



OFFICE OF THE
DISTRICT ATTORNEY
ORANGE COUNTY, CALIFORNIA

TODD SPITZER

April 3, 2019

Sheriff Don Barnes
Orange County Sheriff's Department
550 N. Flower Street
Santa Ana, CA 92703

Re: Deputy-Involved Shooting on January 19, 2018
Non-Fatal Incident involving Randall Wayne Allen
District Attorney Investigations Case # S.A. 18-002
Orange County Sheriff's Department Case # 18-002705
Orange County Crime Laboratory FR # 18-41247

Dear Sheriff Barnes,

Please accept this letter detailing the Orange County District Attorney's Office's (OCDA) Investigation and legal conclusion in connection with the above listed incident involving on-duty Orange County Sheriff's Department (OCSD) Deputies Robert Tomasko and Anthony Garza. Randall Wayne Allen, 23, survived his injuries. This incident occurred in the City of Lake Forest on January 19, 2018.

OVERVIEW

This letter contains a description of the scope and the legal conclusions resulting from the OCDA's investigation of the January 19, 2018, non-fatal, officer-involved shooting of Randall Wayne Allen. 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 OCSD deputies 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 January 19, 2018, Investigators from the OCDA Special Assignment Unit (OCDASAU) responded to this incident. During the course of this investigation, 19 interviews were conducted, and 18 additional witnesses were contacted during the supplemental canvass interviews. OCDASAU Investigators also obtained and reviewed the following: Orange County Sheriff's Department reports, audio dispatch and radio traffic recordings; Orange County Crime Laboratory (OCCL) reports, including toxicology and forensic alcohol examination; deputy processing and firearms examination reports; crime scene investigation photographs; medical records and photographs related to the injuries sustained by Allen; Orange County Fire Authority (OCFA) records; criminal history records related to Allen; Patrol Video System (PVS) from OCSD patrol vehicles; civilian video recordings; and other relevant reports and materials including audio recordings of the conducted neighborhood canvass.

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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 OCSO deputies or personnel, specifically Deputies Tomasko and Garza. The OCDA will not be addressing any possible issues relating to policy, training, tactics, or civil liability.

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 prejudicing the right of a defendant to receive a fair trial while his or her case is still pending.

An important part of the investigation of an incident such as this is attempting to obtain a statement from the involved Deputies. Deputies Tomasko and Garza gave separate and voluntary statements to OCDA Investigators on February 13, 2018.

FACTUAL SUMMARY

On January 19, 2018, at approximately 12:50 p.m., Allen sent a text to his family members saying, "I'm sorry." Allen had a history of mental illness and had discussed suicide. Allen's father was immediately concerned that Allen's text was a suicide note. Allen had been diagnosed three years earlier with bipolar disorder, and was taking multiple medications. Allen had been hospitalized a year prior for self-cutting while he was attending rehabilitation for methamphetamine use. The week prior, Allen disclosed to his parents that he had been using methamphetamine, self-medicating, and was not taking his medication because he did not need it. On multiple occasions, Allen told his father that he did not see a reason to live, and if things got bad enough, he was going to kill himself. One of the ways Allen said he would commit suicide was to do things that would make police officers shoot him, or he would overdose on heroin.

Allen's father went to Allen's apartment in Mission Viejo after receiving the text. When Allen's father arrived, he saw Allen come out of the apartment, shirtless and clenching a small kitchen knife in his teeth with blood on his face. Allen told his father he needed to leave the area and proceeded quickly down the stairs. Allen's father was unable to catch Allen. Allen's mother called an Orange County crisis assessment team, who suggested they call the police because his whereabouts were unknown.

At approximately 3:55 p.m., a citizen called 911 reference a man driving a Toyota Yaris with shaving cream on the rear of the vehicle, in the area of El Toro Road and Trabuco Canyon in Lake Forest. The caller said Allen looked, "off his rocker," was wearing a scary clown mask, no shirt, flailing around his vehicle with cans in his hands, and appeared to be "drugged out or something." Dispatch broadcasted this information to deputies. At approximately 4 p.m., Allen went to Rosetta Genomics at 25901 Commercentre Drive, in Lake Forest, approximately three miles from where he was seen by the caller. Allen placed a black bag containing personal items, five Butane cans, and a can of shaving cream on the ground in one of the empty parking stalls, where he lit them on fire. Surveillance footage from the building showed Allen leaving in his vehicle at approximately 4:05 p.m.

At approximately 4:10 p.m., Allen drove to Walmart on Towne Centre Drive in Lake Forest, approximately two and one half miles from Rosetta Genomics. Surveillance footage shows Allen's gray Toyota Yaris parked near the pharmacy entrance. Deputies received reports through dispatch of a male with a machete and mask who entered Walmart. Allen entered the store wearing a hat, a white mask, no shirt, and black shorts. Allen went to the sporting goods aisle and sliced open a packaged Powerline 340 BB gun with the machete, removed the BB gun, placed the BB gun behind his back in his waistband and left the store. Deputies responded and were unable to locate Allen. They did see a trail of blood from the entrance to the sporting good aisle. Allen's parents called 911 at 4:25 p.m. and told dispatch their son left his apartment with a knife, was suicidal, needed help, and was not taking his medications.

At approximately 4:30 p.m., Allen entered the Up in Smoke shop on Raymond Drive in Lake Forest, approximately six miles from Walmart. Allen wore a black Batman mask and carried a machete in his right hand. Allen had blood on his hands and two cuts on his face. He asked for a small pipe, which the employees gave him so he would leave the store. Allen took the pipe and left. Employees called 911, and deputies were informed of this incident by dispatch.

Allen then drove his vehicle to Kathy Avenue, a residential area in Lake Forest, approximately two and one half miles from the smoke shop. He left his vehicle parked along the curb of Kathy Avenue and walked through the residential neighborhood. At approximately 4:42 p.m., Jane Doe 1 saw Allen walking through her backyard on Heidi Avenue, around the corner from Kathy Avenue. He was carrying a machete and what appeared to be a gun. Allen went to the front door and knocked. Jane Doe 1 opened her front door and Allen yelled, "Can't I take a f***** leak in your house!" and "Call the f***** cops!" Allen then walked away, leaving blood drops on the front door and porch. Jane Doe 1 called 911 and reported the incident. Deputies responded to the residence but were unable to locate Allen.

Jane Doe 2 flagged down a deputy on Angela Street and told him a man entered the open garage of a residence on Angela Street. The deputy heard a scream and saw Jane Doe 3 running from the residence with blood on the left side of her head. Jane Doe 3's husband told the deputy that he and his wife were inside their residence when Allen entered through the garage with a gun and machete. The suspect reportedly struck Jane Doe 3. She was later treated with two staples to close her wound.

More deputies arrived in the residential area. Deputies saw families with children and strollers in the neighborhood and told them to get in their houses. Deputy Garza located Allen's unoccupied Yaris parked on Kathy Avenue. The deputy who responded to Jane Doe 3 communicated over the radio that he was chasing Allen into a house. Additional deputies responded and saw the rear sliding glass door screen was slashed. Allen jumped over the rear wall of the house. Deputies Jason McLennan and Ernesto Escobar were driving in the neighborhood, searching for Allen. They drove to Hoi Circle, a cul-de-sac whose homes were behind the backyard Allen entered and where Allen would arrive after he jumped the fence. At approximately 4:58 p.m., they saw Allen standing at the top of the cul-de-sac, in the middle of the street, shirtless and holding a machete and a handgun. Deputies McLennan and Escobar exited their vehicles and pointed their handguns towards Allen. Deputy McLennan informed dispatch that they had Allen at gunpoint on Hoi Circle and needed additional deputies. Allen was facing the mouth of the cul-de-sac towards Deputies McLennan and Escobar.

The deputies ordered Allen to drop his weapon and get on the ground, stating, "Drop the gun, man, we don't want to shoot you!" Allen responded, "Just shoot me already!" All deputies were in identifiable police uniforms, and there were multiple black and white patrol vehicles within Allen's view. More deputies arrived and ordered Allen to drop his weapon at least 20 times. Deputies reported that Allen said he wanted the deputies to kill him. Allen paced and waved the machete back and forth, and was raising his arms while holding the gun and machete. At the same time, the deputies who followed Allen over the fence were behind Allen. They were facing their fellow deputies with guns drawn on Allen in the cul-de-sac. They moved away from Allen to avoid a crossfire situation. Deputies also called for non-lethal weapons and went to retrieve them.

Deputy Garza was facing Allen at the mouth of the cul-de-sac with his gun drawn. He stated he could see a machete in Allen's right hand, and what looked like a semi-automatic handgun in Allen's left hand. Deputy Garza ordered Allen to drop the machete and the gun. He heard Allen tell the deputies to shoot and kill him. Deputy Garza was aware of Allen's previous activity through radio communications and thought Allen might have mental issues or suicidal tendencies. Deputy Garza also saw that Deputy Jeremy Buffong, who followed Allen over the backyard fence, was still close to Allen, and became concerned when Allen turned his attention to Deputy Buffong. Allen raised his arms toward Deputy Buffong and Deputy Garza thought Allen was going to shoot Deputy Buffong. Deputy Garza fired nine times at Allen. He did not see Allen react and saw Allen start walking, so he fired three additional rounds to prevent Allen from shooting a deputy or civilian, or fleeing into another residence. Deputy Garza believed he struck Allen in the upper back. Allen reacted and fell to the ground, at which time the deputies moved to detain Allen and render medical aid.

Deputy Tomasko was also positioned facing Allen at the mouth of the cul-de-sac, and saw Allen holding a machete and what appeared to be a handgun. Deputy Tomasko was also aware of Allen's previous behavior. Allen was pacing in circles and telling the deputies to shoot him. Deputy Tomasko had prior certification as a Drug Recognition Expert, and it appeared to him that Allen was under the influence of drugs. In addition, a resident was trying to speak to Allen and refused the deputies' orders to go into his house.

When Deputy Buffong tried to de-escalate and said, "Hey, man, let's talk, settle down here," Allen responded and said, "Kill me already." He did not comply with the deputies' orders. When Allen took a step or two toward Deputy Buffong and raised the gun shoulder height toward Deputy Buffong, Deputy Tomasko feared for Deputy Buffong's life, as well as the civilians in the neighborhood, so he fired twice at Allen. Deputy Tomasko then saw Allen bleeding from the shoulder and drop to the ground. Efforts were then made to secure him and provide medical care. OCFA paramedics arrived and transported Allen to Mission Hospital in Mission Viejo, where he was treated for gunshot wounds to his shoulder and knee.

Two minutes and 20 seconds elapsed from Allen's initial contact with deputies in the cul-de-sac to the first shots being fired. Additional deputies on scene were interviewed and stated that they would have shot at Allen because they believed Deputy Buffong's life was in danger. These deputies indicated that they did not shoot at Allen because of crossfire or the presence of residences as their backdrop. Deputies learned that the gun in Allen's hand was a BB gun after the shooting.

Civilians who witnessed the events stated that Allen was given ample opportunities to comply, and the situation could have been prevented if Allen had cooperated.

An OCDA Investigator attempted to interview Allen on January 22, 2018, and he declined to provide a statement to the OCDA.

EVIDENCE COLLECTED

The following items of evidence were collected and examined:

- BB gun with apparent blood
- Machete with 16-inch single blade
- Folding knife
- Magazine with cartridges
- 14 cartridge and cartridge cases from scene

EVIDENCE ANALYSIS

Firearms and Projectile Examinations:

Deputies Garza and Tomasko's Glock pistols were test-fired and both operated without malfunction. Deputy Garza's Glock pistol was identified as having fired 12 cartridge cases. A bullet removed from Allen's knee was also determined to have been fired from Deputy Garza's pistol. The Glock pistol from Deputy Tomasko was identified as having fired two cartridge cases.

Toxicological Examination

A sample of Allen's blood was collected at Mission Hospital on January 19, 2018. An OCSF forensic scientist examined the blood sample and the following results and interpretations were documented:

DRUG	MATRIX	RESULTS & INTERPRETATIONS
Ethanol	Blood Draw	0.000 ± 0.004 w/v
Amphetamine	Hospital Blood	64.8 ± 4.0 ng/ML
Methamphetamine	Hospital Blood	528 ± 35 ng/ML

ALLEN'S PRIOR CRIMINAL HISTORY

Allen's criminal history was reviewed and considered. Allen's California Criminal History dates back to 2016. He has previously been arrested for the following charges:

- Corporal injury on a spouse or cohabitant
- False imprisonment
- Criminal threats

ALLEN'S POST-INCIDENT CONVICTION

On January 23, 2018, the OCDA filed criminal charges against Allen in Orange County Superior Court case # 18HF0097, consisting of one felony count of Assault with a Deadly Weapon, in violation of Penal Code section 245(a)(1); one felony count of Second Degree Robbery, in violation of Penal Code sections 211/212.5(c); one felony count of Possession of Flammable Material, in violation of Penal Code section 453(a); one felony count of Arson of Another's Property, in violation of Penal Code section 451(d); one felony count of Resisting and Deterring an Executive Deputy, in violation of Penal Code section 69; and, one felony count of Brandishing a Deadly Weapon, in violation of Penal Code section 417(a)(1).

On November 28, 2018, the OCDA amended the Complaint to add one felony count of Criminal Threats, in violation of Penal Code section 422(a). On that date, Allen pled guilty to Assault with a Deadly Weapon; Resisting and Deterring an Executive Deputy; Brandishing a Deadly Weapon, and Criminal Threats. The remaining counts were dismissed. Allen was sentenced to nine months in jail and placed on three years of formal probation. Terms of his probation include restitution for all eight counts, stay away from the victims, cooperate with probation regarding mental health and substance abuse treatment as directed, and to not possess any weapons or firearms.

STANDARD LEGAL PRINCIPLES IN DEPUTY-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, however, it would be necessary to prove beyond a reasonable doubt that no legal justifications 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/she 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 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 Supreme Court's analysis and teachings in *Graham* are very much applicable to the circumstances surrounding the interactions of OCS Deputy Garza and Tomasko with Allen.

LEGAL ANALYSIS

The issue in this case is whether the conduct of Deputies Tomasko and Garza on January 19, 2018 was criminally culpable and without justification. In order to charge Deputies Tomasko and Garza 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 Deputies' conduct and they did not act in lawful self-defense. If Deputies Tomasko and Garza's actions were justifiable as lawful self-defense or defense of others, then criminal charges will not be warranted.

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.)

Based on the totality of all the available evidence, Deputies Tomasko and Garza were justified in believing that Allen posed a significant threat of death or serious physical injury to himself and others. All deputies on scene were aware of Allen's previous activities, beginning approximately one hour prior to the shooting. At 3:55 p.m., a civilian called 911 to report a male, later identified as Allen, wearing a mask and flailing his arms around while driving, and appeared to be "off his rocker." Shortly after and a few miles away, deputies were made aware of a fire at a business, and within 15 minutes, Allen was seen at Walmart with a machete, where he stole a BB gun. Deputies knew Allen's parents called 911 because they saw their son bloody and holding a knife in his teeth and feared he was suicidal. Deputies learned shortly after that a shirtless subject, whom they believed to be connected to the aforementioned calls, went to Up in Smoke holding a machete and wearing a

Batman mask. Before deputies contacted Allen, they were aware that he possessed dangerous weapons in public, was behaving in an erratic manner, and was possibly suicidal.

Allen's behavior escalated when he entered Jane Doe 1's backyard and then Jane Doe 3's residence. Deputies were so concerned for the public that they ordered residents to go into their homes. Allen's actions further endangered the deputies and citizens in the neighborhood when he was located in the middle of a residential cul-de-sac holding a machete and a BB gun, which both deputies and civilians believed to be a real handgun. Allen refused repeated orders to drop the weapons, and instead told the deputies to kill him. Allen was unresponsive to Deputy Buffong's attempts to engage and de-escalate the situation. When Allen turned toward Deputy Buffong and raised his hands, still holding the weapons, Deputies Garza and Tomasko believed Deputy Buffong's life was in danger and fired at Allen. As Allen continued to move, Deputy Garza feared he would flee into another residence, and potentially hurt or kill someone else, so he fired at Allen again. When Allen fell to the ground, the deputies rushed to detain him and render medical aid.

As should be apparent from the above-described analysis, the prosecution would be unable to prove that Deputies Garza and Tomasko acted unlawfully. A jury analyzing these facts would justly conclude that it was reasonable for Deputies Tomasko and Garza to believe that their lives and the lives of others were in danger. Therefore, Deputies Tomasko and Garza were justified when they shot at Allen and carried out their duties as peace officers in a reasonable and justifiable manner.

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 no evidence of criminal culpability on the part of Deputies Tomasko and Garza, and there is substantial evidence that their actions were reasonable and justified under the circumstances when they shot Allen on January 19, 2018.

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



Erin Rowe
Deputy District Attorney
Special Prosecutions Unit



Read and approved by **Ebrahim Baytieh**
Senior Assistant District Attorney – Operations IV