



GEORGE GASCÓN
DISTRICT ATTORNEY
CITY AND COUNTY OF SAN FRANCISCO

February 12, 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 March 21, 2014 (Report No. 140240512)

Dear Chief Suhr:

The San Francisco District Attorney's Office has completed its investigation and review of the March 21, 2014 shooting in Bernal Hill Park involving San Francisco Police Sergeant Jason Sawyer (Star # 1127), Officer Richard Schiff (Star # 1196), Officer Roger Morse (Star # 1923), and Officer Nathan Chew (Star # 2088), resulting in the death of Mr. Alejandro Nieto. After a thorough investigation and careful review of all of the evidence in this matter, we have concluded that the officers were acting lawfully in self-defense and in defense of others when they discharged their weapons at Mr. Nieto after he drew and pointed a weapon which the officers reasonably believed to be a firearm. 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. A summary of the evidence obtained during the investigation of this matter, and the basis for our conclusion, is detailed below.

FACTUAL SUMMARY

Civilian Witness Encounters with Mr. Nieto

According to the investigation, on March 21, 2014, several people were walking their dogs in Bernal Hill Park around 7:00 pm when they witnessed Mr. Nieto carrying what they believed to be a firearm and felt threatened by his behavior. One man reported that he was walking his dog heading down the path near the water fountain when he saw Mr. Nieto, near the path benches, eating from a bag of chips. According to this witness, Mr. Nieto looked like he was possibly drugged or mentally ill because he kept turning around quickly and was rigid and erratic with his movements. The witness's dog approached Mr. Nieto and seemed to be interested in the chips Mr. Nieto was eating. Mr. Nieto seemed disturbed by the dog's approach so the man called her back. When the dog continued following Mr. Nieto to the next set of benches, Mr. Nieto jumped up on one of the benches and began waving his hands around, causing the dog to start barking.

The witness started approaching and calling his dog back when, from a distance of about 20 feet, he saw Mr. Nieto lift his windbreaker and t-shirt exposing a weapon on his waistband which looked like a pistol. The witness was frightened and stopped his approach but kept calling his dog back. He

described what happened next as follows: "He then pulled the object from the holster, which was a holster like I would expect a gun to be in. ... I am a registered gun owner, so it's not like I'm unfamiliar with pistols. I have two pistols. I know what they look like. This looked – I was certain at that point it was a pistol. He pulled it out, and I'm still thinking as it's coming up in the air and it's aimed towards me, it's a pistol. When he turned it into profile and aimed it at my dog, that's when I could tell that it was a Taser just because of the size of the muzzle area. It was too tall and Taser shaped – you know, I know what Tasers look like too – to be a pistol. I felt some relief at that point, but again it was only when I could see it well illuminated in profile that I could tell the difference between it being a Taser and a pistol."

Once he saw that Mr. Nieto had a Taser and not a firearm, the witness begged Mr. Nieto not to shoot his dog and told him the dog is not aggressive and just wants some chips. Mr. Nieto then turned the Taser back towards the witness and aimed it at him. Since he felt he was out of range of the Taser, the witness did not get any closer and just kept calling his dog back. Mr. Nieto then began yelling, "Fuck you!" and challenges like, "Come at me!," "Come on!" and "What do you want?" The dog finally returned to the witness and, as the witness was walking away, Mr. Nieto kept yelling, "That's right motherfucker, fuck you!" The witness immediately went down the stairs and left the park, warning people he saw coming up the stairs about Mr. Nieto. The witness unsuccessfully tried calling the police non-emergency number several times as he left the park and recalls looking at his phone and seeing the calls were made at 7:05 pm. He also sent a text message to a friend who walks her dog in the park warning her to stay away because of Mr. Nieto.

A few minutes later, two men were heading back to their car after walking their dogs when they saw Mr. Nieto at the service road on the west face of the hill. One of the men saw Mr. Nieto pacing in a small circular pattern and then pulling up the bottom portion of his jacket to expose a rectangular gun in a holster on his hip. Mr. Nieto held the grip of the gun and looked around but did not draw it. Both men continued down the service road and saw Mr. Nieto shadowboxing and ducking in and out of a chain link fence. After they gained some distance from Mr. Nieto, one of the men called 911 while his partner warned others not to go up the road and spoke briefly to another man who said he had seen someone up the hill with a gun.

Records from San Francisco's Emergency Communications Department show that this 911 call came in at 7:09 pm. While still on the phone with the 911 operator, the witnesses saw Mr. Nieto head down the hill in their direction and thought he might be coming after them. They continued to move away from Mr. Nieto and reached the main roadway, briefly lost sight of him, and then heard gunshots. Thinking they were being shot at, the men ducked behind a parked car. The gunshots, which can be heard on the audiotape of the 911 call, occurred at 7:18 pm.

SFPD Officers' Encounter with Mr. Nieto

At 7:12 pm, based on the information provided by the 911 caller, a communications dispatcher broadcast the report of a suspect with a black gun on his hip on the north side of Bernal Hill Park pacing back and forth near a chain link fence by a bench. The broadcast described the suspect as a Latin male, six feet and one inch tall, 200 pounds, wearing a bright red jacket and black pants. A second broadcast noted the suspect was eating chips or sunflower seeds but resting his hand on his

gun, and a third broadcast noted that the suspect was walking down the hill. San Francisco Police Department Sergeant Jason Sawyer and Officer Richard Schiff were in full standard patrol uniform, in a fully marked patrol vehicle, when they heard the 911 dispatch and headed to the park.

As Sergeant Sawyer and Officer Schiff drove up the path in Bernal Hill Park, they saw Mr. Nieto walking on the path at least 100 yards in front of them and noted he fit the description provided by the 911 caller. Sergeant Sawyer saw that Mr. Nieto was eating a bag of chips and could clearly see a bulge on the right side of his body, covered by his sweatshirt. Sergeant Sawyer directed Officer Schiff to stop the patrol car about 25 to 30 yards in front of Mr. Nieto. As Officer Schiff opened the door to exit the vehicle, he saw Mr. Nieto's arms rise and could see a black holster on his right hip containing what he believed to be a firearm. Both officers exited their patrol car with their guns drawn, but stayed close to the vehicle to use it for cover if needed. The lighting conditions were good and the officers had a clear view of Mr. Nieto as he continued down the hill towards them.

Both officers shouted at Mr. Nieto, "Let me see your hands!" several times. Mr. Nieto threw his bag of chips on the ground, and continued approaching the officers. Mr. Nieto then lifted up the right side of his sweatshirt exposing a black holstered weapon as he shouted back at the officers, "Let me see your hands!" Mr. Nieto then squared off with them in a defensive stance with one leg forward and one leg back, drew the weapon from the holster with his right hand and pointed the weapon directly at the officers. Based on the way Mr. Nieto drew his weapon, Officer Schiff thought he might have some military experience or background in firearms.

As Mr. Nieto drew his weapon, Sergeant Sawyer saw what he believed to be a firearm and noted it had a red laser sight. As Officer Schiff saw the weapon come into view, he thought it looked like a large caliber semi-automatic pistol, similar to the department issued Sig Sauer P226 he carries. Both officers were certain that Mr. Nieto had drawn a firearm and was about to shoot one or both of them. Officer Schiff said he believed if he did not fire at Mr. Nieto he could be dead within seconds. Both officers discharged their firearms at Mr. Nieto. After a number of shots were fired, Mr. Nieto continued standing with his weapon still pointing at the officers. Both officers continued firing towards Mr. Nieto, at which point he dropped to his knees and then laid down flat on the ground in a prone position with his head up, his arms outstretched in front of him, and still pointing his weapon at the officers. Officer Schiff thought Mr. Nieto might have taken this position as a tactical maneuver to make his body a smaller target. Officer Schiff then, for the first time, saw the red light coming from Mr. Nieto's weapon and thought it might be a laser sight. Both officers believed Mr. Nieto was still trying to fire back at them, and continued to fire at Mr. Nieto.

Shortly before the first shots were fired, Officer Roger Morse and Officer Nathan Chew were responding to the 911 call, traveling in their marked patrol car on the Bernal Hill Park access road, when Officer Chew saw Mr. Nieto standing in the middle of the road. Both officers heard several shots ring out, then drove past 10 or 15 officers running up the hill, and pulled up to the right of and slightly behind Sergeant Sawyer and Officer Schiff's patrol car. As Officers Morse and Chew exited their vehicle they could hear more shots being fired. Officer Chew saw that Mr. Nieto was now in a prone position with his head up and with his arm extended as if he was aiming in their direction. He also saw that Mr. Nieto's weapon had a red laser sight, and thought Mr. Nieto was aiming at him when the glint from the laser crossed his eyes. Officer Morse also saw Mr. Nieto lying flat on the

ground with his arms in front of him holding what looked to him like a black semi-automatic pistol. Officer Morse thought Mr. Nieto was firing at them when he heard popping sounds and saw what he thought were muzzle flashes as Mr. Nieto moved his weapon up and down. Both officers began firing their weapons at Mr. Nieto to protect themselves and the other officers. All four officers continued firing until Mr. Nieto's head and weapon went down, and Sergeant Sawyer yelled for the officers to cease fire.

Once Mr. Nieto was no longer moving, Sergeant Sawyer coordinated a plan to go up and check his condition, and radioed for an ambulance. The officers approached Mr. Nieto with their guns still drawn. As they got to about five feet from him they could see that his weapon, which was still in his hand, was a Taser shaped like a large pistol. Officer Morse kicked the Taser out of Mr. Nieto's hand, and Officer Chew handcuffed him. Officer Schiff checked Mr. Nieto's vital signs, and other officers who arrived tended to Mr. Nieto awaiting the ambulance. Paramedics arrived and determined Mr. Nieto was deceased at 7:30 pm.

Crime Scene Investigation

Evidence collected by the crime scene investigators is consistent with the events described by the involved officers. Investigators found a total of 48 bullet casings located at the scene, 45 scattered around both patrol vehicles and three inside one of the patrol vehicles. The passenger door of the patrol vehicle nearest Mr. Nieto's body was determined to be 93.68 feet away from Mr. Nieto's head. Three firearm magazines were found at the scene, two on the ground near the driver's door of one of the patrol vehicles and one on the ground just north of the same vehicle's passenger door. A comparison of the number of rounds of ammunition possessed by the four officers prior to the incident with the number of rounds recovered from their firearms and magazines after the incident indicates that a total of 59 shots were fired by the officers during the incident.

Several items were found near Mr. Nieto's body, including the Taser and two darts attached to wires that led to the Taser indicating that the Taser had been discharged. The Taser's safety switch was noted to be in the armed position. A black Taser holster was on Mr. Nieto's right hip attached to his belt. Two canisters of pepper spray were located, one on the ground between Mr. Nieto and the path, and a second on the ground close to Mr. Nieto's left pants pocket. A pair of handcuffs was located within Mr. Nieto's back pocket.

Taser Identification and Testing

The weapon recovered from Mr. Nieto was an Advanced Taser M26C electronic control device equipped with a red laser which automatically activates when the device is turned on and assists the user in aiming. The M26C uses a replaceable cartridge containing compressed nitrogen to shoot two small darts attached to the cartridge by 15 foot wires. When the trigger is pulled the M26C flashes electrical sparks until the trigger is released and, upon release, continues to flash for five seconds. Each trigger pull drains the batteries, and continuously holding the trigger causes the batteries to drain rapidly. The M26C has an internal memory that stores a record of every trigger pull.

Mr. Nieto's M26C was inspected and tested by Taser International on June 11, 2014 and found to have dead batteries but was fully functional once fresh batteries were inserted. The laser was tested and also found to be fully functional. Examination of the internal memory of the device indicates the Taser was powered on and the trigger was pulled during the incident. According to Bryan Chiles, Technical Compliance Manager for Taser International, assuming the internal clock of the device was set to Greenwich Mean Time (which is how it is shipped from the factory), and assuming the clock drift was constant from the time of manufacture of this device to the time of testing, the trigger was pulled on March 21, 2014 at 7:18:45 pm, 7:18:52 pm, and 7:19:01 pm. These times coincide with time the officers discharged their weapons, which can be heard on the audio recording of the 911 call beginning at 7:18:40 pm.

The M26C is black in color with several yellow stripes on the sides along the lower left and right frame sections. The stripes are not visible when the M26C is seated in its holster or when viewed from the front. Depending on the angle at which the M26C is held, the yellow stripes may or may not be visible when viewed from the side. Despite the fact that the M26C recovered from Mr. Nieto still had these yellow stripes on sides of the device, the witness at whom Mr. Nieto pointed the Taser minutes before the shooting said he never saw them, even when the weapon was turned towards his dog, allowing him see the device from the side. The witness said he identified the weapon as a Taser based on its shape, but was adamant that he did not see yellow stripes.

The cartridges used with the M26C come with 20 to 30 anti-felon identification (AFID) tags which are disbursed when the darts are discharged. The tags are lightweight, look like multi-colored confetti, and have the cartridge serial number printed on them. Crime scene investigators searched a wide area and were unable to locate any AFID tags at the scene. Investigators believe the tags may have been lost due to significant winds on the hill at the time of the investigation, which were causing some of Mr. Nieto's personal effects to blow away upon their arrival. According to the National Weather Service, the winds were approximately 15 miles per hour in the Bernal Heights section of the City at the time of the incident. According to Taser International, it is possible but unlikely that the AFID tags had been previously removed from the cartridge, since it is very difficult to reload the darts after removal of the tags which are housed behind them.

The M26C cartridges also come with two yellow blast doors which cover the front of the cartridge and are designed to break off when the darts are fired. According to Taser International, the blast doors can break off before the darts are fired when the cartridge is subjected to field use, and can easily be removed by the user. The M26C can still be used if the blast doors are missing. Crime scene investigators searched for but were unable to locate any blast doors or pieces of blast doors when they searched the crime scene, indicating that the cartridge in Mr. Nieto's M26C was not equipped with yellow blast doors at the time of the shooting. This is consistent with the recollection of the witness at whom Mr. Nieto pointed the Taser before the shooting, who said he was certain the only color he saw as he looked directly at the front of the weapon from a distance of 15 to 20 feet was black. It is also consistent with the statement by Officer Schiff that all he saw was "straight black" when Mr. Nieto drew the weapon at him and Sergeant Sawyer. In addition, neither Sergeant Sawyer nor Officer Morse nor Officer Chew described seeing yellow or anything else indicating to them that the weapon was a Taser as Mr. Nieto pointed the M26C directly at them from a distance of 25 to 30 yards.

The M26C Operating Manual prominently displays the following warning on page 4: "Do not point the TASER ECD at any law enforcement officer or do anything that would cause law enforcement officers to feel threatened by your use of the TASER ECD. Because the TASER ECD is able to incapacitate a person, law enforcement officers may be justified to use lethal force to protect themselves." A CD version of the M26C Operating Manual was located in Mr. Nieto's car.

Medical Examiner's Report

The autopsy conducted by Dr. Amy P. Hart, Chief Medical Examiner, is consistent with the description of events provided by the officers involved in the shooting. Dr. Hart concluded that Mr. Nieto died as the result of multiple gunshot wounds, noting that there were 14 or 15 "distant gunshot wounds" to Mr. Nieto's head, torso, upper extremities, and lower extremities, and that these wounds may have been created by as few as 10 gunshots. One of the wounds was a graze wound; the rest were all perforating wounds.

The report notes that the Medical Examiner received records from San Francisco General Hospital revealing Mr. Nieto had a history of aggressive and bizarre behavior and auditory hallucinations, and a clinical history of psychosis exacerbated by his failure to take the medications Zyprexa and Abilify which had been prescribed for him. The report also notes that toxicology testing of Mr. Nieto's postmortem blood did not detect the presence of Abilify, Zyprexa, Benadryl, Risperdal, Geodon or Ativan in his system, though it did detect the presence of cannabinoids (marijuana).

Prior Contacts with Law Enforcement

San Francisco Police Department (SFPD) records reveal that Mr. Nieto had two prior contacts with local law enforcement. The first contact was on January 31, 2011, when SFPD officers were dispatched to a coffee shop based on a report that Mr. Nieto had a steak knife in his pocket and might be suicidal. Mr. Nieto told the officers he was afraid someone may attack him and was depressed about his recent breakup and unemployment. According to the police report, Mr. Nieto appeared paranoid, could not maintain eye contact, and had difficulty answering questions about his address and the date and time. Mr. Nieto was taken into custody and placed on a 72-hour mental health hold.

The second contact was on August 15, 2011, when SFPD officers were dispatched to Mr. Nieto's residence on a report that he was unstable and setting things on fire. According to the police report, Mr. Nieto's parents told the officers their son hears voices, suffers from depression, was supposed to be on the medication Abilify but had not taken it. Mr. Nieto set a book on fire in the kitchen and ran with the burning book into the living room where he threw it on the ground and threw himself on top of it. When his father tried to extinguish the fire, Mr. Nieto threw the burning book under the couch. After his mother extinguished the flames with water, Mr. Nieto took the ashes to the kitchen, mixed them with soap, placed them on the patio floor, and ate them off the ground. Mr. Nieto's parents told the officers they feared for his safety as well as their own. The officers called backup to help subdue Mr. Nieto, who was combative, took him into custody and placed on a 72-hour mental health hold. Although Mr. Nieto was prescribed the drug Zyprexa by the doctor who examined him during this mental health hold, he told the doctor he would not take any medication and that he just needed marijuana to calm his mind.

San Francisco Police Department records also reveal that Mr. Nieto had a prior law enforcement contact related to the use of his Taser. On March 3, 2014, less than three weeks before his death, police received a report from the estranged husband of Mr. Nieto's friend stating that Mr. Nieto had used a Taser on him. The reporting party said he was placing his son in the back seat of his car when Mr. Nieto exited a nearby car carrying a black bag and shouted "Get the fuck out!" The reporting party told Mr. Nieto he was just getting his child. Mr. Nieto took a few steps back, drew a Taser from his bag, and as the reporting party turned his back to speak to his wife, Mr. Nieto discharged the Taser at him, striking him once on his lower back and once on the buttocks. As the reporting party pulled off the darts, Mr. Nieto fired a second time, striking his shoulder, arm and forearm. The reporting party said he was bleeding, in pain and afraid, and quickly got into his car and drove away with his child. Mr. Nieto kicked and hit the car doors as he drove away, shouting, "Get out of the car! I'm gonna get you!" The wife of the reporting party told police that Mr. Nieto got into her car without her permission as her husband was picking up their son. She said Mr. Nieto started to scream, got out of the car, and shot her husband with the Taser in front of her and her son. The reporting party and his wife both filed for restraining orders against Mr. Nieto stating this incident caused them to fear for their safety and for the safety of their children. Mr. Nieto filed a police report two days later about the incident. Mr. Nieto reported that he fired his Taser during a verbal altercation with the reporting party because he feared for his life when the reporting party took a boxing stance after Mr. Nieto said he had an active restraining order against him.

ANALYSIS AND CONCLUSION

California Penal Code section 835a allows an officer to use reasonable force to make an arrest, to prevent escape, or to overcome resistance by a person for whom he has reasonable cause to believe has committed a public offense. The statute provides that the officer need not retreat or end his effort to make an arrest because of the person's resistance. Under California law, peace officers may use deadly force to protect themselves from the threat of death or great bodily harm. California law permits the use of deadly force in self-defense or in defense of others if it reasonably appears to the person claiming the right of self-defense or the defense of others that he actually and reasonably believed he or others were in imminent danger of great bodily injury or death. *People v. Williams* (1977) 75 Cal.App.3d 731. In protecting himself or another, a person 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.

In this case, Sergeant Sawyer, Officer Schiff, Officer Morse and Officer Chew all clearly believed their lives, and the lives of the other officers, were in imminent danger at the time they discharged their firearms. Sergeant Sawyer and Officer Schiff both believed Mr. Nieto had a firearm. Believing that Mr. Nieto was about to shoot them, and in fear for their lives, both officers discharged their weapons at him. Once Officer Morse and Officer Chew arrived at the scene they heard gunshots and saw Mr. Nieto in a prone position with his arms outstretched in front of him holding what they each believed to be a semi-automatic firearm. Both officers began firing at Mr. Nieto to protect themselves and the other officers. All four officers continued to believe their lives were in danger and continued to fire until Mr. Nieto's head and weapon went down and Sergeant Sawyer ordered the officers to cease fire.

The belief of each officer that Mr. Nieto's weapon was a firearm was clearly reasonable. The Taser recovered from Mr. Nieto was black in color, shaped like a large frame pistol, and equipped with a red laser. At the time of the incident the Taser was armed, its red laser was activated, and the laser was focused in the direction of the officers. Although the Taser had several yellow stripes along the sides of the left and right frame sections, they would not have been visible to the officers when the Taser was in its holster or when the Taser was pointed directly at them from a distance of 25 to 30 yards away. The officers were responding to a call of a man in the park reported to have a gun and saw what appeared to be a gun as soon as they encountered him on the hill. Mr. Nieto refused to obey orders to show his hands and, instead, immediately drew and pointed his weapon at the officers. Mr. Nieto's actions gave the officers no opportunity to discover that his weapon was not a firearm before having to act to protect themselves and their fellow officers from the threat of death or great bodily harm.

Under these facts, the use of deadly force was justified. It is, therefore, our conclusion that Sergeant Sawyer, Officer Schiff, Officer Morse and Officer Chew acted lawfully.

Very truly yours,



George Gascon
District Attorney

c: Lieutenant Toney Chaplin
Sergeant Jason Sawyer
Officer Richard Schiff
Officer Roger Morse
Officer Nathan Chew