



GARTH DANO
GRANT COUNTY PROSECUTING ATTORNEY

Wednesday, May 06, 2020

Captain Ryan Green
Columbia Basin Investigation Team
Quincy Police Department
P.O. Box 426
Quincy, WA 98848

Re: Washington State Patrol (Lead Agency): 20-004334
Quincy Police Department (Involved Agency): 20QU0524
Grant County Sheriff's Office (Involved Agency): 20GS02301
Decedent/Defendant: Rivera, Jose L., DOB: 10-27-1997
Officer Involved Shooting, MLPD Officer: Nick Stewart

Dear Captain Green:

I am writing to you in your capacity as Commander/Chief of the Columbia Basin Investigation Team (CBIT) concerning the shooting death of Jose L. Rivera, by Moses Lake Police Officer Nick Stewart on 28 February 2020. We have met to discuss the case, both in my office and at the CBIT briefing conducted by Washington State Patrol Detective Robert Schroeder, #2565, which took place at the High School Technology Building in Moses Lake, Washington on 22 April 2020. I was actually called to the scene right after the shooting by Grant County Sheriff's Office Chief Deputy Canfield. I spent approximately two hours there that night at the command center and walked the scene with Chief Deputy Canfield.

PRELIMINARY CONSIDERATION

As a preliminary concern, I must first determine if RCW 10.114.011 has been satisfied. It states:

Except as required by federal consent decree, federal settlement agreement, or federal court order, where the use of deadly force by a peace officer results in death, substantial bodily harm, or great bodily harm, an independent investigation must be completed to inform any determination of whether the use of deadly force met the good faith standard established in RCW 9A.16.040 and satisfied other applicable laws and policies. The investigation must be completely independent of the agency whose officer was involved in the use of deadly force. The criminal justice training commission must adopt rules establishing criteria to determine what qualifies as an independent investigation pursuant to this section.

As referenced in the final sentence of RCW 10.114.011, Washington's Criminal Justice Training Commission (CJTC) was tasked with creating and adopting rules outlining the qualifications of an "independent investigation." The CJTC did as instructed and, on 6 December 2019, filed WAC 139-12-030. The investigation in this matter was made, to the greatest extent possible, in compliance with, and as mandated by, WAC 139-12-030.

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It should be noted the implementation of WAC 139-12-030 did very little to alter the practices of CBIT. Since its establishment, CBIT has recognized the importance and value of openness and transparency, as well as the exclusion of the involved agency during the investigation of incidents involving use of deadly force. While there have been a number of modifications as a result of the implementation of WAC 139-12-030 (e.g., participation of non-law enforcement representatives), CBIT understands and exhibits the importance of independent investigations. While new to all participants in this investigation and to this office, the inclusion of non-law enforcement representatives, at least in this investigation, caused no disruption or impediment to the investigative process or to this office's review process.

Grant County is part of the CBIT's jurisdiction, which consists of the Sheriff's Offices of both Adams and Grant County, in addition to the Washington State Patrol and local police agencies within each of these two counties.

As evident from the investigation materials provided to this office, MLPD, upon sufficient resources from CBIT being on scene, relinquished control of the scene to CBIT and excluded itself from this investigation. See WAC 139-12-030(1)(b). Pending the arrival of CBIT, steps were taken by the MLPD and the GCSO to secure the scene and preserve, protect, and document evanescent evidence to be processed by CBIT investigators upon their arrival. GCSO set up a mobile command center at the scene immediately following the shooting.

WAC 139-12-030(1)(b) does state: "[n]o member of the involved agency may participate in any way the investigation of police use of deadly force by the [CBIT]. . . ." Although somewhat of a misstatement, this clause is intended to go beyond the preservation outlined above. In this case, law enforcement personnel conducted numerous lay witness interviews, to be referenced below.

At the time of this incident, no protocol or methodology had been created by CBIT to solicit non-law enforcement community representatives because there had not been sufficient time to do so between the adoption of the requirement and this incident. Although not in place as readily as in future investigations, Mr. Freddie Prado, a resident of Moses Lake, volunteered to be a neutral detached lay observer and community representative. Mr. Prado did an excellent job in representing the Moses Lake Community concerning this investigation.

Following protocol, Mr. Prado was kept apprised of the status of the investigation, received timely updates, and was present when the CBIT lead investigator presented this matter to other members of law enforcement. In addition, Mr. Prado has been given the opportunity to review the investigative materials and met with investigators and deputies in this office to discuss the investigation. Mr. Prado indicated he was satisfied with the investigation. He was invited back to discuss the outcome of the investigation and this office's determination. I personally spoke with Mr. Prado again on 28 April 2020. Mr. Prado advised he was honored to be a part of this team. He then advised, all of his questions have been answered and he completely supports the findings and conclusions of this investigation.

This office has concluded the investigation complied with RCW 10.114.011 and, to the greatest extent possible, WAC 139-12-030. This office appreciates each agency participating in this investigation for their willingness to apply WAC 139-12-030 under these circumstances and to adapt to the changes necessitated as a result.

APPLICABLE LAW

The use of deadly force by a law enforcement officer is governed in Washington State by RCW 9A.16.040.

- (1) Homicide or the use of deadly force is justifiable in the following cases:
 - (a). When a public officer applies deadly force in obedience to the judgment of a competent court; or

- (b). When necessarily used by a peace officer meeting the good faith standard of this section to overcome actual resistance to the execution of the legal process, mandate, or order of a court or officer, or in the discharge of a legal duty; or
 - (c) When necessarily used by a peace officer meeting the good faith standard of this section or person acting under the officer's command and the officer's aid:
 - (i) To arrest or apprehend a person who the officer reasonably believes has committed, has attempted to commit, is committing, or is attempting to commit a felony;
 - (ii) To prevent the escape of a person from a federal or state correctional facility or in retaking a person who escapes from such a facility;
 - (iii) To prevent the escape of a person from a county or city jail or holding facility if the person has been arrested for, charged with, or convicted of a felony; or
 - (iv) To lawfully suppress a riot if the actor or another participant is armed with a deadly weapon.
- (2) In considering whether to use deadly force under subsection (1)(c) of this section, to arrest or apprehend any person for the commission or any crime, the peace officer must have probable cause to believe that the suspect, if not apprehended, poses a threat of serious physical harm to the officer or a threat of serious physical harm to others. Among the circumstances which may be considered by peace officers as a "threat of serious physical harm" are the following:
- (a) The suspect threatens a peace officer with a weapon or displays a weapon in a manner that could reasonably be construed as threatening; or
 - (b) There is probable cause to believe that the suspect has committed any crime involving the infliction or threatened infliction of serious physical harm.
- Under these circumstances, deadly force may also be used if necessary to prevent escape from the officer, where, if feasible, some warning is given, provided the officer meets the good faith standard of this section.
- (3) A public officer covered by subsection (1)(a) of this section shall not be held criminally liable for using deadly force without malice and with a good faith belief that such act is justifiable pursuant to this section.
- (4) A peace officer shall not be held criminally liable for using deadly force in good faith, where "good faith" is an objective standard which shall consider all the facts, circumstances, and information known to the officer at the time to determine whether a similarly situated reasonable officer would have believed that the use of deadly force was necessary to prevent death or serious physical harm to the officer or another individual.
- (5) This section shall not be construed as:
- (a) Affecting the permissible use of force by a person acting under the authority of RCW 9A.16.020 or 9A.16.050; or
 - (b) Preventing a law enforcement agency from adopting standards pertaining to its use of deadly force that are more restrictive than this section.

Not all subsections, of course, are applicable to the situation at hand. This office has determined the provisions potentially applicable to this investigation include RCW 9A.16.040(1)(b), (c)(i), (2)(a), (4), and (5)(a). Only those portions need to be analyzed in this matter.

INTRODUCTION TO GOOD FAITH ANALYSIS

The ultimate question regarding the shooting of Mr. Rivera by Officer Stewart is whether Officer Stewart's use of deadly force was done in "good faith." "[G]ood faith" is an objective standard which shall consider all the facts, circumstances, and information known to the officer at the time to determine whether a similarly situated reasonable officer would have believed that the use of deadly force was necessary to prevent death or serious physical harm to the officer or another individual.

As part of that analysis, this office must determine if Officer Stewart "[h]ad probable cause to believe that the suspect, if not apprehended, pose[d] a threat of serious physical harm to the officer" The use of deadly force will be considered justified if the suspect . . . "threatens a peace officer with a weapon or displays a weapon in a manner that could reasonably be construed as threatening . . . [or] the suspect has committed any crime involving the infliction or threatened infliction of serious physical harm"

There is absolutely no question that Jose L. Rivera, a known Norteno gang member with a criminal history of violence, theft, drug use, and possession of deadly weapons, was a threat to society. According to the attached police reports, there is uncontroverted documentation of Mr. Rivera's criminal conduct, which led to the felony eluding pursuit through the residential neighborhoods of Moses Lake, where the shooting ultimately took place.

After his tires were flattened during the pursuit, Mr. Rivera stopped his truck in the middle of Denton Street, jumped out, and fled on foot. Mr. Rivera failed to heed Officer Stewart's commands and shot Officer Stewart's K-9, Chief, in the face with the gun he was carrying. Mr. Rivera refused to drop his weapon after repeated commands to do so. All of these facts are provided in the police reports. Attached to this letter are statements from the following officers and the reports of their respective agencies:

- Detective Robert Schroeder (Washington State Patrol) – Attachment 1
- Detective Daniel Richmond (Washington State Patrol) – Attachment 2
- Detective Stephen Harder (Quincy Police Department) – Attachment 3
- Detective Bradley Poldervart (Quincy Police Department) – Attachment 4
- Chief Deputy Dustin Canfield (Grant County Sheriff's Office) – Attachment 5

Because RCW 9A.16.040(2)(a) is satisfied, there is no need to review applicability of RCW 9A.16.040(2)(b). Even assuming, for the sake of argument, RCW 9A.16.040(2)(a) did not apply, RCW 9A.16.040(2)(b) has also been satisfied under the facts presented here—Mr. Rivera pointed a weapon at the deputy, and "threatened infliction of serious physical harm." As a result, Officer Stewart's actions were legally justifiable under RCW 9A.16.040(1)(c)(i).

As outlined in 9A.16.040(1)(4), and to summarize, "good faith" looks at "all the facts, circumstances, and information *known to the officer at the time*" This, by definition, limits the scope of the following inquiry. While there are multiple factors that may, or may not, have factored into the events of the evening of 28 February 2020, only those known to Officer Nick Stewart, *at the time of the shooting*, are relevant to the analysis here.

This is not to say every officer in a similar situation would have acted in the same fashion. It would not be proper for this office to make such a blanket proclamation. Each situation and each individual are different. Certainly, in this case, Mr. Rivera could have been made different choices and this shooting would have been avoided. But, that is not the analysis that is to be undertaken. Nor is it within the purview of this office to scrutinize further the method in which the deadly force is used. I have reviewed the entire file, including the attached videos, and body cameras of law enforcement. They are compelling, chilling, and dispositive.

LAY WITNESS TESTIMONY

Following the shooting, law enforcement officers contacted numerous lay witnesses who reside

on Denton Street, the location of the incident, to obtain percipient testimony surrounding the events that took place. The witnesses contacted include, but are not limited to: Mary Hansen, Alvin Burgess, Jessica Bridenback, Barbara and Paul Buhrman, Thomas Bridenback, Shaina Burgess, Donn Harris, and Steven Lingenfelter. Of the witnesses contacted, a few stated very significant material information, summaries of which follow:

Mary Hansen

- Saw a pickup truck being driven with about 8 - 10 police vehicles following it;
- She went inside when the vehicle approached her location. Once inside she heard 3 shots fired.

Paul Buhrman

- Heard sirens and vehicles coming to a screeching halt;
- Heard "command" type voices and dogs barking;
- He then heard a shot followed by a dog barking in pain;
- A short time later, he heard rapid fire from a large caliber weapon – what sounded to be 4 - 5 shots.

Thomas Bridenback

- Heard sirens in the area, and a few minutes later, heard them get louder and louder, so he paused the movie he was watching inside his residence;
- He looked outside when he heard a truck and the sirens in very close proximity to his residence;
- He described the vehicle (Mr. Rivera's truck) and that he saw someone running from the vehicle;
- **He then saw a K-9 chasing the person fleeing from the vehicle, saw a muzzle flash coming from the fleeing suspect**, and saw the dog drop;
- **The officer, dog, and suspect all appeared to be in a linear/straight line;**
- He then heard gunfire and saw the subject drop;
- He could not recall how many shots were fired;
- He also noted he heard non-specific yelling when the subject exited the vehicle and began running. (emphasis mine)

Shaina Burgess

- She was present with another witness, Steven Lingenfelter;
- She heard sirens and a truck coming down the hill;
- She stepped outside onto the porch where she saw the truck approaching;
- Upon approaching, the truck stopped and a man ran out of the vehicle;
- She then heard 5 - 6 gunshots.

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Donn Harris

- Was in his residence during the incident;
- Heard law enforcement sirens approaching his residence;
- Heard 4 - 5 shots fired

Steven Lingenfelter

- Was outside when he saw law enforcement officers getting out of their cars;
- He then heard 5 - 6 shots;
- He took a video of the incident.

It is important to note that the lay witness testimony provided by all eyewitnesses observing this incident provided no contradictory or discrediting testimony to that provided by Officer Stewart or his fellow officers surrounding the events that took place on the night of 28 February 2020.

CONCLUSION

This situation is tragic. Simply put, there is no other word to adequately describe the events that took place on 28 February 2020. With certainty, neither Officer Stewart nor Mr. Rivera planned on the confrontation that ultimately led to Mr. Rivera being fatally shot. However, it happened, and as a result, after a thorough investigation, the matter was forwarded to this office for review. Now concluded, our office has determined that Officer Stewart acted with the highest level of professionalism as a trained police officer. Based upon our review, he acted in accordance with RCW 9A.16.040. Thus, no charges would even be remotely considered against him for his actions on 28 February 2020.

Neither this office, nor anyone involved in the incident or in reviewing this matter, can say with certainty what Mr. Rivera intended when he turned on Officer Stewart. No law enforcement officer can be expected to wait until they are actually shot at or struck before taking action. Law enforcement officers, through extensive training and experience are trained to analyze and to react to each situation. Within seconds of arriving on scene behind Mr. Rivera, Mr. Rivera shot Officer Stewart's K-9, Chief, as he fled on foot. Officer Stewart gave repeated commands to Rivera to stop and drop his weapon. Rivera did not comply with Officer Stewart's repeated commands. Officer Stewart assessed the situation and reacted pursuant to his training and experience. His assessment, based upon all witness statements, reports, body-worn camera footage, and actions reviewed by this office, ultimately led Officer Stewart to use deadly force. This office has determined the use was justified pursuant to 9A.16.040.

Based upon the findings and conclusions reached, this office is authorizing the release of evidence in this matter in so far as the items are being held for a criminal investigation. This office is not involved in any other aspect of this matter. MLPD and CBIT will need to be consulted before any evidence is actually released.

In closing, this office greatly appreciates the hard work that was put forth to investigate this incident. Throughout the entire investigation, the CBIT maintained its rigorous high standards and provided a complete and thorough investigation. This office found the inclusion of lay witnesses in the process to be a good reminder of the need for transparency with regard to the investigative process. CBIT has always maintained this standard and will certainly do so in the future.

Detective Schroeder provided the official Autopsy and Crime Lab reports to our office on 5 May 2020. Both reports are consistent with the findings and conclusions as set forth above.

If any questions arise, or if any additional information is needed, do not hesitate to contact me.

Yours Very Respectfully and Sincerely,

Garth Dano
Grant County Prosecuting Attorney

Cc: Detective Robert Schroeder – Washington State Patrol
Chief Kevin Fuhr – Moses Lake Police Department
Sheriff Tom Jones – Grant County Sheriff's Office
Chief Deputy Dustin Canfield – Grant County Sheriff's Office

