

CITY AND COUNTY OF SAN FRANCISCO



GEORGE GASCÓN
District Attorney

OFFICE OF THE DISTRICT ATTORNEY

JUNE CRAVETT
Assistant Chief District Attorney
DIRECT DIAL: (415) 551-9537
E-MAIL: JUNE.CRAVETT@SFGOV.ORG

June 29, 2015

Chief Gregory Suhr
Office of the Chief of Police
San Francisco Police Department
850 Bryant Street, Room 525
San Francisco, CA 94103

Re: Officer Involved Shooting on April 7, 2013 (Report No. 130283196)

Dear Chief Suhr:

The San Francisco District Attorney's Office has completed its review of the April 7, 2013 shooting on Valencia Street near 17th Street involving San Francisco Police Officer Ryan Daugherty (Star # 123). We have concluded that Officer Daugherty was acting lawfully in self-defense and in defense of others when he discharged his weapon. Our review did not examine such issues as compliance with the policies and procedures of the law enforcement agency, ways to improve training or tactics, or any issues related to civil liability; accordingly, our review should not be interpreted as expressing an opinion on these matters.

FACTUAL SUMMARY

According to the investigation, on April 7, 2013, as the bars were letting out at 2:00 a.m., two men who had just left work at a nearby restaurant were walking northbound on the east side of Valencia Street towards 17th Street when they came upon an altercation involving a group of men as they neared the T-Mobile store on the corner. Both witnesses thought the group they encountered sounded very angry. One of the witnesses heard someone say, "Fuck that guy," and "I'm going to get that guy." He then noticed a Latino male in his mid-20's standing about four feet away, saw the man use his left hand to pull out a silver or chrome metallic plated gun with black trim from his jacket or waistband, heard a click, and saw the sliding action of the gun. The second witness also saw the man holding the gun, which he described as having silver stripes, and said he was pointing it in his direction. Both witnesses quickly crossed to the west side of Valencia Street by Mission Police Station, and reported what they saw to Officer Gerald Bernal (Star # 2060) and Officer Brian Ng (Star # 1328), who were on uniformed duty in a patrol car by the Mission Police Station parking lot. The witnesses said they had just seen a man with a cocked semi-automatic pistol standing within a group of eight to 10 Latino males in front of the Good Vibrations store at 603 Valencia Street. Officer Bernal looked down the street and saw a group of mixed race males in front of the T-Mobile store at 601 Valencia Street and notified police dispatch of the information given by the witnesses.

WHITE COLLAR CRIME DIVISION

732 BRANNAN STREET • SAN FRANCISCO, CALIFORNIA 94103
RECEPTION: (415) 553-1752 • FACSIMILE: (415) 551-9504

Officer Ryan Daugherty (Star #123) and his partner, Officer Valerie Durkin (Star #4268), were on uniformed duty inside Mission Police Station when they heard the radio dispatch. Officers Daugherty and Durkin immediately exited Mission Police Station's front glass doors onto Valencia Street and walked northeast, diagonally crossing Valencia Street, towards the disturbance near the southeast corner of the intersection of Valencia and 17th Streets. The officers saw about 10 to 15 males in two groups arguing on Valencia Street's east sidewalk near the T-Mobile store. Officer Daugherty thought that most of the males were about 20 years old and that some could be Latin. The larger group of males was on the sidewalk near the T-Mobile store entrance and was arguing with a smaller group of males also on the east Valencia Street sidewalk and just south of the larger group. As the officers continued their approach, the larger group of males appeared to be getting more agitated as they argued and jumped around towards the smaller group. Based on the report of a Latin man with a gun in this area, Officer Daugherty thought someone involved in this altercation might have a gun.

As the officers continued to walk diagonally northeast across Valencia Street towards the two groups of males, they drew their firearms but kept them by their sides. A man standing by a car parked on the east side of Valencia Street saw Officer Daugherty draw his weapon, and yelled, "Oh my God, he's got his gun out!" (referring to Officer Daugherty). Others in the crowd yelled, "Gun!" A female yelled, "He's got a gun!" Officer Daugherty looked towards the man who first yelled, and then turned his attention back towards the large group of males, at which point he saw a man's hand holding a gun at about head height. Officer Daugherty said the gun looked like a silver and black semi-automatic handgun and was held in the man's left hand. Officer Daugherty saw the gunman, later identified as Fredi Ullis Martinez ("Martinez"), make what looked like angry movements and gestures with the gun towards the men in the smaller group, including thrusting the gun three times towards the head of a male in the other group as if simulating he was about to shoot him. Officer Daugherty said he thought Martinez was about to shoot someone and believed he needed to do something to make Martinez drop his gun. Officer Daugherty still did not have a clear view of Martinez's face as he focused on the gun in Martinez's hand. Officer Durkin also saw Martinez holding the gun, though she thought he held it in his right hand. Officer Durkin saw Martinez raise his arm straight out in front of him and point the gun at the man with whom he was arguing. Officer Durkin thought the weapon looked similar to a Sig Sauer P226, only smaller.

Officer Daugherty said he quickly moved a few steps southbound to get a better position and yelled for Martinez to drop the gun. Officer Durkin said she heard Officer Daugherty order Martinez to drop the gun. Martinez turned towards Officer Daugherty with the gun in his hand, raised the gun, and moved to point his gun towards Officer Daugherty. Believing that Martinez was going to shoot him, Officer Daugherty fired one shot, saw the gun was still in Martinez's hand, and quickly fired two more shots. Martinez dropped his gun and fell backwards to the ground. Officers Daugherty and Durkin moved towards Martinez and Officer Durkin immediately put her foot on Martinez's weapon to secure it. Officer Daugherty saw Martinez's hand go to his waistband, so he holstered his firearm, opened Martinez's jacket and did a quick sweep of Martinez's waistband for other firearms. He saw a circle of blood near Martinez's right nipple. Officer Durkin called "shots fired" over the radio. Officers Daugherty and Durkin immediately rendered first aid to Martinez and called for assistance. Martinez was later determined to be paralyzed from the waist down.

It was only after Officers Daugherty and Durkin began rendering first aid to Martinez that they saw other officers rendering aid to a second man who suffered two gunshot wounds, one to his

stomach area and one to his thigh, lying on his front side near the T-Mobile store entrance a few feet northeast of Martinez. Officers gave aid to both men until an ambulance arrived to transport them to San Francisco General Hospital.

Officers secured Martinez's weapon, identified and interviewed witnesses, and secured the scene. Three bullet casings were located on the east sidewalk, in front of the T-Mobile Store at 601 Valencia Street. Martinez's weapon, a Daisy Powerline CO2 Gun, was found lying on its right side and a black plastic grip plate was found lying a short distance west of the weapon, and appeared to have broken off the gun when it hit the ground. The CO2 gun and the black grip plate were located on the sidewalk 10 to 15 feet north of the group of bullet casings. The left grip plate was not attached to the gun and the interior of the grip was exposed, revealing a silver CO2 cartridge affixed to the weapon. The gun was black in color and comparable in size to the Sig Saur P226 and P229 firearms issued to San Francisco police officers. A red CO2 canister, similar in appearance to the canister affixed to the weapon, was located in the street next to the curb line by the right passenger door of a car parked south of the entrance to the T-Mobile store.

A Samoan male at whom Martinez was pointing the gun was interviewed and said he believed that Officer Daugherty saved his life. The witness said he and his friends were leaving the Elbo Room, a bar located at 647 Valencia Street, when a Latin male charged towards him with a bottle. The witness said he thought this was a case of mistaken identity and that the man with the bottle may have thought he was a member of the Norteños gang because he was wearing red. The witness said he and his friends chased the man with the bottle down Valencia Street and, as they reached the T-Mobile Store, they were cornered by a group of Latin males. There was a lot of arguing back and forth when he heard someone in the crowd yell "Gun," then heard a female voice behind him yell, "He's got a gun," and then heard a gunshot from behind him. He then noticed Martinez, who he had not focused on before, standing about four feet away pointing a gun at him and then falling back with it. The witness said he did not hear the officer say anything before the shooting, but noted that the noise level at the scene was "really loud."

A total of 17 civilians provided statements regarding the shooting. Of these witnesses, six reported seeing Martinez holding a gun, including the two men who had initially reported the incident to Officer Bernal, though two of the witnesses said they thought the weapon was a BB gun. None of the civilian witnesses stated that they heard Officer Daugherty yell for Martinez to drop the gun, though several witnesses reported hearing people shouting "Gun" or "He's got a gun." Two additional witnesses, the uncle of Martinez and a friend of Martinez, gave statements which are not corroborated by any of the other witnesses. The uncle of Martinez said he saw a patrol car stop and then saw a female police officer get out of the passenger side of the patrol car and shoot his nephew. The friend of Martinez said he was running down 17th Street when he saw a black man in a red shirt with a silver .380 gun pull the trigger, heard three shots, and saw Martinez lying on the street. This witness said he did not see any police present at the time of the shooting.

In addition to Officer Durkin, a total of seven officers heard the gunshots fired by Officer Daugherty. Three of the officers were in the area of the Mission Police Station parking lot, two were inside Mission Police Station, and two were on foot patrol a block away and were running towards the T-Mobile store. None of these officers witnessed any of the events leading up to the shooting or reported hearing Officer Daugherty order Martinez to drop his gun.

Martinez has provided two different accounts of what happened on the night of the shooting. In the first account, posted on September 19, 2014 by Martinez's civil attorney on the crowdfunding website "www.gofundme.com," Martinez states that he and a friend were walking on Valencia Street when they were confronted by four men who had just left a bar and were looking for a fight. He states they were scared because the men were drunk and bigger than them, and then says: "I had a BB gun, that I use for self defense. I have it to scare others, who are like these men, looking for a fight. I pulled it out and was walking away from those men, when I was shot by a San Francisco Police Officer. The officer says that he yelled for me to put the gun down. That is not true, even the men, who were trying to fight us will tell you that the officer didn't say anything before firing." Two months later, Martinez gave a sworn deposition as part of his civil case against the City. Martinez testified at the deposition that he found the gun on the ground by a garbage can in an alley after he left El Tin Tan that night and picked it up. He further testified that after his friends began to argue with some Samoans by the Elbo Room, he walked up Valencia Street to 17th Street because he wanted to throw the gun away but didn't want to do it in front of the people outside the bar. Martinez testified that when he threw the gun down on the sidewalk by the T-Mobile store, the police shot him.

The witness who suffered two gunshot wounds gave a statement to the police in which he said was walking north on Valencia Street to catch the number 22 bus on 16th Street, when he saw a group of males in front of him also walking northbound. He said he was not behind the group for very long when, as they reached 19th Street, he was shot. The witness said he did not know who shot him, nor did he see any of the men in front of him with a gun. He denied knowing the group of Latin males, although one of the men in the group said the witness accompanied them all to El Tin Tin that night.

ANALYSIS AND CONCLUSION

Under California law, a peace officer may use deadly force to protect himself or another if he actually and reasonably believes he or another is in imminent danger of great bodily injury or death. *People v. Williams* (1977) 75 Cal.App.3d 731. In protecting himself or another, the officer may use all force which he believes reasonably necessary and which would appear to a reasonable person, in the same or similar circumstances, to be necessary to prevent injury which appears to be imminent. CALCRIM 3470. When an officer confronts an armed suspect in close proximity whose actions indicate intent to attack, the officer is not required to hold fire in order to ascertain whether the suspect will, in fact, injure or kill the officer. *Martinez v. County of Los Angeles* (1996) 47 Cal.App.4th 334.

In this case, according to the witness' statements, Officer Daugherty was acting in self-defense and in defense of others when he discharged his weapon. Officer Daugherty was responding to a report of a Latin male with a gun, and was approaching an obvious altercation between two groups of males, including a number of Latin males, when he heard someone yell "Gun!," saw what looked like a silver and black semi-automatic handgun pointed at the head of another male, and then saw the gun turn towards him. Officer Daugherty reasonably believed the weapon Martinez was pointing at him was a firearm. The CO2 cartridge was housed in the grip and could not be seen, while the visible part of the CO2 gun looked like a real firearm, not only to Officers Daugherty and Durkin, but also to several other witnesses who saw the gun brandished by Martinez that night. Believing that his life and the lives of others on the street were being

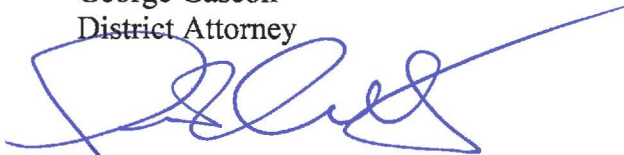
threatened, Officer Daugherty discharged his weapon at Martinez three times, hitting Martinez once and accidentally hitting a bystander two times.

While no witness other than Officer Durkin recalled hearing Officer Daugherty yell for Martinez to drop the gun, this may have been due to the commotion caused by the heated altercation between the two groups of males and the noise level of the crowd which had just emptied out into the streets as the bars closed. Furthermore, whether or not a warning was given would not change the conclusion in this case. The giving of a warning or the failure to do so is just one factor to be considered in determining whether an officer's use of deadly force is justified. *Deorle v. Rutherford* (9th Cir. 2001) 272 F.3d 1272. And, no warning is required where it would be unfeasible or impracticable to give one, such as where even the slightest delay could result in death or serious injury. *Tennessee v. Garner* (1985) 471 U.S. 1; *Jensen v. City of Oxnard* (9th Cir. 1998) 145 F.3d 1078. Here, Officer Daugherty first saw Martinez pointing what he reasonably believed to be a firearm at the head of a man standing only four feet away, and then saw Martinez turn the gun towards him. This is the very type of situation where a warning is not required because any delay could have allowed Martinez the opportunity to fire his weapon, possibly killing Officer Daugherty or someone else in the crowd.

Under these facts, the use of deadly force against Martinez was justified. Furthermore, the injury to the bystander was an accidental and unintended consequence of Officer Daugherty's justified acts of self-defense and defense of others. It is, therefore, our conclusion that Officer Daugherty acted lawfully.

Very truly yours,

George Gascón
District Attorney



June Cravett
Assistant Chief District Attorney

cc: Lieutenant Toney Chaplin
Officer Ryan Daugherty