JESUS RODRIGUEZ
ASSISTANT DISTRICT ATTORNEY

OFFICE OF
THE DISTRICT ATTORNEY
COUNTY OF SAN DIEGO

BONNIE M. DUMANIS
DISTRICT ATTORNEY

San Diego
330 West Broadway
San Diego, CA 92101
(619) 531-4040

http://www.sandiegoda.com

November 14, 2008

Chief William Lansdowne
San Diego Police Department
1401 Broadway
San Diego, CA 92101

Re: Fatal shooting of Cao Van Lam on November 17, 2007, involving San Diego Police Sergeant Danny Orduno and Officers Daniel Hall, Nestor Hernandez, Mark Brenner, John Thompson and Randy Burgess; San Diego Police Department Case No. 07-068220; DA Special Operations Case No. 07-125PS; Deputy District Attorney Assigned: A. Craig Rooten

Dear Chief Lansdowne:

We have reviewed the reports and other materials compiled by your department concerning the fatal shooting of Cao Van Lam by the above-named members of your department on November 17, 2007. Your agency presented this case to our office on March 26, 2008. Two District Attorney Investigators responded to the scene soon after the incident and were briefed by your investigators.

Persons Involved

Cao Van Lam was 41 years old and lived in San Diego. During the incident he was armed with a Ruger P345.45 caliber semi-automatic pistol.

Sergeant Danny Orduno and Nestor Hernandez were assigned to the Gang Suppression Unit. Officers Mark Brenner and John Thompson were assigned to Southeastern Patrol. Officer Randy Burgess was assigned to the K-9 Unit. Officer Dan Hall was assigned to Mid-City Division. Sergeant Orduno and Officer Burgess were armed with .45 caliber semi-automatic handguns, Officers Thompson, Hernandez and Brenner were armed with .9mm semi-automatic handguns and Officer Hall was armed with a HK .223 caliber semi-automatic rifle.

Background

On November 17, 2007, agents from the California Department of Justice Bureau of Narcotics Enforcement Unit (BNE) were surveilling Mr. Lam and Mr. Tri Vo regarding an ongoing narcotics trafficking case. The agents observed Mr. Vo drive Mr. Lam to the 34th Street apartment of Mr. Lam's ex-wife, where Mr. Lam got out of the car and forced his way into his ex-wife's home, where he shot six people, killing one of them.

The BNE agents heard Mr. Lam's gunshots and approached the car he and Mr. Vo drove to the apartment complex. Agent Paul Roberts confronted Mr. Lam as Mr. Lam ran back to the car. During an exchange of shots between the agent and Mr. Lam, Agent Roberts was shot in the abdomen.

Shooting Incident

After shooting Agent Roberts, Mr. Lam fled on foot. Other agents arrested Mr. Vo. Responding police officers began searching for Mr. Lam, who was spotted moments later running across Interstate 805. Six uniformed SDPD officers converged on Mr. Lam from different positions on and around the freeway. During the pursuit, these six officers--Sergeant Danny Orduno and Officers Daniel Hall, Nestor Hernandez, Mark Brenner, John Thompson and Randy Burgess--fired at Mr. Lam, striking him numerous times. Mr. Lam died at the scene.

Sergeant Danny Orduno said he responded to a call of shots being fired and was notified the suspect was running towards the 805 freeway, had wounded an undercover agent, and was shooting at pursuing officers. Sergeant Orduno said he saw Mr. Lam running on the freeway, illuminated him with his spotlight and saw muzzle flashes coming from where Mr. Lam was standing. Sergeant Orduno parked his car, chased Mr. Lam, and ordered him to drop his gun. Sergeant Orduno said he heard other officers yelling at Mr. Lam to drop the gun and then he heard gunshots. Sergeant Orduno said he saw Mr. Lam fall to the ground, so he began approaching him. Sergeant Orduno said he saw Mr. Lam trying to push himself up and raise the gun towards other officers who were approaching, so he fired twice at Mr. Lam.

Officer Daniel Hall also responded to the call of shots fired. He said he was aware that an undercover agent had been wounded and that the suspect was seen running on the I-805 freeway, armed with a handgun. Officer Hall took up a position along a chain link fence that bordered the freeway and said he saw Mr. Lam raise his arm and fire at officers who were approaching on foot. Officer Hall said he saw the approaching officers firing at Mr. Lam and saw their rounds hitting the freeway embankment. Officer Hall said he feared for the lives of the officers on foot, so he fired his rifle twice at Mr. Lam.

Officer Nestor Hernandez was assisting the agents with their surveillance of Mr. Lam and Mr. Vo, and he was informed that they were both Asian gang members who were known to be armed and dangerous. Officer Hernandez monitored the radio call of shots fired on 34th Street, knew an undercover agent had been shot and that the suspect was seen running across the I-805 freeway. Officer Hernandez saw Mr. Lam and officers who were confronting him engaged in a gun battle on the freeway. As Officer Hernandez stopped his car, from about twenty feet away, he saw Mr. Lam kneeling on the ground and pointing a handgun at Sergeant Orduno. Fearing Mr. Lam was going to shoot Sergeant Orduno, Officer Hernandez fired what he estimated to be six or seven rounds at Mr. Lam from a seated position inside his patrol car.

Officer Mark Brenner said he and his partner, Officer John Thompson, responded to a call for assistance and later saw Mr. Lam with a gun in his hand crouched down behind the I-805 center divider. Officer Brenner said he illuminated Mr. Lam with his spotlight and then saw muzzle flashes, heard shots being fired and felt Mr. Lam was firing at them. As Mr. Lam ran across the

freeway, Officer Brenner fired what he estimated to be eight to ten rounds at him from a seated position inside his patrol car. Officer Brenner stopped his car and got out. He saw Mr. Lam standing in the roadway still armed with the gun, so he fired an additional six to eight shots at Mr. Lam. Officer Brenner said when he fired at Mr. Lam he was in fear for both his and his partner's lives. He said he was certain Mr. Lam was the person who had shot the DOJ Agent only minutes before.

Officer Thompson said he and Officer Brenner had been notified one officer had already been shot and the suspect was last seen running towards the I-805 freeway. While chasing after Mr. Lam in their car, Officer Thompson saw Mr. Lam holding a gun in his right hand, crouch down and turn towards himself and Officer Brenner. Officer Thompson said he fired an unknown number of rounds from the passenger seat of the patrol car at Mr. Lam while he was running away from them. Officer Thompson said he fired because Mr. Lam had already shot one officer, was pointing a gun at himself and Officer Brenner, and because he feared Mr. Lam would shoot at them as well.

Officer Randy Burgess also responded and was aware that shots had been fired, a DOJ Agent had been wounded and the suspect had been seen running on I-805. Officer Burgess parked on the freeway under the Lincoln Street Bridge, saw a muzzle flash, heard gunshots, and saw Mr. Lam walking on the freeway towards other officers. Officer Burgess said he feared Mr. Lam was waiting for the officers to get out of their cars so he could shoot them. While holding his K-9 with one hand, Officer Burgess said he fired an estimated four shots at Mr. Lam before he fell to the ground. While Mr. Lam was on the ground, Officer Burgess said he saw him looking towards the approaching officers, and fearing he was going to engage them again, he fired an estimated two or three more shots.

Investigation

A Ruger .45 caliber semi-automatic pistol was found next to Mr. Lam's body. No expended cartridge casings or fired bullets attributable to this weapon were found at the scene. The gun's magazine was empty and its slide was in a locked-back position. Plant material was found in the barrel during an examination of the gun. The Crime Scene Report stated that Mr. Lam had been seen sliding down the east embankment of the I-805 freeway before the shooting began. Your supervising criminalist concluded that the condition of the gun and the lack of casings and projectiles "may be suggestive that the suspect did not fire while on the freeway because he was already out of ammunition."

The scene investigation on the freeway revealed Sergeant Orduno fired two rounds, Officer Brenner fired sixteen rounds, Officer Thompson fired fourteen rounds, Officer Burgess fired seven rounds, Officer Hernandez fired six rounds, and Officer Hall fired two rounds. Thirty-six expended .9 mm shell casings, nine expended .45 caliber shell casings, and two .223 expended shell casings were recovered at the scene. All forty-seven expended casings were located in areas consistent with the stated firing positions of Sergeant Orduno and Officers Brenner, Thompson, Burgess, Hernandez and Hall.

On November 19, 2007, Chief Deputy Medical Examiner Dr. Christina Stanley performed an autopsy on Mr. Lam's body. She concluded that Mr. Lam died as the result of multiple gunshot wounds. A toxicological examination revealed the presence of methamphetamine in Mr. Lam's system.

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.

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 in his effort to effect 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.

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. Homicide is justifiable in accordance with Penal Code section 197 when resisting any attempt by a person to commit great bodily injury on or kill any person.

Conclusions

In this case, the involved officers were confronted by an individual who had just murdered one person, shot five others, and then had shot and wounded a law enforcement officer in his efforts to escape. When Mr. Lam was located and confronted by pursuing officers, he still had the handgun he had just used to kill one person and shoot six others. His actions on the freeway indicate he was still attempting to use his weapon to shoot or intimidate his pursuers, whether he knew he was out of ammunition or not. The officers could not know the condition of Mr. Lam's weapon under the circumstances, nor were they required to make any effort to determine if his firearm was loaded or operable before using deadly force to protect themselves and each other from the apparent threat that he posed.

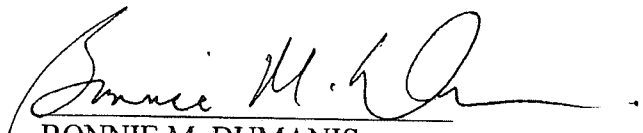
Sergeant Orduno and Officers Hall, Hernandez, Brenner, Thompson and Burgess were aware that they were confronting a violent fleeing felon, who refused their commands and continued to resist their efforts to capture him. The perceptions by the officers that Mr. Lam may have been firing at the officers during the incident on the freeway were not unusual, given that the event took place after dark, six officers were firing their weapons, and the officers were aware of Mr. Lam's extremely violent conduct. In any event, Mr. Lam chose to continue to resist the efforts of the officers to apprehend him, under circumstances where he could have surrendered should he have chosen to do so. Their beliefs that he may have been firing at them during the incident were not unreasonable under the circumstances.

Accordingly, the officers' use of deadly force under the circumstances confronting them in this case was justified, and they bear no criminal liability for their actions.

Tri Vo, Mr. Lam's driver during this incident, pled guilty on August 1, 2008, to charges related to Mr. Lam's shooting the individuals at his ex-wife's home. He was sentenced to seven years state prison on November 7, 2008. Other than any matters related to Mr. Vo's prosecution, we anticipate no further action in this case.

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
Count of San Diego County

BMD:jh
Cc: Captain Jim Collins