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May 13, 2024

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

Sheriff Kelly Martinez
San Diego Sheriff's Department
9621 Ridgehaven Ct.
San Diego, CA 2123

Re: Fatal shooting of Xavier LaCosta on August 15, 2023, by San Diego Police Department Officer Gregory Simon; San Diego Sheriff's Department Case No. 23-134635; DA Special Operations Case No. 23-070PS; Deputy District Attorney assigned: Kristi Gill

Dear Chief Nisleit and Sheriff Martinez,

We have reviewed the materials compiled by the San Diego Sheriff's Homicide Unit concerning the shooting of Xavier LaCosta on August 15, 2023. A District Attorney Investigator responded to the scene and was briefed by detectives. This case was submitted to the District Attorney's Office for review on October 5, 2023. The Medical Examiner's Report was received on April 11, 2024.

Summary

On August 2, 2023, Xavier LaCosta was the passenger in a vehicle driven by Benjamin Pickens when LaCosta and Pickens each fired gunshots at another motorist. Later that night, San Diego Police officers located Pickens and an officer-involved shooting incident occurred, resulting in Pickens' death. LaCosta remained outstanding for more than a week. During that time, San Diego Police detectives identified LaCosta and tracked him to a third-story apartment at 6150 El Cajon Boulevard in the City of San Diego.

On August 15, 2023, detectives solicited the assistance of the San Diego Police Department's (SDPD) Special Investigations Unit and Special Operations Unit to aid in the execution of a search warrant and in LaCosta's arrest. An operational plan to contain the premises and apprehend LaCosta was devised. Officers placed calls to both LaCosta and the resident of the apartment (CW1) to persuade LaCosta to leave the residence. Neither LaCosta nor CW1 answered the calls. Detectives and officers then executed their operational plan to contain the premises and apprehend LaCosta.

SDPD Special Operations Unit officers entered the apartment building and walked up the stairs to the third floor. Officer Gregory Simon was second in the single-file line of officers, behind a

detective. Simon carried his department issued Daniel Defense DDM4 rifle and was followed by several officers, including an officer with a police service dog, an officer with a 40 millimeter less lethal launcher, and an officer with door breaching tools.

Once on the third floor, Simon positioned himself in the doorway between the stairwell and the hallway and aimed his rifle at the front door of the apartment where LaCosta was known to be. Other uniformed officers took perimeter positions in the narrow hallway to the left and right of the entrance to the apartment. The officer with the police service dog took a position further down the hallway to the right of the front door of the apartment.

An officer (LE1) loudly called out to LaCosta by name, announced that San Diego Police Department had a warrant, and ordered LaCosta to exit with nothing in his hands. After a moment, LaCosta opened the door and stepped into the doorway, holding in his right hand a Glock-style handgun that was later identified as a ghost gun. Simon ordered LaCosta to put the gun on the ground and told LaCosta he would shoot him.

LaCosta initially complied and placed the gun on the ground in front of his feet. He then placed his hands behind his head and folded them together. Simon ordered LaCosta to put his hands "all the way up." The canine officer ordered LaCosta to comply or the police service dog would bite him. LaCosta looked at Simon and then made a rapid squatting movement toward the floor while reaching toward the gun. As soon as LaCosta's right hand touched the gun, Simon fired seven rounds, fatally wounding LaCosta.

The Medical Examiner determined LaCosta's cause of death was multiple gunshot wounds and classified the manner of death as homicide. Toxicological testing of LaCosta's blood revealed the presence of amphetamine at a level of 0.02 mg/L, methamphetamine at a level of 0.18 mg/L, buprenorphine at a level of 49 ng/L, and norbuprenorphine at a level of 26 ng/L.

Persons Involved

Xavier LaCosta was a 31-year-old resident of San Diego County. At the time of this incident, Officer Gregory Simon had been a police officer for 6 years, 11 months and was assigned to the San Diego Police Department Special Operations Unit.

Civilian Witness One (CW1)

CW1 is the resident of the apartment where LaCosta was staying and identified himself as a close friend of LaCosta. On August 9 or 10, 2024, LaCosta called CW1 and explained that he didn't have a place to stay. CW1 offered to let LaCosta stay at his apartment for a short time. LaCosta arrived with a gym bag containing some clothing and his "vape stuff." CW1 noticed LaCosta was not acting like his normal self and seemed paranoid. LaCosta told CW1 the police were watching him because he recently got into it with "some Haitian guys" but did not give CW1 any specific details.

On the day of the incident at about 12:45 p.m., as CW1 was leaving for work, he told LaCosta that he would have to get up and do something or else he was going to have to leave. Later in the day, CW1 received several calls from a number with no caller ID and did not answer the phone. He learned from a colleague that detectives were trying to reach him. CW1 sent LaCosta a message saying, "I don't know what you did or what's going on but I'm about to call that guy

back." CW1 then spoke with LaCosta on the phone and attempted to find out what was going on. LaCosta told CW1, "I don't know bro, I'm burnt, they're coming to get me, I gotta go, I love you, bro." When CW1 asked LaCosta who "they" were, LaCosta replied, "You know who," and then hung up. CW1 thought LaCosta was referring to "the Haitians."

CW1 spoke on the phone with a detective who told him to return to his apartment because an incident involving LaCosta had occurred at his home.

Civilian Witness Two (CW2)

CW2 is a neighbor of CW1 and lives in an apartment on the same floor. CW2 works from home. On August 15, 2023, he heard shouting outside of his apartment door. He thought he heard someone shouting something along the lines of, "Open the door. It's the police." CW2 looked through the peep hole on his front door and saw three police officers pointing their firearms at CW1's apartment. CW2 backed away from his front door. He then heard someone outside of his door say, "Put the gun down" or "Drop the gun." He then heard approximately four gunshots in rapid succession.

Law Enforcement Officer One (LE1)

LE1 is assigned to the SDPD Special Operations Unit. He was directly behind Simon as they approached the apartment. His role was to give the "knock and notice" for the search warrant. LE1 carried his department-issued rifle.

While the officers were in position and after other attempts to reach LaCosta were unsuccessful, LE1 gave verbal commands for LaCosta to come out of the apartment. LE1 loudly announced, "San Diego Police... Search warrant. Xavier, come to the door with nothing in your hands." LE1 repeated the command. He could see the front door of the apartment as he gave the commands. LE1 saw the apartment door open. LaCosta stepped out into the entryway holding a handgun in his right hand. The gun had a tan or green lower portion with a black upper slide. It was a Glock-style gun. LaCosta did not point the firearm at officers but was pinching it "strangely." He had it tilted downward between his index finger and thumb.

LE1 and Simon gave LaCosta commands to put the gun down. After a few seconds, LaCosta placed the gun on the ground. LaCosta then lunged towards the handgun that he had just placed on the ground. LE1 took a step back behind Simon. LE1 knew Simon had fired shots because he was standing right next to him and heard it. LE1 could not see if LaCosta was shooting but was concerned for his and his partners' safety. LE1 and the other officers were lined up in the narrow stairwell with room for only one officer in the doorway. After Simon fired his rifle at LaCosta, officers rendered aid to LaCosta. LE1 and other officers then cleared the inside of the residence. No one else was found inside. LE1 did not fire his rifle during the incident.

Law Enforcement Officer Two (LE2)

LE2 is assigned to the SDPD Special Operations Unit. LE2 was assigned as lethal cover for officers utilizing less lethal options. During the briefing, officers learned that LaCosta may be in possession of body armor. Once the officers arrived on the third floor, LE2 realized the hall leading up to the target address was smaller than he had envisioned.

LE2 took a position on the right side of the target address, behind a small alcove next to another apartment door. LE2 tucked himself into the alcove to avoid being involved in any crossfire, and to provide himself with as much concealment as possible. The canine officer and his police service dog were directly across the hall from LE2. Once the officers were in place, LE2 heard SDPD verbal announcements being yelled out and he could visually see Simon holding his rifle.

After the announcements, LE2 heard a door open and saw a handgun come out. The majority of LaCosta's body was not visible because LaCosta was standing in a blind spot in the door well. LE2 reportedly heard LaCosta say, "Shoot me. Shoot me." According to LE2, Simon responded, "No, I'm not going to shoot you bro. Just put the gun down." LE2 had a partial view of LaCosta's hand placing the gun down. The police canine then started barking and drew LE2's attention away from LaCosta. LE2 saw Simon fire his weapon in LaCosta's direction. During the incident and at the time of the shooting, LE2 was concerned for the safety of his fellow officers.

Officer Gregory Simon

Simon is assigned to the SDPD Special Operations Unit. On August 15, 2023, he and his team attended a briefing to assist the Special Investigations Unit and Northern Division detectives. Those units had identified LaCosta as the second suspect in a shooting incident that took place on August 2, 2023. They sought to arrest LaCosta and execute a search warrant at the location where he had been staying. That location was determined to be a third-floor apartment at 6150 El Cajon Boulevard, in the City of San Diego.

During the briefing, officers were shown a photo of LaCosta and were informed the firearm that was used in the prior shooting was still outstanding. They were also informed LaCosta had made a statement to the effect of, "I'm not going down in handcuffs." The briefing included an operation plan to contain the perimeter of the residence and call LaCosta out.

After the briefing, officers went to the third floor of 6150 El Cajon Boulevard. Simon followed a detective up the stairwell to the third floor. Simon positioned himself in the doorway of the stairwell and pointed his department-issued rifle at the front door of the identified apartment, approximately 7-10 feet to the left, at an approximate 45-degree angle from the stairway door. Several officers were behind Simon. Other officers went to the left and right sides of the hallway as perimeter units and out of the way of potential crossfire.

Simon was standing directly in front of LE1 and heard LE1 give loud commands for LaCosta to come out of the apartment. LE1 announced that they were San Diego Police, they had a search warrant, and ordered LaCosta to come out with nothing in his hands. LE1 yelled these commands at least twice and his voice was loud and clear.

The front door of the apartment opened and Simon saw LaCosta in the doorway. Simon yelled, "Let me see your hands," and identified himself as San Diego Police. LaCosta stood in the threshold of the doorway and was holding in his right hand what appeared to be a Glock-style handgun. LaCosta was pinching the top of the hand grip with his fingers while holding the gun out in front of him. Simon ordered him to put the gun on the ground and told LaCosta that he would shoot him. LaCosta placed the gun on the ground in front of his feet. Simon ordered LaCosta to put his hands high up in the air. Instead, LaCosta placed his hands behind his head

and clasped them together. At that point, the canine officer gave a canine advisory command to the effect of, "Canine. The dog will bite you. Follow our commands."

LaCosta then made a very rapid squatting movement to the floor with his right arm stretched out to grab the gun. When LaCosta touched the gun, Simon fired at LaCosta. LaCosta fell to the floor with the handgun still next to his feet. Simon stopped shooting once he recognized LaCosta was no longer a threat or reaching for the weapon. Simon believes he fired his rifle seven times.

Other officers quickly moved toward LaCosta and kicked the gun away from him. Two officers pulled LaCosta out of the apartment and rendered medical aid. Simon and multiple other officers entered and cleared the apartment. Once the apartment was cleared, Simon assisted with rendering medical aid to LaCosta.

Simon did not recall hearing LaCosta say anything during the incident. LaCosta's movements were so fast and violent that Simon believed LaCosta was going to use the gun to shoot him or the other law enforcement officers that were present, and believed that had he not shot LaCosta, he or his team likely would have been shot.

Investigation:

The shooting took place on the third floor of 6150 El Cajon Boulevard, in the entry way to CW1's apartment. The scene was secured, photographed, and investigated by San Diego Sheriff's Homicide detectives. A complete review was conducted of all officers' and detectives' reports, crime scene investigators' reports, audio recorded interviews of civilian and law enforcement witnesses, all body worn camera footage, along with the Medical Examiner's autopsy report and toxicological reports. The events leading up to the incident, and the incident itself, were captured on several officers' body worn cameras. All these items were found to provide evidence which corroborates the officers' statements.

At the time of the incident, Simon was armed with his department issued Daniel Defense DDM4 semiautomatic rifle and his Glock 17, 9mm handgun. He did not utilize the Glock 17 during this incident. Simon reported that prior to the shooting incident, his rifle was seated with a magazine containing twenty-eight .223 rifle cartridges. Following the shooting incident, a San Diego Sheriff's Department Field Evidence Technician collected Simon's rifle and handgun for processing. Simon's rifle was received with one unexpended .223 round in the chamber and twenty unexpended .223 rounds in the seated magazine. Based on the number of rounds that were loaded into the magazine prior to the shooting incident, and the remaining rounds in the rifle after the incident, it was determined that Simon fired seven rounds from his rifle. Consistent with this determination, a total of seven .223 Remington cartridge casings were located on the floor and to the right of the outside of the apartment.

When LaCosta opened the door to the apartment, he was holding what was later determined to be a non-serialized 9mm Polymer80 semiautomatic pistol with a tan colored frame and a black slide. A non-serialized firearm lacks a serial number by which it could be identified and linked to its owner; this type of firearm is commonly known as a "ghost gun." A Polymer80 is commonly known as an "80% gun" as it is not purchased as a fully assembled firearm and, as a result, can be acquired more easily than a firearm.

Following the shooting incident, the ghost gun was impounded as evidence by a Field Evidence Technician and processed. The pistol was found to contain one unexpended 9mm round in the chamber and was seated with a black Glock magazine containing eight unexpended 9mm rounds.

More than 15 SDPD officers and detectives from the Special Operations Unit, the Special Investigations Unit, and Northern Division, as well as a canine officer, were present on scene during the shooting incident. Due to each officer's position within the narrow hallway, most of the officers did not visually observe the events. However, several of the on-scene officers later stated they heard the events, including the verbal announcements made by law enforcement before LaCosta opened the door to the apartment, the subsequent orders given by law enforcement, and the gunshots that followed.

Investigating officers and detectives identified and spoke with 44 individuals that reside in the apartment building where the incident occurred. Seventeen of those individuals were not home during the shooting or did not witness anything. Twenty-six were home during the incident, and largely reported hearing a loud argument followed by the sound of gunshots. Individuals that were in apartments closer to where the shooting happened also heard the police announcements, including the loud pronouncement of "San Diego Police." None of the civilians visually observed the shooting.

The number of shots fired by Simon was corroborated by the number of expended .223 shell casings found at the shooting scene, his statement to investigators, and the audio captured on his body worn camera, and that of several other officers' body worn cameras.

Body Worn Camera Evidence

All officers were equipped with body worn cameras (BWC), but the BWC from Simon and LE2 best captured the shooting. Other officers were positioned in locations where their BWC captured only slight glimpses or solely audio of what transpired.

At 18:46:42 on Simon's BWC, he is pointing his rifle at the front door of the apartment. The BWC is partially obstructed by the rifle in Simon's hands. LE1 is behind him, making verbal announcements for LaCosta to come out of the apartment with nothing in his hands. After two announcements are made, the front door opens and Simon immediately yells for LaCosta to show his hands and then yells for him to drop his gun. Simon's BWC shows LaCosta's legs and then shows a handgun laying on the ground next to LaCosta's feet. Simon orders LaCosta to put his hands all the way up. The canine officer is heard advising LaCosta to comply or he would release the police dog and LaCosta would be bitten. During the announcement by the canine officer, LaCosta is looking directly at Simon. LaCosta then rapidly drops down and reaches for the gun with his right hand. Simon fires seven shots towards LaCosta, who falls back into the apartment. Simon walks forward, along with several other officers. A sergeant kicks the firearm away from LaCosta's reach.

LE2 was down the hall from the doorway and to Simon's right; he had his BWC activated at the time of the incident. LE2's BWC shows that LE2 is pointing his handgun in the direction of the apartment. The front door of the apartment is not visible, however, the front alcove to the door is visible. Simon is seen in the doorway to the stairwell, across from the apartment. Simon is pointing a rifle towards CW1's apartment and is heard yelling "drop the gun." A hand comes out

of the alcove holding a gun. The hand drops down and places the gun on the ground. The hand then raises up and out of view. The canine officer is heard giving commands for the subject to comply or the police dog would be sent in. The gun that was on the ground moves forward, and Simon fires seven shots in the direction of the gun. LE2 then moves up to the apartment, with other officers.

Autopsy

An autopsy was conducted on August 16, 2023. The Deputy Medical Examiner determined that LaCosta suffered five gunshot wounds to his body, specifically to his head, clavicle, arm, chest, and abdomen. During the internal examination, three bullets were recovered and collected as evidence by a Forensic Evidence Technician, who was present during the autopsy. The cause of death was classified as multiple gunshot wounds and the manner of death was classified as homicide.

Toxicological testing was conducted on samples of LaCosta's blood. The testing detected the presence of methamphetamine at a level of 0.18 mg/L, amphetamine at a level of 0.03 mg/L, buprenorphine at a level of 49 ng/mL, and norbuprenorphine at a level of 26 ng/mL.

Legal Standards of Criminal Liability

Penal Code section 835a(c) sets forth the circumstances in which a peace officer may use deadly force and the standard to evaluate the use of such 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 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 defines "deadly force" as 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).

An imminent threat of death or serious bodily injury is one where "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. 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). The statute defines totality of the circumstances as "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).

The statute further states, "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).

Additionally, 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 should 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).

Conclusion

Xavier LaCosta was identified as a shooter in an incident that occurred on August 2, 2023. On August 15, 2023, San Diego Police detectives located him at a third-floor apartment at 6150 El Cajon Boulevard. They developed a plan to contact him and safely take him into custody. They knew the firearm that LaCosta used in the previous shooting was outstanding, LaCosta was possibly in possession of body armor, and LaCosta had made a statement indicating he would not be taken into custody. Once the officers were positioned outside of the apartment door, LE1 loudly called out LaCosta’s name, identified San Diego Police officers were present with a search warrant, and ordered LaCosta to come out with nothing in his hands.

LaCosta opened the door holding a handgun in his right hand. Simon’s rifle was trained on LaCosta as Simon ordered LaCosta to put the gun on the ground. LaCosta laid the gun on the ground, briefly stared at Simon, and then directly defied the orders. LaCosta quickly bent down, attempting to grab the handgun and rearm himself. Just as LaCosta’s hand contacted the ghost gun, Simon fired seven rounds, striking LaCosta. Despite the prompt medical attention provided to LaCosta by officers and paramedics, he succumbed to the injuries.

Based on our review of the facts and circumstances in this matter, Simon reasonably believed LaCosta had the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury when LaCosta lunged for the gun on the floor in front of him. Further, Simon reasonably believed that the use of deadly force in that moment was necessary to defend against the imminent threat of death or serious bodily injury posed by LaCosta. As such, Simon 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

cc: Captain Richard Freedman
San Diego Police Department
Captain James Emig, Jr.
San Diego Sheriff’s Department