

HALL OF JUSTICE
330 WEST BROADWAY
SAN DIEGO, CA 92101
(619) 531-4040
SanDiegoDA.com

OFFICE OF
THE DISTRICT ATTORNEY
COUNTY OF SAN DIEGO
SUMMER STEPHAN
DISTRICT ATTORNEY

DAVID P. GREENBERG
ASSISTANT DISTRICT ATTORNEY

September 17, 2019

Chief of Police David Nisleit
San Diego Police Department
1401 Broadway, Mail Station 700
San Diego, CA 92101

Re: Fatal shooting of Mr. Alfonso Cervantes on April 3, 2019, by San Diego Police Officer M. Martinez; San Diego Police Case # 19-011041; DA Special Operations Case No. 19-065PS; Deputy District Attorney Assigned: Gregg McClain

Dear Chief Nisleit:

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. The purpose of the District Attorney's review is to provide an independent analysis and determine if the shooting was legally justified. As part of our analysis, we have reviewed the materials compiled by your agency's Homicide Division concerning the fatal officer involved shooting of Mr. Alfonso Cervantes near his residence. The case was presented to the District Attorney's Office for review on June 27, 2019.

Summary

On April 3, 2019, several citizens called the San Diego Police Department to report Cervantes was walking around the property of a RV park with a rifle and discharging it indiscriminately. Officer Martinez and a fellow officer located Cervantes. Cervantes was armed with an assault type rifle similar in appearance to an AK-47 and fired a round toward the ground. Martinez briefly lost sight of Cervantes as he walked westbound away from them. Martinez found Cervantes walking in an easterly direction toward them one street to the south. Cervantes was swinging the rifle back and forth as he walked.

Martinez ordered Cervantes to drop the gun, but Cervantes did not comply and continued to walk toward the officers. Martinez fired four rounds, striking Cervantes. Martinez and his partner went to Cervantes and found him unresponsive and not breathing. Martinez performed CPR, but Cervantes succumbed to his injuries and was pronounced deceased at the scene. Toxicology testing revealed Cervantes had consumed methamphetamine.

Persons Involved

Cervantes was a 50 year-old resident of San Diego. Martinez was assigned to the Southern Division and has been employed as a police officer since September 2016. Martinez was in full uniform on the date of the incident.

Civilian Witnesses

Several civilian witnesses were interviewed by responding officers and detectives. None of the civilian witnesses personally saw the shooting, however, they saw and heard the events leading up to and immediately following the shooting. Many of the civilian witnesses heard the gunshots and described Cervantes as wielding an AK-47 type long gun.

Civilian Witness One (CW1)

CW1 lives in the RV park. She saw a man holding a long black gun, like an AK-47. She said he was holding the rifle with both hands pointing the muzzle away from himself and acting strangely. She described him to be approximately five feet seven inches tall, Hispanic, in his 40's, wearing a t-shirt, and navy-blue pajama pants.

She said the man walked between a vehicle parked in front one of the trailers then back and forth in the street. He was talking to himself, but she didn't know what he was saying. As she was watching him, he looked right at her and tried to hide the gun by lowering it on his right side with the muzzle pointing toward the ground.

She called the police. While she was on the phone with dispatch, she heard two gunshots. She immediately went outside and saw the man standing by the same vehicle. She didn't see anyone else around. She went back inside her home and heard two more gunshots several minutes later.

Civilian Witness Two (CW2)

CW2 said she heard about the man walking around the complex with a rifle when she returned home to the RV park. She arrived at her unit and saw the police outside. The officer told her to go inside. Once inside, she said she heard one to two gunshots followed shortly after by an additional four gunshots. She looked out of her mobile home's front window and saw a man on the ground. She became afraid and ran to the back of her mobile home to hide.

Civilian Witness Three (CW3)

CW3 was standing outside of her RV with her daughter when she heard a sound. She thought it was a gas explosion or something. She directed her daughter to go back inside as she went to go see what was happening. She started walking to the end of her RV when a man came around the corner. She said he was short and had a "big black gun." When she saw him with the gun, she realized the sound she had heard was a not gas explosion and thought he had just killed someone at the hotel. She spoke to the man in Spanish and asked, "Hey, what's going on?" He stopped and turned toward her responding in Spanish, "I need to kill this one, she is going to [expletive] me up."

She saw him walking eastbound and she heard approximately three gunshots again a couple of seconds later. He fell to the ground and she ran back inside her residence. She was not aware the police had shot him. She did not see who shot the man. She only heard the shots. She said he was holding the gun in his hands on his right side when he was shot.

Civilian Witness Four (CW4)

CW4 was working at the Travel Lodge. CW4 heard what sounded like two shots but thought someone was throwing items in the dumpster. Moments later his supervisor came in and told him that there was a man outside shooting a gun. CW4 and his supervisor went outside to see

what was going on. They were on the second floor on the south side of the building and had a view of the mobile home park.

CW4 did not see anything initially, but heard a single shot. CW4 looked down and saw Cervantes holding a "black M-16 style" rifle. Cervantes pointed the rifle at CW4 and his supervisor as he made eye contact with them. Cervantes then said in Spanish, "Go to hell."

CW4 and his supervisor ran. As CW4 was running for safety, he saw police officers arriving. CW4 ducked into a room and stayed there. CW4 heard six to seven shots and later learned that Cervantes had been shot.

Law Enforcement Witness One (LE1)

LE1 said he responded to a radio call of a man with a gun. While en route to the call, he heard several updates describing the gun as a possible AK-47 and indicating the suspect had fired several rounds. Once on scene, LE1 retrieved an additional protective ballistic vest and armed himself with his department-issued AR-15 rifle. LE1 partnered with Martinez and they began searching the surrounding area.

LE1 heard a gunshot as he and Martinez walked southbound through the hotel parking lot toward the mobile home complex. He looked westbound through the wrought iron fence near the swimming pool and saw Cervantes wearing a red shirt and light-colored pants holding a black rifle. Cervantes was standing in the middle of the alley which separated the motel and the mobile home complex. LE1 and Martinez moved to a position of cover and attempted to get a better view of Cervantes. However, once they were positioned to see westbound in the alley, Cervantes was no longer visible. Their view of Cervantes was blocked by a wooden fence on the south side of the alley.

LE1 and Martinez continued to move beyond the first row of trailers to the south of the hotel property. He said Martinez was to his left as they went around the first trailer in the row and looked westbound. As they moved south and west approaching the second trailer, LE1 moved behind a car parked in a driveway for cover and Martinez was positioned ahead of him adjacent to the roadway between the trailers.

LE1 heard Martinez yell, "Drop the weapon!" LE1 indicated he saw Cervantes standing in the middle of the road between the second trailer closest to the west end of the roadway. Cervantes was still armed with the rifle and started to turn toward LE1 and Martinez. LE1 said he elected not to shoot at Cervantes because he was concerned if Martinez moved to a position of cover, he would possibly be struck by rounds fired by LE1. Martinez fired two rounds and there was no immediate reaction from Cervantes. LE1 was unsure if Cervantes was hit by the rounds or not. Martinez fired two additional rounds which appeared to impact Cervantes causing him to fall to the ground.

LE1 and Martinez moved forward to where Cervantes was on the ground laying on his right side with the rifle next to him. He said Martinez rolled Cervantes over and started first aid.

Statement of Officer Michael Martinez

Martinez said he was finishing a traffic stop with his partner when he heard the call regarding a male running around the mobile home park with an AK-47. Updates to the call said reporting

parties had heard gunshots in the area. He drove to the area of the shared entrance to the mobile home park and Travelodge Hotel parking lot.

Martinez retrieved his external vest and rifle. When he put on the external ballistic vest, his BWC was still mounted to his uniform shirt. ABLE was overhead and had located Cervantes. ABLE personnel described Cervantes as a male wearing pajama type pants and a red shirt, walking northbound, armed with a rifle.

Martinez said there were five or six officers on scene developing a plan, when he heard Cervantes was walking northbound through the complex. Martinez and the other officers believed Cervantes was walking in their direction, so they disbursed and started moving southbound toward the mobile complex.

Martinez described a large wooden fence or barrier he estimated to be eight to ten feet tall adjacent to the roadway between the Travelodge and the mobile home complex. He said he could see Cervantes walking toward them. He described Cervantes as being Hispanic, wearing blue pants, a red shirt, holding a black rifle in his hand. One of the things that stood out to him was the curved magazine. He said as he called it out to his fellow officers, he heard a round go off.

Martinez said Cervantes was walking toward them swinging the gun in his right hand. The gun was swinging with the movement of his arm as he walked. He said Cervantes pointed the rifle in front of him toward the ground and fired a round. That concerned Martinez. He said he knew the gun was real and took cover behind a car. Cervantes walked away south and Martinez lost sight of him due to the wooden fence.

Martinez broadcast shots fired, and the officers split up into teams. He partnered with LE1 and they started walking southbound through the complex. As they moved, Martinez said he was walking between the RVs trying to get cover. He said they moved to the next road to the south and when he turned the corner facing westbound, Cervantes was already walking eastbound toward Martinez. He didn't expect Cervantes to be there so fast. He said he was in the middle of the road and looked at Martinez and LE1. Cervantes had the rifle in his right hand swinging back and forth it as he walked, but slightly more exaggerated.

Martinez raised his rifle and yelled, "Drop the gun!" Martinez said he only gave one command and he said he screamed it. He waited approximately two seconds and Cervantes continued moving forward. He failed to acknowledge Martinez or put the gun down and Martinez fired four rounds. He said at that moment he knew the gun wasn't a toy and Cervantes had fired in their direction once before. Cervantes was holding the rifle in the same manner as when he fired the first time and Martinez believed he could fire the rifle again. Martinez said he feared for his and LE1's life. He indicated that there were people in the complex including children. Cervantes did not comply when directed to drop the gun. Martinez said he shot Cervantes to protect himself and others around him.

Cervantes was impacted by the rounds and fell to the ground. Martinez and LE1 moved forward telling Cervantes not to move. Martinez conducted a brief pat down of Cervantes for additional weapons and started CPR.

Investigation

The crime scene was secured, photographed, and investigated by San Diego Police Homicide detectives. All detective reports, crime-scene investigator reports, audio-recorded witness interviews, recorded 911 calls, SDPD ABLE helicopter video, and Body Worn Camera (BWC) video were reviewed. All evidence was found to be consistent with the officer's statements and the statements of the civilian witnesses.

Martinez and LE1 were each equipped with a BWC. The time stamp for the BWC video is reflected in Coordinated Universal Time (UTC). This analysis has converted all times and reflected them as Pacific Daylight Time (PDT). Martinez inadvertently covered his BWC when putting on his external ballistic vest, consequently his actions leading up to and including the shooting were not recorded on video, however the entire event was audio recorded. Martinez and LE1 both activated their respective BWC at approximately 1:45 p.m., and they remained active until each left the scene. The BWC footage corroborated the officers' statements.

The respective videos show Martinez and LE1 retrieving and putting on additional protective equipment. LE1's BWC shows Martinez walking ahead and to the left of LE1. Martinez can be heard saying, "I got him," as LE1 and Martinez move to a position of cover adjacent to a recreational vehicle just south of the Travelodge hotel. Both LE1 and Martinez move southwest between two recreational vehicle type trailers.

At approximately 1:46 p.m., Martinez yells, "Drop the gun!" Less than two seconds later, four gunshots are heard. Martinez and LE1 begin walking to where Cervantes is now down on the ground with the rifle at his side. Martinez can be heard yelling "Don't move dude! Don't move!" After conducting a pat down for additional weapons, Martinez performs CPR until relieved by another officer.

At approximately 1:51 p.m., Martinez can be seen picking up and manipulating the weapon used by Cervantes. Martinez removed the magazine and a round from the chamber and placed the rifle and now detached magazine back onto the ground. Both LE1 and Martinez are relieved by other officers and ultimately leave the scene.

Crew members of the ABLE helicopter can be heard stating on a video recording that they wanted to keep their distance from Cervantes, recognizing the capability of the weapon he was carrying to shoot long range.

An examination of the scene revealed Cervantes was armed with an operable 7.62X39mm Arsenal model SLR95 semi-automatic rifle made in Bulgaria. A records check showed the gun was purchased by another person in 1998, but there is no subsequent recorded history regarding theft or transfer of the weapon. The gun was found loaded with one round in the chamber by Martinez. The magazine contained additional rounds for a total of 35 rounds. An examination of the weapon, as well as the scene, revealed at least one round had been fired.

Investigators collected four Speer brand .223 caliber cartridge casings from the scene. All the cartridge casings were from ammunition issued by the San Diego Police Department. A post-shooting examination of the Daniel Defense, model M4 Carbine 5.56/223 Remington caliber semi-automatic, centerfire rifle used by Martinez was completed. The post-shooting

examination of this weapon found Martinez could have potentially fired between three and five rounds.

On April 4, 2019, an autopsy was performed on Cervantes. The autopsy documented three gunshot wounds to the left outer thigh with a corresponding exit wound in Cervantes' left back and a grazing gunshot wounds to the back of the Cervantes' head. Additionally, various abrasions were noted on Cervantes' forehead, right elbow, right hand and left knee. The manner of death was determined to be homicide and the cause of death was gunshot wounds.

Toxicological studies performed on blood collected from Cervantes detected methamphetamine (0.40 mg/L) and metabolite amphetamine (0.07 mg/L). No alcohol was detected.

Family members and people who knew Cervantes well spoke openly to detectives. They described Cervantes as being paranoid and in a panic the day of the shooting. Cervantes was adamant that he was being followed and someone was trying to kill him. Family members attempted to calm Cervantes by assuring him he was not being followed and no one was trying to hurt him. He was concerned there were people hiding in the nearby apartments and under the trailer. They said Cervantes was talking to an imaginary woman and at times was angered during his conversation with her. They described Cervantes' appearance prior to the shooting as looking like something wasn't right or like he was under the influence of drugs.

Family members stated Cervantes had been known to use methamphetamine in the past. When he would use methamphetamine, Cervantes became paranoid, thinking he was being followed or someone was going to harm him. They believe the last time Cervantes used illicit drugs was approximately two years ago. Despite the paranoia he experienced when using methamphetamine, his family did not believe Cervantes suffered from, nor was he ever diagnosed with mental illness.

Legal Analysis

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 whom he has reasonable cause to believe has committed a public offense.

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 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.'”

The "reasonableness" of a 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. Connor* (1989) 490 U.S. 386, citing *Terry v. Ohio*, 392 U.S., at 20-22.

In addition to 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. A person acts in lawful self-defense or defense of another if they reasonably believed they or someone else was in imminent danger of suffering bodily injury, believed the immediate use of force was necessary to defend against that danger, and used no more force than was necessary to defend against that danger.

Conclusion

The officers were confronted by Mr. Cervantes who was armed with an assault-type rifle which was capable of shooting long distance. He was under the influence of a controlled substance. Cervantes had previously fired the rifle indiscriminately and pointed it at people while walking through the RV park where he lived. His behavior caused his neighbors concern and they called police. Officers on the scene saw Cervantes shoot what appeared to be an AK-47 rifle in their general direction. The officers took a position of cover as Cervantes walked away.

When Officer Martinez and LE1 located Cervantes again, he advanced on them while swinging the rifle. Martinez commanded Cervantes to drop the gun, aware that he had already fired it before officers had arrived and after officers responded to the scene. Martinez fired at Cervantes in his own defense, the defense of LE1, and civilians in the vicinity to prevent Cervantes from injuring or killing them. Martinez had a reasonable belief they were all at risk of being severely injured or killed by Cervantes. Based on these circumstances, Martinez bears no state criminal liability for his actions. A copy of this letter, along with the materials submitted for our review, will be retained in our files.

Sincerely,

SUMMER STEPHAN
District Attorney

SS:gm

cc: Captain Tom Underwood
San Diego Police Department
Homicide Division
1401 Broadway, Mail Station 713
San Diego, CA 92101