Office for review on December 3, 2015.

Summary

At 1:04 a.m. on September 28, 2015, Mr. Hernandez called 911 threatening to kill his female companion. The call was traced back to Unit #6, an upstairs apartment in a two story apartment complex at 1170 West San Ysidro Boulevard, San Diego. San Diego Police Department officers responded to Hernandez's residence and knocked on his front door. The apartment complex had exterior lights that partially illuminated the exterior of the building. Hernandez opened the door holding a pistol in his hand. A female was seen in the apartment standing behind Hernandez. Officer Jeffrey McCoy told Hernandez to drop the gun. Hernandez quickly closed and locked the front door. Officers took cover and set up a perimeter around Hernandez's apartment. Hernandez opened his front door multiple times and pointed the gun outward. Officers told Hernandez to drop the gun each time. Hernandez ultimately left his residence and walked down the apartment complex stairs advancing on the officers with the gun in his hand. Officers continued to yell at Hernandez to drop his gun. Hernandez ignored the officers' commands and pointed his gun at the officers. Officers Jeffrey McCoy, Jonathon Wells and Brandon Lull fired at Hernandez, striking Hernandez several times. Hernandez was taken to the hospital where he was pronounced dead shortly after arrival. This incident was recorded with officers' body-worn cameras and video from the ABLE (Airborne Law Enforcement) helicopter camera.

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Persons Involved

Mr. Alberto Hernandez was 59 years old at the time of this incident and lived in San Diego. Officer Jeffrey McCoy had been with the San Diego Police Department for a year and nine months at the time of the incident. McCoy's prior experience included 20 years in the United States Marine Corp with combat service in Afghanistan. Officers Jonathon Wells and Brandon Lull had been with the San Diego Police Department for a year at the time of the incident. All officers were assigned to Southern Division Patrol.

Background

Mr. Hernandez suffered from mental-health issues and alcohol dependency. In the two months leading up to the incident, Hernandez's social worker called the police four times requesting the police check the welfare of Hernandez citing Hernandez's "bipolar-disorder" diagnosis, alcoholism, and eight previous suicide attempts. Officer McCoy was aware of two previous incidents at the residence involving Hernandez's irrational behavior. McCoy told Officers Rack and Herkelman about Hernandez's mental-health issues. On the night of the shooting, some involved officers were aware Hernandez had called 911 stating he was going to shoot a female. Other officers learned Hernandez was armed with a gun when McCoy announced over police radio that Hernandez answered the door with a gun and then shut the door.

Civilian Witnesses

There were four civilian witnesses to the armed confrontation and shooting event involving Mr. Hernandez. These witnesses were tenants of the apartment complex where Hernandez lived. All four witnesses said they heard the officers order Hernandez to drop the gun. They also saw Hernandez pointing an object toward the officers and assumed Hernandez was armed with a pistol. An additional witness (Hernandez's ex-wife) said she knew Hernandez armed himself with a toy/replica gun but said she remained inside the apartment and only heard the incident. The ex-wife made no mention of the toy/replica gun to law enforcement until she was interviewed after the shooting.

Law Enforcement Witnesses

There were seven law-enforcement witnesses that responded to the 911 call and were in position to observe events leading to the shooting. Those witnesses were Officers Kyle Rack, Dean Bishop, Matthew Herkelman, Oscar Torres, Peter Belanger, ABLE Pilot Joseph Waggaman, and Technical Flight Officer Tristan Gonzalez. These seven law enforcement witnesses saw Hernandez pointing a handgun at officers and corroborated the events captured on video.

Officer Jeffrey McCoy's Statement

Officer McCoy heard over police dispatch that a male called 911 stating he was going to shoot his female companion. McCoy responded to the call with Officers Kyle Rack and Matthew Herkelman. McCoy walked up the stairs to Mr. Hernandez's apartment and knocked on Hernandez's door. Hernandez opened the door while holding a handgun in his right hand. McCoy immediately stated, "Put the gun down." Hernandez quickly closed and locked the door. Based on his training and experience, McCoy believed the handgun was real. McCoy announced

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over police radio that Hernandez answered the door with a gun in his hand and then retreated down the stairs with Rack.

Shortly after Sergeant Dean Bishop arrived on scene, Officer McCoy heard Officer Rack yell approximately three times, "San Diego Police. Put the gun down." Mr. Hernandez then shut his front door again. Due to Hernandez's behavior, McCoy and Herkelman began evacuating apartments below Hernandez's. Again McCoy heard officers yell, "Put the gun down." McCoy looked up and could see Hernandez with his door open pointing a gun outward. McCoy repositioned himself behind a tree and then saw Hernandez exit his apartment with the gun in his right hand. McCoy said he and other officers shouted, "San Diego Police. Put the gun down."

Mr. Hernandez began to walk down the apartment-complex stairs with the gun in his right hand. Hernandez was looking around and pointing his gun where he looked. Once Hernandez reached the stairway landing, he pointed his gun at Officer McCoy. Hernandez then turned toward the other officers, took a two-handed grip on the handgun, and pointed it at the other officers. McCoy believed Hernandez was targeting one of the officers and was fearful of their lives and his own. McCoy heard another officer fire, but did not see any reaction from Hernandez. McCoy then fired three to four shots. Hernandez fell to his knees with the gun still in his hand and then collapsed on the steps. McCoy moved the gun away from Hernandez. Officers Torres and McCoy then handcuffed Hernandez.

Officer Jonathan Well's Statement

Officer Wells heard Officer McCoy broadcast that a male answered the door with a gun in his hand and then went back into his residence. Wells responded to help. Wells arrived and saw McCoy and four other officers were on scene. McCoy pointed out Mr. Hernandez's residence upstairs to Wells. Wells was briefed that Hernandez was armed with a firearm and was coming in and out of the residence, which was also occupied by a female.

Officers Lull and Wells began blocking off the street. Wells heard another officer yell, "He's coming out. He's coming out." Wells saw Mr. Hernandez come out of the residence and walk down the apartment-complex stairs. Wells got a direct view of Hernandez and could see a black semiautomatic handgun in his hand. Officers began yelling, "Drop the weapon." Wells saw Hernandez pointing his gun directly at Officer McCoy. Lull was giving commands to Hernandez to drop his gun. Hernandez started to turn from McCoy and point his weapon. An officer yelled, "Shoot him, shoot him," and Wells heard two shots fired. Wells saw Hernandez was still pointing his weapon. Wells fired two to three shots at Hernandez. Wells then heard another officer fire approximately five shots and Hernandez fell down slumping over the landing stairs. Wells and Lull maintained coverage over Hernandez until Officer Torres and McCoy had control of Hernandez.

Officer Brandon Lull's Statement

Officer Lull responded to assist Officer McCoy when he heard McCoy state over police radio that a male answered his residence door with a pistol in his hand, shut the door, and was in the process of locking the door. Lull arrived on scene and spoke with McCoy and Sergeant Bishop. Lull saw Mr. Hernandez open and close his door with a gun in his hand. Bishop requested Lull start blocking traffic on the road due to Hernandez's actions.

Officer Lull returned to the incident area and maintained a position of cover behind a police SUV. Lull had his pistol drawn and pointed at Mr. Hernandez's door. Lull then saw Hernandez come out of his residence armed with a handgun. Sergeant Bishop was giving commands to Hernandez to drop his gun. Lull yelled out for Hernandez to drop the gun or he would be shot.

Mr. Hernandez began walking down the apartment-complex stairs. When Hernandez got to the landing, he pointed his gun at Officer McCoy. Officer Lull yelled, "McCoy, he's pointing the gun at you." Hernandez then swung his gun around at Sergeant Bishop. Lull heard Bishop shout, "shoot him." Hernandez then swung the gun around at Lull. Lull believed Hernandez was going to shoot him and the other officers. Lull fired two rounds. Lull was unsure if he hit Hernandez because Hernandez did not even flinch and was still pointing the gun at Lull. Lull heard shots being fired and thought Hernandez was firing at him. Lull reengaged and fired three to four more times. Hernandez eventually dropped to the ground with the gun in his hand. Lull approached with other officers to apprehend Hernandez.

Investigation

The scene was secured and the investigation into the shooting was conducted by the San Diego Police Department's Homicide Unit. Officer body-worn camera and ABLE-helicopter footage, crime-scene photographs, crime reports, computerized crime-data research, witness interviews, radio communications and medical reports were reviewed to analyze the shooting.

Although the conditions were dark, the ABLE-helicopter footage is clear. The footage shows officers setting up a perimeter around Mr. Hernandez's apartment. Hernandez then opens his apartment door. Moments later Hernandez exits his apartment with an object in his right hand shaped like a handgun and walks down the apartment-complex stairs. Hernandez points the object in the direction of Officers McCoy and Lull and switches to a two-handed grip of the object. Hernandez drops down on the stairway landing after apparently being shot by the officers.

Officer Wells forgot to activate his body worn camera. Officers McCoy and Lull, had their body-worn cameras activated during the incident. The footage from McCoy's camera captures Hernandez opening his apartment door with a gun in his right hand. McCoy tells Hernandez to drop his gun. Hernandez quickly closes the door on McCoy. McCoy backs up and informs other officers Hernandez's gun appears to be a 9mm Beretta. Officers take cover and establish a perimeter. Hernandez repeatedly opens his door with the gun. Eventually Hernandez exits his apartment and walks down the apartment-complex stairs with the gun pointed at officers. During

this time, officers can be heard yelling out to Hernandez multiple times commands such as, "Put the gun down;" "San Diego Police Department, drop the gun;" "Drop the gun, San Diego Police;" and "Drop the gun or you gonna get shot." Hernandez continues to point the gun at officers and officers then fire on Hernandez.

The investigation and location of the bullet casings revealed the number of rounds fired by each officer. Officer McCoy fired three times. Officer Wells fired two times. Officer Lull fired six times. The investigation revealed Mr. Hernandez was shot four times in the torso, three times in his right arm and once in his left leg. Hernandez's gun was found to be a black "Powerline by Daisy 340" ".177 Cal. (4.5mm) BB" replica handgun with its protective orange tip removed.

Toxicological testing of Mr. Hernandez's blood sample conducted by the Medical Examiner's Office was positive for benzodiazepines and also indicated a blood-alcohol content of .30 percent. During a search of Hernandez's residence, officers found evidence of a prescribed narcotic and medications for psychological disorders. Hernandez's ex-wife, who Hernandez was living with, told investigators Hernandez was an alcoholic battling depression. She said on the night of the shooting, Hernandez was drinking and depressed and made a comment that he did not want to "live like this."

Legal Analysis

This review was conducted pursuant to the joint protocol between this office and all San Diego law enforcement agencies calling upon the District Attorney to conduct an independent assessment of the circumstances surrounding the use of deadly force.

Under California law, peace officers may use deadly force to protect themselves from the threat of death or great bodily harm and to use reasonable force in making an arrest. California Penal Code section 835a allows an officer to use reasonable force to make an arrest and to overcome resistance by a person for whom he has reasonable cause to believe has committed a public offense. That section states the officer need not retreat or end his effort to make an arrest because of that person's resistance. Penal Code section 196 declares that homicide is justifiable when committed by public officers when necessarily committed in overcoming actual resistance in the discharge of any legal duty.

In accordance with Penal Code section 196, peace officers may use deadly force in the course of their duties under circumstances not available to members of the general public. We are mindful, however, that certain limits on the use of deadly force apply to peace officers. The U.S. Ninth Circuit Court of Appeals, in the case of *Scott v. Henrich* (9th Cir. 1994) 39 F.3d 912, delineated those circumstances under which deadly force may be used:

[P]olice may use only such force as is objectively reasonable under the circumstances. An officer's use of deadly force is reasonable only if 'the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.' All determinations of

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unreasonable force '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.' [Citations omitted.]

Irrespective of any laws applicable to situations where peace officers use deadly force in accomplishing their duties, the law of self-defense is available to any person. Homicide is justifiable in accordance with Penal Code section 197 when resisting any attempt by a person to commit great bodily injury on or kill any person.

Conclusions

Mr. Hernandez called 911 threatening to shoot his female companion. When police arrived to investigate the call, Hernandez answered the door with a pistol in his hand pointed at Officer McCoy. Hernandez retreated and locked himself in his apartment. Shortly after, Hernandez exited the apartment and headed down the apartment-complex stairs towards the officers. Despite being commanded by officers over ten times to drop the gun, Hernandez continued to point his pistol at officers while advancing on the officers' location. When Hernandez reached the stairway landing, he switched to a two-handed grip of the pistol and pointed it directly at officers. The officers reasonably believed Hernandez had a real handgun and they needed to act immediately to avoid being killed or seriously injured by Hernandez. Officers McCoy, Wells and Lull's use of deadly force was expected and reasonable under the circumstances. They bear no criminal liability for their actions because they were legally justified and compelled to shoot at Mr. Hernandez to stop the threat he posed.

A copy of this letter, along with the materials submitted for our review, will be retained in our files.

Sincerely,



BONNIE M. DUMANIS
District Attorney
County of San Diego

BMD:eg

cc: Captain David Nisleit
San Diego Police Department
Homicide Division

Captain Rudy Tai
San Diego Police Department
Southern Division