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August 6, 2015

Chief Todd Elgin
Garden Grove Police Department
11301 Acacia Parkway
Garden Grove, CA 92840

Re: Officer-Involved Shooting on January 5, 2014
Non-Fatal Incident involving Bac Tieng Nguyen
District Attorney Investigations Case # S.A. 14-001
Garden Grove Police Department Case # 14-00156
Crime Laboratory Case FR # 14-40147

Dear Chief Elgin,

Please accept this letter detailing the Orange County District Attorney's (OCD A) Office's investigation and legal conclusion in connection with the above-listed incident involving on-duty Garden Grove Police Department (GGPD) Officer Josh Olivo. Bac Tieng Nguyen, 29, survived his injuries. The incident occurred in the City of Garden Grove on Jan. 5, 2014.

OVERVIEW

This letter contains a description of the scope and the legal conclusions resulting from the OCD A's investigation of the Jan. 5, 2014, non-fatal, officer-involved shooting of Bac Nguyen. The letter includes an overview of the OCD A'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 GGPD officer involved in the shooting. The format of this document was developed by the OCD A, at the request of many Orange County police agencies, to foster greater accountability and transparency in law enforcement.

On Jan. 5, 2014, Investigators from the OCD A Special Assignments Unit (OCDASAU) responded to this incident. During the course of this investigation, 10 interviews were conducted, and 17 additional witnesses were contacted during the supplemental canvass interviews. OCDASAU Investigators also obtained and reviewed the following: GGPD reports, audio dispatch and radio traffic recordings; Orange County Crime Laboratory (OCCL) reports, including toxicology, forensic alcohol examination, officer processing and firearms examination reports; crime scene investigation photographs; medical records and photographs related to the injuries sustained by Nguyen; criminal history records related to Nguyen; 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 GGPd officers or personnel, specifically Officer Olivo. The OCDA will not be addressing issues of 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 OCDA is not releasing 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.

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 or Gang Units review fatal, officer-involved shootings and custodial death cases and determine whether criminal charges are appropriate. Deputy District Attorneys assigned to the Special Prosecutions Unit review the non-fatal officer-involved shooting cases for possible criminal filings. Throughout the review process, the assigned prosecutor will be in consultation with his or her supervisor, and this Assistant District Attorney 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 Olivo gave a voluntary statement to OCDA Investigators on Jan. 5, 2014.

FACTUAL SUMMARY

Nguyen lived with his father John Doe and his mother Jane Doe in the residence at 9631 Teal Avenue in the City of Garden Grove. In the past month, John Doe witnessed two incidents where his son, Nguyen, held a knife to his own throat and threatened to kill himself, saying he wished to die. These incidents were not reported to the police. Nguyen's sister also stated Nguyen recently sent her suicidal text messages.

On Jan. 4, 2014, at approximately 10:00 p.m., John Doe observed Nguyen in the living room of the home pacing and talking to himself. John Doe told Nguyen he was acting crazy and urged Nguyen to go to bed. Nguyen told John Doe that he [John Doe] was the one who was crazy. At approximately 6:00 a.m. the next day, John Doe got up and saw Nguyen's car was gone from the driveway. After seeing Nguyen's car was gone, John Doe noticed Nguyen left the house and had not cleaned the fish tank as instructed. John Doe removed the fish tank and placed it outside the front door. At approximately 6:30 a.m., Nguyen returned home and saw his fish tank moved outside. Nguyen stated he was upset at seeing his fish tank outside, and put it back inside the home. Nguyen came back outside of the house to the front yard holding a large knife in his hand, which he used to scratch the hood of his own car which was parked in the driveway. After scratching the hood of his own car with the knife, Nguyen held the knife to his own throat. John Doe was afraid because of his son's actions and called GGPd at approximately 7:00 a.m. John Doe told the GGPd dispatcher that Nguyen was suffering from possible mental issues, and was in possession of a knife.

GGPD Officers John Raney and Josh Olivo were dispatched to the residence and arrived at approximately 7:09 a.m. They met John Doe outside of the home, and John Doe directed the officers to the residence by pointing to the open front door of the home. John Doe was unable to speak with the officers because he only spoke Vietnamese. The two officers had been informed by dispatch that Nguyen may be armed with a knife and suffering from mental issues. Officers Raney and Olivo approached the open front door of the residence to contact Nguyen. Officer Raney was positioned on the east side of the front door. Officer Olivo took a position on the west side of the door. As Officers Raney and Olivo got to the front door, Nguyen came out of the foyer area and stood approximately 10 to 15 feet from the officers in the hallway. Nguyen's hands were behind his back, hidden from view. Officers Raney and Olivo told Nguyen to show his hands. Nguyen ultimately complied and showed his hands. Nguyen was holding a large black knife, approximately 12 inches long, which he put up to his throat. Upon seeing the knife, Officer Olivo drew his gun and pointed it at Nguyen. Officer Olivo told Nguyen to put the knife down or he would shoot him. Nguyen responded, "Shoot me." Nguyen lowered the knife away from his throat, but kept it in his hand at waist level. Officer Olivo ordered Nguyen not to put the knife up again.

Nguyen still held the knife at waist level, with the tip pointing upwards, and stepped towards Officers Olivo and Raney. Officer Olivo stated he was in fear for his life and the life of his partner, and fired three successive rounds at Nguyen. Two bullets struck Nguyen in the lower torso. Officer Olivo estimated that Nguyen was within 15 feet of Officer Raney and himself when Nguyen advanced toward them holding the knife. When Olivo approached Nguyen inside the house, Nguyen apologized to Officer Olivo.

Officers Raney and Olivo provided first aid to Nguyen until paramedics arrived on scene. At approximately 7:17 a.m., Garden Grove Fire Department personnel arrived on scene. Paramedics noted that Nguyen was alert, and his vital signs were stable. When asked by one of the paramedics why he had been shot, Nguyen replied, "I was being an a**hole." Nguyen made no other statements, other than answering the paramedics' medical questions.

Nguyen was transported to the University of California, Irvine Medical Center (UCIMC) in the City of Orange. The attending trauma surgeon observed that Nguyen had four apparent bullet wounds, and Nguyen presented with an obvious altered level of consciousness. Nguyen admitted to drug use that day, and his blood tested positive for the presence of amphetamines. Nguyen underwent surgery for his gunshot wounds and was expected to make a full recovery.

Post-Shooting, Voluntary Consensual Statement of GGPD Officer John Raney

Officer Raney gave a voluntary, consensual statement to the OCDA on Jan. 5, 2014. At the time of the incident, Officer Raney had been a police officer for six years. Officer Raney was on patrol in full police uniform. He was dispatched at approximately 7:00 a.m. to a call of an individual with possible mental issues, who might be armed with a knife.

Officer Raney arrived at the same time as Officer Olivo. Officer Raney made contact with the calling party, Nguyen's father, outside the residence. Due to a language barrier, Nguyen's father was unable to explain the circumstances, but he was able to tell Officer Raney, "My son's loco," and pointed Officer Raney toward the open front door of the residence. Officer Raney first saw Nguyen in the hallway of the residence, with his hands hidden behind his back. When Nguyen complied with the officers' commands to show them his hands, Nguyen revealed an approximately 12-inch knife in his left hand. Nguyen then put the knife up to his neck.

After Nguyen put the knife up to his neck, Officer Olivo pulled out his firearm. Officer Raney felt they needed additional officers on scene. Officer Raney pulled out his radio to call for additional officers, and Nguyen took a step forward, still holding the knife. Nguyen had a look of, "I'm not gonna [sic] follow this guy's instructions," to put the knife down. Once Nguyen stepped forward towards their position, Officer Raney heard Officer Olivo fire his weapon at Nguyen.

Post-Shooting, Voluntary Consensual Statement of GGPD Officer Josh Olivo

Officer Olivo gave a voluntary, consensual statement to the OCDA on Jan. 5, 2014. At the time of the incident, Officer

Olivo had been a police officer for six years. Officer Olivo was on patrol in full police uniform. He was on duty the morning of Jan. 5, 2014, and was dispatched at 7:03 a.m. to a call of an individual with possible mental issues, who had possessed a knife earlier.

According to Officer Olivo, Officer Raney arrived first and spoke briefly with Nguyen's father outside the home. Officer Raney learned that Nguyen was inside the house, so Officer Olivo followed Officer Raney to the open front door of the residence. From the doorway, the officers first saw Nguyen in the hallway of the residence. Nguyen had his hand behind his back and was approximately 10 to 15 feet from them.

Officer Olivo gave Nguyen commands to show his hands, but Nguyen initially ignored these commands. Officer Olivo told Nguyen to bring his hands from behind his back or he would shoot him. Nguyen then brought an approximately 12-inch knife up to his neck and said, "Shoot me," in clear English.

After hearing that statement, Officer Olivo began to fear Nguyen would come after Officer Olivo and his partner, or Nguyen would attempt to hurt someone else or himself. Once Officer Olivo saw Nguyen put the knife to his neck, he drew his service pistol and pointed it at Nguyen.

Officer Olivo stated that Nguyen then lowered the knife down to his waistline, with the knife still pointing up. Officer Olivo told Nguyen not to bring the knife back up. At that point, Nguyen took a step towards the officers' position and began to raise the knife back up. From Nguyen's distance of approximately 10 to 12 feet away, Officer Olivo felt Nguyen could have reached them quickly, and he believed the knife would have gone straight through his ballistics vest. Fearing for his own safety, and the safety of Officer Raney, Officer Olivo fired three rapid shots at Nguyen. Two bullets struck Nguyen in the torso, causing Nguyen to fall backward. Officer Olivo immediately approached Nguyen and Nguyen said he was sorry.

Bac Nguyen's, Voluntary, Post-Miranda Interview

Nguyen gave a voluntary, consensual statement to OCDA Investigators on Jan. 5, 2014, at the UCIMC. Before the start of the interview, Nguyen was advised of his Miranda rights. Nguyen acknowledged he understood his rights and voluntarily spoke with the Investigators.

Nguyen stated he was under stress due to financial problems and told the officers, "I want to live, I don't want to live." According to Nguyen, he and his father got into an argument that morning. Nguyen went to his bedroom and removed a decorative sword from its display case, and also picked up a smaller knife, similar in size to a dagger. Nguyen was angry and went outside. He scratched the hood of his own car with one of the knives, then went back inside the house. This caused his father to call the police. Shortly after, Nguyen saw two uniformed police officers outside talking with his father.

According to Nguyen, the officers were outside his front door, approximately 10 to 15 feet away. When the police officers saw him, he put the knife to his throat. Nguyen was not sure if he was going to hurt himself, but stated that the thought crossed his mind. Nguyen stated that the police officers told him to put down the knife or he would be shot, so Nguyen replied, "Shoot me, but be careful, my mom is right there." Nguyen stated that as he was thinking about putting the knife down, he was shot by a police officer. Nguyen stated, "The a**hole that I am, I made them shoot me." During the interview, Nguyen expressed a desire to apologize to the officers "for making them do what they did," and that he "did not want to die and make the officer feel bad for shooting him."

EVIDENCE COLLECTED

From the scene, the following items of evidence were collected and examined:

- Three .45 auto caliber cartridge cases from the scene, located in the driveway
- Two projectiles from the scene
- One 16-inch unsheathed short sword, black in color
- One Federal .45 auto caliber cartridge case

- Two Winchester .45 auto caliber cartridge cases
- Two Copper jacketed bullet cores
- One 39-inch sheathed black sword

From Officer Olivo, the following items of evidence were collected and examined:

- Glock, Model 21, .45 caliber, semi-automatic pistol
- One 13-round magazine from the pistol, containing 10 rounds Winchester.45 ammunition and Federal Hydra Shock .45 ammunition
- One round of Winchester .45 ammunition from the chamber
- Two 13-round magazines from Officer Olivo's duty belt, each containing 10 rounds Winchester.45 ammunition and Federal Hydra Shock .45 ammunition

EVIDENCE ANALYSIS

Firearms Examination

Officer Olivo's Glock pistol fired without malfunction. All three cartridge cases from the scene were determined to have been fired from Officer Olivo's Glock pistol.

Toxicological Examination

A sample of Nguyen's blood was drawn at UCMC and sent to the Orange County Crime Lab (OCCL) for analysis. A test on Nguyen's blood indicated that the sample may contain methamphetamine and/or related compounds.

BAC NGUYEN'S PRIOR CRIMINAL HISTORY

Nguyen's criminal history was reviewed and considered. Nguyen's criminal history includes carrying a concealed firearm, carrying a loaded firearm in a public place, resisting a peace officer, possession of narcotics, burglary, petty theft, vandalism, tampering with a vehicle, accessory to a crime, and violations of probation.

NGUYEN'S POST-INCIDENT CONVICTION

On Jan. 15, 2014, OCDA filed criminal charges against Nguyen in Orange County Superior Court case 14WF0032, accusing him of felony aggravated assault on a peace officer, a violation of California Penal Code section 245(c); and misdemeanor attempted brandishing of a deadly weapon, in violation of California Penal Code section 417(a)(1). On March 17, 2015, OCDA amended the criminal charges to change count 2 from a misdemeanor violation of Penal Code section 417 (a) to a felony resisting and deterring an executive officer in violation of Penal Code section 69. On Aug. 4, 2015, Nguyen was convicted by a jury of all charges filed against him, namely, felony aggravated assault on a peace officer and felony resisting and deterring an executive officer.

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 for the prosecution 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. 332.)

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 Instructions 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 the United States Supreme Court's 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 held 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 bodily 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. Conner* (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 397-398.) Thus, the Court cautioned that the “reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” (*Id.* at 396.)

The United States Supreme Court's analysis and teachings in *Graham* are very much applicable to the circumstances surrounding the interaction of GGPD Officer Olivo with Nguyen.

LEGAL ANALYSIS

At the time of the incident, Officers Olivo and Raney knew they were dealing with a suspect who was potentially armed and mentally unstable. Upon arrival at the residence, Nguyen's father said, "My son's loco," and directed the officers toward the open front door. Because of the language barrier, the officers did not know if Nguyen was still armed with the knife.

The officers first saw Nguyen in the hallway, approximately 10 to 15 feet away, with his hands behind his back. Officer Olivo gave Nguyen commands to show his hands, which Nguyen initially ignored. Officer Olivo told Nguyen to bring his hands from behind his back or he would shoot him. Nguyen put the large knife to his throat and clearly said, "Shoot me." This response caused Officer Olivo to fear Nguyen would attempt to harm himself, or come after Officer Olivo or his partner. After Officer Olivo saw Nguyen put the knife to his neck, he drew his gun and pointed it at Nguyen. Clearly, Officer Olivo was justified in fearing for his safety and it was reasonable for him to draw his weapon.

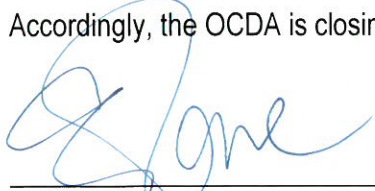
Nguyen then lowered the knife. Officer Olivo told Nguyen not to bring the knife back up. Nguyen then took a step towards the officers and began to raise the knife. Nguyen was about 10 to 15 feet away from the officers. From that relatively short distance, Officer Olivo believed based on his training and experience that Nguyen could have quickly reached the officers and Nguyen's knife would have gone straight through his ballistics vest. Fearing for his own safety, and the safety of Officer Raney, Officer Olivo fired three shots at Nguyen. Nguyen was struck twice. When Officer Olivo approached, Nguyen said he was sorry. It would be hard to reasonably conclude that Officer Olivo was not justified in shooting an unstable human being who was armed with a large knife and was moving towards the officers. Clearly, Officer Olivo was reasonably justified in shooting Nguyen.

In order for Officer Olivo 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 Olivo did not act in reasonable and justifiable self-defense or defense of another when he shot at Nguyen. As should be apparent from the above-described analysis, the prosecution would be unable to carry this burden in this case. A jury analyzing these facts would justly conclude that it was reasonable for Officer Olivo to believe that Nguyen posed a significant and immediate threat of death or serious physical injury to Officers Olivo and Raney. There is overwhelming evidence that Officer Olivo acted reasonably under the circumstances and was justified in using the force and means he believed reasonable to defend himself and his partner from the danger caused by Nguyen.

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 Olivo, and there is substantial evidence that his actions were reasonable and justified under the circumstances when he shot Nguyen on Jan. 5, 2014.

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



ERIN ROWE
DEPUTY DISTRICT ATTORNEY
SPECIAL PROSECUTIONS UNIT



READ AND APPROVED BY **EBRAHIM BAYTIEH**
ASSISTANT DISTRICT ATTORNEY
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