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July 2, 2009

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

Re: Non-fatal shooting of Mr. Jose Ruben Fragoso on October 15, 2008 by San Diego Police Sergeant Christopher Sarot; SDPD Case No. 08-058748; DA Special Operations Case No. 08-113PS; Deputy District Attorney assigned: Jeffrey Dort

Dear Chief Lansdowne:

We have reviewed the reports and other materials compiled by your department's Homicide Division regarding the non-fatal shooting of Mr. Jose Fragoso by Sgt. Sarot on October 15, 2008. A District Attorney Investigator responded to the scene soon after the incident and was briefed by your investigators. This case was presented to the DA's Office on January 29, 2009.

Persons Involved
Mr. Jose Fragoso was 29 years old and armed with a loaded Ruger .9 mm semi-automatic pistol.

Sergeant Christopher Sarot was assigned to supervisory patrol duties in Western Division, and has been with SDPD for 18 years. He was in full uniform, driving a marked police car and armed with a Glock .45 caliber semi-automatic pistol.

Robbery and Shooting Summary
On October 15, 2008 at 10:20 p.m., an armed robbery occurred at Filberto's Taco Shop on Ulric Street in the Linda Vista area of San Diego. The clerk described the robbers as two male Hispanics, one armed with a black gun. Within minutes officers stopped a vehicle nearby that matched the description of a vehicle used in similar recent robberies. In the car were two Hispanic males. The driver of the car, Mr. Sanchez, surrendered; the passenger, Mr. Fragoso, fled on foot. Mr. Fragoso ran into an apartment but quickly left, leaving behind a loaded gun. He also ran into another apartment while fleeing the officers.

After Mr. Fragoso fled the apartment, he was spotted by several uniformed officers, who chased him. The officers gave him commands to stop. Mr. Fragoso did not comply and kept his hands near his waist as if concealing something. Multiple officers, including Sgt. Sarot, struggled with him to get him handcuffed. Mr. Fragoso disobeyed repeated commands to show his hands, and kept fighting. During the struggle, Sgt. Sarot shot Mr. Fragoso once in the right side.

Mr. Sanchez's Statement
Mr. Fragoso's accomplice and the driver of the car, Mr. Sanchez, was interviewed. Mr. Sanchez admitted seeing Mr. Fragoso armed with a handgun when Mr. Fragoso ran from his vehicle.

Investigation
The crime scene was secured and a scene investigation was conducted. The investigation revealed Sgt. Sarot fired once. The fired bullet struck Mr. Fragoso in the right side, and resulted in a through and through wound to Mr. Fragoso's right lower back. Mr. Fragoso was transported to the hospital and was later released. The projectile was located lodged in the bed of a parked truck. The expended shell casing was recovered at the scene. Upon arrest, Mr. Fragoso was patted down and a plastic container was found in his right front pants pocket. Inside this container was cocaine, marijuana, methamphetamine and MDMA (ecstasy).

The gun Mr. Fragoso was armed with during the foot chase, a Ruger pistol, was reported stolen on May 23, 2005. It was loaded with ten rounds of ammunition. It was located in the first of two apartments that Mr. Fragoso entered to hide from police. Also located in that apartment was property stolen from a residential robbery that Mr. Fragoso had committed earlier the same day.

The Ruger's magazine and the plastic container both tested positive for Mr. Fragoso's DNA.

Video Recording by Police Helicopter
The foot pursuit and the events leading up to the shooting were recorded by the police helicopter from above. The video depicts a police unit stopping a car, and Mr. Fragoso immediately leaving the passenger side and running from the car toward an apartment complex. As Mr. Fragoso climbs an apartment staircase, he is seen reaching to his waistband and holding something in his right hand. The helicopter officers noticed this, became concerned and alerted officers on the ground radioing, *"He's holding something in his right hand! Use caution!"*

Foot Pursuit leading to Shooting Scene
Mr. Fragoso was next observed leaving the apartment complex by an officer who shouted at Mr. Fragoso, "**Stop or I'm going to shoot**." Mr. Fragoso disobeyed this order and ran away from the uniformed officer. This officer was pointing his weapon at Mr. Fragoso, but noted that as the suspect ran, he kept his hands at or near his waistband as if to conceal something. This officer considered Mr. Fragoso a "serious threat" but reported he was unable to fire his weapon due other officers in his line of fire.

Mr. Fragoso next ran from the apartment complex onto a street toward Sgt. Sarot and a K-9 officer. The K-9 officer ordered Mr. Fragoso to stop running, and stated, **"Stop! San Diego Police. You will be bit by a police dog."** Mr. Fragoso changed direction in the street and ran toward a parked unoccupied pick-up truck.

As Mr. Fragoso ran away from the K-9 officer, Sgt. Sarot drew his service weapon and yelled commands at Mr. Fragoso to stop. Three officers including Sgt. Sarot converged on Mr. Fragoso

and were able to pin him against the back side panel of the parked pickup truck. Mr. Fragoso continued to disobey and actively resisted officers, even while two officers attempted to pull his hands free from his front waistband area. Sgt. Sarot thought Mr. Fragoso was still armed, and was actively trying to conceal a weapon. Sgt. Sarot then fired one round at Mr. Fragoso. Mr. Fragoso went to the ground, but civilian witnesses report he was still resisting on the ground.

Criminal Complaint
On October 17, 2008, the District Attorney's Office charged Mr. Fragoso with multiple felonies in case number SCD 216812. On April 1, 2009, Mr. Fragoso pled guilty to three felonies, one count of each: Armed Residential Robbery, Possession of a Controlled Substance while Armed and Resisting an Executive Officer. He was sentenced on May 4, 2009 to seven years and eight months in state prison.

Sgt. Sarot's Actions and Statements
Sgt. Sarot supplied a voluntary and recorded statement. Sgt. Sarot monitored the call alerting officers to the armed robbery of Filberto's Taco Shop by two Hispanic males armed with a handgun, one of whom fled on foot when stopped. Sgt. Sarot also knew there had been an ongoing series of unsolved armed robberies involving male Hispanics. Sgt. Sarot also knew that a gun had been discarded during the foot chase and found inside the apartment the suspect had briefly hid inside. Sgt. Sarot stated the gun recovery confirmed for him that the suspect was armed and noted it is quite common for criminals to carry more than one gun.

Sgt. Sarot said he was on the perimeter when he first saw the suspect: *"He ran up to the bed... of the truck.... He still had his hands down in his waist...I don't know what he was doing. He was doing something with his hands. It looked to me like he was trying to get something."* Sgt. Sarot said he ordered the man, ***"Stop! Show me your hands! ... You're gonna be shot!"*** Sgt. Sarot said that Mr. Fragoso continued to keep his hands in a location where he could not see them, even after multiple commands and being notified he would be shot. Sgt. Sarot stated he held his gun in his right hand and flashlight in his left and, while trying to control the man, he heard other officers ordering the man to show his hands.

Sgt. Sarot said, *"But this guy...was determined that we weren't gonna get his arms out. And I was really concerned that he had a gun in his waistband given the background of the call [robbery with a gun used]... and a gun was found...there was at least another officer on each side of me trying to grab this guy and pull his arms. Again, he was being given commands,* ***"Show us your hands!"*** *I felt that myself and the other officers that were there were in danger of being assaulted or shot... I thought he was still armed... I thought his intent was to hurt or try to kill myself or another officer... I felt it was imminent and he was going for something...I told him one more time,* ***'Show me your hands, you're gonna get shot.'*** *... And that's when I pulled the trigger. Just shot one round."*

Sgt. Sarot said his decision to fire was deliberate. The sergeant was asked if there were any other alternative measures available to him. Sgt. Sarot said, *"At that time, no."* Sgt. Sarot said he was

not equipped with a Taser and did not believe applying a carotid hold would work because the suspect was struggling and he was unable to get into a position to apply that hold.

Legal Analysis

This review was conducted pursuant to the joint protocol between this office and all San Diego 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 states the officer need not retreat or end his effort to make an arrest because of that person's resistance. 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 physical 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.'[Emphasis added, 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.

Conclusions

In this incident, Sgt. Sarot responded to a call of an armed robbery that had just occurred. He and other uniformed officers located and pursued Mr. Fragoso on foot ordering him several times at gunpoint to stop and show his hands. During the foot pursuit, multiple officers observed Mr. Fragoso having an object in his hand, and running with his hands in his waistband, as if holding something concealed. Immediately following these foot pursuits, during their attempt to arrest and control Mr. Fragoso, Sgt. Sarot feared he was reaching for a weapon. It was at this point that Sgt. Sarot fired once wounding Mr. Fragoso in the right side.

During this incident, Mr. Fragoso had a legal duty to stop and surrender when ordered to do so by the officers. Mr. Fragoso's legal duty to comply with the officers' commands to stop and surrender continued throughout the foot chase and at the confrontation by the truck.

Based on the events as they unfolded it is reasonable to believe Sgt. Sarot feared for his life as well as the lives and safety of the other officers present. Sgt. Sarot shot a suspect of an armed robbery, that had fled police, repeatedly resisted arrest, had ignored commands to stop and continually kept his hands in his waistband. Sgt. Sarot was faced with an instant decision about what to do with a fleeing felon, who at night had decided to actively resist any attempt to remove his hands from his waist area. Sgt. Sarot's decision to use deadly force is therefore reasonable and he bears no criminal liability for his actions.

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: Damon Mosler
DAMON MOSLER
Deputy District Attorney
Chief, Special Operations Division

DM:jh
cc: Captain Jim Collins