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**REPORT AND EVALUATION OF THE APPLICABILITY OF
CRIMINAL CHARGES TO THE CIRCUMSTANCES SURROUNDING
THE DEATH OF ALBERTO SEPULVEDA**

INTRODUCTION

On September 13, 2000, 11-year-old Alberto Sepulveda died as a result of being hit by a single gunshot. The shot was fired from a shotgun in the possession of an officer of the Modesto Police Department SWAT Team, who was participating in the serving of federal search and arrest warrants. After the shooting occurred, the Modesto Police Department and the Stanislaus District Attorney's Office immediately joined in an investigation into the circumstances surrounding the shooting. As part of its oversight duties, the District Attorney's Office was required to review the evidence obtained during the investigation to determine if any criminal charges should be filed. Chief Roy W. Wasden, of the Modesto Police Department, requested that the California Attorney General's Office conduct an independent review of the Modesto Police Department's investigation of the shooting. The District Attorney's Office requested that the Attorney General's Office participate in the determination of whether criminal charges were warranted. The following report, authored jointly by both the District Attorney's Office

and the Attorney General's Office, contains the summary of evidence, analysis, and conclusions as they relate to the sole issue of whether any criminal charges are justified based on the events of September 13, 2000.

Based on our joint review of the investigative records, which include all police reports, transcripts of interviews, physical evidence, and autopsy and lab reports, it is the opinion of both the Stanislaus District Attorney's Office and the California Attorney General's Office that no criminal charges should be filed, and that Alberto Sepulveda's death was a tragic accident.

SUMMARY OF EVIDENCE

A review of the evidence establishes that the following events took place:

At the beginning of 1999, federal law enforcement agencies developed information that a subject in Stanislaus County was heavily involved in methamphetamine trafficking. This information resulted in the formation of an Organized Crime Drug Enforcement Task Force, or "OCDETF." The "OCDETF" involved numerous federal and state agencies during the course of the investigation.

While the "OCDETF" focused primarily on one methamphetamine trafficker, during the investigation several of the target's co-conspirators, associates and criminal business partners were also identified. Evidence obtained during the investigation connected the main target to three large scale methamphetamine manufacturing labs. Several purchases of methamphetamine also occurred, yielding approximately 3 ½ pounds of methamphetamine. The "OCDETF" was also advised by another federal agency that an associate of the target was purchasing or attempting to purchase numerous handguns.

During the summer of 2000, a portion of the investigation was completed. (The remainder of the investigation is not relevant to this summary.) The evidence that was developed was presented to a Federal Magistrate. The Magistrate issued numerous arrest warrants for those identified as being criminally involved in the drug trafficking. The Magistrate also issued search warrants for fourteen (14) separate locations identified as being connected to the drug trafficking conspiracy.

One of the locations to be searched was 2524 McAdoo Avenue in Modesto. This was the residence of Moises Sepulveda (DOB 12-11-67).¹ Moises Senior was linked to the target of the "OCDETF" and a warrant was issued for his arrest. Moises Senior was connected to the McAdoo address by agents during surveillance. To ensure that he still lived there at the end of the investigation an officer was sent to verify his presence.

¹ It was discovered during the service of the search warrant and arrest warrant that Moises Sepulveda was also known as Moises Sepulveda, Sr. For clarity, he will be referred to throughout this report as Moises Senior.

On 8-18-00, at the request of federal investigators, a uniformed Modesto Police Officer went by the location at McAdoo and walked up to the residence. The officer had been provided with a photograph of Moises Senior. As the officer walked toward the front of the house, he saw Moises Senior sitting at a table with an adult female. Moises Senior was counting out money and placing it into separate envelopes. The officer made no notation of children being present at the time, and during a later interview he did not recall any children.

During the month of September, the federal authorities planning the operation decided to serve all of the search warrants at the same time in the early morning hours. This is a common police tactic for this type of investigation. Primarily, simultaneous service is done to prevent any of the suspects from being able to alert the others and flee. Additionally, early-morning service is widely considered to yield the best chance of apprehending all of the suspects at a given place — typically, home. Finally, the authorities felt that serving the warrants in the early-morning hours would be potentially less dangerous to law enforcement. Based on past experience in investigating large scale methamphetamine trafficking organizations, the authorities believed that many persons involved may very likely have guns; and some of the suspects in this investigation did have prior involvement with drugs, weapons and gang activities. Thus, they believed that by catching the suspects by surprise would minimize the risk to officers of a violent response.

The federal authorities put together several of their own special weapons and tactics teams (SWAT) but did not have enough available for all of the locations. For this reason, the federal authorities asked for assistance from local police agencies, specifically requesting to use local SWAT teams. The Modesto Police Department (MPD) approved the federal request for assistance on 9-8-00. After approval, Sgt. Mike Zahr assigned a SWAT officer to scout the McAdoo location. The SWAT officer drove around the location trying to determine a basic floor plan of the house, while looking for any potential problems like fortifications, or if animals or children were present. Nothing was seen to indicate children were present.

A briefing was held on 9-12-00 where the federal authorities gave an overview of the investigation to all of the local agencies that were to play a role in the service of the warrants. Written materials were provided to the MPD representatives. Each local agency received an informational packet at this briefing. The informational packet stated that the organization was “armed and dangerous.” Each packet contained a photograph and criminal history report for each suspect. Each packet also contained photographs of each residence to be searched, and each packet listed locations where children or potential children were known to be. With respect to the McAdoo address, Moises Senior was described as not having a prior criminal history, and there was no information suggesting that there were children at the residence.

Based on the packet of briefing materials and MPD SWAT’s own surveillance, Sgt. Zahr completed an MPD SWAT log, indicating “none known” for weapons, dogs/animals, or children/medical. Nowhere in the evidence does it appear that any of

the SWAT team members knew that there were children present in the McAdoo house.

The search warrant service was set for around 6:00 a.m. on 9-13-00. All of the federal and local SWAT teams assembled in Modesto at about 4:30 a.m. for one last briefing before serving the warrants. No new information was received by the MPD SWAT team. The SWAT team going to McAdoo consisted of Sgt. Zahr as the team leader, with the other members being Officers Dale Lingerfelt, Mark Weiglein, David Hawn, Craig Wend, Carlos Castro, and Dave Sundy. Each member was paired up with another officer and called a "team." Team one (#1) consisted of Wend and Hawn, team two (#2) was Castro and Sundy, team three (#3) was Weiglein and Lingerfelt.

After the briefing, the McAdoo teams assembled in a business parking lot a few blocks away from the house. The teams went over assignments and "geared up." The gear consisted of recognizable uniforms, with extra equipment for SWAT purposes, such as load bearing vests, ballistic helmets and goggles.

Each team member had a specific assignment. Zahr was to supervise the paired-up teams; Lingerfelt was to carry a ballistic shield outside of the house to protect the team from gunfire; Weiglein was to deploy a distractionary device, if needed; Hawn was to force entry or kick the door after "knock/notice" was given; Wend was to give "knock and notice" for the team; Castro was to carry a sledge hammer; and Sundy was to carry the pry bar (used to force open doors).

In addition to the MPD SWAT team, Drug Enforcement Administration (DEA) Agent Mike Collett was assigned as the federal agent to supervise the service of the federal warrant. To comply with federal law, Agt. Collett was to give the constitutional "knock/notice" in English and Spanish. The team was told by the federal authorities that pursuant to a 9th Circuit Court of Appeals decision, they would have to wait before making entry after giving "knock/notice" even if the delay would put the team at risk. The assembled team had a facially valid search warrant and arrest warrant signed by a federal magistrate judge.

Shortly after 6 a.m., the SWAT team went to a location a short distance from the McAdoo address. After learning that other warrants were under way, and being given the signal to proceed, Sgt. Zahr contacted MPD communications at exactly 6:18 a.m. Sgt. Zahr asked communications for a "10-33" which means to clear the radio channel except for emergency traffic.

The team drove in the SWAT vehicle to just south of the McAdoo house. The SWAT vehicle was followed by additional cars, including cars carrying federal agents assisting the team, and a marked MPD unit driven by a uniformed officer. When the caravan stopped, the SWAT team got out and lined up to approach the house. As planned, Lingerfelt was in the lead, followed by Weiglein, Hawn, Wend, Zahr, Sundy and Castro. Agent Collett trailed behind.

The team approached the front door of the house. Zahr gave the signal, and Wend

began banging on the front door. Wend announced that they were the police, and Collett announced in English and then in Spanish that they were the police with a search warrant demanding entry. Zahr started to count, "one, one thousand, two, one thousand . . ."

The team waited at the front door, exposed on the front porch. There are windows located on both the left and right side of the front door. Lingerfelt placed the tactical shield against the left window to protect the team. There was no shield for the window on the right side. At about twenty seconds, Sundry saw movement in the window, to the right of the door, and yelled to the team. Collett saw a male that he recognized as Moises Senior approach the front door but not open it.

At somewhere between 25 and 30 seconds Zahr could hear movement from inside, and no one was opening the door. Zahr next told Hawn to breach the door. Hawn kicked the door, but it didn't open. Hawn kicked it a second time, and the door broke open. Moises Senior was so close to the door that part of the door frame hit him when the door broke open.

Wend immediately entered the house, and, at the same time, Weiglein tossed in a "flash-bang" device.² Wend yelled at Moises Senior to get on the ground, and he pushed him down by the shoulder. The flash-bang went off stunning Moises Senior, but not Wend who has trained for the distraction. Wend continued forward into the house, followed by Hawn. Wend and Hawn went through the living room, to the right, to the entrance of a long hallway. Castro and Sundry entered the house and moved to the left towards the kitchen area. Weiglein and Lingerfelt, who by now had dropped the ballistic shield onto the front porch, entered last.

Wend observed a person, later identified as Moises Sepulveda, Jr., (referred to hereafter as, Moises Junior) in the hallway and yelled for the person to get on the ground. This was the first time that anyone on the SWAT team became aware of juveniles in the house. Moises Junior laid down. Wend advanced towards him and saw a room to his right. Zahr called for team #3, Weiglein and Lingerfelt, to approach the living room area near the mouth of the hall. The house was totally dark except for the lights used by the SWAT team.³

Wend turned towards the room to his right and noticed a small girl, later identified as Xitlalic Sepulveda. Wend quickly looked the room over and could tell it was a little girl's room. No one else appeared to be in the room. Wend told Xitlalic that everything would be okay and then backed out of the door into the hallway, turning to the left. At

² The flash-bang is used as an officer safety tool to disorient any of the occupants near the door who might have been waiting for the officers. The flash-bang works by giving off a loud noise and bright light, which temporarily stuns anyone nearby who is not prepared for it. This was done at the McAdoo residence because the MPD team had to wait at the front door for such a long period of time and because the team had to force its way into the residence.

³ According to the Old Farmer's Almanac, sunrise for Modesto on September 13, 2000, was at 6:44 a.m. The moon also set that morning at 6:28 a.m. (www.almanac.com)

this location Wend stood at another doorway. Hawn was also standing at this doorway, and Zahr had moved to the left of Hawn, into the hallway.

This doorway where Wend and Hawn stood was the entry into the bedroom shared by Moises Junior and his brother, Alberto Sepulveda. Moises Junior was laying in the hallway, somewhat in front of the doorway, as Hawn entered the brothers' room and found Alberto.⁴ Alberto offered no resistance and complied when told to get on the ground. Alberto was wearing green cut-off sweat pants and white boxers. He had no shirt and nothing in his hands. The room was dark except for the light from Hawn's gun.⁵ Hawn remained at the doorway, covering Alberto.

While teams one and three were gathering at or near the front bedrooms and hallway, team #2, Castro and Sundy, moved into the kitchen on the left side of the house. They "cleared" the kitchen and moved to a door on the right side (south) of the room.⁶ The door opened up to the hall and the master bedroom. Sundy saw a female, later identified as Sonia Sepulveda, standing in the hallway near the master bedroom, wearing only a nightshirt. Both officers yelled to her, in Spanish, to put her hands up and to walk down the hall. They yelled these commands to her two to three times. Sundy yelled to the other officers that she was coming down the hallway. Castro and Sundy then moved on. Sundy noticed a bottleneck of SWAT members and subjects in the hall as he crossed into the bedroom. Castro and Sundy went into the master bedroom, cleared it, and then proceeded to clear a bathroom.

At this point Zahr, Wend, and Hawn were all within a very confined space where the living room door opened into the hallway, and where the two front bedroom doorways opened. Moises Junior was also still laying on the floor in the hallway at the same spot. Team #3 was also in the same area, covering, and ultimately handcuffing, Moises Senior, who was on the floor in the living room.

Wend saw Sonia standing at the other end of the hallway. Wend yelled at her to get down on the ground but she refused. Sonia later admitted that she refused for modesty reasons, since she only had a short nightgown on. Wend grabbed her by the arm and pushed/pulled her towards the living room, where team #3 was located. Sonia was yelling and screaming while flailing her arms about. Lingerfelt ordered her to the ground, but she did not comply. Lingerfelt overcame Sonia's efforts to resist, and he pushed her down. Weiglein then handcuffed her. Weiglein had also grabbed Moises Senior by the

⁴ The SWAT team was originally uncertain as to whether Alberto was a juvenile or an adult. Alberto was eleven years old, but in the darkness did not look it. He was later determined to be 5'5" tall and weighed 200 pounds.

⁵ Officer Hawn's shotgun was equipped with a light on the barrel which was operated by a pressure pad.

⁶ In order to protect officer safety, it is standard procedure for officers to visually inspect, or "clear" a room of all occupants, whether adults or juveniles. Before a room is considered cleared all locations where a person could be found must be viewed.

ankles and slid him aside to make room for Sonia. Agent Collett observed the problems of the confined space from the outside doorway.

During this time Moises Junior began to become uncooperative. He tried to get up or lift up. Wend, Zahr and Weiglein ordered him to lay down. Moises Junior was about one foot behind Hawn. The area was congested with a lot of contact occurring between the four SWAT officers due to their size/equipment in the small area. Because of the congestion, Zahr told Weiglein to get Moises Junior out of the way. Weiglein asked for a pair of handcuffs, and Zahr handed him a set. Weiglein stepped towards Moises Junior to handcuff him. Weiglein pulled him by the ankles to make room while the bumping continued between Wend, Zahr and Hawn. Wend and Hawn continued to cover the bedrooms because they had not been cleared yet. Alberto was still on the ground, but he was not handcuffed.

Wend turned to look back into Xitlalic's room. Wend illuminated the room with his flashlight when he heard a gunshot. Wend was about six to eight inches from Hawn and immediately realized that Hawn's gun had gone off. Hawn blurted out "Fuck!" Wend looked at Hawn and saw that Hawn had a "bewildered appearance on his face." Hawn immediately said, "I didn't even touch the trigger" and turned the gun on its side to check it. Several of the officers heard some part of this statement. Hawn turned the gun back over, and illuminated the floor. Wend could see that Alberto now had a bullet wound. Wend looked back at Hawn and noticed that Hawn's knife, secured in his tactical vest, was sticking up and out from his chest area. Hawn stated again that he didn't touch the trigger. Wend told Zahr that first aid was needed, and he took Hawn outside. Wend later suggested to investigators that, given the knife's proximity to the shotgun's trigger area, they should test whether the knife may have caused the shotgun to fire.

Zahr called for an ambulance "Code-3" at exactly 6:22 and 49 seconds. Wend looked at Hawn, and Hawn appeared stunned. Weiglein and Lingerfelt got Moises Junior handcuffed and passed him to the federal agents at the outside door to the house. Sundry and Castro moved down the hall to join the others, and Zahr yelled out the "room's not secure." Team #2 took up the position just vacated by Hawn and Wend.

As Sundry stood in the doorways to the front bedrooms, he saw Xitlalic still huddled in the corner. Castro spoke to her in Spanish to get her to come out. Xitlalic was directed to the front of the house where the federal agents and uniformed officers had taken Moises Senior, Moises Junior, and Sonia. The family was detained outside, with the adults being placed in patrol cars.

Sundry told Castro the room with Alberto in it wasn't cleared and for Castro to cover him. As Sundry entered the room he saw an obvious wound to Alberto. Sundry went to the closet in the room and checked it. This was the first time the boys room had been completely cleared by the SWAT team. Sundry and Castro moved to Xitlalic's room and checked it as well. It was at this point that the house was determined to be "cleared." Zahr then told someone to check Alberto as there were no unknown dangers

to the team.

Castro and Sundy returned to Alberto, and Castro checked for a pulse. Castro found none. Sundy took off his gloves and also tried, but he, too, found no pulse. Castro and Sundy both felt there was nothing that they could do for Alberto. Team #2 stood by until the Fire Department arrived, which was within three to four minutes. According to the time log, the Fire Department was on scene at 6:24 a.m. They examined Alberto but could find no pulse. The paramedics arrived within seven minutes of the call with advanced life support equipment, but they, also, could find no signs of life. Alberto was pronounced dead by the paramedics four minutes after they arrived.

The scene was then "frozen" for an investigation to take place. Wend stayed with Hawn in the SWAT team van and maintained the shotgun until it was collected by Lt. Cooperider. The SWAT team was relieved by uniformed officers and a "log" was started to document the entry/exit of people from the house.

As is standard procedure for an officer-involved incident, supervisors at the scene called out the Investigative Services Division (ISD) of the Modesto Police Department. ISD took over the scene and began an investigation. The Professional Standards Unit (PSU) also responded to conduct an internal investigation. Since a death occurred, the District Attorney's Office was also called out to investigate. A search warrant was obtained for the scene, and investigators were assigned specific tasks. Det Craig Grogan was assigned as the ISD case officer.

Grogan went to the northwest-area office for MPD and interviewed the Sepulveda family members individually. A Spanish translator was used as needed or requested. The family told Grogan that they were in bed when they heard banging on the door. The banging was loud enough to wake them and they could hear the English words for police with a search warrant. Neighbors also confirmed that there was loud banging and calls of "police" with a "search warrant."

Moises Senior said he was able to get up and walk from the back bedroom to the front door. He said Xitlalic told him it was the police, and he told her to go lay down. As he reached the front door, he said the door flew open, and the officers pushed him down. He heard the loud bang of the distraction device. He saw the officers put his oldest son on the floor, and then they stepped on his son. At this point he heard a loud noise, like a shot, and saw blood on Alberto's back. He said there were two officers at Alberto's door when the shot was fired, one a taller one with a long gun and a shorter one with a pistol. Moises Senior said the tall one went into the room first, and the other went in after because they both couldn't go in at the same time.

Moises Junior said he was in bed at the time of the search warrant. He heard the announcement and the words "police with a search warrant." He got up and walked into the hallway. His dad told him to go back to bed. After the officers entered, he heard the demands to get on the ground, and he complied. He admitted that he kept moving his hands so the officers stepped on him. He said his mom didn't do as ordered, and she had

to be "pulled" to get her down.

Xitlalic said that she heard the announcement of "police with a search warrant" given in both English and Spanish. Her bedroom was to the right of the front door, if you stand in the street facing the house.

None of the family heard any unprofessional remarks uttered by any of the SWAT team.

The SWAT team members were each interviewed regarding the incident, separately from each other and from the Sepulveda family. Each member of the team was asked about their SWAT training, the raid itself, and about their prior knowledge and present impressions of Officer Hawn. Each member related basically the same information about MPD SWAT training, which was verified through other sources. The officers also gave consistent accounts of the raid itself. There were no major inconsistencies from the SWAT team members' recall of the raid and the recollection of the Sepulveda family members.

As a SWAT team, MPD had won numerous awards at various competitions. Part of the criteria for winning competitions included weapons handling, as well as proficiency at keeping the finger off the trigger until a shoot/don't shoot decision arises. They all related that they were trained not to put the finger on the gun until you pull the trigger. Several of the team members are certified weapons experts. They explained that MPD has been training for at least five years in the "finger off" approach, and that they had never seen Hawn make any mistake with his finger on the trigger. They were uniform in their praise of Hawn as a well trained officer.

Officer Hawn had been a "shotgunner" for a number of years and was said to have "bonded" with his shotgun. The Benelli shotgun was his assigned SWAT weapon, and he had won competitions for his professionalism with it. Lingerfelt also carried one of the Benelli shotguns. He explained that both his and Hawn's shotguns were part of a lot of six Benelli shotguns purchased in 1994. The six guns were sequential in serial numbers. The shotgun is a semi-automatic Benelli MP-1 Super 90, 12-gauge. Once loaded and fired, it loads itself automatically. On the date of the raid, Officer Hawn's gun held one-ounce, rifled slugs.

During this investigation Hawn's gun was examined by two separate weapons experts, one from MPD and one from the Department of Justice (DOJ) who conducted an independent examination. Both experts agreed the gun was working in all mechanical aspects and had not been modified from factory specifications. The gun was tested for any defects that would cause it to fire without operating the trigger. None of the tests conducted caused the gun to fire without engaging the trigger. The experts determined that the trigger pull of the shotgun was between 2 1/2 to 6 1/4 pounds, depending on where the force was applied to the trigger. DOJ also tested Hawn's gun for trigger stroke length and it was estimated that the trigger only needed to travel 1/8 of an inch before it would fire. Two of the other MPD Benelli shotguns, from the same batch as Hawn's gun, were

also examined by DOJ and determined to exhibit the same characteristics. Representatives from Benelli confirmed that the characteristics of Hawn's gun were consistent with factory specifications.

Next, Det. Grogan and other members of ISD investigated Hawn's past conduct and training as an officer. A thorough review of all MPD reports involving the Sepulveda family, and the McAdoo residence was conducted, and no record was ever found that connected Hawn to either. According to MPD records, Hawn had never been in contact with any member of the Sepulveda family before the date of the raid.

All current SWAT team members were questioned about Hawn's behavior and personal views. Every team member stated that they noticed nothing wrong with Hawn's behavior, preparedness or conduct on the day of the raid. They also uniformly stated that Hawn had never expressed any bias against Hispanics. One of the team members who is Hispanic, Carlos Castro, concurred with this evaluation and noted he had known Hawn for many years. Former SWAT team members, including those that have left MPD, were questioned, and all denied that Hawn possessed any racial or improper bias.

Det. Grogan also pieced together the events in detail to establish a time line. This time line punctuated how quickly events unfolded prior to the shooting. The time line showed that Zahr radioed at exactly 0618 for a "10-33" and then again at 0622 and 49 seconds for a "Code-3" ambulance. That is a total of 4 minutes and 49 seconds to go from the business where the SWAT team originally staged, to the house, make entry, and then call for the ambulance. Grogan re-enacted the drive from the staging area to the house, which was between one and two miles, and it took 2 ½ minutes. Since Zahr and Collett recalled the time spent at the door being at least thirty seconds, the period of time left for entry into the home was approximately 1 minute and 49 seconds, until Zahr radioed for the ambulance.

Based on the fact that no intentional reason could be found for Officer Hawn to shoot Alberto, and his immediate denial that he had touched the trigger, criminalists from the Department of Justice attempted to test the theory suggested by Officer Wend, immediately after the shooting, that Hawn's knife may have discharged the shotgun. A DOJ agent, of similar height and weight to Hawn, put on Officer Hawn's tactical vest with all of his equipment, including the knife seen sticking out by Wend. When the shotgun was carried with a sling, as it was done by Hawn at the time of the entry, investigators found that the knife could catch on the weapon, pulling the knife out from the body. Photographs taken of Hawn on the day of the shooting similarly show the knife handle being pulled away from the officer's body.

The DOJ agent stood in a fixed position, moving only his upper body to simulate being bumped or adjusting for someone to go by. With the agent in a fixed position, and the gun in a position pointing downward toward the ground, the knife could make contact with the trigger of the gun. Test ammunition was placed in Hawn's gun to see if touching the knife on the trigger could cause the gun to fire. The test showed that when the knife

would touch the trigger, with little or no movement by the agent, the gun would fire. The test was repeated several times to ensure its accuracy, and the test was video taped.⁷

Investigators examined the history of Officer Hawn's knife being in the same position on his vest and determined that Hawn had carried it there before the date of the raid. Investigators located photographs that depicted SWAT team members, and the investigators confirmed the authenticity of these photographs. One photograph depicted Officer Hawn in his SWAT gear and vest. Clearly visible in the photograph was the same knife carried by Hawn on the date of the McAdoo raid. In the photograph, the knife was visible in the same spot described by Officer Wend. The photograph was taken by the Modesto Bee several months before the McAdoo raid.

Investigators also determined through test firing the gun that the muzzle-to-impact distance was greater than three feet. The distance from where Alberto was laying on the ground to where Hawn was standing at the doorway, according to the witnesses, was approximately 7 ¼ feet (measured at 88.5 inches.) The angle of the injury to Alberto was also consistent with Officer Hawn standing at the doorway, pointing the gun towards the ground.

While the pathologist could not measure the angle of Alberto's injury, the autopsy findings were similarly consistent with the shotgun discharging while pointing at an angle towards the ground. The entrance wound was to Alberto's back, on the right side by his shoulder ("medial aspect of the shoulder".) It was 4 ¾ inches from the middle ("midline") of his back and traveled through the body terminating its pathway on the inside of the left chest. The bullet was recovered, lodged in the left nipple. The pathologist determined that Alberto died as the result of a single gunshot wound. The Coroner's Office listed the manner of death as accidental.

LEGAL ANALYSIS

In deciding whether criminal charges should be filed, a prosecutor must determine the facts, apply those facts to the applicable charges, and then assess whether each element of the applicable charges can be proved beyond a reasonable doubt. Any death at the hands of another is a "homicide" in California. Homicide is defined as the killing of one human being by another, either lawfully or unlawfully. The crimes of murder and manslaughter are deemed unlawful homicides; excusable and justifiable homicides are deemed lawful and are not considered criminal. (California Jury Instructions, 6th Edition - CALJIC 8.0.)

⁷ When DOJ criminalists performed this test they discovered that small brass particles from the handle of Hawn's knife were transferred to the trigger of the shotgun. When they initially examined Hawn's gun no such particles were found in the trigger; however, the facts of the case also show that the gun was handled and analyzed by several persons prior to being provided to the DOJ analysts.

The law in California defines murder as the unlawful killing of a human being when done with "malice aforethought" or during a specified felony or a felony that is inherently dangerous to human life. (Penal Code §187 - CALJIC 8.10.) Murder is further broken down into degrees; it would be murder in the first degree if the killing was done willfully, and with premeditation and deliberation, or during a specified felony, or other circumstances not applicable to the facts here. All other murders would be in the second degree. (§189.) Malice is defined as either express or implied: express malice is a manifestation of an intention to unlawfully kill; implied malice results from an intentional act, done with the knowledge of the consequences being dangerous to human life and a conscious disregard for such life. (CALJIC 8.11.)

The facts in this case do not support the conclusion that this was an intentional killing. No evidence suggests that Hawn intended to kill Alberto, and, in fact, no motive can be established to show any reason for him to want to kill Alberto. The facts show that none of the SWAT team knew Alberto was even in the house until he was seen in the bedroom. Also, there is no evidence that Hawn harbored any ill-will against a class of people, or had a bias against anyone in the McAdoo house. More importantly, the most reasonable scenario accounting for the discharge of Hawn's weapon appears to be that during the jostling that occurred in the small hallway area, Hawn's knife handle came into contact with the trigger. Thus, this evidence does not show that Officer Hawn did any act with the required mental state of malice. Therefore, charges under either first or second degree malice murder cannot be sustained.

Similarly, there is no evidence which would support charges under the felony-murder rule. Under that doctrine, the prosecution must show that the suspect committed an underlying felony offense inherently dangerous to human life, and that during the commission of that felony a victim died. But peace officers have broad powers in enforcing the law. (Penal Code §§196, 835, and 843.) And a peace officer acts within the laws when he is executing a facially valid search or arrest warrant. (Penal Code §§844, and 1531.) Here, there is no evidence to support the theory that Officer Hawn was committing any underlying felony. Officer Hawn was acting as a peace officer and is allowed to carry a gun and enter someone's house. The federal search warrant and the arrest warrant given to MPD, regarding the McAdoo residence, appeared to be valid on their face. Therefore, Officer Hawn was not breaking any laws, and charges under the felony-murder rule cannot be sustained.

Once charges under the various types of murder have been ruled out, then charges under the other form of unlawful killing, manslaughter, must be considered. Manslaughter is divided into two separate crimes, voluntary and involuntary. (Penal Code §192(a) and (b).)

Voluntary manslaughter is defined as the intentional killing of another, unlawfully and without malice. (Penal Code §192(a) - CALJIC 8.40.) As set forth above, the evidence does not support the conclusion that this was an intentional killing. As such, Officer Hawn's conduct cannot constitute voluntary manslaughter.

Involuntary manslaughter is defined as an unlawful killing of a human being without malice and without an intent to kill. (Penal Code §192(b) - CALJIC 8.45.) That same instruction further states that for a killing to be unlawful it must take place (1) during an unlawful act, not amounting to a felony, which is dangerous to human life under the circumstances of its commission; or (2) during the commission of an act, ordinarily lawful, which involves a high degree of risk of death, without due caution and circumspection.

With respect to a killing which occurred during the commission of an unlawful act, there is no evidence to support such a charge. In the instant case, a federal Magistrate had signed a search warrant for the McAdoo residence and issued a criminal arrest warrant for an occupant of that house. As observed above, a peace officer does not violate the law when executing a facially valid search warrant or arrest warrant. Since Officer Hawn's actions complied with the law, this first type of involuntary manslaughter is inapplicable.

With respect to a killing which occurred during the commission of an ordinarily lawful act, done without due caution or circumspection, a further definition is warranted. CALJIC 8.46 defines "due caution and circumspection" in the following way:

The term "without due caution and circumspection" refers to a negligent act [or] negligent acts which are aggravated, reckless and flagrant and which are such a departure from what would be the conduct of an ordinarily prudent, careful person under the same circumstances as to be contrary to a proper regard for human life [or] the danger to human life [or] to constitute indifference to the consequences of such acts. The facts must be such that the consequences of the negligent act [or] acts could reasonably have been foreseen. It must also appear that the death [or] danger to human life was not the result of inattention, mistaken judgment or misadventure, but the natural and probable result of an aggravated, reckless, or grossly negligent act.

Applying this definition to the instant facts, there is similarly no evidence to support such a theory of involuntary manslaughter. All of the credible evidence shows that Officer Hawn used care, caution and control during the course of the raid. Hawn's spontaneous statement that his finger was not on the trigger is consistent with his extensive training and years of experience he had as a SWAT officer, where he had repeatedly been instructed to keep his finger outside the trigger guard unless a shoot/don't shoot situation arose. Similarly, the fact that Officer Hawn continued to cover Alberto until such time as the room was secure was certainly prudent and consistent with SWAT training. Officer Hawn's shock and surprise after the gun discharged, as observed by Officer Wend, is also consistent with an accidental firing. Finally, the testing of the shotgun by DOJ persuasively establishes that the most likely cause of the shotgun discharge was the handle of the knife coming into contact with the trigger. Under these circumstances, the evidence does not establish that Officer Hawn

committed any act without due caution or circumspection.


Penal Code §195 states that a homicide is excusable when “committed by accident and misfortune, or in doing any other lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent.” We believe that this statutory section best characterizes the events that occurred on September 13, 2000. The evidence, without exception, does not support any suggestion that Officer Hawn acted with any unlawful intent; and the evidence strongly supports the inference that the gun discharged by accident and not by any volitional act. As such, Officer Hawn’s acts cannot constitute any chargeable crime.

CONCLUSION

In sum, we believe that Alberto Sepulveda died as the result of an accidental discharge of Officer David Hawn’s weapon. We also find that Officer David Hawn was acting within the range of due care owed to the public while performing his duties under the provisions of California Penal Code §835. We also find that the discharged round that struck Alberto Sepulveda was excusable under the provisions of Penal Code §195, since the discharge was caused by an unforeseen mechanical means and not a negligent or intentional act on the part of Officer David Hawn. Therefore, we conclude that Alberto Sepulveda’s death was profoundly tragic, but it did not result from a criminal act.⁸



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⁸ After complete review of the evidence in this case, and after formulating our conclusions, Officer Hawn’s interview with MPD’s internal affairs officers was reviewed by both the Stanislaus District Attorney’s Office and the Attorney General’s Office. While this information could not be, and was not, considered by us in determining whether Officer Hawn’s actions were potentially criminal, (see Penal Code section 832.7, and *Lybarger v. City of Los Angeles* (1985) 40 Cal.3d 822, 828-829) we think it is important to note that no important discrepancy exists between the information contained in Officer Hawn’s internal-affairs interview and in the accounts of other witnesses at the scene.