

CITY AND COUNTY OF SAN FRANCISCO OFFICE OF THE DISTRICT ATTORNEY



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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 January 22, 2011 (Report No. 110068366, 110068764)

Dear Chief Suhr:

The Special Prosecutions Unit of the San Francisco District Attorney's Office has completed its review of the January 22, 2011 shooting in front of 21 Carrizal Street by Daly City Police Officer Donald McCarthy. We have concluded that the officer acted lawfully in self-defense and defense of others.

FACTUAL SUMMARY

Daly City Police Officer Edward Klier (Star #161) was assigned to a Daly City crime suppression unit which partnered with the San Mateo County gang task force. Klier and McCarthy were working together on the evening of January 22, 2011. Klier was driving an unmarked Ford Crown Victoria that had numerous police lights.

Klier said that that evening, he noticed a white Toyota Camry in the area of Velasco and Santos Streets. Officer McCarthy ran the Camry's license plate. The response indicated the registration was expired, and the car had last been registered in San Jose. Klier is aware that the Camry is a type of vehicle that gets stolen frequently. He turned on all of the police vehicle's emergency lights just as the Camry pulled quickly into a driveway of a private residence on Carrizal Street. Klier and McCarthy got out of the police vehicle. Klier walked up to the Camry and contacted the driver through her open driver's side window. The driver said that she had no identification. When Klier asked her to turn off the car, she said she couldn't because it had no keys. She appeared nervous and was looking from side to side.

Suspecting that the driver was operating a stolen vehicle, Klier opened the driver's door, placed a hand on the driver's left arm, and told her to get out of the car. Klier told the driver to put on the brake and put the car in park. At this time Klier was in the "V" between the open driver's side car door and the frame of the car. The driver made a movement as if complying, partially exited the car, but the car began to move forward slowly. Then the driver's body lunged back into the driver's seat and she accelerated. Believing the driver was preparing to evade Klier put both his hands on her to get her out of the car as the car moved forward. The Camry smashed into the house. Instead of complying with the officer's demands to stop the car and get out, the driver immediately reached for the gear shifter, placed the car in reverse, and accelerated backwards.

Klier was stuck behind the door and was unable to escape. The door struck him in the shoulder as the car backed up, and he tried to spin away from the car. Klier let go of the driver and grabbed onto the door frame in an effort to remain upright and not get dragged under the car. He

felt his left foot starting to be pulled under the car, and he "started to go down a little bit." Klier screamed at her to turn off the car, and he heard Officer McCarthy yelling at the driver to shut off the car. Then the Camry struck the parked police car and stopped abruptly. The impact knocked Klier onto the hood of the Ford. He also heard the engine continuing to rev after striking the police vehicle. Klier thought the Camry was hung up on the police car. Officer Klier said he was afraid he was going to suffer serious injury or death as a result of being dragged or run over by the Camry. Klier then heard McCarthy fire two or three shots, at which point the driver's vehicle stopped revving, and he was able to regain his footing. Officer Klier said he thought the entire incident took about twenty seconds.

Daly City Police Officer Donald McCarthy (Star #190) said he'd been with DCPD for four years and with San Mateo PD for a year before that. He confirmed that he, like Klier, was assigned to the Daly City crime suppression unit, which partnered with the San Mateo County gang task force. Their shift on January 22, 2011 began at 1600 hours. McCarthy recalled that Officer Klier, who was driving, asked him to run a Camry on their vehicle's mobile data terminal. Klier decided to pull the Camry over. At about the same time, the Camry pulled into a driveway. Klier activated the emergency lights to initiate the traffic stop.

McCarthy saw that there were two people inside the car. McCarthy also saw three males in front of the house and near the vehicle. In order to keep an eye on everyone, McCarthy took a position near the back of the Toyota as his partner approached the driver. When he heard Klier – using a louder voice – tell the driver to put her hands on her head and get out, McCarthy moved closer so he was near the back passenger side of the vehicle. McCarthy saw there were no keys in the ignition. McCarthy said the driver then put the Camry in "Drive," "floored it," and Klier flew forward with the car. The car hit the house with such force that it left a big dent, and Klier got jerked forward. The car then peeled out and began reversing, and McCarthy could see Klier was being dragged. McCarthy was worried for Klier, for the other two people who were near the front of the car, and for himself.

McCarthy said that the reversing car clipped him just above the knee, spinning him around. When he turned back, he couldn't see his partner for a moment. McCarthy yelled for the driver to stop, closed back in on the Camry coming up along the passenger side of the car, and drew his firearm. He could only see a small portion of Klier, apparently stuck between the cars, and heard Klier yelling. The car was peeling out and the engine was firing up, trying to move. McCarthy said that Klier was a big guy, so if he could only see a little bit of him it made him afraid his partner was down and pinned with no defenses.

McCarthy said the backing Toyota struck the police car. After the impact, the engine continued to rev, and the car was moving back and forth and shaking. The driver appeared to be still working the controls, as if trying to break free. McCarthy continued to yell at the two people in the car to stop. He said he feared that either the car would continue to back up over his partner, or it would accelerate forward and turn into him. McCarthy was afraid Klier was pinned between the cars, was underneath the car, or was down on the ground and unable to take care of himself. McCarthy thought Klier could get run over right there, and he also thought that the car could break loose and run McCarthy down. When the driver refused to comply with the commands to stop, McCarthy, who was on the passenger side of the car, leaned into the car, past the passenger (who he said was sitting there frozen the whole time) so as not to shoot him, and fired what he thought were two rounds. The car then ceased revving and moving.

After the driver was stabilized at the hospital, officers went to interview her. She asked for a lawyer immediately, so no statement was ever taken.

The passenger in the Camry was interviewed. The passenger said the driver had picked him up about twenty minutes before the shooting. The passenger had never seen the driver in the Camry before and she told him it did not have a key. The driver did not tell him whose car it was. They

drove to the area of Carrizal and Parque to visit the driver's cousin. The driver pulled into the driveway at 21 Carrizal to ask the two teenage boys in front to borrow a phone to call her cousin. One of the two boys tried to hand the driver a phone, but as they pulled into the driveway, the passenger said the police car behind them "blurred" them – which, he explained, meant the police car made the quick squawking sound of a police siren. The teenager with the phone pulled the phone back. The police vehicle activated both red and white lights.

Two uniformed officers got out of the police car. There was no doubt in the passenger's mind that these two men were police. The officer on the driver's side spoke first, and told the driver to step out of the car. That officer then partially opened the driver's door from the outside. The passenger said that the driver was scared and shaking. The car was in "D." She "accidentally" sped forward into the garage of the house and hit it "a little bit." The car then jumped backwards (still in "D") while "one cop was hanging on the [driver's] door." The officer was "hooked" on the door with his arm. The car rolled back at a "slow speed" and struck the police vehicle. The only thing the driver said throughout was "Oh shit!" After the Camry hit the police car, the officer fired his gun, striking the driver. The passenger only heard one shot. The officers were saying "get out of the car" to the passenger and the driver both before and after the officer shot. The car was still on, and the engine was revving.

Witness A was outside 21 Carrizal St, drinking a beer like any typical Saturday. He had consumed maybe six or seven beers that day, but said he wasn't intoxicated. Witness A was standing between the garage and the steps. Out of nowhere, a white Camry pulled into the driveway and stopped for a second. Witness A heard police sirens and saw the police right behind them. He saw the police car at the same time he saw the Camry. Witness A thought the cops were "narcs," or undercover cops.

Witness A could see two people in the white Camry, a driver and a passenger. The Camry smashed into the house. The Camry drove, hit the house, stopped, and then reversed. The Camry skidded out, burned out, and the tires squeaked when the car was trying to reverse. Witness A saw two officers. He thought he heard an officer say "Stop your car, it's the police," but he does not remember anything else the officers said. Witness A saw the officer pull his gun and shoot two shots at the passenger side. When the officer shot, the car stopped. According to Witness A this all happened really quickly. When the Camry was going in reverse, it was going to cause damage – the people in the Camry were not looking at their mirrors.

Witness B was also in front of 21 Carrizal St. Witness B was standing outside drinking his second or third beer when he saw a white car pull up with a marked vehicle right behind it. There was a driver and passenger in the car. The unmarked unit turned its lights on while the car was in the driveway. Witness B heard both officers telling the driver to "put your hands in the air." They had their hands in the air, and looked like they were complying and not resisting. Then the car started moving slowly and the officers said, "Stop the car, stop the car." The driver punched the gas and hit the side of the house. Once she hit the house, the officers drew their guns. Then the white car tried to back up and hit the unmarked car, and left a skid mark. According to Witness B, this is when the officer on the passenger's side of the white Camry drew his gun and fired two shots. Once the white car hit the police car, the officer fired the shots. Witness B thought that there was no way the officer was going to get hit by the white Camry.

Witness C was in front of 21 Carrizal. He saw a driver in a Camry and a "narc" following her. The driver came up the hill, and then she stopped and asked Witness C for his phone. Witness C gave his phone to the passenger of the car, but then the police car turned its lights on. An officer got out of the car and Witness C got his phone back from the passenger and stepped away. The officer told the driver several times to turn the car off and get out of the car. The driver opened her car door but then she pressed the gas and she hit the house. She reversed backwards and hit the police car. When the officer told the driver to turn off the car, the passenger took off his

seatbelt and tried to get out. As soon as the passenger opened the door, the driver pressed the gas so the passenger couldn't get out. The car reversed back, the open door of the white car hit the police car, and the driver couldn't go anywhere. The car went forward another two or three feet to get away, but that's when the officer took out the gun and fired two shots. All of a sudden the white car stopped.

The owner of the stolen Toyota Camry said that his car was parked at 3:00 p.m. with the doors locked. The owner noticed that the car was missing at about 5:00 p.m., and he called the police. The owner did not give anyone permission to drive the car, and he is the only person with the key.

Crime Scene / Forensic Evidence

The police vehicle at Carrizal and Parque on January 22, 2011, was facing roughly south on Carrizal towards Geneva. Perpendicular to the Ford, with its left rear area against the left front of the police car, was a white Toyota Camry. The front of the Toyota faced southeast, towards the driveway and garage of 21 Carrizal Street. When he arrived at the scene San Francisco Police Department Officer Tigran Antonian (Star #2109) observed the Toyota Camry was running. He reached into the Camry to turn it off and realized there was no key in the ignition. Antonian used his knife and turned the ignition counter clockwise to turn the vehicle off.

There was a single shell casing a few feet south of the front passenger side of the Toyota.

There was scuffing to the driver's side front bumper of the Camry. The Camry's position of rest had the push bar of the police vehicle wedged into the left rear wheel well just forward of the left rear tire. There were two shell casings on the street between the front of the Camry and the rear of a black pickup truck parked against the east curb of Carrizal. There was a deformed slug and a metal jacket from a bullet or bullets on the street to the north of the Camry.

There was a dent in the left front (driver's side) quarter panel just forward of the door. The door made contact with the quarter panel when it swung open or closed. There was no obvious damage to the front passenger side of the vehicle; however, the side mirrors were attached so that they could be folded forward or backward without sustaining damage.

There was a tire acceleration skid on the sidewalk in front of 21 Carrizal, a few feet back from a cracked section of stucco to the left of the garage door. The skid mark indicated acceleration away from the residence. The 1988 Camry with automatic transmission is a front wheel drive vehicle. An SFPD mechanic performed an inspection of the Camry, including a road test. It was determined that the vehicle's transmission, steering, brakes, and carburetor/ throttle all functioned normally.

SFPD CSI removed a quantity of marijuana from the passenger compartment of the Camry.

CONCLUSION

This review was conducted pursuant to the joint Officer Involved Shooting and In Custody Death protocol between this office and the San Francisco Police Department in which the District Attorney conducts an independent assessment of the circumstances surrounding the use of deadly force by peace officers. The review does not examine such issues as compliance with the policies and procedures of any law enforcement agency, ways to improve training or tactics, or any issues related to civil liability. Accordingly, such a review should not be interpreted as expressing an opinion on these matters.

California Penal Code section 835a allows an officer to use reasonable force to make an arrest, and to overcome resistance by a person for whom he has reasonable cause to believe has committed a public offense. That section states the officer need not retreat or end his effort to make an arrest because of that 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.

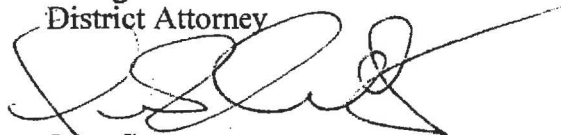
In the present case, the driver used the Camry as a deadly weapon – the driver is charged with two felony violations of using the car as a deadly weapon against Officers Klier and McCarthy.

The officers knew that the white Camry was fully operational. They saw the white Camry accelerate quickly into the house, and then reverse quickly into the police car. During this time, Officer Klier, trapped in the "V" between the open Camry car door and the Camry's frame, was hanging on to the car and was trying to maintain his balance and not get dragged underneath. Both officers were struck by the car while it was moving. Though it appeared that the Camry had gotten "hung up" on the police car and momentarily couldn't go anywhere, the driver appeared to be working the controls and trying to get the Camry unstuck. The car was shaking and moving back and forth, and the officers believed that the driver was continuing to try to get the car free so she and the passenger could evade arrest for being in the stolen car. Officer McCarthy reasonably believed that the driver was going to keep trying to get the car free. Officer McCarthy also reasonably believed that his partner was getting dragged under the car. Had the Camry gotten disentangled from the Crown Victoria, it could have swerved erratically to get around the Crown Victoria and struck either of the officers or possibly one of the civilians. Therefore, the use of force by Officer McCarthy was not excessive in this case. He was acting in self-defense and in defense of Officer Klier.

This case was considered carefully by the District Attorney. After a thorough review of the applicable law, witness statements, physical evidence, and police reports, there appears no reasonable factual or legal basis exists to charge Officer Donald McCarthy with any crime; we are therefore closing our file and will take no further action in this matter.

Sincerely,

George Gascón
District Attorney



June Cravett
Assistant Chief District Attorney

c: Chief Manuel Martinez Jr., Daly City Chief of Police
Lt. Hector Sainez, San Francisco Police Department Homicide Unit
Officer Donald McCarthy, Daly City Police Department