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DISTRICT ATTORNEY

ORANGE COUNTY, CALIFORNIA

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DIRECTOR
ADMINISTRATIVE SERVICES

SUSAN KANG SCHROEDER

CHIEF OF STAFF

June 20, 2012

Sheriff Sandra Hutchens
Orange County Sheriff's Department
550 North Flower Street
Santa Ana, CA 92703

Re: Custodial Death on August 29, 2010
Death of Inmate Stephen Jeffery Clevenger
District Attorney Investigations Case #10-021
Orange County Sheriff's Department DR # 10-162289
Orange County Crime Laboratory Case # 10-50620

Dear Sheriff Hutchens,

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 the Aug. 29, 2010, custodial death of inmate Stephen Jeffery Clevenger.

OVERVIEW

This letter contains a description of the scope and the legal conclusions resulting from the OCDA's investigation of the custodial death of Clevenger. In this letter, the OCDA describes the investigative methodology employed, evidence examined, witnesses interviewed, facts discovered and the legal principles applied to determine whether criminal culpability exists on the part of any Orange County Sheriff's Department (OCSD) deputy or any other person under the supervision of the OCSD.

On Aug. 29, 2010, OCDA Special Assignment Unit (OCDASAU) Investigators responded to OCSD Men's Central Jail after Clevenger died while in custody. The OCDA conducted an independent and thorough investigation of the facts and circumstances of this event and impartially reviewed all evidence and legal standards. The scope and findings of this review are expressly limited to determining whether any criminal conduct occurred on the part of OCSD deputies or personnel. The OCDA will not be addressing policy, training, tactics, or civil liability.

INVESTIGATIVE METHODOLOGY

Among other duties, the OCDASAU is responsible for investigating custodial deaths within Orange County when an individual dies while in custody. 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, scene processing and evidence collection, and hospital investigative responsibilities as needed.

The OCDASAU audio records all interviews, and the Orange county Crime Laboratory 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. Prosecutors 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.

All OCSD deputies and personnel contacted during the investigation of this case gave voluntary statements to OCDASAU Investigators.

FACTS

Clevenger was a 29-year-old male who had a history of psychological issues and had been in and out of custody for most of his adult life at the time of his death.

On April 29, 2009, Clevenger was arrested by OCSD on an outstanding criminal arrest warrant. Approximately one month later, while Clevenger remained in custody on a parole hold, the Orange County Grand Jury indicted him on five felony counts, including three counts of first degree robbery, one count of assault with a deadly weapon, and one count of street terrorism. Additionally, the robbery and assault with a deadly weapon counts were alleged to have been committed for the benefit of a criminal street gang. This case remained pending until his death.

On Aug. 7, 2010, while still in custody on the above-mentioned case, Clevenger slit his wrists with a jail-issued razor. He caused self-inflicted 2 ½ and 3 ½ -inch lacerations on his wrists after apparently stating that he had "a bad day in court." Clevenger told the attending medical staff that he wanted to die. After receiving treatment for these wounds, he was returned to the jail and housed in the Mental Health Ward. He was medically cleared four days later to return to regular jail housing.

On Aug. 28, 2010, Clevenger was placed in a Disciplinary/Isolation (Dis/Iso) cell due to inmate overflow. These cells are single-inmate cells and, since Clevenger was classified as an orange band (high security) inmate, he could not be housed within the general inmate population.

On Aug. 29, 2010, OCSD Deputies David Mayer and Joseph McDonnell had the responsibility to check on the welfare of the inmates in the Dis/Iso cells every half hour. At 7:05 p.m., Deputy Mayer signed the safety check log, indicating that he had checked on Clevenger and found him to be, "OK." At 7:30 p.m., Deputy McDonnell observed Clevenger to be awake and sitting on his bunk; accordingly, Deputy McDonnell recorded in the safety check log that Clevenger was, "OK." At 8:03 p.m., Deputy Mayer saw Clevenger sitting on his bed looking at what appeared to be papers. Deputy Mayer recorded that Clevenger was, "OK."

At about 8:30 p.m., Deputy Mayer accompanied a Correctional Medical Services (CMS) nurse to the Dis/Iso cells for a required welfare check by medical staff. At about 8:38 p.m., Deputy Mayer approached Clevenger's cell. Deputy Mayer observed the back side of Clevenger's body hanging by the neck from what first appeared to Deputy Mayer to be

a rope. The rope was in fact a bed sheet hanging from a metal bar above the cell door. Deputy Mayer did not observe any movement, nor was there any verbal communication from Clevenger. Deputy Mayer immediately called for assistance via his hand-held radio. He specifically asked for a "cutting device" and medical staff to respond to his location.

Deputy Mayer opened the cell door and immediately wrapped his arms around Clevenger's knee/thigh area and lifted him up, holding Clevenger's weight in an attempt to relieve the pressure from around his neck. Deputy Mayer described Clevenger as being pale and did not feel any movement coming from Clevenger as he was carrying his weight. Deputy Mayer did not hear any noises or sounds coming from Clevenger during this time. Deputy Mayer held Clevenger in this position until OCSD Deputy Joshua Yoshimoto arrived with a cutting device.

Deputy Yoshimoto cut the bed sheet from above Clevenger's head and Deputy Mayer lowered Clevenger's body to the bed. Clevenger was unresponsive. Deputy Yoshimoto removed the remaining portion of the bed sheet from Clevenger's neck and began cardiopulmonary resuscitation along with Deputy Scott McTigue, who had arrived to help. Deputy Yoshimoto checked Clevenger for a carotid pulse but found none.

CMS personnel arrived and assisted in attempts to resuscitate Clevenger. All life support measures had no effect and all of these were recorded on video. Approximately 15 minutes after Deputy Mayer had discovered Clevenger, Santa Ana Fire personnel arrived on scene and continued attempts to revive him. Clevenger was subsequently transported to the hospital. All attempts to resuscitate Clevenger were unsuccessful and at 9:29 p.m., the treating trauma care physician at Western Medical Center in Santa Ana pronounced Clevenger dead.

No evidence was found in Clevenger's cell to show that any other person had any involvement in bringing about his death.

AUTOPSY

An autopsy was performed the following day, Aug. 30, 2010, by Dr. Joseph Cohen, then-Riverside County's Chief Forensic Pathologist. Dr. Cohen concluded the cause of death was asphyxiation due to hanging.

EVIDENCE ANALYSIS

Clevenger's post-mortem blood samples were analyzed for prescription and commonly abused drugs and none were found.

BACKGROUND INFORMATION

Clevenger's serious criminal history dates back to January 2000 and involves theft, weapons, violence, and the use of controlled substances. As of the date of his death, Clevenger had a parole revocation hold through the California Department of Corrections and Rehabilitation.

THE LAW

Homicide is the killing of one human being by another. Murder, voluntary manslaughter, and involuntary manslaughter are types of homicide. To prove that a person is guilty of murder, it must be proven:

- a. The person committed an act that caused the death of another person;
- b. When the person acted he had a state of mind called malice aforethought; and
- c. He killed without lawful excuse or justification.

There are two kinds of malice aforethought, express malice and implied malice. Express malice is when the person unlawfully intended to kill. Implied malice requires that a person intentionally committed an act, the natural and probable consequences of the act were dangerous to human life, at the time he acted he knew his act was dangerous to human life, and he deliberately acted with conscious disregard for human life.

A person can also commit murder by his failure to perform a legal duty, if the following conditions exist:

- a. The killing is unlawful (i.e., without lawful excuse or justification);
- b. The death is caused by an intentional failure to act in a situation where a person is under a duty to act;
- c. The failure to act is dangerous to human life;
- d. The failure to act is deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.

A person can also commit involuntary manslaughter by failing to perform a legal duty, if the following conditions exist:

- a. The person had a legal duty to the decedent;
- b. The person failed to perform that legal duty;
- c. The person's failure was criminally negligent; and
- d. The person's failure caused the death of the decedent.

In *Girardo v. California Department of Corrections and Rehabilitation* (2008) 168 Cal.App.4th231,251, the court establishes that there is a "special relationship" between custodian and inmate:

"The most important consideration in establishing duty is foreseeability. It is manifestly foreseeable that an inmate may be at risk of harm....Prisoners are vulnerable. And dependent. Moreover, the relationship between them is protective by nature, such that the jailer has control over the prisoner, who is deprived of the normal opportunity to protect himself from harm inflicted by others. This, we conclude, is the epitome of a special relationship, imposing a duty of care on a jailer owed to a prisoner, and we today add California to the list of jurisdictions recognizing a special relationship between jailer and prisoner."

California Government Code 845.6 codifies that the special relationship that exists in a custodial setting gives rise to a legal duty, as follows:

"...A public employee and the public entity where the employee is acting within the scope of his employment, is liable if the employee knows or has reason to know that the prisoner is in need of immediate medical care and he fails to take reasonable action to summon such medical care."

Criminal negligence involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with criminal negligence when he acts in a reckless way that creates a high risk of death or great bodily injury and a reasonable person would have known that acting in that way would create such a risk. In other words, a person acts with criminal negligence when the way he acts is so different from how an ordinarily careful person would act in the same situation that his or her act amounts to disregard for human life or indifference to the consequences of that act.

An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. There may be more than one cause of death. An act causes death only if it is a substantial factor in causing the death. A substantial factor is more than a trivial or remote factor; however, it does not need to be the only factor that causes the death.

LEGAL ANALYSIS

There is no evidence of express or implied malice on the part of any OCSD deputy or any inmates or other individuals under the supervision of the OCSD. Accordingly, the only possible type of homicide to analyze in this situation is murder or manslaughter under the theory of failure to perform a legal duty. Although the OCSD owed Clevenger a duty of care, the evidence does not support a finding that this duty was breached – either intentionally (as required for murder) or through criminal negligence (as required for involuntary manslaughter).

Clevenger took his own life. He attempted to do the same a few weeks earlier when he cut both of his wrists. OCSD deputies in the jail made regular half-hour checks on Clevenger's welfare. Once jail deputies became aware that Clevenger hanged himself, they made appropriate efforts to resuscitate him. There was no evidence of foul play on the part of any person who came into contact with Clevenger prior to his death. When OCSD personnel found Clevenger unresponsive, they took significant measures to revive him.

CONCLUSION

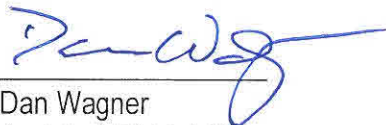
Based on all the evidence provided to and reviewed by the OCDA and pursuant to applicable legal principles, there is no evidence to support a finding of criminal culpability on the part of any OCSD personnel or any individual under the supervision of OCSD. Evidence shows that inmate Clevenger died from suicide.

Respectfully Submitted,



Mark Geller
Senior Deputy District Attorney
Gang Unit

Read and Approved,



Dan Wagner
Assistant District Attorney
Head of Homicide Unit