

1 THE COURT: Sustained. I can see it.

2 BY MR. RAINS: Q. Play the video forward, if you
3 will.

4 A. At this point, Mr. Grant is down.

5 Q. All right. Now you indicate at 2:09:08 that from --
6 2:09:03 to 2:09:08 on the Cross video, we see Grant rotating
7 counter-clockwise and the right forearm contacting the
8 platform; is that correct?

9 A. That's correct. Here is Mr. Grant's right elbow.
10 Here is his head and his right forearm, and he's rotating as
11 we view the image, counter-clockwise.

12 Q. And do we see at some point shortly after that him
13 on the ground where his knees are partially bent?

14 A. Yes. At this frame right now, for example, 2:09:19
15 on the Vargas video, I'm pointing at Mr. Grant's knees.
16 Here is his right knee and left knee, and they are raised.

17 Q. And is he on his back at this point?

18 A. Yes. Directing your attention to Cross, here is
19 Mr. Grant's right arm, and pointing with the arrow here is
20 his left arm.

21 Q. All right. At some point in time, does Officer
22 Pirone reach down and put his hand under Grant's head
23 shortly after that?

24 A. Yes, sir.

25 Q. Show us that?

26 A. It would be visible in Cross. Mr. Grant's head is
27 coming down to the platform; Officer Pirone places his hand
28 beneath it.

1 Q. So the video indicates that Grant had gone down on
2 his back to begin with?

3 A. Correct.

4 Q. At some point in time in the video, does it appear
5 that he changes his position?

6 A. Mr. Grant does exhibit rotation, which would be to
7 his right. As we view the Cross video, it would be
8 clockwise rotation, and he does end up prone.

9 Q. And according to Exhibit I, we'll see that at about
10 2:10:51 on the platform camera time, Frame Number 21,334.
11 Could you get us in that area?

12 A. Yes, sir.

13 Q. You are at 21,334, and according to the entry on
14 Exhibit I, Mehserle straddles Grant whose legs indicate
15 rotation to Grant's right to a prone position. Could you
16 show us that with regard to the Vargas video?

17 A. Yes, sir. This white area, to which I'm pointing
18 down, I want you to remember that, and we're going to back
19 up a bit and when I put it in motion, you should be able to
20 see the legs rotating. I've backed up to about 21,320, and
21 as we move forward, watching those legs and from the white
22 sock that you are going to see, the left leg just came over
23 and Mr. Grant at this point, 21,346, is face down.

24 Q. Now, at some point in time then, according to this
25 right after that, Pirone uses his left knee to restrain
26 Grant. Could you show us where that is shown?

27 A. From about this point, and this is 21,365.

28 Q. Now, Mike I want you to move up to Frame Number

1 21,431.

2 A. Yes, sir.

3 Q. At this point in time, it appears that Officer
4 Pirone in the Carazo and Cross videos, because we see those
5 probably the best, is sort of looking in the direction of
6 Mr. Jackie Bryson; is that correct?

7 A. Yes, sir.

8 Q. And is there a way when he was in this position
9 relative to Mr. Bryson at this time, 21,054, showing us what
10 the platform looked like, particularly I'm interested in
11 whether any of the cameras would have shown us whether there
12 was a wall of people on the platform?

13 A. I can take you to the BART platform camera for this
14 frame. As you see, that space has been taken over when
15 Carazo started filming, but I can view that frame
16 separately. I'm going to use a work product where I put all
17 of the available videos on screen so that we can see this.
18 21,431, very close, 423. If I go again, I'll probably pass
19 it. This would be a fraction of a second that was
20 requested.

21 Q. So 423 would be how much time from 431

22 A. About a quarter-second.

23 Q. A quarter of a second. And that's showing -- that
24 platform camera is showing us the number of people that were
25 on the platform that Officer Pirone might have been looking
26 at had he been looking in that direction?

27 A. Referring you to Cross, which is now in the top
28 middle, the images on the platform camera would be generally

1 to the right of Officer Pirone in the Cross video.

2 Q. Thank you. You want to return then to your matrix?

3 Mike, on Exhibit I at frame 21,460 through 21,482,
4 you indicate that by looking at Cross, it appears that both
5 Carazo and Liu at the same time, Grant's waist has risen and
6 rotated relative to the platform movement, shows elevation
7 during return of platform. Could you show us those frames?

8 A. Yes, sir. Directing your attention in Cross to this
9 white area, this is a band of white that is between
10 Mr. Grant's upper garment and his dark trousers, either his
11 shorts or his T-shirt, but for analysis, it's a good
12 indicator of the position of his waist. Here, I'm pointing
13 to where Mr. Grant's leg is located and where the waist is.
14 And if we now, particularly in Cross, even though it's
15 visible as well as in Carazo, we get the best view in Cross,
16 we can watch it when it returns to the back to the platform
17 to get a sense of the movement involved.

18 Q. And it appears that white ring moved down; is that
19 correct?

20 A. Yes, relative to, say, using Officer Pirone's duty
21 belt as a reference, that waistband area moved down a
22 noticeable difference.

23 MR. STEIN: Objection, speculation; move to strike.

24 THE COURT: Motion to strike is granted. It's
25 stricken.

26 BY MR. RAINS: Q. Mike, at this point in time,
27 where you had just shown us the synchronized video, it is
28 2:10:56, correct?

1 A. Correct.

2 Q. And the movement that you describe in the Exhibit I
3 is occurring at seven seconds before you've determined the
4 shot was fired, correct?

5 A. That's correct.

6 Q. Is there any more movement by Mr. Grant visible in
7 the synchronized videos before the shot is fired?

8 A. Yes, sir.

9 Q. Would you show us movement that occurs in the next
10 seven seconds by Mr. Grant before the shot is fired?

11 A. I'm going to direct your attention to the Cross
12 video, the clearest view. I'm going to stop at 21,557 for
13 reference. This white band to which I'm pointing is Oscar
14 Grant's left elbow, and this where I'm pointing would be his
15 left shoulder and here is his head.

16 Q. He would appear to be staring in the direction of
17 Mr. Reyes, possibly?

18 A. Correct, he's facing towards Mr. Reyes. And again,
19 just for reference, backing up to 21,581, this white area to
20 which I'm directing your attention is where his outer
21 garment ends, and this would be where Mr. Grant's neck is.

22 Q. So his head has appeared to move out from Pirone's
23 knee?

24 MR. STEIN: Your Honor, I would object as it calls
25 for speculation.

26 THE COURT: Sustained.

27 MR. STEIN: Motion to strike.

28 THE COURT: It's stricken.

1 BY MR. RAINS: Q. Now, is Pirone up?

2 A. Yes, sir.

3 MR. STEIN: Objection, vague as to "up".

4 THE COURT: Overruled. I can see the video.

5 BY MR. RAINS: Q. Keep playing. Stop there. We
6 are Relative Frame Number 21,656; is that correct?

7 A. That's correct.

8 Q. And from what we're looking at there, Officer Pirone
9 appears to have his left hand on Mr. Grant's head?

10 A. That's correct.

11 Q. And his right hand on Mr. Grant's shoulder?

12 A. That's also correct.

13 Q. And Mr. Grant appears to be facing now away from
14 Mr. Reyes, correct?

15 A. Also correct.

16 Q. And to the right of Officer Pirone in this image,
17 you see Officer Mehserle; is that correct?

18 A. Yes, sir.

19 Q. And that appears to be Jackie Bryson to the right of
20 Pirone and Mehserle in the image, correct?

21 A. Correct.

22 Q. Is there any more movement by Mr. Grant shown in the
23 videos before the shot is fired?

24 Now, we are at what time?

25 A. 21,101.

26 Q. 21,101. So we have roughly two more seconds before
27 the shot is fired, right?

28 A. That's correct.

1 Q. And can you run the video forward there until
2 2:11:03, when you have determined the shot is fired?

3 A. I'm going to change the image size just a bit, so
4 you can see the frame and the timing counters. The shot is
5 fired here.

6 Q. Back up, Mike, if you would. Stop. Looking up in
7 the Cross video, can you play that forward and tell us
8 whether it appears that Mr. Grant's left shoulder comes off
9 the ground.

10 MR. STEIN: Objection, irrelevant.

11 THE COURT: Sustained.

12 MR. RAINS: Your Honor, we're talking about
13 struggling.

14 THE COURT: Sustained. I can see the video. I've
15 seen this video, and he can't tell me what I'm seeing. He
16 can tell me what he thinks he's seeing, but I'm looking at
17 the video, and I've seen it multiple times. Because you
18 have about two minutes left.

19 MR. RAINS: Can I ask him what he sees in that
20 video?

21 THE COURT: You can ask him what he sees, but
22 whether it's relevant, that's a different issue. Go ahead.

23 BY MR. RAINS: Q. Mr. Schott, what do you see in
24 the Cross video just before the shot is fired?

25 A. I see Mr. Grant's left arm and hand in motion in the
26 background in the space between Pirone's left arm and
27 Pirone's leg. I also see that the shoulder-to-shoulder line
28 of Grant taken in conjunction with the space appearing

1 beneath the left shoulder indicates a rotation of perhaps
2 35 degrees at this point, just an estimate, off of the
3 platform.

4 Q. You determined when the shot was fired?

5 A. Yes, sir.

6 Q. Now, yesterday in the courtroom, Mr. Stein played
7 the video, and I think the Cross video -- and to
8 Mr. Pirone -- and when he heard the shot, he stopped the
9 video and said look at the image up there.

10 A. Yes.

11 Q. Is there some other way to more accurately determine
12 when the shot is fired?

13 A. Yes. The procedure you described will show the
14 image taken with reaction time of about 15 frames after the
15 shot was actually fired. I used a sound editor that
16 displays both the individual images as well as a sound graph
17 that shows both on the graph and by the sound of the
18 hearing, the precise frame during which the sound of the
19 shot was recorded.

20 Q. So you, by using this sound editor, can tell us the
21 precise frame the shot was fired?

22 A. That's correct.

23 Q. You don't have to rely on lag time to hit a button
24 after you hear a gunshot go off?

25 A. That would not be a reliable way of determining the
26 time a shot was fired.

27 Q. And you are prepared, as the Court indicated, I have
28 roughly two minutes, and I suspect that you can't get

1 through your sound editor description in two minutes, can
2 you?

3 A. Well, I can show you the screen capture of what I
4 was viewing the sound editor. If given time, I need to load
5 that editor in and bring it up on screen if you wanted to
6 see it live.

7 THE COURT: No, I don't want to see it. It's not
8 relevant as to what this Court needs to decide, so I'll take
9 your testimony as is. Okay.

10 BY MR. RAINS: Q. Mr. Schott, show us the position
11 of Mr. Grant at Frame Number 21,699, the precise frame that
12 you have determined the Schott was fired.

13 A. On Cross, we lose a little bit of clarity and the
14 view, but switching over to Carazo, I can see that
15 Mr. Grant's shoulders or his left shoulder has in fact come
16 off the platform, and it indicates rotation to
17 counter-clockwise as we view the image.

18 Q. Now, keep running it forward from 21,699 and see if
19 Cross picks it up again?

20 A. This is now 21,702, just after the shot, this would
21 be 1/10 of one second after the shot. Cross also shows
22 Mr. Grant is turned off of the platform with his left
23 shoulder.

24 THE COURT: Okay. You have one question left.

25 BY MR. RAINS: Q. 21,705, this is after the shot is
26 fired and Mr. Grant's hand is up and not in his back; is
27 that correct?

28 A. That's correct.

1 MR. RAINS: Your Honor, I need more time than this
2 to adequately defend my client of this murder charge. I
3 cannot be stopped from defending my client of this very
4 serious charge by the Court arbitrarily.

5 THE COURT: The Court is not arbitrarily stopping
6 you from denying your client. None of this is relevant.
7 None of this is relevant to the issues at hand before this
8 Court. Nothing is anew to this analysis. I've seen these
9 videos over and over. This witness can't testify as to what
10 happened. He wasn't there. He can give me some imaging on
11 how he did a comparison analysis; that doesn't give the
12 Court information that it needs to make this decision. So
13 with that, your direct examination has been concluded. I
14 find anything further -- in fact, his testimony is really
15 not relevant, but I allowed you to have it anyway, because
16 videos were shown. What I'm going to do is we're going to
17 take a ten minute recess, give my reporter a recess.

18 Mr. Stein, you have five to seven minutes for
19 cross-examination, so use your time sparingly, but I want to
20 hear from you lawyers as it relates to this case. Ten
21 minutes.

22 (Recess taken)

23 THE COURT: All right. Mr. Stein, use your time
24 wisely.

25 MR. STEIN: Your Honor, I have no questions for this
26 witness. I'd like to yield my time with potential rebuttal
27 witnesses.

28 THE COURT: All right. So you are excused,

1 Mr. Schott. Thank you.

2 Anything further?

3 MR. STEIN: I have a rebuttal witness.

4 THE COURT: Hold on. Mr. Rains?

5 MR. RAINS: In light of the Court's rulings, I have
6 no further evidence to offer.

7 THE COURT: Now, Mr. Stein.

8 MR. STEIN: Yes, Your Honor.

9 THE COURT: What would you like to do?

10 MR. STEIN: I'd like to call Officer Terry Foreman
11 to the stand. As an offer of proof --

12 THE COURT: Yes?

13 MR. STEIN: -- as an offer of proof, Officer Foreman
14 would testify that he spent many hours with the defendant,
15 Mr. Mehserle, upon being called on Mr. Mehserle's request to
16 come down to the department shortly after the shooting.

17 Officer Foreman would testify that he spent many
18 hours with the defendant, those early morning hours, and as
19 well as in the days that followed. He would testify that at
20 no time, although they did discuss what happened on the
21 platform, at no time did the defendant ever mention that he
22 mistakingly shot Oscar Grant because he meant to pull his
23 Taser instead of his gun.

24 THE COURT: You are going to do that in five
25 minutes?

26 MR. STEIN: I can try. He's on the fourth floor in
27 the waiting room. I think the sheriff's department is
28 holding him.

1 THE COURT: Call me when he's down.

2 TERRY FOREMAN,

3 having first been duly sworn, testifies as follows:

4 THE CLERK: Please state your name and spell it for
5 the record.

6 THE WITNESS: Terry Foreman, F-O-R-E-M-A-N.

7 THE CLERK: And your first name?

8 THE WITNESS: Terry, T-E-R-R-Y.

9 THE COURT: All right. Mr. Stein?

10 DIRECT EXAMINATION BY MR. STEIN

11 Q. Good morning or good afternoon, sir. Who do you
12 work for?

13 A. I work for the BART Police Department.

14 Q. How long have you worked for the BART Police
15 Department?

16 A. Approximately two years.

17 Q. And do you know a person by the name of Johannes
18 Mehserle?

19 A. Yes, I do.

20 Q. Do you see Mr. Mehserle in court?

21 A. Yes.

22 Q. Can you identify him for us, please?

23 A. Wearing a gray suit, maroon shirt, and striped tie.

24 MR. STEIN: May the record reflect that the witness
25 identified the defendant?

26 THE COURT: All right. The record will so reflect.

27 BY MR. STEIN: Q. Now, I'd like to direct your
28 attention to the early morning hours of 2009, at

1 approximately 3:30 in the morning did you receive a
2 telephone call while you were home?

3 A. Yes, I did.

4 Q. And who did you receive that call from?

5 A. Officer Jessie Sekhon.

6 Q. And did Officer Jessie Sekhon make a request of you?

7 A. Yes, he did.

8 Q. And what was that?

9 A. To come down to Lake Merritt station for Johannes
10 Mehserle.

11 Q. Did he tell you why?

12 A. Yes.

13 Q. What did he tell you?

14 A. He said he was involved in a shooting.

15 Q. And after he told you that, were you told any
16 details about that shooting?

17 A. No, not at that time.

18 Q. After you received that call, did you leave your
19 residence and go to the Lake Merritt BART station in
20 Oakland?

21 A. Yes, I did.

22 Q. Prior to doing so, or while you did so, did you
23 attempt to make telephone contact with Mr. Mehserle?

24 A. Yes, I did.

25 Q. Where were you when you did that?

26 A. I was in my car, driving on the freeway.

27 Q. And what was your purpose for calling him at that
28 time?

1 A. To see if he was okay.

2 Q. Did you, in fact, speak with him?

3 A. Yes, I did.

4 Q. Did he provide you at that time any details about
5 what happened during this officer-involved shooting?

6 A. No, he did not.

7 Q. When you arrived at the Lake Merritt station, did
8 you make contact with Mr. Mehserle?

9 A. Yes, I did.

10 Q. And where did you see him?

11 A. He was in one of the interview rooms at Lake Merritt
12 BART station.

13 Q. And when you saw him in the interview room at the
14 Lake Merritt BART station, was he by himself or was he with
15 someone?

16 A. I believe at that time he was with Officer Jessie
17 Sekhon.

18 Q. And that is the officer that called you?

19 A. Yes.

20 Q. By the way, Officer Foreman, how long had you known
21 Mr. Mehserle at this point?

22 A. Approximately 22 months.

23 Q. And you worked with him?

24 A. Yes.

25 Q. Your friends?

26 A. Yes.

27 Q. Is it your understanding that it was his request
28 that you come and be with him?

1 A. That was my understanding.

2 Q. When you went into the room, did you speak with
3 Mr. Mehserle?

4 A. Yes, I did.

5 Q. Did he speak to you about some of the things that
6 occurred on the platform during this officer-involved
7 shooting?

8 A. I basically told him that I was there to support
9 him; to basically give him information of the process that
10 was going to be occurring, and he made some statements.

11 Q. Do you recall what any of those statements were?

12 A. Yes.

13 Q. What was that?

14 A. He was mentioning that "it was different"; he
15 mentioned that a couple times. "It was different. It was
16 different." I did not know what he was referring to, and so
17 forth. And then he said, "I thought he had a gun."

18 Q. And just so the record is clear, when you said "I
19 didn't know what he was referring to," those were not his
20 words; those are your words describing your mental state
21 when he was saying, quote, "It was different"; is that
22 right?

23 A. Yes.

24 Q. Okay. And did he ever say words to the effect that
25 he was going for his pocket?

26 A. Yes, he did.

27 Q. Now, at some point while you were with Mr. Mehserle,
28 did his attorneys arrive in that interview room?

1 A. Yes.

2 Q. And when they arrived, did they ask you any
3 questions?

4 A. They asked me if he said anything or talked to
5 anybody.

6 Q. And did you respond?

7 A. Yes.

8 Q. What did you tell him?

9 A. I told them that he thought the person had a gun.

10 Q. Did Mr. Mehserle tell you whether or not he had
11 viewed any videotape of the shooting the morning that it had
12 occurred?

13 A. I don't believe it was Officer Mehserle, no.

14 Q. Someone else told you that he had viewed that?

15 A. Yes.

16 Q. Now, during your time spent at the Lake Merritt BART
17 station -- first of all, how long did you stay there, do you
18 remember?

19 A. Approximately six hours.

20 Q. And during that six hours, how many of those hours
21 were spent with Mr. Mehserle?

22 A. Probably about a guesstimate, maybe five and a half,
23 five hours.

24 Q. And other than the statements that you've already
25 told us about, "It was different. He was going for his
26 pocket. I thought he had a gun," did Mr. Mehserle ever say
27 during those five or so hours that he accidentally shot
28 Mr. Grant when he meant to pull his Taser, and instead he

1 pulled his firearm? Did he ever say anything like that?

2 A. Well, when he mentioned that he thought he had a
3 gun, I just stopped him right there, and I said hey, I'm
4 here to give you support. I don't want you to go into the
5 situation, and so forth.

6 Q. I understand. But during those five or six hours,
7 did he ever say anything to you, something to the effect of
8 I shot him by mistake; I meant to pull my Taser, and instead
9 I accidentally pulled my gun?

10 A. No.

11 Q. Now, after your meeting with him at the BART
12 station -- I'm sorry -- at the Lake Merritt BART station,
13 did you on subsequent days continue contact with him?

14 A. Yes, I did.

15 Q. And, in fact, the morning of the shooting, that
16 would have been the 1st, you left at about 11:00 o'clock in
17 the morning; is that correct?

18 A. Correct.

19 Q. And later on that evening, you called Mr. Mehserle,
20 and you checked on him at that time; is that correct?

21 A. Correct.

22 Q. That was over the phone?

23 A. Yes.

24 Q. And when you spoke to him over the phone, did he
25 ever say anything to you along the lines of I shot him by
26 mistake; I meant to pull my Taser, and instead I pulled my
27 gun"?

28 A. Uh, no.

1 Q. Okay. After that day, did you continue to speak
2 with him on a daily basis?

3 A. Yes, I did.

4 Q. And during the times that you met with him on a
5 daily basis, at some points did he repeat those statements
6 to you that he had made earlier, for example, he said to you
7 that he was going for his pocket, or I thought the guy had a
8 gun?

9 A. Yes.

10 Q. Now, in the days that followed, was there an
11 occasion when you drove Mr. Mehserle to his lawyer's office
12 in Sacramento?

13 A. Yes.

14 Q. And was it just the two of you in the car at that
15 time?

16 A. Yes.

17 Q. During that trip, did Mr. Mehserle ever say to you
18 anything to the effect of I shot the man by accident. I
19 meant to pull my Taser, and instead I accidentally pulled my
20 gun?

21 A. No. He would breakdown and start crying, and very
22 emotional and would say, "I thought he had a gun. I thought
23 he had a gun." And I would say, "Hey, let's don't talk
24 about this."

25 Q. But he never said the things that I referenced?

26 A. No.

27 MR. STEIN: Thank you, sir. That's all I have.

28 THE COURT: Mr. Rains?

CROSS-EXAMINATION BY MR. RAINS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Q. Officer Foreman, good morning.

A. Thank you.

Q. Officer Foreman, when you first met Mehserle at the BART station, you told them that you were there for peer support?

A. That's correct.

Q. And as a peer support person, did you explain to him what your role was?

A. Yes.

Q. Did you tell him that you didn't want him to get into the facts of the case?

A. Yes.

Q. And at some point in time -- strike that. You've been interviewed about your involvement with Mr. Mehserle, correct?

A. That is correct.

Q. You had a chance to look at the transcript of your interview?

A. Yes, I did.

Q. All right. And at some point in time, you said that Mr. Mehserle started to talk about what happened and you told him to stop?

A. Correct.

Q. Why did you tell him to stop?

A. I didn't want to you know. I was there to support him. I did not want him to go into the situation or what happened.

1 Q. All right. And at any time, either the night that
2 this occurred or these subsequent occasions that Mr. Stein
3 has just asked you about, was there ever an occasion where
4 in your opinion while you were with Mr. Mehserle or on the
5 phone, he had an opportunity to tell you of all the events
6 that occurred that night or that morning on the platform?

7 A. I'm sorry. Can you repeat that? I'm sorry.

8 Q. Was there ever an occasions where you just said to
9 Mehserle, for instance, tell me what happened?

10 A. Yeah, I could have done that, but I did not.

11 Q. You didn't?

12 A. Did not.

13 Q. Why?

14 A. It wasn't my role.

15 Q. You are not a lawyer?

16 A. No, I'm not.

17 Q. You give him any legal advice on how to conduct
18 himself?

19 A. No, I did not.

20 Q. Did you want to hear any facts?

21 A. I wanted to, but I didn't.

22 Q. You didn't ask him to tell you what happened?

23 A. No, I did not.

24 Q. And if he started to talk to you at any time about
25 what happened, what was your response?

26 A. I didn't want to hear about it.

27 Q. You cut him off?

28 A. I had cut him off.

1 Q. So my question to you, sir, is at any point in time
2 after you cut him off, did you have the impression as you
3 sit up here today, did you know from Mr. Mehserle himself
4 what happened out there?

5 A. No, I do not.

6 MR. RAINS: Thank you.

7 THE COURT: Mr. Stein?

8 MR. STEIN: Nothing further. Thank you.

9 THE COURT: People rest?

10 MR. STEIN: Subject to the moving in of certain
11 items, yes.

12 THE COURT: Let's do that.

13 MR. STEIN: People's 1 is the autopsy protocol. I'm
14 not offering it. People's 2 is the diagram referred to by
15 Dr. Rogers. I am offering it.

16 THE COURT: All right. Do you want to be heard?

17 MR. RAINS: No.

18 THE COURT: Admitted.

19 (People's Exhibit 2 admitted into evidence)

20 MR. STEIN: People's 3 is the CD which contains the
21 virtual dub program which we used to view the many videos.
22 I am offering that.

23 THE COURT: I'm going to let you go through all of
24 them, and if there's any objection as it relates to those
25 items, Mr. Rains you can tell me in the end.

26 MR. RAINS: All right.

27 MR. STEIN: People's 4 is a group exhibit showing
28 stills from the Cross video. I am offering those.

1 People's 5 is a group exhibit, multiple stills from
2 the Cross video. I am offering those.

3 People's 6 is a one page still from the Vargas
4 video, the first of two Vargas videos. I am offering that.

5 People's 7 are photographs of the Vargas camera used
6 to take the video. I am offering those.

7 People's 8 are photographs of the camera used by
8 Mr. Tommy Cross to take the video. I am offering those.

9 People's 9, the camera used by Ms. Carazo to take
10 the video that we observed in court. I am offering those.

11 People's 10 is the photograph or three photographs,
12 actually, of the camera used by Mr. Liu to take his video.
13 I am offering that.

14 People's 11 is the CD which contains the video taken
15 by Ms. Karina Vargas. I am offering that.

16 People's 12 is the CD which contains the videos
17 taken by Mr. Cross. I am offering that.

18 People's 13 is the CD which contains the Carazo
19 video. I am offering that.

20 People's 14A is -- I'm sorry. All of these
21 exhibits, Your Honor, starting from 11 going through 14,
22 there is an A subset, the number is the envelope; the subset
23 with the A is the CD. So the record is clear, I am offering
24 both the envelope and the CD which is contained therein.

25 THE COURT: Okay.

26 MR. STEIN: With regard to 14 and 14A, this is the
27 CD that was taken by Mr. Liu. I am offering 14 and 14A.

28 15 is the report authored by Mr. Danny Tong from the

1 27 is the CD which contains portions of the
2 surveillance camera platform at the Fruitvale station. I
3 played frames 13,200 through and including 14,350. I am
4 offering that.

5 28 is the diagram referenced to by Domenici. I am
6 offering that.

7 29, 30, and 31 are transcripts of the statements
8 taken by investigators of Officer Domenici. I am offering
9 these transcripts, not for the truth of the matter, but for
10 foundational purposes should Officer Domenici become
11 unavailable at trial. Again, I'm not offering it for the
12 truth, but they need to be in evidence so that their
13 testimony could be --

14 THE COURT: Foundational only.

15 MR. STEIN: Yes, foundational only. So I am
16 offering that.

17 32 is another transcript from an interview taken by
18 investigators of Officer Domenici. I am offering that for
19 the same purpose, foundational only.

20 THE CLERK: Your Honor, there's no 33. I skipped
21 that number.

22 MR. STEIN: 34, 35, and 36 are transcripts
23 pertaining to interviews taken of Officer Pirone by
24 investigators. I am offering those for the same purpose,
25 foundational only, as well as 37. I'm offering that as
26 well. Thirty-eight.

27 I am not offering 38. This is the supplemental --
28 well, actually, I am for the same reasons, foundational

1 alone. It was referred to by Officer Pirone.

2 And with that, Your Honor, those are the items that
3 I'm offering at this point.

4 THE COURT: Mr. Rains, do you want to be heard on
5 those items?

6 MR. RAINS: I think maybe just People's 5, if I
7 could take a quick look at that.

8 THE COURT: All right. Go ahead.

9 MR. RAINS: Your Honor, with respect to People's 5,
10 these are still frames sought to be introduced by the
11 People. I think this came in through Ms. Long, as I recall,
12 and I will object to this on lack of foundation only because
13 when I asked her when these were taken in relation to the
14 shot being fired, Ms. Long was unable to say -- she said she
15 had never been asked to make that determination, so without
16 any foundation, I would object to them coming in for any
17 purpose. As to the other exhibits, as solely for purposes
18 of the preliminary hearing, I'm not going to object. And as
19 to the transcripts and whatnot for foundational purposes
20 only, for purposes of the preliminary hearing, I won't
21 object.

22 THE COURT: They won't be admitted.

23 MR. STEIN: Which ones?

24 THE COURT: No. 5 that he's objecting to.

25 Mr. Rains, I see your items, and the ones I took the
26 stipulations to.

27 MR. RAINS: Your Honor, I think I had Exhibits A
28 through T, if I'm correct on that -- A through Y. The gun

1 belt and the Taser being the last two exhibits.

2 THE COURT: The Taser is only item that wasn't
3 presented to the Court.

4 MR. RAINS: The gun belt, we did not get to
5 testimony on that, so I will withdrawal Exhibit Y, because
6 it was not received.

7 There were a number of photographs that came in from
8 Mr. Schott, I think the key is the video that he played
9 which is Exhibit G. And we certainly seek the introduction
10 of that. The other photographic exhibits that came in were
11 still frames, and I provided copies of those to Mr. Stein.
12 And since we did not get any testimony as to Exhibit S, I
13 would withdraw that.

14 I'm going to show Mr. Stein Exhibit T. Mr. Schott
15 did not testify to that as well. It is shown at relative
16 Frame Number 21,705 of the Cross video, and I would seek the
17 introduction of T. I would seek the introduction, with the
18 exception of the gun belt, Exhibit S which there was no
19 testimony on, all other exhibits.

20 THE COURT: Mr. Stein?

21 MR. STEIN: With regard to Exhibit T, which is being
22 offered, I would state that this is contained on the disk
23 that is being admitted, and given that it was not referenced
24 to by any witness, and it does contain other things on the
25 piece of evidence that's being offered, I would be opposed
26 to it at this time.

27 THE COURT: All right. Mr. Rains, do you want to be
28 heard? That's true.

1 MR. RAINS: No. The only -- well, I did show
2 Dr. Rogers photographs or actually what I will say are
3 photographs of the mannequins that are shown on Exhibit T,
4 and he did identify paths of a bullet through Mr. Grant's
5 body from those, but he did not see this exhibit.

6 THE COURT: To the extent that it's on the CD
7 itself, that that won't be admitted itself.

8 MR. RAINS: To the extent that the CD reflects it?

9 THE COURT: Absolutely.

10 MR. RAINS: Thank you. I that's all then, Your
11 Honor.

12 THE COURT: That being the case, those items will be
13 admitted.

14 (People's Exhibits 4, 6-14A, 16-21, 23-24, 26-32 and 34-38
15 were admitted into evidence)

16 (Defendant's Exhibits A-R and U-X are admitted into
17 evidence)

18 THE COURT: Would the People like to be heard, as it
19 relates to a holding order in this matter?

20 MR. STEIN: I would. Thank you.

21 Your Honor, I know that this Court has heard many a
22 preliminary hearing, so it is not necessary to go over the
23 standard that is before the Court for the purposes of a
24 holding order. I know the Court is very well aware of that.
25 And although there may have been more public attention drawn
26 to this case, that doesn't change the standard and the
27 standards remains the same and the Court is very familiar
28 with applying that standard. In the case that I brought

1 before the Court, which I completed in the first two days,
2 the focus of that case has to do with the video. And it is
3 in that context that I would ask the Court to consider the
4 question whether or not there exists probable cause to hold
5 the defendant Johannes Mehserle to answer for the crime
6 charged of murder. As the Court knows, in order to find the
7 defendant -- find that there is sufficient cause to bind him
8 over for trial for that count, the elements of murder must
9 be shown by probable cause. As the Court is also well
10 aware, that the elements of murder are two-fold. One, you
11 must have the killing of one human being by another; two,
12 there must be malice, express or implied. Now in this
13 particular case, there is no question that Johannes Mehserle
14 caused the death of Oscar Grant. There is no question about
15 that. The only question is whether or not the evidence
16 shown in this case establishes by probable cause the mental
17 state of malice, and as I said, malice -- it is not defined
18 as what most people may think it is defined. If you are to
19 ask most people on the street, how do you define the word
20 "malice," they may say ill will or hatred. And as the Court
21 well knows, when you talk about the term "malice" in a court
22 of law, malice -- ill will or hatred has nothing to do with
23 that definition. In fact, the term "malice," has an
24 entirely different definition than ill will or hatred. The
25 definition of malice when you are talking about a murder
26 charge is defined as an intent to kill. An intent to kill.
27 And how do we determine someone's intent? Well, two ways.
28 First of all, and in this case, I think most clearly by the

1 act, by the act itself. And that is why these videotapes, I
2 would submit, are so crucial, are so significant. Because
3 as Mr. Schott testified, oftentimes videos can be very
4 helpful in investigating a crime. The reason for that is
5 that sometimes witnesses can see or hear things differently.
6 Sometimes a witness can see something that really didn't
7 happen and it doesn't mean the witness is lying; it's just
8 because that's human nature. In fact, the Court is well
9 aware that two people witnessing the same event can describe
10 it differently. But the same cannot be said for a
11 videotape, and that is why I think these videotapes are so
12 important, because they are not biased; they are not
13 recorded under stress like witness's accounts of certain
14 events may have been. And so these videotapes, I think, are
15 very significant in that regard. And what they clearly show
16 is an act of Mr. Mehserle pulling his gun, pointing it at
17 the back of Mr. Grant and firing his gun.

18 Now, in the evidence that I've used and what the
19 Court has accepted, there are some still frames where
20 Ms. Vicki Long has described how it was that she produced
21 them. She observed the video, and through working with the
22 computer that she works with, she was able to develop a
23 number of stills. And specifically I'm referring to
24 People's 4, frames from the Cross video, Frames 2336 through
25 and including 2343. And what you see in these stills, I
26 would submit, Your Honor, is Officer Mehserle not
27 willy-nilly grabbing his gun, rather he's looking at exactly
28 what he's doing, namely he's looking down towards his gun;

1 he's got his hand in around the holster of the gun itself
2 and he's looking at what he's doing. And you see that in
3 these frames, and that's important because when you ask the
4 question was there an intent to kill, well, if the officer
5 is looking at his gun as he's pulling it out, I think that
6 speaks strongly as to his knowledge and his awareness as to
7 what he is doing. Again, you look at the weapon used. I
8 mean, this is not an incident where someone is hit with a
9 baseball bat where one's intent could be in question. The
10 weapon used here was a firearm by a person who is trained to
11 use firearms. Undoubtedly, Mr. Mehserle knows that you do
12 not pull your gun from your holster unless you intend to
13 destroy something, and that you do not point your gun at
14 anything you do not intend to destroy. I think that's a
15 reasonable inference from the fact that he's a trained
16 police officer. And in this case, he did, in fact, withdraw
17 that gun, leaned over Oscar Grant as he was face down on the
18 platform, and he fired the gun not into his leg, his
19 shoulder, but into the center of his back. Now, that alone,
20 Your Honor, without any other evidence whatsoever, I would
21 submit supports a holding order in this case, but there's
22 more. In this case, the defense has chosen to put on a
23 case, and as the Court is also aware, that doesn't happen
24 very often. Typically in a preliminary hearing, the
25 District Attorney calls its witnesses and that's it. But in
26 this case, the defense chose to put on a case to support
27 their defense, called witnesses who they argue support an
28 affirmative defense.

1 Through cross-examination of those witnesses, Your
2 Honor, I believe that their testimony only serves to
3 establish one thing and that is it serves to establish that
4 they made every effort to make this scene more chaotic than
5 it was, and that they felt for some reason it was necessary
6 to exaggerate their level of fear when this happened. That
7 is what I believe their testimony showed. And without it,
8 you are still left with these videos and these stills which
9 in my mind, Your Honor, clearly, clearly show an intentional
10 killing and that that killing was done by the defendant,
11 Johannes Mehserle. Thank you.

12 THE COURT: Thank you, Mr. Stein.

13 Mr. Rains?

14 MR. RAINS: Thank you, Your Honor.

15 Your Honor, the issue that exists here for purposes
16 of this preliminary is whether this is a murder case or not.
17 And we submit to the Court that this is not a murder case.
18 And I understand the standard by which the Court will make a
19 holding order here, and I understand this is not a
20 determination of innocence or guilt. This is a
21 determination of probable cause. But there has to be some
22 evidence of each element of the offense charged. And we
23 know that it's a not a mystery to anybody in this courtroom
24 now, that the issue is whether or not the evidence indicates
25 that Mr. Mehserle acted with malice, either express or
26 implied, when he dealt with Mr. Grant and attempted to place
27 him under arrest after Mr. Grant was arrested, and
28 Mr. Mehserle was notified of that arrest by Officer Pirone.

1 As the Court is well aware from the preliminary
2 hearing brief I submitted, in order to be held to answer for
3 murder, that is to have malice, Mr. Mehserle must have acted
4 in a way that was dangerous to life. He must have done so
5 deliberately, and he must have done so with a conscious
6 disregard for life, with a conscious disregard for life.
7 Now, no officer shoots his or her Taser at somebody with a
8 conscious disregard for life. Somebody could shoot a weapon
9 at somebody with a conscious disregard for life, but not a
10 Taser. So the issue here is does the available evidence to
11 this Court indicate that Mr. Mehserle intended to tase
12 Mr. Grant or not. If the evidence does indicate that, and I
13 submit it does overwhelmingly, and almost without any other
14 qualification, then we have no malice. We have an intent to
15 tase, to not act in a conscious disregard for life, but in a
16 way to bring a struggling and resisting Oscar Grant into
17 custody and to get him into handcuffs, and that's what this
18 case presents.

19 Now I understand what Mr. Stein says about malice.
20 Yeah, it doesn't mean hatred or ill will, but malice -- you
21 know, I have no doubt that if Mr. Mehserle would have been
22 heard on the platform by a single person, just a single
23 person, uttering racial epithets, uttering hatred, uttering
24 profanity at one person, let alone Mr. Grant, that the DA
25 would have loved to have that in evidence and say, look at
26 this guy. He's out of control. He's mean. He hates these
27 folks, and he's taking out this aggression, and he's killing
28 Mr. Grant, and ultimately, because he's angry. But what do

1 we know about the evidence in this case? We know that
2 Officer Mehserle had just got done with his partner, Officer
3 Woffinden over at West Oakland, they watched a guy get his
4 gun cut of out his pants. They go to Fruitvale; they get to
5 Fruitvale -- two and a half minutes, two and a half minutes
6 before the fatal round is fired, and after Officer Pirone by
7 all accounts is concluded a confrontation with Mr. Grant
8 that Mehserle never sees. In other words, he gets there, he
9 doesn't know what's happened. He's just getting there in
10 response to a call for help. He gets there. He deals with
11 things, and the video is clear and the witnesses are clear,
12 that once he arrives, he is absolutely in control of
13 everything he does. We see him handcuffing Mr. Bryson. Is
14 there any animus? Is there hatred? Is there excessive
15 force? There's none. The one person who by all accounts
16 was in complete control up until a certain moment was
17 Johannes Mehserle. He was in control of his mouth; he was
18 in control of his emotions; he was in control of everything
19 until that moment arose when he saw what he thought was
20 Oscar Grant going for a gun. And he starts yelling at his
21 partner, Officer Pirone, "Tony, get up, get up. I can't get
22 his hands. I can't get his hands." And then interestingly
23 enough, rather than just shooting Mr. Grant, just shooting
24 him because he could have, he just stayed right there. He
25 could have stayed right there and shot him. But he stands
26 up -- he stands up and moves back and then he shoots.
27 That's consistent with an officer deploying a Taser.

28 Now I know that we showed this video, this still

1 frame. This is in evidence now. You heard testimony from
2 Officer Pirone about how an officer goes about getting a
3 Taser out of the holster. He does it by having the thumb up
4 here to push the snap, like in that top frame. An officer
5 doesn't get a gun out of the holster that way. That gun is
6 not coming out of that holster that way, because that's not
7 how you get a gun out of the holster, that's how you get the
8 Taser out of the holster, but there's Mehserle pulling on
9 his gun with his thumb up, and the gun is not coming. And
10 so then, we have frame 21,620, look at that gun. He's
11 pulling on that gun so hard that holster is coming out from
12 the belt, and he can't get the gun out. He can't get the
13 gun out. That's because he's using the motion to get the
14 Taser out. The gun is not coming. The gun finally came.
15 It finally came. But that's what was happening here, is an
16 officer who announced his intention to tase, who made the
17 motion to tase, who got up to tase, rather than to shoot
18 from a contact range. He got up and he moved back; he was
19 tasing this man, and lo and behold, the gun goes off. But
20 that's not where the evidence stops in this case. You know
21 what's notable about this case, is that there's not a single
22 witness, not a single witness who has testified under oath
23 or whose transcript has been admitted, who said that they
24 saw anything on Johannes Mehserle's face other than a look
25 of horror, of shock and horror at what had just happened.
26 This isn't the face of a man -- this is not the reaction of
27 a man who had intended to shoot a weapon, and had just
28 accomplished his goal. This was the look of a man who said

1 literally "Oh, shit. Oh, shit." And that's why there's no
2 malice here, Judge. There's no malice because all of
3 Mehserle's actions are consistent with a man who simply
4 intended to use a nonlethal weapon to subdue somebody who
5 was resisting him. And let's get this clear about this
6 record of resistance, because the first witness in this case
7 was Dr. Thomas Rogers who testified about the trajectory of
8 the bullet through Mr. Grant's back. The trajectory of the
9 bullet that went in on the left side and exited, actually,
10 lodged right at his right pectoralis, moving left to right
11 through the body at 30 degrees. And the video shows
12 clearly -- we have the video right after the shot is fired,
13 Mehserle is straight down, straight down at Mr. Grant, that
14 gun barrel is pointed at Mr. Grant. How in the world does
15 that round go left or right in the body at a 30-degree
16 angle, if he's standing right over this man and this man has
17 got his hands on his back like the DA once said. He's not
18 resisting and he's not moving. He's there waiting and he is
19 waiting to be handcuffed. And the answer is that's not
20 where he was. The DA of this county came into this
21 courtroom charging this man with murder and they tried to
22 prove that he shot Oscar Grant who was not resisting by
23 playing a video and hearing when the shot goes off and
24 hitting the stop button. When they had all this
25 sophisticated equipment and probably more than Mr. Schott
26 ever had, and they could have shown otherwise, that is how
27 they tried to prove that Mr. Grant wasn't resisting. The
28 problem was that he was resisting. The fact of the matter

1 is that he was resisting. The forensic evidence shows it;
2 the autopsy evidence shows it, and the video shows it,
3 because Mr. Grant's left shoulder is right up off the ground
4 at Frame Number 21,699, and that's why there's no malice
5 here. Mr. Mehserle was dealing with a resisting suspect who
6 he was trying to tase.

7 This was a tragic, tragic accident. His face showed
8 it; his gestures showed it; all of the evidence points to
9 it. And that is why when all is said and done in this case,
10 understanding the low standard that this Court is reminded
11 itself and repeated and it's been repeated it is a low
12 standard, but if there ever was, ever was a case where the
13 Court should say, you know what, the People failed to meet
14 even the lowest standard. They failed to meet. If there
15 ever was a case, right here, right here, this is it.

16 Thank you.

17 THE COURT: Thank you, Mr. Rains.

18 Mr. Stein?

19 MR. STEIN: Briefly. Thank you, Your Honor.

20 Two things that Counsel said I'd like to address.
21 First of all, the defense that's put forth here that
22 Mr. Mehserle was trying to tase Mr. Grant when he shot him
23 in the back, I think that one of the things that comes along
24 with doing the job that this Court does is that it becomes
25 intimately familiar with human nature, that's just a
26 byproduct of what this Court has to do and deal with, and
27 it's a product of having lived a little bit, I think. And I
28 think human nature is such that if Johannes Mehserle did as

1 Counsel wants this Court to believe, that he intended to
2 tase Mr. Grant when he shot him in the back, that human
3 nature tells us that not only would he have acted
4 differently than he did on that platform, that rather, I
5 don't think you would have been able to shut him up as to
6 what he did. And what I mean by that is that if somebody in
7 Mr. Mehserle's position fired a gun into the back of
8 someone, and when they realized the mistake they had made, I
9 think that they would have said repeatedly to anyone and
10 everyone who would listen, oh, my God. I made a mistake.
11 Oh, my God. I meant to pull my Taser. But we don't have
12 that here. We don't have that here, and in fact the record
13 is deafly silent on it. And when you ask the officers who
14 were called by the defense, Pirone, Domenici, Woffinden,
15 Knudtson, not a one of them -- not a one of them offered any
16 statement about what the defendant said to them consistent
17 with someone who accidentally shot someone with a firearm
18 when they meant to pull their Taser. And along those lines,
19 I offered in rebuttal Officer Foreman, Terry Foreman, who
20 was asked by the defendant to come and sit with him through
21 the process that an officer goes through after they've been
22 involved in a shooting, and it's not like they didn't talk
23 about some of what happened. They did. Officer Foreman
24 testified that Mr. Mehserle made statements like "He was
25 going for a gun. It was different. He was going for his
26 pocket." Not once during that five- to six-hour period, did
27 Mr. Mehserle ever say anything to the effect of it was a
28 mistake. I shot him with the wrong gun. I meant to use my

1 Taser. And Your Honor, human nature tells you that if that
2 was, in fact, the case, Officer Foreman would have been that
3 person, this counselor, this peer officer. Then in the days
4 following, Officer foreman spent much time with
5 Mr. Mehserle. And it's not like the incident didn't come
6 up, because it did. Granted they didn't go into detail,
7 granted that whenever it did come up, Officer Foreman said,
8 "I don't want to talk about the specifics," but what was
9 said, in my opinion, is inconsistent with a person who at
10 that time realized they had taken a human life, and that it
11 was all an accident. To me, human nature is inconsistent
12 with that type of behavior. I think he would have done
13 something different if he meant to do something different.

14 And lastly, with regard to the extent that Mr. Grant
15 was resisting, Mr. Rains makes reference to the position
16 that Oscar Grant was in at or around the time he was shot,
17 and from that he argues that clearly he was resisting. That
18 is not the only evidence that I'd ask the Court to consider.
19 I'd ask the Court to consider Mr. Grant on his knees in
20 front of these officers with his hands up in front of him.
21 I'd ask the Court to consider Mr. Grant trying to hold back
22 Jackie Bryson when Jackie Bryson has seen how Mr. Michael
23 Greer was taken down by Officer Pirone. And I would ask
24 this Court to also consider the statements Mr. Grant made
25 about his daughter. Are those statements that are
26 consistent with someone who was resisting? I think not.

27 Thank you.

28 THE COURT: All right. Thank you, both counsel.

1 It's interesting in the sense that when I first got this
2 case, I had my own concerns regarding these charges against
3 Mr. Mehserle. And I think Mr. Rains opened up with, this is
4 the first time we had a peace officer charged with murder in
5 an officer-involved shooting. And I was also checking the
6 case law as it related to this matter, and I think it's the
7 first time that we don't have an officer after the shooting
8 giving a statement indicating what their state of mind was
9 at the time that the offense occurred. Now, as we got into
10 this, I'll tell you as I said earlier today, the
11 confrontation clause really works, because when you get the
12 other sides of the story, I think the more information you
13 gather. Both Mr. Stein and Mr. Rains, you did an
14 exceptional job in cross-examining the witnesses. And it
15 was through your cross-examinations, I think Mr. Rains'
16 cross-examinations of Mr. Liu, and Mr. Stein, your
17 cross-examination of the other officers, that swayed this
18 Court as to the decision that I have to make, because I
19 gathered a wealth of information that I didn't have before,
20 and it wasn't apparent on the record. And I kind of
21 disagree with the lawyers in the sense that this case is not
22 really about the videotape taken by the numerous individuals
23 as this Court sees it. This case really boils down to the
24 state of mind of Mr. Mehserle at the time that he committed
25 this act. The videos in this case, it captures the
26 shooting; it provides us with a synopsis of what is taking
27 place at the scene up and through the shooting for a period
28 of time. It provides us with a picture of the conduct of

1 the individuals, the BART officers and others on the BART
2 platform as well as the conduct of the victim in this
3 matter, Mr. Oscar Grant, prior to the time he was shot.

4 At a preliminary hearing, a holding order for the
5 charges filed on the Complaint is appropriate if there is
6 some rational ground for assuming the possibility that an
7 offense has been committed and the accused is guilty
8 thereof. Rational ground. Reasonable and probable cause
9 may exist, although, there may be some room for doubt. The
10 quantum of evidence sufficient for a holding order is less
11 than substantial evidence required to sustain a conviction
12 on appeal.

13 It is clear Mr. Mehserle shot Oscar Grant. It is
14 clear Oscar Grant was unarmed. Now, Mr. Rains has argued to
15 this Court that there exists a legal justification or a
16 legal excuse under the law which would either completely
17 exonerate the defendant for his act or reduce the act to a
18 lesser included criminal offense of maybe manslaughter.
19 Now, this argument is totally dependent upon what this
20 defendant's state of mind was at the time that he committed
21 this act. The defendant didn't give a statement, except for
22 the statement that Mr. Foreman attributes really to him
23 after things occurred in this matter. And defendant has not
24 testified at this preliminary examination, so the only means
25 of determining what defendant's possible state of mind is
26 through the circumstance of the evidence that was presented.
27 I say "possibly" because the inference has to be drawn by
28 the Court through the witnesses as to what Defendant was

1 possibly thinking at the time, and even that is truly
2 speculation in some sense. To excuse the defendant's act,
3 would be to completely exonerate the defendant and to
4 dismiss the charges against the defendant, because to excuse
5 his act, the Court would have to make a finding that the
6 defendant's act of shooting the victim was an accident. On
7 this record and at this hearing, there is no competent
8 evidence which will support this Court making that finding.
9 "Oh, my God. Oh, my God," these words were attributed to
10 the defendant and was part of the focus of the inquiry that
11 after the shooting, the defendant must have shot his Taser.
12 But what does it mean? Oh, my God, I shot my gun. Oh, my
13 God, he didn't have a weapon. Oh, my God, he didn't reach
14 for a weapon. Oh, my God, he shot an unarmed man. Oh, my
15 God, all these people just saw me shoot this man. Oh, my
16 God, I thought he pulled a gun. Oh, my God, I pulled my gun
17 and I made a mistake. Oh, my God, I thought I pulled my
18 Taser. That coupled with the fact that you have the
19 statements attributed to the defendant by Officer Pirone,
20 when he says the defendant says, "I'm going to tase him,"
21 then after he shoots him he says, "I thought he had a gun."
22 Did he change his mind about tasing him? I think that
23 changes the dynamics. When he tells Foreman, "I thought he
24 had a gun," that changes the dynamics. And when he says to
25 Foreman as he does to Pirone, "His hand was going for his
26 waistband," and then he hears a pop, is that to justify his
27 conduct? On this record, assuming the defendant made that
28 statement that's been attributed to him by others, that

1 evidence is not sufficient to support a state of mind that
2 would excuse defendant's act for shooting Oscar Grant but
3 the inquiry doesn't stop there. The next question is, is
4 there evidence justifying defendant's act under the law?
5 Does it mitigate what he did? What is the record at this
6 time that supports the defendant's state of mind that he
7 acted in self-defense or in the defense of others thus
8 justifying his conduct? Now, if the defendant is alleging
9 he acted in self-defense because he believed he and his
10 fellow officers were in peril, then the defendant would thus
11 have to admit that his act was intentional and not an
12 accident. However, I don't believe when I review this
13 video, that individuals can create a circumstance in a
14 situation to rely on that situation to justify the peril. I
15 mean, despite what the confused situation was, just prior to
16 Oscar Grant being shot, he and others were sitting down
17 against the wall at the BART platform. Mr. Grant had a cell
18 phone camera in his hands which appeared from the video he
19 was attempting to document the conduct of the BART officers.
20 Now, as you recall, and I brought this up when we were
21 talking about in Mr. Stein's cross-examination of Rogers,
22 and the film section 595, where you hear Mr. Stein ask -- I
23 asked him to play it back and you hear the officer -- and
24 Officer Pirone identified his voice -- and attribute to
25 Officer Pirone who says, "You can't take pictures," and then
26 subsequently the officer slammed Mr. Grant down on the
27 ground, and then you also hear him make these other
28 statements. Within seconds, Oscar Grant is shot.

1 Oscar Grant and the others, maybe they are loud and
2 somewhat uncooperative and argumentative, but those young
3 men as the videotape shows, did nothing to warrant the use
4 of deadly force, in particular, that force used against
5 Oscar Grant. Self-defense or defense of others is not
6 justified under these limited facts before this Court.
7 However, the inquiry doesn't stop there. Is there a set of
8 facts on this record that would lead this Court to find an
9 application of imperfect self-defense, that is, to apply
10 this doctrine the evidence would have to show that the
11 defendant had a good-faith belief that the actions he took
12 was justified under the circumstances. However, when I
13 review this, once again the evidence here, I cannot make
14 that -- I can't take that leap. Had I heard directly from
15 the defendant, maybe I could draw those conclusions, but I
16 haven't. I don't know what he was thinking at the time that
17 he shot Oscar Grant. He didn't testify before this Court,
18 and I can't make this finding of imperfect self-defense.
19 That's what would be necessary.

20 In this case, the videos are conclusive that the
21 defendant shot the victim. None of the videos clearly
22 provide, I think, a clear picture of what the defendant's
23 state of mind was at the time. However, when you listen to
24 the testimony of those officers, it really sets the tone of
25 defendant's action. You have the testimony of BART Officer
26 Woffinden who tells us that just prior to him, Mehserle, his
27 partner, arriving at the Fruitvale station, it was New
28 Year's Eve, that just before arriving at Fruitvale station,

1 they had witnessed an encounter where a subject who had been
2 in some type of incident on BART, had been searched and had
3 a gun. That prior to the West Oakland encounter, they were
4 aware of another incident in San Francisco where a gun had
5 been involved. That his state of mind was in an elevated
6 state as he and the defendant traveled to Fruitvale and that
7 their adrenaline was rushing and that scared thoughts were
8 going through his mind as well as his thoughts of his family
9 and his wife and his kids. Their state of mind leaving West
10 Oakland to Fruitvale was arriving in general uncertainty.
11 Woffinden, Pirone, Knudtson and Domenici, they all talk
12 about it. They all talk about it. They were aware of these
13 other incidents with guns, and their state was elevated.
14 And Woffinden says, you know, when they get there at the
15 scene, it was extremely noisy, they were being taunted; it
16 was chaotic; there was no respect for the group. He pulled
17 his baton, and you saw it in the video, however, he didn't
18 pull his emergency button. What he was doing, his back was
19 to the action with what was happening with Mr. Mehserle.
20 All these officers talked about there were so many threats
21 and there was a fear for their safety.

22 Now, I know this was a 242 call. And I think
23 Mr. Stein alluded to it because, you know, Oakland officers
24 wouldn't have come here. Remember the OPD, and their state
25 would not have been elevated. I'm not certain I can trust
26 what Officer Pirone said, but I am certain when he said, and
27 it was on Mr. Stein's cross-examination, that he believed
28 that Mr. Grant posed an imminent threat of death to them.

1 And then, in fact, after Mr. Grant had been shot, he said he
2 had Officer Mehserle handcuff him, because he still wasn't
3 sure he had a weapon or not. There's no doubt in my mind
4 that Mr. Mehserle intended to shoot Oscar Grant with a gun
5 and not a Taser. However, I think coupled with that, the
6 most telling and compelling testimony, because as I said,
7 the video doesn't tell you as much as -- I think when you
8 listen to Mr. Liu, and Mr. Liu explains on the
9 cross-examination of Mr. Rains, you know, he says it didn't
10 look like Oscar Grant was resisting. He said, "Grant had
11 his arms moving up and down," but he said that Officer
12 Mehserle, and you saw him while on his knees near the
13 victim, pulled out his pistol from his right belt. And then
14 he sees Officer Mehserle stand up, he moves slightly back,
15 he grabs his gun with both hands, which is consistent with
16 what Pirone says, at waist level and he fires into him.
17 This is the only real description on this record of what
18 happened. We have a video, but that testimony of Liu,
19 because believing that testimony and believing what Pirone
20 said about the defendant using both hands, that would be
21 totally inconsistent with the testimony they gave this Court
22 about using a Taser and always grabbing it with their weak
23 hand. The fact that he grabbed it with his right hand and
24 the testimony is he took two hands and shot down at the
25 victim, tells me that it's consistent with his intent to
26 shoot the victim at that time.

27 Now, there's a question on the record of whether or
28 not there was this ill will, but I think the record is clear

1 that the act in itself, that it was a dangerous act and it
2 was an intentional act, and it was deliberately done with
3 the knowledge of shooting that weapon, you kill somebody.
4 Without his state of mind, I think an unlawful killing by a
5 human being of another with malice and without legal
6 justification, as I believe in this case, is murder. The
7 facts as presented here on this record, because we all
8 operate on this record now that the standard is so low,
9 without more, clearly supports a probable cause finding that
10 there's been sufficient evidence presented for this
11 defendant to stand trial for the murder of Oscar Grant.

12 That being the case, it appears to me that the
13 felony offense, to wit, a violation of section 187(a) of the
14 Penal Code and the use clause and the GBI have been
15 committed, and that there's sufficient cause to believe the
16 defendant, Johannes Mehserle, guilty thereof, I order the
17 defendant to be held to answer to the same. The Superior of
18 the State of California, in and for the County of Alameda,
19 and order the defendant appear in Department 11 on June the
20 18th, the year 2009 at 9:01 a.m.

21 He's currently admitted to bail on the sum of 3
22 million dollars. He'll continue on that bail. That will be
23 the order.

24 MR. RAINS: What was the date?

25 THE COURT: June 18th.

26 ----oOo----

27

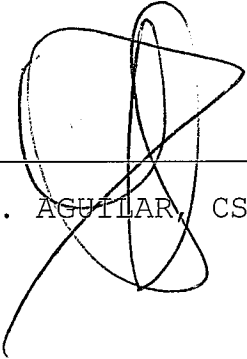
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

STATE OF CALIFORNIA) SS.
COUNTY OF ALAMEDA)

I, THERESA AGUILAR, official reporter of the Superior Court of the State of California, County of Alameda, do hereby certify that I accurately reported the within entitled matter and that the foregoing pages constitute a full, true and correct transcription of my shorthand notes of the oral proceedings in the said matter

DATED: 6-17-09



THERESA A. AGUILAR, CSR 10498