

**Officer Involved Shooting of Diamond Vargas
Los Angeles Police Department**

Officer Daniel Jara, #38241

Officer Nestor Escobar, #40031

J.S.I.D. File #14-0757



JACKIE LACEY

District Attorney

Justice System Integrity Division

October 26, 2016

MEMORANDUM

TO: COMMANDER ROBERT A. LOPEZ
 Los Angeles Police Department
 Force Investigation Division
 100 W. First Street, Suite 431
 Los Angeles, California 90012

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

SUBJECT: Officer Involved Shooting of Diamond Vargas
 J.S.I.D. File #14-0757
 F.I.D. File #078-14

DATE: October 26, 2016

The Justice System Integrity Division of the Los Angeles County District Attorney's Office has completed its review of the December 26, 2014, non-fatal shooting of Diamond Vargas by Los Angeles Police Department (LAPD) Officers Daniel Jara and Nestor Escobar. It is our conclusion that the officers acted in lawful self-defense and defense of others.

The District Attorney's Command Center was notified of the shooting on December 26, 2014, at approximately 3:27 a.m. The District Attorney Response Team responded and was given a briefing and a walk-through of the scene.

The following analysis is based on reports prepared by the Los Angeles Police Department (LAPD), submitted to this office by detectives with the LAPD Force Investigation Division. Officers Jara and Escobar's compelled statements were not considered as part of this analysis.

FACTUAL ANALYSIS

Heather Mulkey and Diamond Vargas have been in a volatile, on and off again relationship since 2003. According to Mulkey, Vargas has been diagnosed with schizophrenia and bipolar disorder and is subject to hallucinations and extreme paranoia. Vargas does not take her prescribed medication and her behavior has been worsening in the past year.

On December 25, 2014, at approximately 11:05 p.m., Mulkey and Vargas went to the Hollywood and Highland Center to get something to eat. They rode together on Mulkey's motorized scooter and parked in the subterranean parking structure located at 6801 Hollywood Boulevard in the City of Los Angeles.¹ While in the restaurant, Vargas became increasingly paranoid about other individuals around them. Vargas was loud and disruptive and began arguing with Mulkey. The restaurant owner asked them to leave. In fear of Vargas' erratic behavior, Mulkey fled to the

¹ Vargas and Mulkey were separated and not living together but had spent Christmas Day together.

parking garage in an attempt to escape from Vargas. Mulkey's scooter had a dead battery so she walked it down to the third level in order to hide from Vargas while she attempted to jump start it.

Moments after Mulkey reached the third level, Vargas arrived in a taxi. Vargas exited the cab and began screaming at Mulkey and knocked over her scooter. Mulkey hid behind a parked car and watched as Vargas repeatedly hit her scooter with a small wooden bat Vargas had in her backpack. Mulkey screamed for help. An unknown citizen alerted parking supervisor Jorge Jaime to the incident and he immediately responded to the third level. Mulkey ran to Jaime and told him that Vargas was trying to hit her with a bat. Jaime radioed assistant parking supervisor Al Dawoud and requested assistance. Before leaving the office, Dawoud instructed an employee to dispatch Hollywood and Highland Center security personnel to the location.

Dawoud, parking supervisor Linda Silguero and parking employee Yacoub Yacoub, joined Jaime on the third level. They observed Vargas vandalizing the scooter with the bat. Dawoud approached Vargas and asked, "What is happening?" Vargas dropped the bat and pulled out a handgun from inside her leather jacket. From a distance of twenty feet, Vargas pointed the gun at Dawoud, Silguero, Yacoub and Jaime. In fear for their lives, all four ran into an enclosed escalator lobby several aisles away. At the same time, security employee Charles McNeal arrived on the third level via the escalator. As he exited the escalator lobby, McNeal observed the parking structure employees running toward him. McNeal then saw Vargas pointing a handgun in his direction. McNeal took cover inside the enclosed lobby with the others. Dawoud radioed the office and instructed them to call the police.

While awaiting the police's arrival, the witnesses observed Vargas continuing to argue with Mulkey, who was still hiding behind parked cars. Vargas intermittently pointed the gun at Mulkey and to her own head. On one occasion, Vargas pointed the gun in the direction of the escalator lobby.²

On December 26, 2014, at 1:25 a.m., a LAPD radio call was broadcast to patrol units regarding an "ADW (assault with a deadly weapon) suspect there now, 6801 Hollywood Boulevard, in the parking structure. Suspect is a female, white, armed with a gun, fist fighting with other females." LAPD uniformed Officers Alex Garcia and Cairo Palacios were the first officers to arrive on scene. The officers immediately observed Mulkey screaming in a parking aisle. Palacios could not understand Mulkey, however, Garcia heard her saying, "The gun doesn't have a firing pin! The gun doesn't have a firing pin!" The officers then observed Vargas further down the same aisle, pointing a handgun to her head.³ Garcia and Palacios exited their patrol car, unholstered their service weapons and took cover behind their vehicle. Vargas moved out of their view behind a parked car.

² Security employee Nicolas Vega captured cell phone video of Vargas prior to the police's arrival. The escalator lobby is surrounded by large glass windows. In the video, Vargas can be seen walking back and forth in one of the parking aisles. It appears that she is speaking to someone in front of her while gesturing with both arms. At one point, Vargas turns toward Vegas with her right hand extended in his direction. The camera pans down to the ground and a voice is heard saying, "She's pointing that shit ...oh, shit!" The video ends at that point.

³ Mulkey later told investigators that she had seen Vargas in possession of the same handgun on a prior occasion. Vargas told Mulkey that her roommate had removed the firing pin. Garcia told investigators that he did not accept Mulkey's statement as fact and that he considered the handgun to be a threat.

LAPD uniformed Officers Daniel Schneider and Bryant Teongnoi were the next officers to arrive and parked behind Garcia and Palacios, followed by LAPD uniformed Officers Daniel Jara and Thomas Barajas. Garcia advised the officers that Vargas was armed and pointed out the location where he had last seen her. At the same time, LAPD uniformed Officers Nestor Escobar and Xiuhnenetl Lopez arrived on scene. Lopez observed Vargas holding a handgun north of her location and saw Mulkey crying to her left. Lopez detained Mulkey and placed her into a patrol vehicle after patting her down. Mulkey told Lopez that Vargas wanted to kill herself and was armed with a gun and had pointed it at Mulkey.

Officers positioned themselves in varying locations in an attempt to locate Vargas. Schneider took cover on the left side of a large concrete pillar while Jara and Escobar took cover on the right side of the same pillar. Schneider and Escobar were armed with their service weapons while Jara was armed with a shotgun. From his position, Schneider observed Vargas standing behind a silver vehicle downrange from them. Schneider could see something in Vargas' right hand, but could not make it out clearly. However, based upon the fact that both Garcia and Mulkey stated that Vargas was armed, he believed she was holding a gun. Schneider told Vargas, "Drop what you have in your hands! Put your hands up!" at least three times. Vargas did not comply. Instead, Vargas pointed what he believed to be a gun directly at them. Schnieder yelled, "She's pointing the gun at us! She's pointing the gun at us!"

As Vargas pointed the gun at Schneider, Jara and Escobar, Escobar fired two rounds from his service weapon and Jara fired three rounds from his shotgun. Vargas fell to the ground. According to Schneider, he did not fire his service weapon because he did not believe he could fire accurately from the distance he was from Vargas.

Jaime observed Vargas pointing the gun to her head when the police arrived. Jaime heard an officer order her to put the gun down twice. Vargas pointed the gun toward the officers followed by three to four gunshots. Vargas fell to the ground. Jaime did not see the officers fire their weapons because his view was blocked by pillars and parked cars.

According to Dawoud, Vargas told the first officers to "Step back!" while pointing the gun to her head. An officer told her, "Put the gun down, please, put the gun down." Vargas did not listen and instead pointed the gun at the officers. The police fired at her and she fell to the ground. A few seconds later, Vargas tried to pick up the gun and turn toward the police. Dawoud heard more gunfire and believed that Vargas was struck in the leg.

According to McNeal, he saw the police officers draw their service weapons, approach Vargas and order her to put the gun down three times. Vargas pointed the gun at the officers which was followed by five to six gunshots.

Mulkey did not see the shooting because she had been placed into the back seat of a police vehicle. She heard approximately seven gunshots. Mulkey believed that Vargas was on a suicide mission and wanted the police to kill her because she refused to drop the gun when the officers ordered her to do so.

Officers approached Vargas and took her into custody. Vargas told the arresting officers that she had wanted them to kill her.

A .22 caliber semiautomatic firearm was recovered on the ground next to Vargas. The firearm contained one round in the chamber and one round in the magazine.⁴

Personnel from the Los Angeles Fire Department responded to the location and transported Vargas to Cedars-Sinai Medical Center where she was treated for shotgun wounds to the left knee and leg. While being transported to the hospital, Vargas repeatedly asked, “Why didn’t they kill me?”

Vargas was charged in case BA432470 with two counts of assault with a semiautomatic firearm upon a peace officer and four counts of assault with a semiautomatic firearm. On July 12, 2016, after a jury trial, Vargas was convicted of one count of assault with a semiautomatic firearm, along with personal use of a firearm allegations.⁵ The jury was unable to reach verdicts on the remaining counts and a mistrial was declared. Sentencing is scheduled for October 31, 2016. Vargas also faces a second strike allegation pursuant of Penal Code section 1170.12 and a serious felony allegation pursuant to Penal Code section 667(a)(1). Vargas has a prior conviction for assault with a firearm and robbery. A decision on whether to retry the remaining five counts has not been made.

LEGAL ANALYSIS

The use of deadly force in self-defense or in defense of another is justifiable if the person claiming the right actually and reasonably believed (1) that he or the person he was defending was in imminent danger of being killed or suffering great bodily injury, (2) that the immediate use of force was necessary to defend against that danger, and (3) that he used no more force than was reasonably necessary to defend against that danger. See, *CALCRIM No. 505*.

“The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with 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.

In *Graham*, the United States Supreme Court held that the reasonableness of the force used “requires careful attention to the facts and circumstances of each particular case.” “Thus we must avoid substituting our personal notions of proper police procedures for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes ‘reasonable’ action may seem quite different to someone facing a possible assailant

⁴ The firing pin was present in Vargas’ handgun and the weapon was operable. However, due to a broken/missing extractor spring, the discharged cartridge cases would not reliably extract from the weapon. Also, the magazine lip had to be slightly bent open to allow the loading and cycling of the cartridges.

⁵ The jury convicted Vargas on the count alleging Dawoud as the victim.

than to someone analyzing the question at leisure.” *Smith v. Freland* (6th Cir. 1992) 954 F.2d 343, 347.

“Where the peril is swift and imminent and the necessity for action immediate, the law does not weigh in too nice scales the conduct of the assailed and say that he shall not be justified in killing because he might have resorted to other means to secure his safety.” *People v. Collins* (1961) 189 Cal.App. 2d 575, 589.

The test of whether the officer’s actions were objectively reasonable is “highly deferential to the police officer’s need to protect himself and others”. *Munoz v. City of Union City* (2004) 120 Cal.App. 4th 1077, 1102.

CONCLUSION

The evidence examined shows that Vargas was bipolar, suffered from schizophrenia and was not taking her prescribed medication. Shortly before the shooting, Vargas began exhibiting paranoid behavior that frightened Mulkey. Mulkey attempted to escape Vargas, without success. Vargas tracked Mulkey down in the parking garage and began to vandalize her scooter with a bat. When parking garage personnel attempted to intervene on Mulkey’s behalf, Vargas pointed a loaded firearm at them. Prior to the police’s arrival, Vargas continued to point the gun at parking personnel, Mulkey and to her own head.

Officers observed Vargas pointing the gun to her head before disappearing from view. When Schneider next observed her, Vargas was still armed with the firearm and ignored multiple commands to drop the gun and raise her hands. According to Mulkey, she believed that Vargas was on a suicide mission. Instead of dropping the firearm, Vargas pointed it at Schneider, Jara and Escobar. Vargas’ actions placed Jara and Escobar in reasonable fear for their lives, and the lives of their fellow officers, and they responded with reasonable deadly force. After the shooting, Vargas acknowledged that she intended for the police to shoot her and repeatedly asked, “Why didn’t you kill me?”

We conclude that Officers Jara and Escobar acted in lawful self-defense and defense of others when they used deadly force against Diamond Vargas. We are therefore closing our file and will take no further action in this manner.