



OFFICE OF THE

DISTRICT ATTORNEY

ORANGE COUNTY, CALIFORNIA

TONY RACKAUCKAS, DISTRICT ATTORNEY

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

MICHAEL LUBINSKI
SENIOR ASSISTANT D.A.
SPECIAL PROJECTS

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

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

JEFF MCLAUGHLIN
CHIEF
BUREAU OF INVESTIGATION

LISA BOHAN - JOHNSTON
DIRECTOR
ADMINISTRATIVE SERVICES

SUSAN KANG SCHROEDER
CHIEF OF STAFF

December 20, 2012

Chief Corey S. Sianez
Buena Park Police Department
6640 Beach Blvd.
Buena Park, CA 90622-5009

Re: Officer Involved Shooting on December 11, 2011
Non-Fatal Incident involving Jose Botello
District Attorney Case # 12N00174
District Attorney Investigations Case # 11-026
Buena Park Police Department DR # 11-45025
Orange County Crime Laboratory Case # 11-56427

Dear Chief Sianez,

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 off-duty Buena Park Police Department (BPPD) Officer Kevin Franklin. Jose Botello, 23, Buena Park, survived his injuries. The incident occurred in the City of Buena Park on Dec. 11, 2011.

OVERVIEW

This letter contains a description of the scope of and the legal conclusions resulting from the OCDA's investigation of the Dec. 11, 2011, non-fatal officer-involved shooting of Botello. 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 BPPD officers 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 Dec. 11, 2011, Investigators from the OCDA Special Assignment Unit (OCDASAU) responded to this incident. OCDASAU Investigators interviewed five witnesses, completed 35 canvass interviews and obtained and reviewed the following: BPPD reports, audio recordings and dispatch and radio traffic recordings; Orange County Fire Authority incident reports; Orange County Sheriff 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 Botello; criminal history records related to Botello including prior criminal history records and prior incident reports; the personnel records of Officer Franklin; and other relevant reports and materials including audio recordings of the conducted neighborhood canvass.

The OCDA conducted an independent and thorough investigation of the facts and circumstances of this incident and has impartially reviewed all evidence and legal standards available. The scope and findings of this review are expressly limited to determining whether any criminal conduct occurred on the part of BPPD officers or personnel, specifically Officer Franklin. 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.

Officer Franklin gave a voluntary, consensual statement to the OCDA on Dec. 11, 2011.

FACTS

At approximately 4:00 a.m., on Dec. 11, 2011, Botello and his girlfriend Luisa Enriquez left their friend's apartment to go home after a night of drinking. As Enriquez and Botello began walking, they started to argue about how they would get home. Botello wanted to get a ride and Enriquez wanted to walk. As the argument continued, Enriquez walked away from Botello westbound on the north sidewalk of Orangethorpe Avenue, heading over the bridge that crosses the Interstate-5 Freeway. Botello followed her, still angry. As they continued walking westbound on Orangethorpe Avenue, the argument became more heated, at which time Botello positioned himself in front of Enriquez. Enriquez then put her purse down on the ground and they started to argue face to face.

At approximately 5:18 a.m., off-duty Buena Park Police Officer Franklin was en-route to start his shift at BPPD when he observed the dispute between Botello and Enriquez, who were face to face, approximately three to four feet away from each other. Officer Franklin was on his way to work at the time of the incident and was wearing plain clothes. Officer Franklin was heading westbound on Orangethorpe Avenue when he passed Botello and Enriquez on the north sidewalk, west of Auto Center Drive. As Officer Franklin passed the couple and looked in his rearview mirror, he observed Enriquez attempting to walk away from Botello as Botello blocked her pathway by stepping in front of her.

Officer Franklin made a U-turn and drove back toward the dispute to make sure Enriquez was okay. Since there was no traffic, Officer Franklin drove eastbound in the westbound lanes and stopped adjacent to the north sidewalk near Botello and Enriquez. Officer Franklin stopped approximately 15 feet west of the couple and asked Enriquez if she was okay. Enriquez raised her hand to the side of her face as if simulating a telephone and mouthed silently for Franklin to call the police. Botello then walked aggressively toward Officer Franklin while pulling up on the front of his shirt with his left hand and reaching toward the front of his waistband with his right hand. Botello told Officer Franklin, who was still located in his pickup truck, to stay out of their business. Officer Franklin stated that Botello appeared to be a gang member and he

feared Botello was reaching for a handgun. Officer Franklin removed his revolver from his waistband, pointed it out the driver's door window at Botello, and fired one round from his .38 caliber revolver, striking Botello in the right wrist. The round went through the wrist and into Botello's right hip. Botello then fled westbound down the northbound on-ramp for the I-5 Freeway. Officer Franklin immediately telephoned BPPD and reported the incident.

Voluntary, Consensual Statement of Officer Franklin

Officer Franklin gave a voluntary, consensual statement to the OCDA on Dec. 11, 2011.

On Dec. 11, 2011, Officer Franklin was off-duty and heading to work in his pick-up truck. He was carrying a .38 Special revolver at the time. Officer Franklin was travelling on Orangethorpe Avenue near Auto Center Road when he saw two people on the right hand side sidewalk. The male, Botello, and female appeared to be in a domestic dispute. As Officer Franklin passed the two people, he saw in his rear view mirror that the female was trying to walk away from Botello. Botello, however, was blocking her path and holding his hands up.

Officer Franklin then made a U-turn and asked the couple if everything was okay. The female then motioned with her finger for Officer Franklin to call the police. Botello then started walking toward Officer Franklin in an aggressive manner while lifting up his shirt. Botello was approximately 15 feet from Officer Franklin when he did this. Officer Franklin also noticed that Botello was wearing baggy clothing. While walking toward Officer Franklin, Botello reached into his waistband and said, "What the f***?" Officer Franklin felt that Botello's threatening conduct was consistent with that of a criminal street gang member.

At that time, Officer Franklin believed that Botello was reaching for a weapon. Officer Franklin then reached for his own weapon and fired one shot at Botello. Officer Franklin then stepped on the gas and drove away so that he wasn't shot at. Officer Franklin indicated that when he looked back, Botello began running up the embankment behind the freeway. The female was seen running behind the male. At that time, Officer Franklin called dispatch and informed them of what had happened.

Post-Shooting Voluntary Interviews with Civilian Witnesses

Enriquez indicated that she had been living with her boyfriend, Botello, for the past two and a half years. She knows that Botello is a gang member out of Los Angeles. Enriquez stated that she and Botello have been involved in domestic disturbances in the past.

On the evening of Dec. 10, 2011, she was with Botello at the La Isla Bar and Grill in Anaheim. Botello was unarmed on that night. During the course of the evening, Enriquez drank approximately five beers and Botello drank approximately six beers. The two left the bar around midnight and then went to a family member's house. At approximately 1:00 a.m., the two went to their friend's apartment and continued drinking. Both Enriquez and Botello had at least one 12-ounce mixed drink at that location.

At approximately 4:00 a.m., the two left the friend's apartment to go home. Enriquez considered Botello to be "pretty drunk" when they left. On the walk home, the two began to argue about which route was best to take. Enriquez began to walk away from Botello, but he followed after her, still angry. At one point, the argument became heated and the two argued face to face. Enriquez then noticed a passing a truck stop in the street. The driver, Officer Franklin, asked the two if they were okay and needed help. Enriquez told Officer Franklin that she was okay. Botello, however, angrily approached the officer's car door.

Botello then stated something to the effect of, "What's up? Get out of my business. What is it to you?" Botello got to within five feet of Officer Franklin and Enriquez believed that Botello was going to fight with the officer. Enriquez then started walking away from the two when she heard a single gunshot. She then turned and saw Botello limping as he walked away from Officer Franklin's truck. Enriquez never saw Officer Franklin with a gun and didn't witness the actual shooting. Botello never mentioned anything about being shot but told Enriquez, "See what happened? You

caused this.” Officer Franklin came back to the scene, exited his vehicle, and told Enriquez that he was a police officer.

Botello’s Consensual, Voluntary, Post-Miranda Statement

Jose Botello was 22 years old on the night of the incident. He has a girlfriend of three years. He also used to be involved with a Hispanic criminal street gang from Los Angeles.

On the night on the incident, Botello explained that he was drunk and could not remember the entire incident. Botello initially stated he and Enriquez had been drinking at a friend’s apartment in Buena Park. While at the location, Botello drank one 24-ounce beer. Botello and Enriquez got into an argument at the apartment because he wanted to go home and Enriquez wanted to stay and keep drinking. Enriquez and Botello left the apartment and started to walk home. On the way home, Botello stopped at a 7-Eleven on Orangethorpe Avenue to buy a “blunt,” that he planned on using to smoke his marijuana.

After leaving the 7-Eleven, they walked west on Orangethorpe Avenue approaching the northbound I-5. At that time, a “black guy” in a black truck pulled up alongside of Botello. The driver of the truck asked him if he had any money and asked him where he was from. Botello feared he was going to get robbed, so he stayed quiet and walked away from the truck onto the freeway. Botello heard one gunshot and realized he had been shot in the waist area. Botello started running and heard the “black male” yell, “East Side Buena Park.”

Botello then changed his statement, saying that when the “black male” pulled up to him, he asked Botello what he had in his pockets. Botello said he may have had his right hand in his pocket, however, he did not say anything to the male. The man then pointed a gun at him, so he started running. Botello could not describe the subject’s gun.

Botello changed his statement again, saying he and Enriquez were drinking at a friend’s apartment in Buena Park then left to walk home. Botello said he was “drunk,” had smoked some marijuana, and could only recall the following: He and Enriquez started to argue as they walked home. A male subject pulled up to them in a truck and shot him. After he was shot, Botello ran onto the freeway.

After being confronted with Enriquez and Officer Franklin’s statements, along with the position of the injuries he sustained during the incident, Botello changed his statement again. Botello admitted he was drunk, was engaged in an argument with Enriquez, and he “f***** up.” He said it is consistent with his past behavior that he probably turned his anger toward Officer Franklin, said something similar to, “Yeah, get the f*** outta my business. This is my girl,” and “probably” approached him in an aggressive manner, as if to challenge him, just prior to the shooting. He admitted he may have had his right hand near his waistband area, possibly to tighten his belt, “Getting ready to, you know, do something stupid,” just in case Officer Franklin exited the truck. He denied reaching toward or into his waistband pretending to have a weapon and denied being in the possession of any weapons during the incident. He also denied knowing that Officer Franklin was a police officer.

EVIDENCE COLLECTED AT THE SCENE

Photographs were taken at the scene and a diagram was prepared using measurements taken at the scene. Near the area of the shooting, along the curb that separates the shoulder from the I-5, two pieces of clothing were located. One black ribbed undershirt and a dark blue cotton t-shirt. Both items appeared to have been cut lengthwise from the waist to the neck. Located along the fence that borders the east side of the dirt shoulder were two small additional items of evidence. The items consisted of a black disposable lighter and a sealed prescription bottle.

Officer Franklin’s 5-shot .38 caliber, Smith & Wesson revolver and ammunition were collected for processing by OCCL.

Botello’s blood was collected at the University of California, Irvine (UCI) Medical Center under vial number 591275. Botello’s clothing was also collected.

EVIDENCE ANALYSIS

FIREARMS EXAMINATION-OFFICER FRANKLIN'S HANDGUN

(Smith & Wesson, Model 442-2, .38 Special +P Caliber Revolver, # DAV0072)

Officer Franklin's 5-shot, double-action only revolver was received unloaded. Packaged with the revolver were four Winchester brand .38 Special +P caliber cartridges, each loaded with a jacketed hollow point bullet and one Winchester brand .38 Special +P caliber cartridge case.

The Smith & Wesson Revolver was test fired and operated without malfunction.

EVIDENCE EXAMINATION OF BOTELLO'S CLOTHING

On Feb. 28, 2012, OCCL Forensic Scientist Linda Huber examined Botello's t-shirt, tank top, jean pants, and underwear for the presence of gunpowder residue and bullet holes. Huber did not locate any gunpowder residue on the above items. Huber also examined the above items for the presence of soot, with no significant findings. Apparent blood was observed on the t-shirt and two apparent bullet holes were observed in the back and right side. Apparent blood was observed on the tank top and one apparent bullet hole was observed in the left side. Both the t-shirt and the tank top had previously been cut. The location of the apparent blood, bullet hole, and cuts on the tank top in relationship to the t-shirt cuts and bullet holes are consistent with the tank top being worn inside out. All of the apparent bullet holes were tested for the presence of lead, with positive results.

Huber examined Botello's boxer shorts underwear, black denim jean pants, and black belt. Huber observed apparent blood on the underwear, one apparent bullet hole in the back and two side-by-side apparent bullet holes in the front right side near the waist. This is consistent with the fabric being folded over when the apparent bullet hole was created. Apparent blood was also observed on the jean pants and one apparent bullet hole was observed in the back of the upper right area of the waist. All of the apparent bullet holes were tested for the presence of lead, with negative results.

TOXICOLOGY

Botello's pre-transfusion blood samples were analyzed for blood alcohol and common drugs of abuse. The toxicological examination detected the presence of Methamphetamine, Tetrahydrocannabinol, Tetrahydrocannabinol Carboxy-Acid, and showed Botello's blood alcohol to be .206 percent.

BOTELLO'S MEDICAL CONDITION

On Dec. 11, 2011, at approximately 5:40 a.m., Botello was transported to UCI Medical Center by ambulance. Botello was conscious and had a through-and-through gunshot wound to his right forearm, right hip, and an exit wound to his right buttocks. Botello was coherent and able to answer basic questions posed to him by medical staff, such as his name and if he had any medical problems. Botello had no significant past medical or critical history. Doctors ordered x-rays and a medical evaluation to determine if the gunshots caused any nerve and artery damage to Botello's wrist, arm or pelvic area. The X-rays revealed no broken bones and it was unknown at that time if there was nerve or artery damage, but Botello had "good pulses" and "good documented sensations." Doctors ordered a blood screening and "basic labs," pursuant to "standard trauma protocol." Botello received no transfusions or blood during his time in the emergency room. After a complete medical evaluation, Botello was determined to be "dynamically stable" and given only pain medication.

BOTELLO'S POST-INCIDENT CONVICTION

A request for criminal filing against Jose Botello for Penal Code section 415(1) (Challenging another person to fight in a public place) was submitted by BPPD to the OCDA's office for review on Jan. 13, 2012. This request for criminal filing was based on the conduct described above that led up to Officer Franklin firing his handgun. After a thorough review, the case was rejected by the OCDA's office on Feb. 9, 2012, based on insufficient evidence to prove the charge beyond a reasonable doubt.

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.

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 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 Officer Franklin with Botello.

LEGAL ANALYSIS

Officer Franklin was off-duty and not in police uniform, however, he was still entitled to defend himself within the confines of the law as detailed above per CALCRIM 3470. According to Officer Franklin, he contacted Botello and Enriquez after witnessing what appeared to be a domestic violence incident. Officer Franklin was off-duty and Botello did not know that Franklin was a peace officer. Botello and Enriquez were arguing in the street in the middle of the night. Officer Franklin drove his truck up to the two and asked if he could help the situation. In response, Botello aggressively approached Officer Franklin. Botello then angrily responded to the officer's question in a voice and conduct consistent with someone who was a criminal street gang member. As he continued to approach the officer, Botello also pulled up his shirt and made a motion as if he were reaching for a weapon. When Botello closed to within 15 feet, Officer Franklin shot Botello with a single round. One reasonable interpretation of these facts is that Officer Franklin reasonably believed that Botello was reaching for his waist for a handgun. In that case, Officer Franklin's shooting would be justified self-defense. *Kortum v. Alkire, supra*, 69 Cal.App.3d at 33, *People v. Jackson, supra*, 233 Cal.App.2d 639, 641-642.

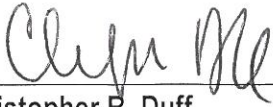
In order for criminal charges to be justly brought against Officer Franklin, it would need to be shown that he did not act in reasonable and justifiable self-defense or defense of others when he shot Botello. An analysis of the facts as presented in this case does not disprove the proposition that Officer Franklin shot in lawful self-defense. In fact, Botello's girlfriend, Enriquez, told investigators that she believed that Botello, a self-admitted gang member, was extremely intoxicated on the night of the shooting and was going to fight with Officer Franklin. A reasonable interpretation of the evidence is that Officer Franklin used the force that appeared to be objectively reasonable at the time considering all of the facts and circumstances. See, e.g., *Graham v. Conner* (1989) 490 U.S. 386. This version of the facts was further corroborated by Jose Botello's statements where he admitted the following: that he may have had his hand near his waistband area, swearing at the officer and walking toward him in an aggressive manner just prior to the shooting.

In order for Officer Franklin to be justly and lawfully charged and convicted with a crime in this incident, it is the prosecution's burden to prove beyond a reasonable doubt that Officer Franklin did not act in reasonable and justifiable self-defense or defense of others when he shot at Botello. 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 Officer Franklin to use the force that he did in this circumstance. There is significant evidence that Officer Franklin 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 the evidence does not support criminal culpability on the part of Officer Franklin, and there is substantial evidence that the officer's actions were reasonable and justified under the circumstances when he shot Botello on Dec. 11, 2011.

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



Christopher R. Duff
Senior Deputy District Attorney
Special Prosecutions Unit



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