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BONNIE M. DUMANIS
DISTRICT ATTORNEY

June 9, 2008

Sheriff William Kolender
San Diego County Sheriff's Department
9621 Ridgehaven Court
San Diego, CA 92123

Re: Non-fatal shooting of Mr. Albert Cherry on August 14, 2006, involving Sheriff's Deputy Carlos Serrato; San Diego Sheriff's Case #06-058964H; DA Special Operations Case No. 06-093PS; Deputy District Attorney Assigned: Richard Monroy

Dear Sheriff Kolender:

We have reviewed the materials compiled by your department concerning the non-fatal deputy-involved shooting of Mr. Albert Cherry on August 14, 2006. A District Attorney Investigator responded to the scene soon after the incident and was briefed by your investigators.

Persons Involved

Mr. Albert Cherry was 45 years old, stood 5'8" and weighed 185 pounds. He was living in San Diego. At the time of this incident, Mr. Cherry was driving a maroon 2000 Ford Taurus reported stolen to the San Diego Police Department a week earlier on August 7, 2006.

Deputy Carlos Serrato was a K-9 handler assigned to patrol duties. Deputy Serrato was wearing a Sheriff's Department uniform, driving a marked Sheriff's patrol car and armed with a department issued .40 caliber Glock semi-automatic pistol.

Background

On August 7, 2006, Mr. Wilson reported to the San Diego Police Department that his car, a 2000 Ford Taurus, had been stolen. Wilson said he met an acquaintance at a local park on August 5, 2006 and later went to her apartment. Wilson let the woman borrow his car, the woman in turn lent the car to a male friend of hers and that individual never returned the car. Wilson reported the car stolen and the San Diego Police Department entered the car's license plate and identifying information into the National Criminal Information Center computer database as stolen.

Shooting Incident

On August 14, 2006 at 3:27 p.m., a week after the Ford was reported stolen, Deputy Serrato drove to Rohr Park in Chula Vista to give his K-9 a break. When Deputy Serrato arrived at the park, he saw a Ford Taurus occupied by two people parked in the lot. Using his computer, Deputy Serrato ran the car's license plate and learned the Taurus had been reported stolen a week earlier.

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Before Deputy Serrato could take any enforcement action, the car started up and drove away. Deputy Serrato followed, but before he could affect a traffic stop, the car pulled over, stopped, and the driver, Albert Cherry, got out and began waving his arms. Deputy Serrato exited his patrol car, drew his handgun, and ordered Mr. Cherry to the ground. Mr. Cherry got back in the car and drove off at high speed. Deputy Serrato pursued the Taurus with lights and siren for the next three minutes at speeds reaching 80 MPH.

Mr. Cherry drove towards the San Diego County Animal Shelter, a dead end location, and crashed through the closed electronic steel gate. After forcing the gate open with the car, the female passenger, Ms. Webb, jumped out of the car while it was still in motion, fell to the ground and ran away on foot.

Mr. Cherry drove the car around to the rear of the facility with Deputy Serrato in pursuit. When Mr. Cherry reached the rear dead end of the facility he crashed into an animal cage and became trapped in the back lot. Deputy Serrato stopped his car behind the Taurus effectively cornering Mr. Cherry in the rear parking lot. Deputy Serrato exited his unit, drew his handgun, stood to the left of his patrol car and in front of Mr. Cherry's car and repeatedly ordered Mr. Cherry to stop the car, get out and get on the ground. When Mr. Cherry drove the car forward, Deputy Serrato fired two shots at Mr. Cherry through the windshield striking Mr. Cherry in the wrist and chest. Mr. Cherry then stopped the car, got out, laid on the ground and was arrested.

Statements

Deputy Serrato provided a voluntary and recorded statement to investigators after the incident. Deputy Serrato said he drove to Rohr Park that afternoon to give his dog a break. As he pulled his patrol car into the parking lot, he noticed a maroon Ford Taurus occupied by a male driver and a female passenger. Deputy Serrato initially thought the occupants of the car were eating lunch. Before Deputy Serrato exited his car, he ran the car's license plate through his computer. That inquiry revealed the car had been reported stolen.

Before Deputy Serrato could take any enforcement action, he heard the car start up and watched as it pulled out of the lot and onto Sweetwater Road. Deputy Serrato said he followed the car out of the lot, but before he could make any radio transmissions, the driver pulled the car over and stopped. Deputy Serrato said he pulled in behind the car, exited his patrol car, drew his handgun, and told the driver to get out of the car. Deputy Serrato said the driver got out of the car, faced him and began waving his hands. The driver then suddenly jumped back in the car, put the car in drive, and drove off.

Deputy Serrato re-entered his patrol car, turned on his overhead lights and siren and notified Dispatch he was in pursuit of a stolen car. Deputy Serrato said he pursued the car south on Central to Bonita Road where the driver ran a red light. Deputy Serrato said the driver of the Ford fled east on Bonita Road at speeds between 70 and 80 MPH. As the car approached Sweetwater Road, the driver cut across two lanes of traffic, continued east on Sweetwater Road and slowed his speed to about 50 MPH.

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Deputy Serrato saw the car approach the County Animal Shelter, the driver accelerated and crashed through the closed chain link entrance gate. Deputy Serrato saw the gate land on the roof of the car, a female passenger opened the right front door and rolled away from the car. Deputy Serrato thought the car's engine had died and the driver was trying to get the car started. The driver was able to re-start the car and accelerate. Deputy Serrato said the driver of the car drove around to the rear of the Animal Shelter and crashed into a dog kennel.

Deputy Serrato pulled in behind the car, exited his car, drew his handgun, and yelled at the driver to get out of the car. Deputy Serrato said the driver ignored his commands while at the same time shifting the car into gear to free it from where he had crashed. Deputy Serrato saw the driver put the car into drive, make a U-turn in the rear lot of the shelter and then wedge his driver's door up against a parked car.

While Deputy Serrato was yelling at the driver to get out, he heard the driver yelling, "*Okay! Okay!*" However, instead of getting out, Deputy Serrato said he saw the driver working the gear shift lever and heard the engine accelerating. Deputy Serrato said when the driver was able to get the car into gear; the driver accelerated the car towards him. As the car drove towards Deputy Serrato, he said he fired twice at the driver through the windshield.

Deputy Serrato said he fired at the driver because he feared at that point he was going to be hit by the car. He stated, "*I fired to stop him from hurting me... I had tunnel vision. I was scared. I didn't know if he was armed, plus I didn't know where the female was... I was thinking this guy's trying to run me over. I was thinking he's gonna hit me, or he's gonna pin me in between my vehicle and take off and just leave me there to die... He's gonna run me over and just leave me there... I reacted the way I was trained.*" Deputy Serrato said he was also concerned that the female might double back and ambush him from behind.

Deputy Serrato said as soon as he fired his second shot the driver stopped the car, put it in park and began complying with his commands. Deputy Serrato didn't know if the driver had been hit so he continued yelling at the driver to get out of the car. Deputy Serrato said the driver yelled back, "*Okay, okay, okay*", put the car in park, opened the driver's door and rolled out onto the pavement. Deputy Serrato said he continued giving commands, telling the driver to put his hands out, spread eagle on the ground and, "*Don't move! Don't move!*"

Deputy Serrato said he held the driver at gunpoint while continually looking around to make sure the female didn't attack him from behind. Deputy Serrato said when another deputy arrived, they both held the driver at gunpoint until a third and fourth deputy arrived and they could safely handcuff him.

Mr. Cherry waived his Miranda rights and provided investigators with a recorded statement. When asked what happened, Mr. Cherry stated, "*I just blacked out.*" Mr. Cherry said he had wanted to kill himself for the past few weeks because he didn't want to live anymore. When asked if he'd ever tried to kill himself, Mr. Cherry replied, "*I'm going to (kill myself)... I thought he (the deputy) would kill me... I wanted him to. I asked him to... When he shot the first time, I said please kill me... I told him to kill me... When I didn't stop...*"

Mr. Cherry said he and Ms. Webb were in the park inside the car. Mr. Cherry said he obtained the car from a female friend of his and, although he didn't steal the car, he knew the car had been reported stolen. Mr. Cherry said when he drove away he didn't know where he was going, didn't have any destination in mind, and was thinking he didn't want to go back to prison. Mr. Cherry remembered the point during the incident when he stopped the car and got out. He knew a deputy was chasing him, but couldn't remember if the deputy's lights and siren were on. Mr. Cherry didn't know where he drove to but knew it was a dead end. Mr. Cherry said when he reached the dead end he thought about killing himself and indicated he was going to have the deputy kill him. He remembered Ms. Webb got out of the car when he hit the fence and that he was trying to back up so he could turn around. Mr. Cherry saw the deputy had his gun out and as he tried to turn the car around the deputy shot him.

Mr. Cherry stated, *"He said let me see your hands. I watched the car start rolling and that's when he shot me... I wasn't trying to just go towards him. He said let me see your hands. The car's still in drive."* Mr. Cherry said his foot was on the brake and the car rolled forward after the deputy shot him. Mr. Cherry said, *"The car went forward and he shot me again."* Mr. Cherry didn't remember what happened next and didn't remember putting the car in park. He heard the deputy telling him to get on the ground and said he blacked out.

Mr. Cherry told investigators, *"I did want him to kill me... I'm fucked up... I said go ahead and kill me... I said please kill me!"* However, Mr. Cherry denied driving the car at the deputy in an attempt to force the deputy to kill him. Investigators explained that a witness said they saw him drive towards the deputy. Mr. Cherry replied, *"Oh my God. That's not true at all... The witnesses are lying... The truth is I didn't do that."* Mr. Cherry said he never tried to hit the deputy with the car or drive past him at any time. Mr. Cherry said the results of his blood test would show the presence of alcohol and cocaine.

Ms. Webb said she knew Mr. Cherry as, *"Brother."* Webb and Mr. Cherry went to a store to buy some liquor and then went to a park to drink. Ms. Webb said while they were talking and drinking, she smoked a joint. When the deputy pulled into the park, they noticed he was running their license plate. Webb said Mr. Cherry told her the car they were in was stolen. Webb said Mr. Cherry panicked because he didn't want to go back to prison. When Mr. Cherry drove away, Webb told him running away wasn't cool and he needed to pull over and talk to the deputy.

Webb recalled Mr. Cherry stopped the car, and when he started to get out the policeman told him to get his hands up. Webb said Mr. Cherry replied, *"No. I can't go back. I can't go back."* Webb said she didn't get out of the car because she panicked. Webb said Mr. Cherry put the car in drive, took off and the police followed after them with his lights and siren on. Webb said Mr. Cherry flipped out. As he drove away from the police, she told him to calm down because she didn't want to die. When they arrived at the animal shelter, Webb said she jumped out of the car.

Webb said, ***“He would have done anything! From what I saw. Anything not to go back. That’s why he was running.”*** Webb explained when they reached a dead end, Mr. Cherry knocked down the fence and kept going. Webb panicked, jumped out of the car and ran away, but was caught by some detectives. She heard gunshots but didn’t witness the shooting.

Mr. Hanson, an Animal Control Officer for the County, was in uniform and working in the office of the facility when he heard sirens. Hanson heard a loud crash and some screaming coming from the parking lot. He ran outside and saw the front gate had been pushed forward off its track. He also saw a maroon car driving towards the rear of the facility being chased by a Sheriff’s patrol car with its lights and siren on. Hanson saw a Black female jump from the car’s front passenger door while the car was still in motion. Hanson estimated the car was traveling at between 10-15 mph.

Hanson confronted the woman, who was incoherent, babbling and animated. He told her she wasn’t free to leave and to stay there. Hanson then ran to the back of the facility and saw the deputy was out of his car with his gun drawn and the driver of the car was trying to maneuver around in a very tight space. Hanson heard the deputy yelling and repeating commands, ***“Stop! Get out of the car! Shut off the engine! Put it in park!”***

Hanson was about twenty feet behind the deputy and asked him if he needed help. The deputy looked at Hanson and asked him if he was armed, Hanson said, “No” and the deputy said to stay back. Hanson saw the suspect trying to turn the car around in the confined and narrow rear lot. Eventually, and after making several turning movements, the car ended up facing north toward where the deputy was standing. Hanson said the deputy was standing out in the open with his gun drawn about five to seven feet away from his patrol car.

Hanson said there was a brief period of about six to ten seconds where there was a stalemate, with the driver of the car stopped in the rear lot and the deputy standing in front of the car with his weapon drawn. Hanson estimated the deputy was about twenty-five feet away from the car while it was stopped in front of him. Hanson saw the driver of the car looking directly at the deputy. Hanson said the car moved slowly forward about four or five feet and stopped as the deputy gave more commands.

Hanson said, ***“At that point, the vehicle accelerated at a high rate of speed directly at the deputy... At which point he fired two rounds through the front windshield... The vehicle immediately came to a stop. I assume the suspect hit the brakes... The vehicle stopped.”***

Hanson estimated that when the car accelerated, it covered between ten and fifteen feet and was about fifteen feet from the deputy when he fired. He estimated the car’s speed at about 15 MPH as it accelerated toward the deputy. Hanson said, ***“He was trying to escape. And he would have run over the deputy. There was no way to go around. The deputy’s vehicle was blocking a great deal of that portion of the lot... And the deputy was standing in the area between his car and our animal control truck... There’s no way he could have gone around him.”***

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Hanson explained that because there was not enough room to get past, the driver would have had to run over the deputy in order to escape and felt the driver accelerating forward was a deliberate act. Hanson heard the deputy giving more commands and saw the driver crawl out onto the pavement and lay on the ground. Hanson watched as the deputy held the driver at gunpoint for about a minute until other uniformed officers arrived and the driver was arrested.

Ms. Hoefert, an Animal Control Officer for the County, was in uniform and working in the office of the facility when she heard sirens approaching and getting louder. She heard a crash in the compound that sounded like someone had crashed a car into the steel rolling gate in front of the shelter. Hoefert knew something was wrong and ran outside with Mr. Hanson.

Hoefert saw a red car had crashed into the front gate. She saw the gate was dented and the car was embedded into the gate. Hoefert was shocked to see the driver, a Black male, push the gate forward with his car and the gate give way. Behind the red car was a marked Sheriff's patrol car with its lights and siren on. As the car drove through the gate, Hoefert saw the passenger door open and a Black female stumble out onto the ground. Hoefert tried to detain the female, but she got up and left. Hoefert couldn't determine if the woman was trying to escape from the driver or from the pursuing deputy.

Hoefert saw the red car drive around behind the facility at a high rate of speed with the Sheriff's car following behind. After the car drove to the rear of the shelter, Hoefert heard a crash that sounded like metal hitting metal. Hoefert ran to the back of the facility and saw the car had crashed into an animal cage and pushed the cage up against the building. She saw the driver was trying to turn his car around because where he had driven to was a dead end. Hoefert said there wasn't much room for the driver to maneuver because equipment, vehicles, and a trailer were parked in the lot.

Hoefert saw the deputy, who was in uniform, was out of his patrol car and standing in front of the suspect's car. She saw the deputy had his handgun drawn pointing it at the driver. Hoefert heard the deputy giving loud commands telling the driver over and over again, *"Stop! Get out of the car! Stop! Get out of the car!"*

Hoefert used her radio to call County Communications to notify them of the situation at the shelter. While Hoefert was yelling at other employees to get down and stay inside the building, she heard two gunshots a moment apart. Hoefert did not see the shooting and did not see what the deputy and driver were doing when the shots were fired. Hoefert said she was scared, frightened and terrified. After the shooting, Hoefert saw other deputies arrive and the driver being handcuffed and arrested.

Ms. Jones, a Lieutenant with Animal Control, was in her office when she heard a siren and employees running. When Jones looked outside, she saw Hoefert talking to a Black woman in the parking lot. Jones also saw a red car being followed by a Sheriff's patrol car drive around to the rear of the facility. Jones saw a deputy standing with his arms out as if he was holding a gun. She later heard two pops.

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Ms. Moore, an employee of the animal shelter, was working in the rear parking lot when she heard a siren. Moore heard a banging noise and saw a red car driving into the lot. Moore was eventually told by staff to go inside the building with other employees. While inside, Moore heard an officer yelling loudly telling a man to get out of a car. She remembered the officer yelling very loudly five or six times telling the man to do things. She then heard a single gunshot.

Radio Transmissions

The Sheriff's Department's radio transmissions and communication tapes regarding this incident were reviewed in detail. Those recordings reveal Deputy Serrato began notifying the Sheriff's Dispatch Center of his involvement in this pursuit at 3:27 p.m. that afternoon. The pursuit covered about three miles and lasted about three minutes.

Deputy Serrato first radioed, ***"70 King 4 (call sign), I've got a 10851 (stolen car)! In pursuit, southbound Central. It's gonna be a red Ford Taurus... Start Astria (Sheriff's Helicopter). I'm now eastbound ... It's gonna be 4KWE407. Speed's around 80."*** Deputy Serrato later radioed, ***"Eastbound Sweetwater Road. Speeds about 40, occupied by two BMA's... We're at Sweetwater and... Speeds are about 70... We're gonna be getting on the freeway here."***

For the next minute and a half there were no radio transmissions by Deputy Serrato. The dispatcher tried to raise him on the air and the responding units tried to locate him. Deputy Serrato then radioed, ***"King 2, shots fired"*** but he didn't state his location. Thirty-seconds later the dispatcher notified the responding Sheriff's units, ***"I just got word from Animal Control that the Animal Shelter needs 11-99 (Immediate Law Enforcement assistance) now! Units respond to the Animal Shelter! Shots fired at the Animal Shelter!"*** Thirty-five seconds later Deputy Serrato radioed, ***"I got one down. Start the FD. ...70 King 4, I got one person down, Animal Control here with me. Got the suspect proned down on the ground."***

Investigation

The crime scene was secured and a scene investigation established the following. The Animal Control Shelter's steel, electronically operated entrance gate had been forced from its track and the frame was buckled. A sign attached to the gate read, ***"Employees Only."*** The Ford Taurus sustained damaged to the right passenger side mirror, right front fender, body and front bumper. The damage the car sustained was consistent with forcing open the entrance gate. The keys were in the ignition. The car had an automatic transmission. The gear shift was located on the column. At the time the scene photos were taken, the car's transmission was in park. Skid marks observed on the pavement indicate the Taurus jumped the curb and collided with an animal cage in the rear lot forcing the cage backwards and out of place. Damage on the Taurus' left front bumper is consistent with hitting that cage.

A crack pipe and a lighter were found in the driver's seat. There were two bullet holes in the Ford's windshield. The angle of these entry holes were consistent with Deputy Serrato firing at the Ford from in front of and slightly to the left of the car's windshield. Two expended .40 caliber shell casings were recovered at the scene. Ballistics examinations, interviews and shell placement reveal these two shots were fired from Deputy Serrato's handgun.

The investigation revealed Deputy Serrato fired two shots at Mr. Cherry while Mr. Cherry was seated in the driver's seat of the Ford Taurus. Mr. Cherry sustained a penetrating gunshot wound of the right wrist, and perforating gunshot wounds of the right chest. Toxicological tests were conducted by Sharp Hospital staff upon Mr. Cherry's admission to that facility for treatment. Those toxicology tests were positive for the presence of cocaine.

Criminal Conviction

Mr. Cherry was charged by the District Attorney's Office with the felony crimes of Assault with a Deadly Weapon, Felony Evading, Auto Theft and Receiving Stolen Property. On February 1, 2007, Mr. Cherry pled guilty to Assault with a Deadly Weapon and Felony Evading. The Auto Theft and Receiving Stolen Property counts were dismissed. Probation was denied and he was sentenced to four years and eight months in State Prison with credit for 156 days time served. He was also ordered to pay \$920 in restitution to the auto theft victim.

Legal Analysis

This review was conducted pursuant to the joint protocol between this office and all San Diego County law enforcement agencies calling upon the District Attorney to conduct an independent assessment of the circumstances surrounding the use of deadly force. 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.

In this case, a uniformed Sheriff's deputy, while on routine patrol, came upon a stolen car occupied by Mr. Cherry and Ms. Webb. Mr. Cherry, knowing he was in possession of a stolen car, immediately realized the deputy was running a check on the car's license plates and fled. A high speed vehicle pursuit ensued for the next three minutes and culminated when Mr. Cherry crashed through the front gate of the County Animal Control Shelter and became cornered in the rear lot.

Based on witness statements and physical evidence, it's apparent Deputy Serrato exited his patrol car, drew his handgun and repeatedly ordered Mr. Cherry to surrender. Mr. Cherry refused and either intentionally or unintentionally drove his car forward in an attempt to escape or force Deputy Serrato to fire on him. Mr. Cherry also indicated many times during his interview that he was mentally unstable and was hoping the deputy would kill him.

Under California law, peace officers may use deadly force to protect themselves from the threat of death or great bodily harm and to use reasonable force in making an arrest. 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 had reasonable cause to believe has committed a public offense. That section states the officer need not retreat or end his effort to affect an arrest because of that person's resistance. Penal Code section 196 declares that homicide is justifiable when committed by public officers when necessarily committed in overcoming actual resistance in the discharge of any legal duty.

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In accordance with Penal Code section 196, peace officers may use deadly force in the course of their duties under circumstances not available to members of the general public. We are mindful, however, that certain limits on the use of deadly force apply to peace officers. The U.S. Ninth Circuit Court of Appeals, in the case of *Scott v. Henrich* (9th Cir. 1994) 39 F.3d 912, delineated those circumstances under which deadly force may be used:


‘[P]olice may use only such force as is objectively reasonable under the circumstances. An officer’s use of deadly force is reasonable only if ‘the officer has probable cause to believe that the suspect poses a significant threat of death or serious injury to the officer or others.’ All determinations of unreasonable force ‘must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.’”
[Citations omitted.]

Irrespective of any laws applicable to situations where peace officers use deadly force in accomplishing their duties, the law of self-defense is available to any person. Under these circumstances, the use of deadly force by Deputy Serrato was reasonable and therefore Deputy Serrato bears no criminal liability for the actions taken during this incident.

A copy of this letter, along with the materials submitted for our review will be retained in our files.

Sincerely,

BONNIE M. DUMANIS
District Attorney

By: 
RICHARD MONROY
Deputy District Attorney
Chief, Special Operations Division

BMD:rm;jh

Cc: Captain Octavia Parker