



OFFICE OF THE
DISTRICT ATTORNEY
ORANGE COUNTY, CALIFORNIA
TONY RACKAUCKAS, DISTRICT ATTORNEY

JIM TANIZAKI
CHIEF ASSISTANT D.A.

JOSEPH D'AGOSTINO
SENIOR ASSISTANT D.A.
GENERAL FELONIES/
ECONOMIC CRIMES

MICHAEL LUBINSKI
SENIOR ASSISTANT D.A.
SPECIAL PROJECTS

JAIME COULTER
SENIOR ASSISTANT D.A.
BRANCH COURT OPERATIONS

SCOTT ZIDBECK
SENIOR ASSISTANT D.A.
VERTICAL PROSECUTIONS/
VIOLENT CRIMES

JENNY QIAN
DIRECTOR
ADMINISTRATIVE SERVICES

SUSAN KANG SCHROEDER
CHIEF OF STAFF

October 2, 2017

Chief Thomas C. Kisela
Orange Police Department
1107 N. Batavia Street
Orange, CA 92866

Re: Officer-Involved Shooting on March 13, 2017
Fatal Incident involving Michael Anthony Perez
District Attorney Investigations Case # SA 17-007
Orange Police Department Case DR # 17-03-0421
Orange County Crime Laboratory Case FR # 17-44282
Orange County Coroner Office Case # 17-01315-EK

Dear Chief Kisela,

Please accept this letter detailing the Orange County District Attorney (OCDA) Office's investigation and legal conclusion in connection with the above-listed incident involving on-duty Orange Police Department (OPD) Officer Carlos Gutierrez. Michael Anthony Perez, 33, died as a result of his injuries. The incident occurred in the City of Orange on March 13, 2017.

OVERVIEW

This letter contains a description of the scope and the legal conclusions resulting from the OCDA's investigation of the March 13, 2017, fatal officer-involved shooting of Perez. 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 OPD 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 March 13, 2017, Investigators from the OCDA Special Assignment Unit (OCDASAU) responded to the scene of this incident. During the course of this investigation, there were 19 interviews conducted, and 12 additional witnesses contacted during the supplemental canvass interviews. OCDASAU Investigators also obtained and reviewed the following: OPD reports, audio dispatch and radio traffic recordings; Orange County Crime Laboratory (OCCL) reports, including toxicology, forensic alcohol examination, latent print, officer processing and firearms examination reports; crime scene investigation photographs; medical records and photographs related to the injuries sustained by Perez; criminal history records related to Perez including prior incident reports; and other relevant reports and materials including audio recordings of the neighborhood canvass conducted by investigators and video recordings of the incident.

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 OPD officers or personnel, specifically Officer Gutierrez. The OCDA will not be addressing any possible issues relating to policy, training, tactics, or civil liability.

REPLY TO: ORANGE COUNTY DISTRICT ATTORNEY'S OFFICE

WEB PAGE: www.OrangeCountyDA.com

MAIN OFFICE
401 CIVIC CENTER DR W
P.O. BOX 808
SANTA ANA, CA 92701
(714) 834-3600

NORTH OFFICE
1275 N. BERKELEY AVE.
FULLERTON, CA 92631
(714) 773-4480

WEST OFFICE
8141 13TH STREET
WESTMINSTER, CA 92683
(714) 896-7261

HARBOR OFFICE
4601 JAMBOREE RD.
NEWPORT BEACH, CA 92660
(949) 476-4650

JUVENILE OFFICE
341 CITY DRIVE SOUTH
ORANGE, CA 92668
(714) 935-7624

CENTRAL OFFICE
401 CIVIC CENTER DR. W
P.O. BOX 808
SANTA ANA, CA 92701
(714) 834-3952

INVESTIGATIVE METHODOLOGY

Among other duties, the OCDASAU is responsible for investigating officer-involved shootings within Orange County when someone is injured because 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, as well as 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 Assistant District Attorney supervising the Special Prosecutions Unit, who will eventually review and approve any legal conclusions and resulting memos. The case may often be reviewed by multiple veteran prosecutors, their supervisors, the Chief of Staff, 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 Gutierrez gave a voluntary statement to OCDA Investigators on March 22, 2017.

FACTUAL SUMMARY

On March 12, 2017, at approximately 11:20 p.m., OPD Officer Shemyakin observed a 1998 white GMC van traveling eastbound on Wilson Avenue in the city of Orange with a non-operational taillight. Perez was the driver and sole occupant of the van. Officer Shemyakin conducted a records check of the license plate and learned there was an arrest warrant for Perez attached to the van's plate. Officer Shemyakin initiated a traffic stop with lights and sirens in the 200 block of West Wilson Avenue, but Perez failed to immediately yield. Perez instead yelled out of the window of the van, inquiring as to why he was being pulled over. Officer Shemyakin responded several times, requesting Perez immediately stop the van to speak with him. Perez proceeded to drive a short distance to a well-lit strip mall parking lot located at 108 West Katella Avenue in Orange and parked his van in a parking stall. Officer Shemyakin then parked his patrol vehicle behind Perez's van.

Due to Perez's uncooperative behavior and failure to yield, Officer Shemyakin drew his weapon and ordered Perez repeatedly to turn the engine off, place the keys on the dash, and place his hands in the driver side window. Perez refused to comply. Moments later, several OPD officers arrived to assist. Officer Shemyakin repeatedly asked Perez to exit the van and other officers assured Perez of his safety if he followed directions. Perez remained uncooperative. Numerous officers attempted to negotiate with Perez in an attempt to gain his compliance and convince him to exit the van. The officers assured Perez they only wanted to help and not to harm him. At one point, Perez placed a red plastic gasoline container on the dashboard. Perez lit a lighter and held it near the uncapped gasoline container, verbally threatening to ignite the gasoline, and even placed a towel inside of the gasoline can to create a makeshift Molotov cocktail. A strong gasoline odor emitted from Perez's van. OPD Sergeant Bevins requested Orange Fire Department (OFD) and paramedics to respond to the scene and ordered spike strips be placed in front and behind Perez's van to prevent Perez from possibly attempting to flee the scene.

For approximately one hour, OPD officers attempted to negotiate with Perez to convince him to surrender. Perez refused to comply and pretended to light the towel sticking out of the gasoline can, stating he was not going back to jail. Perez threatened to light the gasoline can, as well as himself on fire. According to multiple witnesses and officers present at the scene, Perez appeared unstable and violent. It should be noted that almost a month prior to this incident, Perez's wife filed a domestic violence restraining order against Perez due to his drug use, hallucinations, suicidal thoughts, and violent tendencies. As officers continued to ask Perez to exit the van, Perez displayed a pipe used to smoke methamphetamine

and stated he was going to smoke it, but instead lit a cigarette and smoked it with the gasoline can on his lap. Perez would occasionally hold the cigarette or a lighter near the gas can, threatening to start a fire.

OPD officers devised a tactical plan consisting of breaking the front passenger window and using a fire hose borrowed from the OFD, to introduce water into Perez's van. The water would dilute the gasoline in the van, extinguish any potential fire ignited by Perez, and force Perez to exit his van to be arrested. However, after the fire hose was used, Perez moved to the back of the van before eventually exiting via the open driver's side window. Against multiple police orders, Perez refused to display his hands, which were concealed behind his back. Officer Shemyakin attempted unsuccessfully to detain Perez, and a struggle between them ensued. Witnesses in the parking lot observed that when Perez exited the van he appeared angry, agitated, irrational, and not in a normal state of mind.

Officer Shemyakin attempted to grab Perez to restrain him, but Perez was moving erratically, swinging his arms, and was observed by officers to possess a knife. Multiple officers yelled, "Knife, knife, knife!" Perez still refused to comply with their demands, and continued to physically resist Officer Shemyakin. Officer Boykin believed Perez was going to stab Officer Shemyakin, so he deployed a less lethal 40 mm projectile in an effort to stop Perez from resisting. The projectile struck Perez but appeared to have no effect. As Officer Shemyakin and Perez continued to struggle, Perez reached behind his back/right hip area where a sheathed knife was observed by Officer Gutierrez. When Officer Gutierrez saw Perez's hand on the handle of the knife, he anticipated Perez would use the knife to stab Officer Shemyakin. Therefore, Officer Gutierrez shot one round from his handgun, striking Perez in the torso. Perez fell to his knees, got up, walked backwards a few steps, and then collapsed to the ground. Two knives were recovered from Perez, an unsheathed double-edged dagger found near his body, and a sheathed dagger that was attached to his right hip.

Officers detained Perez and provided immediate medical attention alongside the OFD, including cardiopulmonary resuscitation (CPR). At approximately 12:37 a.m. on March 13, 2017, Perez was transported by ambulance to University of California, Irvine, Medical Center (UCIMC). Perez arrived at UCIMC at approximately 12:42 a.m. and was pronounced deceased at 12:50 a.m. on March 13, 2017.

During this incident, Officer Gutierrez attempted to negotiate with Perez for approximately 15 minutes, requesting Perez exit the van by saying he wanted the situation "to end peacefully." Officer Gutierrez even "guarantee[d] [Perez's] safety" if Perez complied. Also during this incident, Perez threatened multiple times to light the gasoline can on fire and harm himself and/or the officers. Perez told the officers he had no regard for his own life and poured gasoline on himself. It should be noted that Perez's intent to do harm to himself was subsequently corroborated by text messages he sent, and a hand written suicide note he gave to a family member several days prior to this incident.

EVIDENCE COLLECTED

The following items of evidence were collected and examined:

- One 40 mm less lethal cartridge case head stamp 38 short blank and two disposable butane lighters
- One glass pipe
- One disposable butane lighter
- One sheathed knife
- One knife with a double edged blade
- One cartridge case head stamp 9mm "WIN" Luger
- One 40 mm less lethal projectile
- One Defense Technologies .40 mm less lethal, Tactical Single launcher
- One Sig Sauer, Model P320, 9mm semi-automatic pistol, Serial Number 58B025832
- One 9 mm caliber cartridge from the chamber of the handgun
- Fifteen 9mm caliber cartridges from the magazine in the handgun
- Surefire rail mounted light, Serial Number A247013
- Two additional 17 cartridge capacity magazines
- One heart blood standard of Perez

- One suicide note by Perez
- Two videos recorded by witnesses
- One video from Officer Shemyakin's vehicle.
- One surveillance video from a business in the parking lot

AUTOPSY

On March 14, 2017, Forensic Pathologist Dr. Yong-Song Kim of the Orange County Coroner's Office conducted an autopsy on the body of Perez. Dr. Kim concluded the bullet wound to Perez's left and right thoracic wall was caused by a single bullet. Dr. Kim concluded that the bullet entered the left lateral thoracic wall, traveled through the left and right ventricles of the heart and through the right lung before it exited Perez's body via the right lateral thoracic wall. Dr. Kim also observed an approximate one inch contusion to Perez's right lower back resulting from the 40 mm less lethal sponge gun projectile. Dr. Kim concluded that Perez's cause of death was a perforating gunshot wound to the left lateral thorax.

EVIDENCE ANALYSIS

Firearms Examination

Officer Gutierrez's Sig Sauer P320 handgun was test fired at the OCCL and fired without malfunction. Officer Boykin's Defense Technology 40 mm caliber sponge gun launcher was also collected from the scene and test fired without malfunction.

Toxicological Examination

A sample of Perez's blood was collected at the Orange County Sheriff-Coroner Forensic Science Center. An OCCL Department forensic scientist examined the blood sample for alcohol, prescription drugs, and common drugs of abuse. The following results were obtained:

DRUG	MATRIX	RESULTS & INTERPRETATIONS
Amphetamines	Postmortem Blood	0.0267 ± 0.017 mg/L
Methamphetamines	Postmortem Blood	1.25 ± 0.09 mg/L

PEREZ'S PRIOR CRIMINAL HISTORY

Perez's criminal history was reviewed and considered. Perez had a California Criminal History that dated back to 2001 showing arrests for the following crimes:

- Driving under the influence of alcohol/drugs
- Possession of a controlled substance
- Possession of a control substance paraphernalia
- Grand theft - auto
- Taking of a vehicle without owner's consent
- Assault with a deadly weapon
- Exhibit deadly weapon
- Possession, manufacturing, selling dangerous weapon
- Inflicting corporal injury
- Violating domestic violence restraining order

DISCLOSURE OF OFFICER-INVOLVED SHOOTING VIDEO & AUDIO EVIDENCE

The OCDA recognizes that releasing video and audio evidence of officer-involved shooting and custodial death incidents can assist the public in understanding how and why these incidents occur, increase accountability, and build public trust in law enforcement. Consistent with the OCDA's written policy in connection with the release of video and audio evidence relating to officer-involved shooting and custodial death incidents where it is legally appropriate to do so, the OCDA decided to release to the public video/audio evidence in connection with this case. The relevant video/audio evidence is available on the OCDA webpage <http://orangecountyda.org/reports/videoandaudio/default.asp>.

STANDARD LEGAL PRINCIPLES IN OFFICER-INVOLVED SHOOTING CASES

Possible criminal charges against an officer involved in an on-duty shooting include murder [Penal Code Section 187]; manslaughter [Penal Code Section 192]; 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 is 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 the 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 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 from attack if, as a reasonable person, he had grounds for believing and did believe that bodily injury was about to be inflicted upon him 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 interaction between OPD Officer Gutierrez and Perez.

LEGAL ANALYSIS

The facts in this case are determined by considering all the statements made by the OPD officers, which were supplemented by other relevant material and witnesses present at the incident.

The issue in this case is whether the conduct of Officer Gutierrez on March 13, 2017, was criminally culpable and without justification. As stated above, in order to conclude that Officer Gutierrez committed 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 officer's conduct. Therefore, in order to lawfully charge Officer Gutierrez with a crime, the prosecution must prove beyond a reasonable doubt that he did not act in lawful self-defense or defense of others. If the actions by Officer Gutierrez on the date of the incident were justifiable as lawful self-defense or defense of others, criminal charges would 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 potentially dangerous, emergency conditions or other exigent circumstances exist, the California Courts of Appeal have noted that the United States Supreme Court's definition of reasonableness is comparatively generous toward 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.)

It is clear based on the totality of all the available evidence that Officer Gutierrez was justified in believing that Perez posed a significant threat of death or serious physical injury to himself and others. This conclusion is based on all of the circumstances, particularly the conduct of Perez leading up to the shooting. Because Perez parked his van in a shopping center adjacent to a busy street containing restaurants and a laundromat, there were multiple bystanders and patrons nearby that could have been harmed by Perez, had he followed through on this threats to light the gas can or himself on fire. The officers therefore had to act with even greater caution to ensure the safety of not only themselves and Perez, but also innocent bystanders. Prior to Officer Gutierrez shooting Perez, Officer Gutierrez witnessed Perez refusing to cooperate with multiple officers who attempted to convince Perez to comply for approximately an hour. Officer Gutierrez even attempted to negotiate with Perez himself for approximately 15 minutes, requesting Perez exit the van by saying he wanted the situation "to end peacefully." Officer Gutierrez even "guarantee[d] [Perez's] safety" if Perez complied.

Officer Gutierrez's actions were reasonable in the situation as Perez threatened multiple times to light the gasoline can on fire and harm himself and/or the officers. Perez told the officers he had no regard for his own life and poured gasoline on himself. Perez's intent to do harm to himself was subsequently corroborated by text messages he sent and a hand written suicide note he gave to a family member several days prior. Officer Gutierrez believed Perez's comments,

aggressive and erratic attitude and uncooperative behavior made him a threat to himself, the officers, and the public. Sergeant Plog also described Perez's demeanor as not normal saying Perez was "loud," "didn't make a whole lot a sense," and was not calm. Perez's behavior became even more volatile and dangerous in the seconds leading up to his being shot by Officer Gutierrez. After exiting through the driver side window, Perez took an aggressive posture and possessed two knives as Officer Shemyakin struggled to detain him while multiple officers yelled, "Knife, knife, knife!" Additionally, a less lethal 40 mm projectile was first deployed upon Perez by Officer Boykin, which had no effect in bringing Perez under control. Only after seeing Perez then grab the handle of the sheathed knife attached to his back/right hip area while physically resisting Officer Shemyakin did Officer Gutierrez, believing Officer Shemyakin was about to be stabbed, fire the shot which struck Perez. Officer Gutierrez was justified in his conclusion and his actions.

In order for Officer Gutierrez to be justly and lawfully charged and convicted of any crime based on this incident, it is the OCDA's burden to prove beyond a reasonable doubt that Officer Gutierrez did not act in reasonable and justifiable self-defense or defense of another when he shot Perez. As is apparent from the above-described analysis, the prosecution would be unable to carry such a burden in this case. A jury analyzing these facts would justly conclude that it was reasonable for Officer Gutierrez to believe that his life and the lives of others who attempted to detain Perez were in imminent danger. Therefore, Officer Gutierrez was justified when he shot Perez. Simply stated, Officer Gutierrez did not commit a crime, to the contrary, he carried out his duties as a peace officer 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 Officer Gutierrez, and there is substantial evidence that his actions were reasonable and justified under the circumstances when he shot and killed Perez on March 13, 2017.

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



CLIFF BODLEY
Deputy District Attorney
Target/Gangs Unit



Read and approved by **EBRAHIM BAYTIEH**
Assistant District Attorney
Supervising Head of Court – Special Prosecutions Unit