



OFFICE OF THE

DISTRICT ATTORNEY

ORANGE COUNTY, CALIFORNIA

TODD SPITZER, DISTRICT ATTORNEY

March 18, 2019

Chief Robert Sharpnack
Costa Mesa Police Department
99 Fair Dr.
Costa Mesa, CA 92626

Re: Officer-Involved Shooting on August 14, 2018
Non-Fatal Incident involving Bradley Montgomery
District Attorney Investigations Case # 18-029
Costa Mesa Police Department Case # 18-011140
Orange County Crime Laboratory Case #18-51612

Dear Chief Robert Sharpnack,

Please accept this letter detailing the Orange County District Attorney's (OCDA) Office's investigation and legal conclusion in connection with the above-listed incident involving on-duty Costa Mesa Police Department (CMPD) Officer Dana Potts. Bradley Montgomery, 49, survived his injuries. The incident occurred in the City of Costa Mesa on Aug. 14, 2018.

OVERVIEW

This letter contains a description of the scope and the legal conclusions resulting from the OCDA's investigation of the Aug. 14, 2018, non-fatal, officer-involved shooting of Bradley Montgomery. The letter includes an overview of the OCDA's investigative methodology and procedures employed, as well as a description of the relevant evidence examined, witnesses interviewed, factual findings, and legal principles applied in analyzing the incident and determining whether there was criminal culpability on the part of the CMPD officer-involved in the shooting. The format of this document was developed by the OCDA, at the request of many Orange County police agencies, to foster greater accountability and transparency in law enforcement.

On Aug. 14, 2018, Investigators from the OCDA Special Assignment Unit (OCDASAU) responded to this incident. During the course of this investigation, six interviews were conducted, and four additional witnesses were contacted during the supplemental canvass interviews. OCDASAU Investigators also obtained and reviewed the following: Costa Mesa reports, audio dispatch and radio traffic recordings; Orange County Crime Laboratory (OCCL) reports, officer processing and firearms examination reports; crime scene investigation photographs; photographs related to the injuries sustained by Montgomery; criminal history records related to Montgomery including prior incident reports; DAR recordings, and other relevant reports and materials including audio recordings of the conducted neighborhood canvass.

The OCDA conducted an independent and thorough investigation of the facts and circumstances of this incident and has reviewed all evidence and legal standards impartially. The scope and findings of this review are expressly limited to determining whether any criminal conduct occurred on the part of CMPD officers or personnel, specifically Officer Potts. The OCDA will not be addressing any possible issues relating to policy, training, tactics, or civil liability.

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In a case where there is an officer-involved shooting incident and the OCDA files criminal charges against the individual shot by the police, it is the OCDA's policy not to release the final report regarding the officer-involved shooting incident until after the issue of guilt is decided in the underlying filed criminal case. This policy is in place to ensure that the OCDA does not release any information that may be viewed as prejudicial to the right of the defendant to receive a fair trial while his or her case is still pending.

INVESTIGATIVE METHODOLOGY

Among other duties, the OCDASAU is responsible for investigating officer-involved shootings within Orange County when someone has been injured as a result of police gunfire. An OCDASAU Investigator is assigned as a case agent and is supported by other OCDASAU Investigators, as well as Investigators from other OCDA units. Six Investigators are assigned to the OCDASAU on a full-time basis. There are additional OCDA Investigators assigned to other units in the office trained to assist when needed. On average, eight Investigators respond to an incident within an hour of being called. The Investigators assigned to respond to an incident perform a variety of investigative functions that include witness interviews, neighborhood canvass, crime scene processing and evidence collection, vehicle processing, and hospital investigative responsibilities as needed. The OCDASAU audio records all interviews, and the OCCL processes all physical evidence related to the investigation.

When the OCDASAU Investigator has concluded the investigation, the file is turned over to a veteran Deputy District Attorney for legal review. Deputy District Attorneys from the Homicide, TARGET/Gangs, and Special Prosecutions Units review fatal and non-fatal officer-involved shootings and custodial death cases, and determine whether criminal charges are appropriate. Throughout the review process, the assigned prosecutor will be in consultation with the Senior Assistant District Attorney supervising the Operations IV Division of the OCDA, who will eventually review and approve any legal conclusions and resulting memos. The case may often be reviewed by multiple veteran prosecutors, their supervisors, and the District Attorney. If necessary, the reviewing prosecutor may send the case back for further investigation.

An important part of the investigation of an incident such as this is attempting to obtain a statement from the involved officers. Officer Potts declined to give a voluntary statement to OCDA Investigators.

FACTUAL SUMMARY

On Aug. 14, 2018, at approximately 4:57 a.m., CMPD responded to a report that a male; short, average build, dressed in all black, jumped out of the back of a parked vehicle and was trying to break into the patio of a residence. The reporting party first heard the suspect attempting to force open the locked door of the patio, hearing the door rattle loudly. The reporting party then witnessed the suspect trying to climb over the gate to get into the patio of the residence.

Officer Potts and Officer Gallardo responded to the address and began to look for the suspect near the surrounding area and row of apartment residences that the suspect was attempting to break into. Officer Gallardo began checking the dumpster enclosure and parked cars while Officer Potts checked the nearby garages of the homes. Neither officer had their firearm drawn while they checked the surrounding areas of the residences.

Officer Gallardo stopped at the bottom of the stairs north of the patio of the residence where the suspect had been seen climbing the fence. Officer Gallardo saw Officer Potts begin to move toward a wall north of the patio and then west onto a grass area. Officer Gallardo heard a gun being drawn from a holster and a single gunshot. Immediately after the shot was fired, Officer Potts is heard on his DAR (digital audio recorder) saying "Oh shoot" and approximately eight seconds later saying "What did you have in your hands?" Officer Potts then advanced toward the front door of the residence that the suspect was breaking into to find the suspect, Bradley Montgomery, lying on the ground with a single gunshot wound to his abdomen. Montgomery was lying face up immediately after the shot was fired, and was subsequently turned over so as to handcuff him.

Officer Novikoff arrived on scene prior to the shooting and attempted to locate the other officers. He heard a single gunshot fired, broadcasted over the police radio that a shot had been fired, and jumped the fence to see Montgomery on the ground being handcuffed by Officers Potts and Gallardo. Officer Novikoff asked what happened and Officer Potts

responded, "It looked like he had something in his hand" or "I thought he had something in his hand." Officer Novikoff could not recall the exact phrasing.

Officers immediately broadcasted via the police radio request for paramedics and handcuffed Montgomery. Officers moved Montgomery to the street so they would better be able to administer aid to him. Officer Potts questioned Montgomery by asking, "What did you have in your hand...a metal stick..?" Montgomery denied having anything in his hand. Two different metal objects that fit the description of a "metal stick" were located near the area that Officer Potts found Montgomery trying to break into the residence. These items were photographed and taken into evidence. Montgomery was exhibiting extremely erratic behavior and was rambling continuously. Officers placed gauze over his wound and applied pressure to both the entrance and exit wound.

When Costa Mesa Fire Department (CMFD) arrived on the scene, the responding paramedic saw no immediate signs of trauma on Montgomery. The Paramedic believed, based on Montgomery's incoherent ramblings and erratic behavior that Montgomery was under the influence of methamphetamine. The paramedic examined Montgomery and found a single "through and through" gunshot wound to Montgomery's lower right abdomen and right lower back area. Montgomery's vital signs were normal, his wounds were dressed and he was prepared for transport. Costa Mesa paramedics transported Montgomery to Orange County Global Medical Center. En route, Montgomery was combative, sweating profusely, and attempting to remove the equipment that monitored his vital signs. Montgomery was determined to be under the influence of methamphetamine. Montgomery was uncooperative and very agitated with medical staff. Montgomery was in stable condition and his injury did not require surgery. Montgomery was treated for non-life threatening injuries of a "through and through" gunshot wound to the right side of his abdomen area.

Montgomery refused to speak to the investigators and refused to release his hospital medical records.

EVIDENCE COLLECTED

The following items of evidence were collected and examined:

- One (1) cartridge case, head stamp "WIN 9mm LUGER"
- One (1) expanded bullet
- One (1) swab

EVIDENCE ANALYSIS

Firearms Examination

Officer Pott's semi-automatic handgun pistol was collected. The pistol was test fired at the OCCL and fired without malfunction. The expanded bullet from the scene was determined to have been fired from Officer Pott's pistol.

MONTGOMERY'S PRIOR CRIMINAL HISTORY

Montgomery's criminal history was reviewed and considered. Montgomery had a California Criminal History that dates back to 1997. He has previously been arrested for the following charges:

- Under the Influence of a Controlled Substance
- Battery on a Peace Officer
- Obstruct and Resist a Peace Officer
- Burglary
- Forgery with Intent to Defraud
- Theft
- Possession of a Controlled Substance
- Trespassing
- Unlawfully Entering a Non-Commercial Dwelling
- Loitering on Private Property
- Driving While under the Influence-Alcohol/Drugs

- Possession of a Controlled Substance in Prison
- Possession of Drug Paraphernalia

MONTGOMERY'S POST-INCIDENT CONVICTION

On Dec. 18, 2018, the OCDA filed a criminal complaint against Montgomery in Orange County Superior Court Case Number 18WM17075, accusing him of Prowling, a misdemeanor, in violation of California Penal Code section 647 (h). On Feb.19, 2019, Montgomery pleaded guilty and was sentenced to 30 days in custody.

STANDARD LEGAL PRINCIPLES IN OFFICER-INVOLVED SHOOTING CASES

Possible criminal charges against an officer involved in a non-fatal shooting include attempted murder [Penal Code Section 664/187], assault with a deadly weapon [Penal Code Section 245], and assault by a police officer [Penal Code Section 149]. In order to convict an officer of any of these charges. it would be necessary to prove beyond a reasonable doubt that no legal justification(s) existed for the officer's actions. (*People v. Adrian* (1982) 135 Cal.App.3d 335, 340-342.) Several such justifications may apply in any given case and they are set forth in Penal Code Sections 196, 197 and 835a.

California Penal Code Section 196 provides that use of deadly force by a public officer is justifiable when necessarily used in arresting persons who are "charged with a felony" and who are fleeing from justice or resisting such arrest. Section 196 applies both where the suspect in question is "charged with a felony" and where the officer has "reasonable cause" to believe that the person has committed a felony. (*Kortum v. Alkire* (1977) 69 Cal.App.3d 325, 332.) The felony must involve violence or the threat of violence. (*Id.* at 333.)

California Penal Code Section 197 provides that the use of deadly force by any person is justifiable when used in self-defense or in defense of others.

California Penal Code Section 835a allows any police officer who has reasonable cause to believe that a person to be arrested has committed a felony [public offense] to use reasonable force to effect the arrest, to prevent escape, or to overcome resistance. The section further provides that a police officer "who makes or attempts to make an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance." The Court of Appeal in *Kortum* further held that deadly force against a fleeing felony suspect is justifiable only when the felony "is of the violent variety, *i.e.*, a forcible and atrocious one which threatens death or serious bodily harm, or there are other circumstances which reasonably create a fear of death or serious bodily harm to the officer or to another." (*Kortum v. Alkire, supra*, 69 Cal.App.3d at p. 333.)

In addition, Penal Code section 834a requires that if a person has knowledge, or by the exercise of reasonable care, should have knowledge, that he/she is being arrested by a peace officer, that person must refrain from using force or any weapon to resist such arrest.

Similarly, the relevant Criminal Jury Instruction as written by the Judicial Council of California and set forth in CALCRIM 3470 permits a person being assaulted to defend himself/herself from attack if, as a reasonable person, he/she had grounds for believing and did believe that bodily injury was about to be inflicted upon him/her or upon another person. In doing so, such person may immediately use all force and means which he believes to be reasonably necessary and which would appear to a reasonable person, in the same or similar circumstances, to be necessary to defend against that danger and to prevent the injury which appears to be imminent.

The law as detailed in CALCRIM 3470 and in well-settled case law therefore permits a person, if confronted by the appearance of danger which arouses in his/her mind, as a reasonable person, an honest fear and conviction that he/she or another person is about to suffer bodily injury, to act in self-defense or defense of others upon such appearances, and from such fear and honest convictions. The person's right of self-defense is the same whether the danger is real or merely apparent. (*People v. Jackson* (1965) 233 Cal.App.2d 639, 641-642.)

Nevertheless, the above justifications must be interpreted in light of United States Supreme Court precedent that limits the right of a police officer to use deadly force. (*People v. Martin* (1985) 168 Cal.App.3d 1111, 1124.) Thus, in *Tennessee v. Garner* (1985) 471 U.S. 1, 3, the United States Supreme Court ruled that a police officer is entitled to use deadly force only when “the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.”

This limitation was, however, clarified subsequently by the United States Supreme Court in the seminal case of *Graham v. Connor* (1989) 490 U.S. 386, wherein the Supreme Court explained that an officer’s right to use force [*i.e.*, his/her weapon] is to be analyzed under the Fourth Amendment’s “objective reasonableness” standard. The Supreme Court further stated that the determination of the reasonableness of an officer’s use of force “must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation” (*Id.* at 396-397.)

The United States Supreme Court’s analysis and teachings in *Graham* are applicable to the circumstances surrounding the interactions of Costa Mesa Officer Potts with Montgomery.

LEGAL ANALYSIS

The issue in this case is whether the conduct of Officer Potts on Aug. 14, 2018 was criminally culpable and without justification. As stated above, in order to charge Officer Potts with a criminal violation, it is required that the prosecution be able to prove beyond a reasonable doubt that no legal justification existed for the police officers’ conduct. Therefore, in order to lawfully charge Officer Potts with a crime, the prosecution must prove beyond a reasonable doubt that he did not act in lawful self-defense. If the actions that day of Officer Potts were justifiable as lawful self-defense or defense of others, then criminal charges will not be warranted.

As the Court of Appeal held in a recent case, it is well settled that “unlike private citizens, police officers act under color of law to protect the public interest. They are charged with acting affirmatively and using force as part of their duties, because ‘the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effectuate it.’ Police officers are, in short, not similarly situated to the ordinary battery defendant and need not be treated the same. In these cases, then, the [] police officer is in the exercise of the privilege of protecting the public peace and order and he is entitled to the even greater use of force than might be in the same circumstances required for self-defense.” (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 527.)

Where potential dangerous, emergency conditions or other exigent circumstances exist, the California Courts of Appeal have noted that the Supreme Court’s definition of reasonableness is comparatively generous to the police. The court in *Brown* noted that in effect, “the Supreme Court intends to surround the police who make these on-the-spot choices in dangerous situations with a fairly wide zone of protection in close cases. A police officer’s use of deadly force is reasonable if the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. Thus, an officer may reasonably use deadly force when he or she confronts an armed suspect in close proximity whose actions indicate an intent to attack.” (*Brown v. Ransweiler, supra*, 171 Cal.App.4th at p. 528.)

The evidence reviewed in this case supports the conclusion that the OCDA will not be able to prove beyond a reasonable doubt that Officer Potts did not reasonably believe that Montgomery posed a significant threat of death or serious physical injury to himself and others. This is based on the totality of the circumstances, including the conduct of Montgomery in the moments leading up to the shooting.

On Aug. 14, 2018 Officer Potts had information that Montgomery was witnessed trying forcefully to break into a residence and then was observed dressed in all black, in the dark, trying to climb over a tall, gated patio, to break into the residence. It appears reasonable to conclude that Officer Potts believed he saw Montgomery holding a weapon before firing at him. Officer Potts asked Montgomery twice where the “metal stick” he had been holding was located. Montgomery was near the entryway of the residence when shot by Officer Potts. CMPD officers observed that Montgomery was exhibiting

objective symptoms that he was under the influence of a controlled substance. Costa Mesa Police Officers responded quickly and Paramedics were dispatched immediately. Montgomery received expedient and appropriate medical attention. Costa Mesa Fire Paramedics and the Medical Staff at Orange County Global Medical Center observed Montgomery acting erratic, uncooperative, rambling uncontrollably and under the influence of methamphetamine. Montgomery refused to give a statement.

Therefore, based on all the available evidence, it appears that Officer Potts acted justifiably when he shot Montgomery. It was dark, Montgomery was dressed in black, was observed climbing over a wall into an enclosed, locked patio which had an open sliding glass door of a residence. This could have reasonably created a belief in Officer Potts' mind that the use of lethal force was necessary to stop the threat that Montgomery was posing.

Certainly, it would have been preferable if the OCDA were able to obtain a voluntary statement from Officer Potts regarding his observations and state of mind at the time of the shooting. However, Officer Potts' decision to decline to give the OCDA a voluntary statement may not legally and ethically be used to draw negative evidentiary inferences regarding the conduct and the state of mind of Officer Potts.

It should also be noted that, in order for Officer Potts to be justly and lawfully charged and convicted with a crime in this incident, it is the OCDA's burden to prove beyond a reasonable doubt that Officer Potts did not act in reasonable and justifiable self-defense or defense of another when he shot at Montgomery. As should be apparent from the above-described analysis, the prosecution would be unable to carry this burden in this case. Montgomery's refusal to give a statement to the OCDA also creates an additional hurdle in the ability to uncover and prove any criminal conduct on the part of Officer Potts. A jury analyzing these facts could justly conclude that it was reasonable for Officer Potts to believe that his life and the lives of others in the residence were in danger. Therefore, there is a lack of sufficient evidence to prove beyond a reasonable doubt that Officer Potts committed a crime when he shot at Montgomery.

CONCLUSION

Based upon a review of all of the evidence provided to and obtained by the OCDA, and based on the entirety of the facts contained in all the available reports and interviews reviewed, and pursuant to the applicable legal principles, it is our legal opinion that there is a lack of sufficient evidence to prove beyond a reasonable doubt criminal culpability on the part of Officer Potts when he shot Bradley Montgomery on Aug. 14, 2018.

Accordingly, the OCDA is closing its inquiry into this incident.



HEATHER BROWN
Senior Deputy District Attorney
Homicide Unit



Read and Approved by **EBRAHIM BAYTIEH**
Senior Assistant District Attorney - Operations IV