

**In-Custody Death of Timothy McMillan
Los Angeles County Sheriff's Department**

**Deputy Ramon Chavez #499011
Deputy Steven Marquez #602951
Deputy Nathan Botten #528103
Deputy Alexander Zambrano #524507**

J.S.I.D. File #16-0466



JACKIE LACEY

District Attorney

Justice System Integrity Division

February 11, 2020

MEMORANDUM

TO: CAPTAIN KENT WEGENER
Los Angeles County Sheriff's Department
Homicide Bureau
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Monterey Park, California 91755

FROM: JUSTICE SYSTEM INTEGRITY DIVISION
Los Angeles County District Attorney's Office

SUBJECT: In-Custody Death of Timothy McMillan
J.S.I.D. File #16-0466
L.A.S.D. File #016-10457-0534-038

DATE: February 11, 2020

The Justice System Integrity Division of the Los Angeles County District Attorney's Office has completed its review of the September 13, 2016, in-custody death of Timothy Shannon McMillan involving Los Angeles County Sheriff's Department (LASD) Deputies Ramon Chavez, Steven Marquez, Nathan Botten, and Alexander Zambrano. We have concluded that the deputies used reasonable force under the circumstances and are not criminally responsible for McMillan's death.

The District Attorney's Command Center was notified of this in-custody death at approximately 7:35 a.m., on September 13, 2016. The District Attorney Response Team (DART) responded to the location, and was given a briefing regarding the circumstances surrounding the use of force and a walk through of the scene.

The following analysis is based on investigative reports, audio recordings, transcripts of interviews, the autopsy report, crime scene diagrams and sketches, photographic and video evidence, and witness statements submitted by LASD Homicide Detectives Karen Shonka and Wayne Holston.

FACTUAL ANALYSIS

On September 13, 2016, at approximately 4:00 a.m., McMillan carjacked a Rosemead city vehicle being operated by Rosemead public safety officer Frances A. Frances A. told David C., who was standing nearby, to call 9-1-1.¹ David C. placed the call, then handed his phone to Frances A. who reported the carjacking and requested assistance.

¹ Frances A.'s phone was in the car stolen by McMillan.

McMillan drove Frances A.'s city vehicle to a McDonald's restaurant on Rosemead Boulevard in San Gabriel. He parked immediately outside the south entrance to the restaurant. See Figure 1 below.



Figure 1: An external surveillance camera at McDonald's captured McMillan leaving the Rosemead city car near the sidewalk abutting the south entrance to McDonald's, and exiting the car.

McMillan entered McDonald's at approximately 4:40 a.m. He began yelling, first at McDonald's employees behind the counter and then at customers seated in the dining area. Restaurant manager Sarai H. tried to calm him, but McMillan cursed at her. McMillan then walked towards the door, grabbed a handful of cookies from a display case, and walked back to the car. McMillan came back inside the restaurant a few minutes later carrying a lunch pail.

Sarai H. asked McMillan to move the car because it was obstructing a driveway. McMillan became enraged and shouted, "Shut up motherfucker!" Sarai H. told McMillan that she was not going to talk to him anymore and that she was going to call the police. She proceeded to the back office and called 9-1-1. McMillan grabbed more cookies, continued to yell and curse, took some pennies from his pocket, and threw the loose change at the counter. McMillan then sat down at a table near the soda machine.² See Figure 2 below.



Figure 2: McMillan occupied a table near the soda counter.

² Another McDonald's employee named Evelyn G. substantially corroborated the account given by Sarai H. A McDonald's customer, Ron B. indicated that McMillan also shouted about having just robbed somebody.

LASD dispatch broadcast that a carjacking had occurred. Upon receiving the 9-1-1 call from McDonald's, it was broadcast that the Rosemead city car had been sighted there. Uniformed LASD Deputies Ramon Chavez and Steven Marquez, who were working a marked black and white vehicle in the area, responded and were the first law enforcement officers to arrive.³ The deputies parked approximately 15 feet behind the city vehicle and entered the restaurant. Chavez entered through the south door. Marquez entered through the west door. Chavez approached McMillan with his pistol drawn. Marquez initially drew his service weapon, but holstered his handgun and drew his Taser as they approached. Chavez saw that McMillan was eating. Chavez ordered McMillan to show his hands. See Figure 3 below.



Figure 3: Deputies Marquez and Chavez as they contact McMillan.

McMillan raised his hands in compliance with the deputy's orders. Chavez ordered McMillan to stand up, turn around, and place his hands behind his back. McMillan muttered indiscernibly. McMillan stood up, turned around momentarily, and faced the window with his back towards the deputies as instructed, but then made a quarter turn clockwise, and bladed his body perpendicular to Chavez while letting his right arm hang to his side.

In the meantime, a number of other deputies arrived, including LASD Sergeant Jeffrey Serpa and Deputy Nathan Botten. Botten heard Chavez and Marquez giving instructions to McMillan. Serpa observed Chavez directing McMillan. After turning his body at an angle toward Chavez, McMillan began doing what Serpa described as "a weird boxing dance." Botten described McMillan as pointing his index fingers and moving them up and down as he moved towards

³ Chavez was Marquez's training officer at the time of the incident.

Chavez. Seeing that McMillan had no weapon in his hands, Chavez holstered his pistol. McMillan advanced towards Chavez. See Figure 4 below.



Figure 4: McMillan did his “boxing dance” just before charging towards Botten.

Realizing that he no longer had a shot that would not involve risk to Chavez, Marquez holstered his Taser. As McMillan pranced, he advanced diagonally to Chavez’s right in the general direction of Botten who stood about eight feet further back. As McMillan advanced, he appeared to throw a couple of shadowbox punches in Botten’s direction, then suddenly rushed towards Botten. See Figure 5 below.



Figure 5: McMillan rushed past Chavez towards Botten.

Botten grabbed hold of McMillan’s left wrist. Chavez collared McMillan as he went by, then wrapped his left arm around McMillan’s upper chest, turned him clockwise, and executed a spinning takedown that resulted in McMillan being placed face down on the floor and Chavez on top of McMillan’s back.⁴ McMillan, who was not a small man⁵, went down hard. About the time of the takedown, Serpa requested paramedics to the scene. See Figure 6 below showing the moment of takedown.

⁴ Chavez indicated that because of the spin, he was unable to break his own fall and that he landed atop McMillan.

⁵ The medical examiner’s report noted that McMillan was 71 inches tall and weighed 282 pounds.



Figure 6: Chavez wrapped his left arm around McMillan’s upper chest, then spun him to the floor.

Chavez landed on his own left arm which was pinned beneath McMillan’s clavicle and neck. Once McMillan was on the floor, deputies swarmed McMillan in an effort to subdue him. McMillan continued to struggle to break free once he was on the floor. Chavez acknowledged using his right hand to punch McMillan in the eyebrow three to four times, while telling McMillan to stop fighting.

While the pile is visible in the surveillance video, a pony wall at the end of a table row obstructed the camera’s view of McMillan. Some general movement of deputies’ torsos can be seen, reflective of the struggle. See Figure 7 below.



Figure 7: Deputies hunched down on the floor to subdue and restrain McMillan.

Witness accounts detail what happened on the floor. Botten stated that he lost his grip on McMillan’s wrist as Chavez took McMillan down. Botten immediately got on McMillan’s back in order to keep him on the floor. Botten then attempted to control McMillan’s left arm, which McMillan managed to pull away a couple of times. Marquez acted to control McMillan’s legs and McMillan donkey-kicked him in response. Marquez also described McMillan as “bucking,” (lifting up his rear end) in an effort to get up. Botten heard Marquez tell McMillan to stop kicking, so Botten repositioned his left knee on top of McMillan’s left thigh to help control McMillan’s legs.

Deputy Alexander Zambrano arrived on scene as McMillan began his assault on the deputies. Zambrano assisted in the effort to restrain McMillan. Zambrano tried to pull McMillan's right arm around behind his back. Zambrano heard Chavez state, "Stop fighting! Stop fighting!" and heard what sounded like four punches. Botten also heard Chavez tell McMillan to stop fighting, followed by the sound of skin-on-skin contact that sounded like four blows.

Other deputies who had responded to the scene shortly after Chavez and Marquez, including Sergeant Curt Messerschmidt, Deputies Rafael Ruiz and Eric Gonzalez, all reported seeing Chavez strike McMillan three to four times in the face. Gonzalez stated that McMillan was trying to "fight his way back up" when Chavez began punching him. Gonzalez also described McMillan as kicking his legs wildly to the point where it was lifting Marquez up and down.

Zambrano made a second effort to pull McMillan's arm back, which McMillan resisted, but this time Gonzalez was able to handcuff the arm. Botten eventually gained control of McMillan's left arm and forced it behind McMillan's back, thus facilitating McMillan's handcuffing. After McMillan was handcuffed, Marquez applied a hobble, but the hobble was never linked to the handcuffs.⁶ Botten disengaged from the pile once he heard Marquez announce that McMillan had been hobbled.⁷

After McMillan was restrained, he was propped up on his side. He had blood on his face, and there was blood on the floor near his face. McMillan was breathing, but Deputies Javier Gonzalez, Zambrano, Botten, and Ruiz all described McMillan's breathing as sounding like "snoring." Deputy Lai Pong Tung and his partner Deputy Frances Bui arrived after McMillan was restrained. Tung saw McMillan laying on the floor and described him as spitting blood as he was breathing. Tung requested Bui to retrieve a spit mask from their vehicle. Bui attempted to put the mask on McMillan, but the mask was too small and the attempt was aborted.

Los Angeles County Firefighter Paramedics Sergio Romo responded from Engine Company Five to the location and arrived within approximately five minutes of the call for service. When Romo arrived, McMillan was in full cardiac arrest. Romo administered CPR, but without success. McMillan was pronounced deceased on scene.

On September 15, 2016, an autopsy was performed by Dr. Odey C. Ukpo, M.D., M.S., of the Los Angeles County Coroner's Office. The report also documented evidence of neck compression, petechiae, facial plethora, and pulmonary edema (symptoms commonly associated with asphyxia). Alluding to the deputy's arm having been pinned beneath McMillan's neck, the report noted that there was evidence of neck compression. However, the medical examiner reasoned that based on the surveillance video this condition occurred over a period of less than two minutes, a timeframe that would not result in death. The report noted further that, "It is unclear of [sic] how much of a role natural disease (hypertensive cardiovascular disease, sleep apnea, schizoaffective disorder) and injury (neck compression) played in Mr. McMillan's death." McMillan's body temperature was measured as 96.1 degrees Fahrenheit approximately eight hours after death, indicative of hyperthermia prior to death. The medical examiner concluded that the cause of death was "cardiopulmonary arrest during law enforcement prone restraint due to schizoaffective disorder and

⁶ Serpa observed that the cuffs were never linked with the hobble.

⁷ Marquez applied the hobble to McMillan's legs.

hypertensive cardiovascular disease.” Toxicology testing detected no controlled substances in McMillan’s system. The medical report contained a psychiatric consultation opining that McMillan’s hyperactive activity, hyperthermia, and sudden cardiac collapse were consistent with lethal catatonia, or death due to psychiatric illness resulting in sudden cardiac death. The manner of death was undetermined.

LEGAL ANALYSIS

California law permits an officer to use reasonable force when making an arrest, preventing escape, or overcoming resistance of a person the officer believes has committed a crime. *Munoz v. City of Union City* (2004) 120 Cal.App.4th 1077, 1102; See also Penal Code § 835a. The right to use some degree of physical coercion, or the threat thereof, is deemed an inherent part of an officer’s executing the responsibilities to protect the public interest. *Id.* at 1109. Sometimes this use of force may require “even greater use of force than might be [necessary] in the same circumstances required for self-defense.” *Id.* at 1109. Evaluating an officer’s use of force requires an assessment of whether or not the officer acted in an objectively reasonable manner given the facts and circumstances confronting the officer at the time. This standard “is highly deferential to the officer’s need to protect himself and others.” *Id.* at 1108.

An officer “may use all the force that appears to him to be necessary to overcome all resistance, even to the taking of life; [an officer is justified in taking a life if] the resistance [is] such as appears to the officer likely to inflict great bodily injury upon himself or those acting with him.” *People v. Mehserle* (2012) 206 Cal.App.4th 1125, 1146. In protecting oneself or another, a person may use all the force which that person believes reasonably necessary and that would appear to a reasonable person, in the same or similar circumstances, to be necessary to prevent the injury which appears to be imminent. CALCRIM No. 3470. If the person’s beliefs were reasonable, the danger does not need to have actually existed. *Id.*

In evaluating whether a police officer’s use of force was reasonable, it is helpful to draw guidance from the objective standard of reasonableness adopted in civil actions alleging Fourth Amendment violations: “The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than the 20/20 vision of hindsight. . . . The calculus of reasonableness 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.” *Graham v. Connor* (1989) 490 U.S. 386, 396-397.

An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. CALCRIM No. 582.

In the present case, deputies responded to a call of a carjacking involving violence and encountered McMillan who acted erratically. McMillan, a man of large stature, refused to follow the deputies’ instructions as they attempted to take him into custody. Instead, he became combative. McMillan’s combative behavior justified the deputies’ use of force. Given the nature of the call and McMillan’s violent resistance, we find Chavez’ punches to have been reasonable. The deputies’ combined use of force was an appropriate and commensurate response to McMillan’s violent reaction. Based on

the medical examiner's report, it cannot be said with any certainty that a neck or head restraint caused McMillan's death. Even if it were posited that such a neck or head restraint played a role, it appears that Chavez' arm ended up under McMillan's neck as a result of how the bodies landed after the takedown, not as part of a conscious effort to subdue McMillan. Given the totality of the circumstances, the deputies' actions were not unreasonable and it would not be possible to prove that Chavez intentionally maintained a potentially fatal chokehold.

CONCLUSION

Based upon the foregoing analysis, we find that Deputies Ramon Chavez, Steven Marquez, Nathan Botten, and Alexander Zambrano acted lawfully and are not criminally responsible for McMillan's death. We are closing our file and will take no further action in this matter.