

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



DWAIN D. WOODLEY
ASSISTANT DISTRICT ATTORNEY

April 16, 2021

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

Re: Fatal shooting of Mr. Richard Price by San Diego Police Officers Joshua Clabough, Ace Ybanez, Jason Gonzalez, Kevin Cummings, Miles McCardle, David Burns and Joshua Leiber on July 9, 2020; SDPD Case No. 20034439; DA Special Operations Case No. 20-092PS; Deputy District Attorney assigned: John B. Dunlap

Dear Chief Nisleit,

We have reviewed the reports and other materials compiled by the San Diego Police Department Homicide Unit concerning the shooting of Richard Price. District Attorney Investigators responded to the scene and were briefed by detectives. This case was submitted to the District Attorney's Office for review on October 13, 2020. Additional materials were provided through December 30, 2020.

Summary

On July 9, 2020, at approximately 3:51pm, a person called 911 and reported a male pointed a gun at her and her companion on Menlo Avenue. She described the male wearing all black and carrying a black handgun in his right front pocket. San Diego Police officers responded. At approximately 3:55pm, the reporting party directed officers to Price, who was at 4200 Menlo Avenue holding what appeared to be a handgun. Price was not compliant with officers' commands and dropped what officers believed was a handgun near his feet. Officers ordered Price to step away from the gun, but Price picked it up and pointed it at the officers. Seven officers discharged their firearms, striking Price multiple times. Price fell to the ground with the handgun still near his body. Due to the proximity of the gun to Price, officers believed Price was still a threat. An arrest team, including a police service dog, approached Price. One beanbag round was fired at Price to check for responsiveness but there was no movement from him. The police dog pulled Price away from the gun, allowing officers to approach and render first aid. Price was transported by medics to UCSD Hospital where he was pronounced deceased at 4:24pm. The handgun Price used was later determined to be an airsoft pistol that resembled a firearm. Toxicology testing from Price detected Amphetamine (0.03 mg/L), Methamphetamine (0.36 mg/L) and Phencyclidine (PCP) (530 ng/mL). The cause of death was determined to be a gunshot wound of the head and manner of death was determined to be homicide.

Persons Involved

Richard Price was a 49-year-old resident of San Diego. All officers involved in this incident were employed by the San Diego Police Department. The officers' names and length of employment are as follows: Joshua Clabough, over three years; Ace Ybanez, over five years; Jason Gonzalez, six years; Kevin Cummings two years, Miles McCardle, six years; David Burns, four years; Joshua Lieber, six years.

Civilian Witnesses

Officers and investigators canvassed the neighborhood and spoke to ten civilians. Some of the civilians heard the shooting but did not witness the incident. Four civilians captured portions of the incident on their cell phones. The videos were turned over to investigators for review.

Civilian Witness 1 (CW1)

CW1 was the reporting party. CW2 was a passenger in the vehicle. CW1 saw a tall Black male wearing all black retrieve a handgun from his pants pocket and point the gun towards CW1 and CW2. CW1 quickly drove past the man and called 911. The dispatcher told CW1 to return to the area to see where the male was located. CW1 and CW2 drove back to the area and saw the man, who appeared to be wiping the gun down. CW1 and CW2 drove south on Menlo Avenue. CW1 approached several officers who had stopped two people in the area and told the officers that they stopped the wrong person. CW1 directed officers towards Menlo Avenue where CW1 last saw the man with the gun. CW1 remained at the corner of Menlo Avenue and Orange Avenue as officers went to contact him. CW1 eventually heard several gunshots but did not witness the shooting.

Civilian Witness 2 (CW2)

CW2 was seated in the front passenger seat of CW1's vehicle. CW1 was driving north on Menlo Avenue when CW2 observed a Black male on the sidewalk with the handle of a gun protruding from his pocket. The male grabbed the gun from his pocket and pointed it at them. CW1 quickly drove past the man and called 911. CW1 was distraught and parked her vehicle. CW1 traded positions with CW2. The dispatcher advised CW1 to return to the area. CW2 drove back to where they last saw the male. CW2 saw the male near the same location and the man pointed the gun at them again. CW2 quickly drove away. CW1 and CW2 flagged down an officer and told the officer what occurred.

Civilian Witness 3 (CW3)

CW3 recorded the incident with his cell phone. CW3 was indoors when he heard a loud voice say, "You in the black, San Diego Police Officer. Get on the ground." CW3 looked outside and saw three officers with guns drawn. Two other officers ran up and stood behind a silver car. CW3 never saw the person the officers were addressing. Once officers fired, they continued to give commands to get away from the gun.

Civilian Witness 4 (CW4)

CW4 recorded the incident on her cell phone. CW4 was walking when CW4 saw an officer with a gun shouting, "Get on the ground!" Several more officers arrived and CW4 heard an officer say multiple times "Put the weapon down." The officer also said, "We don't want to shoot you!" CW4 could not see the person officers were yelling towards. After the shooting, CW4 heard officers continuing to give commands. CW4 saw a man lying on the ground after the gunfire.

Civilian Witness 5 (CW5)

CW5 was standing outside when he saw officers pointing their guns towards a Black male. The man was fumbling with his waistband and never said anything back to the officers who were yelling commands. CW5 saw a black object fall from the male onto the ground. Officers fired their weapons once the male began to bend over. CW5 did not see the man point anything at the officers.

Civilian Witness 6 (CW6)

CW6 was indoors when he heard officers giving commands, "Get on the ground," "Freeze," "Drop the gun," and "Don't make any sudden movements." CW6 looked outside and saw a man had his hands in his

waistband and was not complying with officers. CW6 decided to walk outdoors when he heard shots fired. CW6 saw the man was lying on his stomach and his arms were still moving.

Law Enforcement Witness 1 (LE1)

LE1 responded to the radio call of a male with a gun in the area of Menlo and University Avenue. While driving on Menlo Avenue, two females in a vehicle told him there was a male with a gun up the street. LE1 observed Price holding what appeared to be a gun and manipulating it in front of him. LE1 broadcast what he observed over radio and told Price to drop the gun. LE1 was approximately 100 to 200 feet away from Price.

Price dropped the gun and officers ordered him to step away from it. Price was unresponsive to commands. LE1 directed LE2 to get a beanbag shotgun. Price picked the gun up and pointed it at officers. LE1 did not have a clear shot because Leiber was in front of him. LE1 yelled for someone to shoot. LE1 heard multiple gunshots. LE1 saw Price on the ground. LE1 heard another officer say that Price still had the gun near his left hand. LE1 and a team of officers with ballistic shields approached Price. One shot was fired from a beanbag shotgun at Price without any response. A police service dog pulled Price away from the gun. Officers handcuffed him and rendered first aid.

Law Enforcement Witness 2 (LE2)

LE2 and Ybanez responded to the radio call. LE1, who was walking on foot, directed LE2 and Ybanez towards an individual. A motorist drove up and said the officers had the wrong person and the actual suspect was up the street. LE2 apologized to the detained man and released him. LE2 and Ybanez drove north on Menlo Avenue.

LE2 heard LE1 yelling at Price about a gun. LE2 ran back to his patrol vehicle to get a beanbag shotgun. LE2 returned and took cover behind a vehicle. LE2 heard officers telling Price not to touch the gun. LE2 saw Price was fiddling with his pants but did not see a gun. Officers told LE2 the gun was on the ground near Price's feet. LE2 was repositioning when he heard gunshots.

Price was on the ground face down. An officer fired a beanbag round that hit Price. The police service dog was sent in, pulled Price closer to the officers, and they handcuffed him. LE2 unhandcuffed Price so officers could administer CPR. LE2 believed the gun looked like a Glock.

Law Enforcement Witness 3 (LE3)

LE3 was the police service dog handler. LE3 responded to the radio call. He was two blocks from the scene when he heard over the radio shots had been fired and the suspect was down. LE3 arrived and saw Price was still moving and not showing his hands. An officer stated the gun was near Price's shoulder. LE3 and the contact team moved closer, approximately 15 to 20 feet away from Price, as LE3 gave Price several warnings to roll over and show them his hands or he would be bitten and shot. There was no response from Price. LE3 directed an officer to fire a beanbag round at Price because they did not know if Price was lying in wait and still had access to the weapon. Price was struck with the beanbag round, but there was no reaction. LE3 deployed the police service dog, which bit and held Price's left ankle. LE3 commanded the police service dog to pull Price approximately five feet, placing the gun out of his reach. LE3 and officers approached and handcuffed Price.

Officer Joshua Leiber's Statement

Leiber responded to the radio call at 4300 Menlo Avenue. When Leiber arrived, the reporting party told LE1 that the wrong people were detained and the suspect was at 4200 Menlo Avenue. Leiber drove north

and observed a gun coming out of Price's right pocket.

Leiber took cover with other officers behind a vehicle approximately 20 yards from Price. Leiber pointed his firearm at Price and gave him commands not to reach for the gun. Price reached for the gun in his pocket and dropped the gun onto the ground. Leiber saw the gun appeared to be a black semi-automatic handgun. Leiber ordered Price to step away from the gun. Price picked up the gun and Leiber ordered Price to drop it, but Price turned towards Leiber while manipulating the gun.

Price held the gun downward with both hands near his abdomen at a "low-ready" position. Price raised the gun in the direction of Leiber and Gonzalez. Leiber said he feared for his life, Gonzalez's life and the citizens that could be behind him. Leiber heard a gunshot. Leiber fired two rounds fearing Price had just fired at him. Price fell onto his knees. Price still had the gun in his hand directly in front of him. Price began to raise the firearm towards officers. Leiber feared Price may shoot so he fired two more rounds. Price fell to the ground. Officers did not immediately approach him because the gun was close enough for Price to grab it.

Officer Joshua Clabough's Statement

Police units were dispatched to the call of a man with a gun in his pocket. The suspect description provided was a Black male wearing all black clothing. Clabough responded, parked his vehicle, and walked to the corner of Orange and Menlo Avenue. A woman driving an SUV approached him and said that the person police were detaining was not the suspect. The female pointed north on Menlo Avenue to Price. Clabough saw Price wearing all black on the east curb. Clabough confirmed if that individual (Price) was the suspect, and the female said he was. Clabough walked north and heard LE1 yell, "Drop the gun!" Clabough observed what appeared to be a handgun drop in front of Price. Clabough moved approximately 20 yards from Price. Clabough ordered Price to step away from the gun but Price did not respond. Price bent down and picked up the gun from the ground. It appeared that Price was fidgeting with the gun near his midsection. The barrel of the gun pointed in Clabough's direction. Clabough said he feared that he would be shot so he fired three rounds and Price fell to the ground. Price reached for the gun again and Clabough fired one more round. Clabough approached Price from the north with his ballistic shield.

Officer Jason Gonzalez Statement

When Gonzalez and Cummings arrived at the call, several officers had detained a potential suspect. The reporting party directed officers down the street where the actual suspect was located.

Officers ordered Price to back away from a gun on the ground. Gonzalez also ordered him to back away from the weapon. Price, who had been fixing his pants, picked up the gun from the ground. Price raised the gun with both hands on it and pointed in a shooting stance in the direction of Cummings and other officers. Gonzalez feared that his partner would be shot so Gonzalez fired approximately four to five times. Price fell to the ground. Price raised the gun and again pointed it in the same direction towards other officers. Gonzalez fired four to five additional rounds. Price was no longer moving.

Gonzalez and officers approached Price with shields. Price was unresponsive to commands. The gun was still near Price's left hand and Price was impacted with a beanbag shotgun round. The police service dog pulled Price away from the gun and officers rendered first aid.

Officer Ace Ybanez's Statement

Ybanez and LE3 were dispatched to the call of a man with a gun. The suspect was described as a Black male wearing a black shirt and pants. The reporting party told officers the man police had detained was not

Chief of Police David Nisleit

April 16, 2021

Page 5 of 9

the suspect and the suspect was further north on Menlo Avenue. Ybanez and LE3 drove north on Menlo Avenue. Ybanez parked his patrol vehicle and grabbed his shotgun. Ybanez told LE3 to get the beanbag shotgun so that they would have a less lethal option available. Ybanez went to the west curb and took cover. Ybanez chambered a round into his shotgun and moved across a driveway in front of a gold van approximately 20 yards from Price. Officers were giving Price verbal commands to get away from the gun. Price appeared to be manipulating his belt. Ybanez said he pleaded with Price, "Please just walk away." Officers continued telling Price, "Don't touch the gun."

Price bent over and picked something up from the ground. Officers kept saying it was a gun but Ybanez was not able to see the weapon. Ybanez heard a volley of gunfire. Ybanez did not fire at this time because he did not know what Price had in his hand. Price immediately fell to the ground. A few seconds later, Price attempted to get back up using his knees and elbows. Ybanez did not see an orange tip that would identify the gun as a replica.

Ybanez saw residents in the neighborhood come outside and he feared officers or civilians would be shot. Ybanez fired two rounds from his shotgun. Price fell to the ground and was no longer moving. The gun landed on the ground inches from Price's hand. Ybanez felt it was not safe to approach Price to render first aid because the gun was close to Price and was unsure if Price was "playing possum." Officers held their position until the police service dog arrived.

Officer Kevin Cummings' Statement

Cummings and Gonzalez were dispatched to a call regarding a Black male wearing a black shirt and black pants carrying a handgun in his right front pocket near Menlo Avenue. As Cummings exited his patrol vehicle, the reporting party told LE1 that a person police detained was not the correct man and the suspect was a half a block up the street on the east side. Cummings and Gonzalez drove and parked approximately 20 yards from Price. Price held a gun for a few seconds before dropping the firearm. Cummings said the gun appeared to be a black semi-automatic handgun.

Price did not comply with commands and began fidgeting with his pants. Cummings heard another officer tell Price not to touch the gun. A few seconds later, Price reached down and picked up the gun with his right hand. Price took a step or two forward and Cummings did not see what Price did with the gun in his hand. Cummings heard several gunshots. Price went down onto his stomach. After a few seconds, Price raised his right hand and pointed the gun towards officers. Cummings feared Price would shoot at officers on the west curb, and in response, Cummings fired two rounds. Price fell back to the ground and was no longer moving. Cummings advised officers that Price had the gun in his hand or the gun was underneath Price. Cummings saw the gun come out from underneath Price when he was pulled away.

Officer David Burns' Statement

Burns and his trainee officer, McCardle, responded to radio traffic of an uncooperative man with a gun near 4200 Menlo Avenue. Burns exited his patrol vehicle and took cover behind another patrol vehicle. Burns was approximately 20 to 25 yards from Price. Burns saw that Price had a black gun in his right hand. In a crouched stance, Price raised the gun towards the officers to the west. Burns feared that Price would begin to shoot at the officers so Burns fired five to six rounds from his weapon.

After the gunfire, Burns saw that Price was still pointing the gun at officers to the west. Burns fired one to two more rounds at Price. Burns saw Price beginning to crouch down but still had the gun pointed at the officers to the west and Burns fired one to two more rounds at Price.

Price fell to the ground and Burns saw that the gun was laying on Price's left hand. Burns felt Price still posed a threat since the gun was still close to his hand. Burns maintained his sight on Price while officers established a contact team and approached him.

Officer Miles McCardle's Statement

McCardle broke from a traffic stop and drove to the radio call. McCardle arrived and exited his vehicle as the first volley of shots began. McCardle went to the driver side door of a patrol vehicle. Price was crouched on one knee in a shooting stance holding what appeared to be a black semi-automatic handgun in his right hand and pointing it in the direction of McCardle and other officers. McCardle said he feared that he and the other officers would be shot. McCardle fired his gun six times at Price. McCardle stopped firing once he saw Price fall backwards and onto the ground. McCardle moved to the back of the patrol vehicle to re-load his firearm and moved to a parked patrol car to his left to get a different vantage point of the area where Price was located. It was not safe to approach Price because McCardle was not sure where the gun was located and feared that Price could be trying to draw them in and begin firing.

Investigation

4200 Menlo Avenue is a residential street consisting mainly of single detached homes and apartment buildings. The crime scene was secured, photographed and investigated by the San Diego Police Homicide Unit. All detectives' reports, audio-recorded interviews of witnesses, and interviews of officers involved, along with medical reports, Body Worn Camera (BWC) footage and recorded cell phone video footage that captured the moments before and after the shooting incident were reviewed.

All officers involved were wearing clearly identifiable San Diego Police Department uniforms with San Diego Police shoulder patches. All officers on scene were equipped with BWC and each activated it before arriving at the scene. The footage generally corroborated the officers' and witnesses' statements. Several residents in the area used their cell phone to record the events leading up to the shooting. The videos corroborated the officers' statements. Price can be seen fidgeting with the front portion of his waistband as officers were giving commands. Price bent down, reached down with his right hand and picked up the firearm. Price, with both hands on the gun, pointed the weapon southwest where officers were located. Two shots were heard, Price fell forward, and additional gunshots were heard.

An examination of the scene revealed Price was armed with a black "Umarex" brand Glock17 replica airsoft pistol. The airsoft pistol was located on the east curb line of 4200 Menlo Avenue. The airsoft pistol had a metal air cartridge located in the handle. The slide to the airsoft pistol was in a rear locked position, exposing the black barrel and guide rod. The pistol did not have an orange tipped barrel.



Leiber, Gonzalez, McCardle and Burns were equipped with department-issued 9mm Glock 17 semi-automatic pistols. Clabough was equipped with a department-issued 9mm Sig Sauer semi-automatic pistol. Cummings was equipped with a .45 caliber Springfield XD-45. Ybanez was equipped with a department-issued Remington 870 12-gauge shotgun.

The firearm, magazines and cartridges of each shooting officer was collected and examined by the SDPD Firearms Unit. The examination determined Leiber fired a maximum of five rounds, Gonzalez fired a maximum of 12 rounds, McCardle fired a maximum of six rounds, Burns fired a maximum of 13 rounds, Cummings fired a maximum of 2 rounds, Clabough fired a maximum of five rounds and Ybanez fired a maximum of two rounds.

A total of eighteen 9mm cartridge casings were located on the street in between the front portion of the silver Toyota Rav-4 and rear of the gold van parked on the west curb of 4200 Menlo Avenue. One 9mm cartridge casing was found and collected from the roof of the Rav-4. Two empty shotgun shells were located on the street near the front portion of the beige minivan where Ybanez was positioned when he fired his shotgun.

A total of nine 9mm cartridge casings were located on the street near the front and rear driver side of the patrol vehicle parked in the middle of the street south of Price's location. Three 9mm cartridge casings were located near the hood of patrol vehicle. Two 9mm cartridge casings were located on the roof of the patrol vehicle. Two .45 caliber cartridge casings were located on the street near the rear passenger side of the patrol vehicle.

On July 10, 2020, Chief Medical Examiner Glenn Wagner, D.O. conducted Price's autopsy. Dr. Wagner found a penetrating gunshot wound to the left portion of the skull; a penetrating gunshot wound to the upper left chest that perforated soft tissue, fracturing posterior left ribs 3-5 and perforating the upper portion of the left lung; multiple perforating gunshot wounds to the left arm and a penetrating gunshot wound to the right ankle; and two superficial dog bite injuries located on the right ankle. Toxicology testing from Price detected Amphetamine (0.03 mg/L), Methamphetamine (0.36 mg/L) and Phencyclidine (PCP) (530 ng/mL).

The cause of death was determined to be a gunshot wound to the head and the manner of death was homicide. Additional gunshot wounds to the chest, left arm and right ankle were listed as contributing factors. A "homicide" classification does not require intent to cause death. The classification is for purposes of death certification. It is not a legal term, but one employed to describe a medical assessment.

Legal Standards of Criminal Liability

Penal Code section 835a(c) sets forth the standard to evaluate a peace officer's use of deadly force. The law provides that "a peace officer is justified in using deadly force upon another person only when the officer reasonably believes, based on the totality of circumstances, that such force is necessary, for either of the following reasons:

To defend against an imminent threat of death or serious bodily injury to the officer or to another person."
Penal Code section 835a(c)(1)(A).

"The statute provides definitions for "deadly force," "imminent" and the "totality of circumstances" in Penal Code section 835a(e)(1) – (3).

“Deadly force” means any use of force that creates a substantial risk of causing death or serious bodily injury, including, but not limited to, the discharge of a firearm.” Penal Code section 835a(e)(1).

“A threat of death or serious bodily injury is “imminent” when based on the totality of the circumstances, a reasonable officer in the same situation would believe that a person has the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury to the peace officer or another person.” Penal Code section 835a(e)(2).

“An imminent harm is not merely a fear of future harm, no matter how great the fear and no matter how great the likelihood of the harm, but is one that, from appearances, must be instantly confronted and addressed.” Penal Code section 835a(e)(2).

“Totality of the circumstances” means all facts known to the peace officer at the time, including the conduct of the officer and the subject leading up to the use of deadly force.” Penal Code section 835a(e)(3).

“In determining whether deadly force is necessary, officers shall evaluate each situation in light of the particular circumstances of each case, and shall use other available resources and techniques, if reasonably safe and feasible to an objectively reasonable officer.” Penal Code section 835a(2).

“[T]he decision by a peace officer to use force shall be evaluated from the perspective of a reasonable officer in the same situation, based on the totality of the circumstances known to or perceived by the officer at the time, rather than with the benefit of hindsight. The totality of circumstances shall account for occasions when officers may be forced to make quick judgments about using force.” Penal Code section 835a(4).

“A peace officer who makes or attempts to make an arrest need not retreat or desist from their efforts because of resistance or threatened resistance of the person being arrested. A peace officer shall not be deemed an aggressor or lose the right of self-defense by the use of objectively reasonable force in compliance with subdivisions (b) and (c) to effect the arrest or prevent escape or overcome resistance. For purposes of this section “retreat” does not mean tactical repositioning or other de-escalation tactics.” Penal Code section 835a(d).

Penal Code section 196 was also amended. The statute provides that homicide is justified when committed by peace officers and those acting by their command in their aid and assistance when the homicide results from a peace officer’s use of force that is in compliance with Section 835a.

Conclusion

Officers responded to a report of a male armed with a gun in a residential neighborhood. Officers encountered Price holding what they reasonably believed to be a firearm. Officers identified themselves and gave him multiple commands to get on the ground and to drop the gun, but Price ignored the commands.

The investigation revealed Price possessed a replica pistol, identical to a Glock 17 handgun with the same markings and “Glock” logos located on the grip and slide of the pistol. The pistol did not have any safety markings that would have identified the weapon as a toy. In fact, five of the seven officers involved in this shooting incident were carrying Glock 17 handguns. As evidenced by the included photographs, it was reasonable to believe Price possessed a real handgun. When the replica firearm fell directly in front of Price, officers gave him commands for over two and a half minutes to step away from it and not to pick it

Chief of Police David Nisleit

April 16, 2021

Page 9 of 9

up. These commands were confirmed by video and statements provided by civilian witnesses. Price ignored commands and reached down to grab the replica firearm from the ground. He held it with both hands and pointed it in the direction of officers, prompting them to fire.

Attempts to get less lethal options to the scene were utilized. Price's actions of grabbing the apparent firearm from the ground and pointing it at officers, compelled officers to fire before these less lethal options could be deployed.

In reviewing the circumstances which includes the nature of the call, Price's failure to abide by commands, his retrieval of the apparent firearm from the ground, and his manipulation and pointing of it towards the officers would make it apparent to reasonable officers in the same situation that Price had the ability and opportunity to shoot them, and intended to shoot at them. Officers had reason to believe that there was an imminent threat of death or serious bodily harm either to themselves, other officers, or residents in the neighborhood and the threat needed to be instantly confronted. Under the totality of circumstances, Clabough, Gonzalez, Burns, Ybanez, Cummings, Lieber and McCardle bear no state criminal liability for their actions. A copy of this letter, along with the materials submitted for our review, will be retained for our files.

Sincerely,


SUMMER STEPHAN
District Attorney

cc: Captain Richard Freedman
San Diego Police Department
Homicide Division