



OFFICE OF THE

DISTRICT ATTORNEY

ORANGE COUNTY, CALIFORNIA

TONY RACKAUCKAS, DISTRICT ATTORNEY

JIM TANIZAKI
SENIOR ASSISTANT D.A.
VERTICAL PROSECUTIONS/
VIOLENT CRIMES

MARY ANNE MCCAULEY
SENIOR ASSISTANT D.A.
BRANCH COURT OPERATIONS

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

MICHAEL LUBINSKI
SENIOR ASSISTANT D.A.
SPECIAL PROJECTS

JEFF MCLAUGHLIN
CHIEF
BUREAU OF INVESTIGATION

LISA BOHAN - JOHNSTON
DIRECTOR
ADMINISTRATIVE SERVICES

SUSAN KANG SCHROEDER
CHIEF OF STAFF

November 20, 2013

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

Re: Officer Involved Shooting on November 22, 2011
Non-Fatal Incident involving Bryan Garrett McCluey
District Attorney Case # 11F15604
District Attorney Investigations Case # 11-024
Orange County Sheriff's Department DR # 11-211028
Orange County Crime Laboratory Case # 11-55634

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 on-duty Orange County Sheriff's Department (OCSD) Deputy John Gomez. Bryan Garrett McCluey, 23, San Juan Capistrano, survived his injuries. The incident occurred in the City of San Juan Capistrano on Nov. 22, 2011.

OVERVIEW

This letter contains a description of the scope of and the legal conclusions resulting from the OCDA's investigation of the Nov. 22, 2011, non-fatal officer-involved shooting of McCluey. 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 deputy 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 Nov. 22, 2011, Investigators from the OCDA Special Assignment Unit (OCDASAU) responded to this incident. OCDASAU Investigators interviewed 38 witnesses and obtained and reviewed the following: OCSD reports, audio recordings and dispatch and radio traffic recordings; Orange County Fire Authority (OCFA) incident reports; 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 McCluey; criminal history records related to McCluey; and other relevant reports and materials including audio recordings of the conducted neighborhood canvass. The involved deputies gave a voluntary, consensual statement about the incident to the OCDA on Nov. 22, 2011.

The OCDA conducted an independent and thorough investigation of the facts and circumstances of this incident and has impartially reviewed all available 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, specifically Deputy Gomez. The OCDA will not be addressing herein issues of policy, training, tactics or civil liability.

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. 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.

FACTS

On Nov. 22, 2011, at 11:46 a.m., the OCSD received a 911 call from McCluey's mother, Lynn McCluey, asking for help. Dispatch heard arguing in the background. Lynn McCluey told the dispatcher her son, McCluey, was schizophrenic but not taking medication, assaulted her younger son earlier that day, and was in her home.

Deputies were dispatched to a residence on Via San Carlos in San Juan Capistrano. Upon arrival, Deputy Thomas Spratt saw a male subject run toward the residence holding a knife. The male subject was shirtless, unkempt, and had marks under his eyes. The male ignored Deputy Spratt's commands to drop the knife. The subject was later identified as McCluey.

Several more deputies arrived. McCluey and his mother were in a second story bedroom, which overlooked the street. Deputies tried to get McCluey to come out of the house. McCluey refused, yelling, "Come and get me," "The war's on," and, "Come shoot me."

Deputy Spratt told McCluey to "Put the knife down, we don't want anyone to get hurt, we are here to help." McCluey was uncooperative and responded, "F*** you, suck my d***, kill me, this is war." Lynn McCluey yelled, "Help!" "He's schizo," and, "He has a knife." Lynn McCluey said she could not leave because McCluey locked her in the bedroom.

Fearing for Lynn McCluey's safety, deputies entered the house and realized both McCluey and his mother were in a locked upstairs bedroom. Deputy Spratt asked Lynn McCluey if she was able to come out of the bedroom or open the door. Lynn McCluey said no, and sounded afraid.

Deputies tried to get McCluey to surrender but he refused, yelling louder. Deputies heard Lynn McCluey scream and thought she was in danger. Sergeant Raymond Ulmer gave orders to enter the bedroom to protect Lynn McCluey. Deputy Gomez kicked open the bedroom door.

Upon entry, McCluey advanced toward the deputies while holding a knife in his right hand. Fearing for their safety, two deputies deployed their Tasers, and Deputy Gomez fired two shots from his Glock, Model 21 semiautomatic pistol, .45 caliber handgun at McCluey. McCluey was Tased and shot once in the left hand.

As a result of being Tased, McCluey fell to the ground, still holding his knife. Deputies escorted Lynn McCluey from the bedroom and took the knife away from McCluey. Lynn McCluey was uninjured and told deputies her son had been acting weird when he suddenly came into her room, holding a knife and acting bizarre.

Paramedics treated McCluey at the scene. He was then transported to Mission Hospital and underwent surgery. McCluey was interviewed at the hospital by an OCSD Investigator. McCluey admitted having a knife and pointing it at his mother, as well as using profanities toward the deputies.

Voluntary, Consensual Statement of Deputy Gomez

Deputy Gomez gave a voluntary, consensual statement to the OCDA on Nov. 22, 2011. Deputy Gomez has been an OCSD deputy sheriff for 21 years and is a member of the Critical Incident Response Team (C.I.R.T.).

Deputy Gomez was on duty on Nov. 22, 2011, when he heard a radio request for a C.I.R.T. response to McCluey's home in San Juan Capistrano for a possible hostage situation. Deputy Gomez responded immediately to the call and drove "Code 3" (lights and sirens activated) to that location.

Upon arrival, Sergeant Ulmer advised Deputy Gomez that the situation was critical and they needed to enter the residence immediately. Deputy Gomez heard fellow deputies trying to communicate with a male subject (later identified as McCluey) inside the home, in an upstairs room facing the street. McCluey sounded agitated and refused to come out, saying to the deputies, "Come and get me," "Shoot me," and, "Come and suck me." Deputy Gomez also heard a female subject (later identified as Lynn McCluey) asking for help.

At Sergeant Ulmer's direction, Deputy Gomez and four other deputies entered the home. Once inside, Deputy Gomez realized both McCluey and his mother were in the locked upstairs bedroom. Deputy Gomez and the others went upstairs and positioned themselves in the hallway leading to the bedroom.

The deputies upstairs tried several times to get McCluey to surrender, but he refused, yelling obscenities at them. Lynn McCluey kept saying things like, "Help," "He has a knife," and "He's schizo." Deputy Gomez believed the situation was critical and Lynn McCluey was in danger. Sergeant Ulmer directed two deputies to ready their Tasers. Deputy Gomez was assigned to cover the other deputies with his sidearm and force entry into the bedroom.

Deputy Gomez kicked the door of the locked bedroom until it opened, and then took a few steps back to cover other deputies. McCluey came into view, holding a knife in his right hand in a "cocked" position. McCluey advanced toward the threshold of the door.

Fearing for the safety of his fellow deputies, Lynn McCluey, and himself, Deputy Gomez fired two rounds from his handgun toward McCluey. He estimated that McCluey was less than 10 feet from him and advancing at that time.

Deputy Gomez saw other deputies deploy their Tasers. McCluey retreated back to the interior of the bedroom and out of Deputy Gomez's sight. Deputy Gomez focused on Lynn McCluey, who was lying on the bed. Deputy Gomez pulled Lynn McCluey out of the bedroom and removed her from the house. Other deputies attended to McCluey, who was lying on the floor after being struck by a Taser.

Post-Shooting, Voluntary Interviews with OCSD Personnel On Scene

Voluntary, Consensual Statement of Sergeant Ulmer

Sergeant Ulmer gave a voluntary, consensual statement to the OCDA on Nov. 22, 2011. Upon his arrival at the scene, deputies informed Sergeant Ulmer that a male subject entered the house with a knife. He had been informed that deputies had dealt with McCluey in the past and that he was mentally ill, had violent tendencies, and liked knives. Sergeant Ulmer heard Lynn McCluey say she was trapped upstairs and McCluey would not let her out. McCluey shouted profanities at Lynn McCluey and the deputies. Sergeant Ulmer heard Lynn McCluey scream and decided deputies needed to enter the house for her safety. He and five other deputies went inside. Sergeant Ulmer stayed downstairs while five deputies went upstairs to the locked bedroom. Inside the house, deputies continued to ask McCluey to come out, but he refused and responded with additional profanities. After hearing a second scream from Lynn McCluey, Sergeant Ulmer ordered Deputy Gomez to force entry into the bedroom. Because he was downstairs, Sergeant Ulmer did not see McCluey's actions toward the deputies upon initial entry into the bedroom. When Sergeant Ulmer went upstairs, he saw McCluey lying on the floor still holding a knife.

Voluntary, Consensual Statement of Deputy Spratt

Deputy Spratt gave a voluntary, consensual statement to the OCDA on Nov. 22, 2011. When Deputy Spratt arrived, he saw McCluey, shirtless and unkempt, peering over a brick wall with wide eyes and a "thousand yard stare." Deputy Spratt saw McCluey holding an approximately 4-inch knife. McCluey disregarded Deputy Spratt's orders to drop the knife, and instead ran toward the house. Deputy Spratt heard Lynn McCluey say she was locked inside. McCluey yelled profanities at the deputies, and Deputy Spratt heard yelling inside the bedroom and items being banged around. Sergeant Ulmer ordered Deputies Spratt, Gomez, Harold Abe, Rodger Williams, and George Miller inside the house. Once upstairs, Deputy Spratt heard Lynn McCluey scream and thought she was in danger. Deputy Gomez then kicked the door open. Deputy Spratt saw McCluey approximately eight feet away, walking toward the deputies with a knife in his hand. Deputy Spratt thought McCluey was going to stab or kill himself or fellow deputies, and fired his Taser. Deputy Spratt did not realize Deputy Gomez fired his gun until it was announced. Still holding the knife, McCluey fell to the floor after being struck by a Taser.

Voluntary, Consensual Statement of Deputy Abe

Deputy Abe gave a voluntary, consensual statement to the OCDA on Nov. 22, 2011. Deputy Abe arrived after Deputy Spratt. He entered McCluey's home along with Deputies Spratt, Gomez, Williams, and Miller. Inside the house, Deputy Spratt was trying to get McCluey out of the locked bedroom. McCluey refused and said, "Let's just go to war." Deputy Abe knew Lynn McCluey was in the room against her will and he was afraid McCluey would use the knife. Deputy Abe could not see inside the bedroom immediately after Deputy Gomez forced entry. He thought Deputy Gomez fired, and he did hear a Taser activate. He then saw McCluey on the floor and thought the Taser was effective because it froze up McCluey's body. Lynn McCluey appeared unhurt and was taken out of the bedroom. Deputy Abe then handcuffed McCluey's wrist to the bedpost.

Voluntary, Consensual Statement of Deputy Williams

Deputy Williams gave a voluntary, consensual statement to the OCDA on Nov. 22, 2011. When Deputy Williams arrived, he knew Lynn McCluey was trapped inside the bedroom and heard deputies tell McCluey to put the knife down and come out. Sergeant Ulmer ordered Deputies Spratt, Gomez, Abe, Williams, and Miller into the house. Once inside, Deputy Spratt again asked McCluey to put down the knife. McCluey repeatedly said, "F*** you, kill me, suck my d***." Lynn McCluey said she could not come out the room and sounded scared. Lynn McCluey screamed and Deputy Gomez kicked in the bedroom door. Deputy Williams saw McCluey move toward the deputies at the doorway. He heard four pops, which he thought were two Tasers and two gunshots, but he did not see who fired. McCluey fell to the floor as a result of the Taser. When the Taser stopped cycling, McCluey yelled profanities at the deputies. Lynn McCluey was unhurt and taken out of the bedroom.

Voluntary, Consensual Statement of Deputy Miller

Deputy Miller gave a voluntary, consensual statement to the OCDA on Nov. 22, 2011. When Deputy Miller arrived, he heard Lynn McCluey yelling, "Don't do that," in a stressed voice. Deputy Miller went into the house with Sergeant Ulmer and Deputies Spratt, Gomez, Abe, and Williams. Inside, he heard McCluey say, "We are at war, f*** you." Deputy Miller heard Lynn McCluey scream and thought the situation was escalating. When Deputy Gomez kicked open the door, Deputy Miller was standing behind him, just outside the bedroom. Deputy Miller thought a Taser had been used, but it appeared as if it had no effect on McCluey, who was still upright, agitated, sweating, and facing the deputies. Deputy Miller then deployed his Taser, which struck McCluey. McCluey then fell to the floor, still holding the knife in his right hand. After the Taser completed its cycle, McCluey began yelling profanities at the deputies.

Post-Shooting, Voluntary Interview with Lynn McCluey

Lynn McCluey was interviewed on Nov. 22, 2011. She said McCluey has been diagnosed with schizophrenia and does not take his medication. McCluey arrived three day earlier from Napa, where he claimed everyone was trying to kill him. She called 911 because her younger son had been in an altercation with McCluey earlier that day and advised her to call the police. When Lynn McCluey called 911, McCluey walked in the room with a knife, locked the door, and would not let her out. Lynn McCluey was communicating with responding deputies from the upstairs window. Lynn McCluey also recalled McCluey screaming, "F*** you" and communicating with the deputies. Lynn McCluey did not believe McCluey would stab her, but she screamed inside the room because McCluey was scaring

her. After she screamed, the police broke down the door, and she saw little white dots on her son's body. Lynn McCluey said she was happy with the way the deputies protected her, and said of Deputy Gomez, "He's fine, he's a really nice man. He was trying to protect me."

Canvass Interviews of Neighborhood Witnesses

OCDASAU interviewed 24 neighbors. Of those who heard or saw any portion of the incident, all were consistent with their descriptions of the event. They saw police activity in front of the McCluey house, heard a loud voice say at least once, "Come out with your hands up," then shortly after heard two pops.

McCluey's Consensual, Voluntary, Post-Miranda Statements of Events

McCluey was interviewed on Nov. 22, 2011, in the hospital. He was advised of his Miranda rights and waived those rights. He said his mother is "crazy as f***." He thought he drank four to six beers that day and was not taking medication. McCluey admitted he had a knife and, "I started acting like I was going to do something," when Lynn McCluey called the cops. McCluey said his mother did not yell at all for help while he was in the room. When asked why he was holding the knife, McCluey said it didn't really matter. He said people normally have conversations with other people holding knives, "All the time," and, "Yeah, people are always fucking holding knives, dude." McCluey later said his mother was screaming because he had the knife in his hand, and, "She's always scared of me, man." He admitted to pointing the knife at her from five feet away. McCluey said he saw the police out the window, but the police did not say anything or give any warnings, either from outside or before they forced open the bedroom door. McCluey did admit that "it was me talking s*** on the cops saying back the f*** up and all this s***."

EVIDENCE COLLECTED AT THE SCENE

OCCL personnel located, identified, photographed, and collected the following items of evidence:

1. Miscellaneous Taser dots
2. Knife
3. Taser wires and probes
4. One gray Taser cartridge door
5. One green Taser cartridge door
6. Two expended Taser cartridges
7. Two shell casings head stamp "FEDERAL 45 AUTO+P"
8. One jacketed bullet from the bed post
9. One jacketed bullet from the west wall
10. One pillow case with apparent bullet hole and possible blood smear
11. Miscellaneous black foam Taser dots
12. Overall photographs taken of Deputies Gomez, Spratt, Abe, Miller, Williams, and Sergeant Ulmer, in full OCSO uniform

FROM DEPUTY GOMEZ

13. Glock, Model 21, .45 caliber, semi-automatic handgun, serial number LET384
14. One .45 caliber cartridge in the chamber of the handgun
15. 11 .45 caliber cartridges in the magazine from the handgun
16. Three magazines from the left front magazine pouch of Deputy Gomez's Sam Brown belt, each containing 13 .45 caliber cartridges
17. Photograph and cartridge count of back up weapon, Sig-Sauer, Model P 239, 9mm caliber, serial number SA32529, containing nine, 9 mm caliber cartridges

FROM SERGEANT ULMER

18. Taser X26, Yellow model, serial number X00-229527 – expended Taser cartridge remained at the incident scene

Sergeant Ulmer gave his Taser to OCSO Deputy Miller prior to the shooting, and Deputy Miller discharged Sergeant Ulmer's Taser during the shooting incident.

FROM DEPUTY SPRATT

19. Taser X26, Yellow model, serial number X00-229527 – expended Taser cartridge remained at the incident scene

EVIDENCE ANALYSIS

Toxicology

McCluey's pre-operative blood sample was analyzed twice for blood alcohol. McCluey's blood alcohol was determined to be .231 and .235, respectively. His blood also contained morphine and tetrahydrocannabinolic acid (THCA), a metabolite of marijuana.

Firearms Examination

Deputy Gomez's Glock, Model 21 semiautomatic, .45 caliber pistol was test fired and malfunctioned once during the test firing. The slide lock lever locked the slide open with a cartridge still in the magazine. The cause of the malfunction was not determined.

Projectile Examination:

Two .45 Auto caliber Federal brand HST jacketed hollow point bullets were recovered from the bedroom. The first was recovered from the bedpost, the second from the bedroom wall. Both were compared to a test fired bullet from Deputy Gomez's Glock pistol. Both projectiles shared similar characteristics with the Glock pistol, but it could not be determined if either projectile was fired from Deputy Gomez's Glock pistol.

Cartridge Case Examination

The two Federal brand .45 Auto caliber cartridge cases collected from the scene were determined to have been fired from Deputy Gomez's Glock pistol.

MCCLUEY'S MEDICAL CONDITION

After the shooting, OCFA personnel treated McCluey, who was handcuffed in the upstairs bedroom where the incident occurred. McCluey sustained a gunshot wound to the middle and index fingers of his left hand, and an 1/8 inch laceration to his neck from the removal of a Taser barb. McCluey was transported to Mission Hospital. A doctor diagnosed McCluey's middle finger as having complex fractures, and McCluey's index finger as having soft tissue injury. The doctor performed surgery, secured the fractures with screws and pins, and closed both wounds. McCluey was in stable condition following surgery.

MCCLUEY'S PRIOR CRIMINAL HISTORY

McCluey's criminal history was reviewed and considered.

MCCLUEY'S POST-INCIDENT CONVICTION

On Nov. 23, 2011, the OCDA charged McCluey with two counts of criminal offenses in Orange County Case # 11CF3186. McCluey was charged with one count of Penal Code (PC) section 245(c), Aggravated Assault on a Peace Officer, and one count of PC section 236, False Imprisonment. McCluey pleaded guilty to PC section 245(c), Aggravated Assault on a Peace Officer, on June 22, 2012. The second count was dismissed. McCluey was sentenced to one year in jail and five years of formal probation, and signed under penalty of perjury the following factual basis for his plea:

"In Orange County, California, on 11/22/11, I did willfully and unlawfully commit an assault with a deadly weapon (a knife) upon the person of Deputy Gomez knowing that he was a peace officer engaged in the performance of his duties."

STANDARD LEGAL PRINCIPLES IN OFFICER-INVOLVED SHOOTING CASES

Possible criminal charges against an officer involved in a shooting include murder [Penal Code Section 187]; 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. Banks (1977) 67 Cal. App. 3d 379, 383-84. 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. *People v. Kilvington* (1894) 104 Cal. 86, 89. The felony must involve violence or the threat of violence. *Kortum v. Alkire* (1977) 69 Cal. App. 3d 325, 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." As with Penal Code Section 196, Section 835a only allows use of deadly force by the police officer when the suspect's felony involves violence or the threat of violence. *Kortum v. Alkire* (1977) 69 Cal. App. 3d 325, 333. The court 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 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.

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 mind, as a reasonable person, an honest fear and conviction that he 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 bodily injury to the officer or others."

This limitation was, however, subsequently clarified 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 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 evolving." *Id.* at 397. Thus, the Court cautioned that "[t]he 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, supra*, are very much applicable to the circumstances surrounding the interactions of Deputy Gomez.

LEGAL ANALYSIS

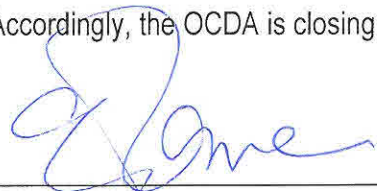
Officers were dispatched to 911 call of a woman being held hostage by her son, who was schizophrenic and wielding a knife. Deputies had prior contacts with McCluey and were aware that he was mentally ill and had violent tendencies. Upon arrival, deputies confirmed that McCluey would not let Lynn McCluey leave the upstairs bedroom. When seen outside, McCluey disobeyed Deputy Spratt's command to come back and drop the knife, and ran toward the house. Inside the house, McCluey shouted profanities at the deputies and refused to come out of the house. After hearing Lynn McCluey scream, and fearing for her safety, Sergeant Ulmer ordered deputies into the house. Once inside, deputies again tried to get McCluey to surrender. McCluey refused and continued to yell profanities. Lynn McCluey screamed again and Sergeant Ulmer ordered Deputy Gomez to force entry into the bedroom. Once inside, McCluey was less than 10 feet away and advanced toward the deputies holding the knife. Fearing for his safety and that of his fellow deputies, Deputy Gomez fired two shots from his sidearm, striking McCluey once in the left hand. Two other deputies deployed their Tasers, which immobilized McCluey, who was still holding the knife. McCluey's actions, objectively and reasonably, posed a danger of death and serious bodily injury to the deputies and Lynn McCluey. Deputy Gomez's belief that it was necessary to employ deadly force to stop the threat is reasonable under the circumstances.

In order for Deputy Gomez to be justly and lawfully charged and convicted of a crime in this incident, it is the prosecution's burden to prove beyond a reasonable doubt that Deputy Gomez did not act in reasonable and justifiable self-defense or defense of others when he shot at McCluey. As should be apparent from the above-described legal analysis and legal conclusion, the prosecution would be unable to carry this burden in this case. A jury analyzing these facts would likely conclude that it was reasonable for Deputy Gomez to use the force that he did in this circumstance. There is significant evidence that Deputy Gomez acted reasonably under the circumstances.

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 we 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 Deputy Gomez, and there is substantial evidence that the officer's actions were reasonable and justified under the circumstances when he shot McCluey on Nov. 22, 2011.

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



ERIN ROWE
DEPUTY DISTRICT ATTORNEY
Special Prosecutions Unit



Read and Approved by **Jaime Coulter**
Assistant District Attorney, Special Prosecutions Unit