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June 17, 2015

Chief Jay R. Johnson
Newport Beach Police Department
870 Santa Barbara Drive
Newport Beach, CA 92660

Re: Officer-Involved Shooting on July 11, 2014
Non-Fatal Incident involving Scott Jay Abraham
District Attorney Investigations Case # S.A. 14-010
Newport Beach Police Department Case # 14-05389
Orange County Crime Laboratory Case # 14-49320

Dear Chief Johnson,

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 Newport Beach Police Department (NBPD) Officers Michelle Kent and Adam Gilbert. Scott Abraham, 43, survived his injuries. The incident occurred in the City of Newport Beach on July 11, 2014.

OVERVIEW

This letter contains a description of the scope and the legal conclusions resulting from the OCDA's investigation of the July 11, 2014, non-fatal, officer-involved shooting of Abraham. 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 Newport Beach Police Department 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 July 11, 2014, Investigators from the OCDA Special Assignment Unit (OCDASAU) responded to this incident. During the course of this investigation, 19 interviews were conducted, and 22 additional witnesses were contacted during the supplemental canvass interviews. OCDASAU Investigators also obtained and reviewed the following: Newport Beach Police Department (NBPD) reports, audio dispatch and radio traffic recordings; Orange County Crime Laboratory (OCCL) reports, including toxicology, latent print, officer processing, and firearms examination reports; crime scene investigation photographs; medical records and photographs related to the injuries sustained by Abraham; criminal history records related to Abraham; 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 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 NBPD officers or personnel, specifically Officer Kent and Officer Gilbert. The OCDA will not be addressing any possible issues relating to 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 the OCDA does not release any information that may prejudice the defendant's right 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 Kent and Officer Gilbert each gave a voluntary statement to OCDA Investigators on July 18, 2014. Officers Kent and Gilbert were very professional in the entirety of their interactions with OCDA.

FACTUAL SUMMARY

On July 11, 2014, at approximately 5:50 p.m., Jane Doe was vacationing with her family and had rented an apartment on the 4600 block of Seashore Drive in the City of Newport Beach. Jane Doe called the NBPD to report that a man, later identified as Abraham, entered her apartment without permission and spoke to her. Jane Doe told police she was unable to understand what Abraham said, but Abraham was carrying a small hammer or screwdriver. Abraham left soon after he walked in, and Jane Doe alerted her husband, John Doe, about what had just happened.

John Doe went outside with his cousin to confront Abraham, and when they did, Abraham threatened them with a screwdriver. John Doe stated that Abraham approached him and shouted that he was the "President of the United States," while speaking unintelligibly and holding a yellow screwdriver over his head in a striking position. NBPD officers showed John Doe a California driver's license photo of Abraham, and John Doe positively identified Abraham as the man who confronted him on the patio. However, John Doe told NBPD officers that he did not desire prosecution of Abraham for the incident.

At approximately 9:38 p.m., John Doe 2 arrived home from dinner with his girlfriend. John Doe 2 lived on the 4600 block of Seashore Drive, and was Abraham's next door neighbor. John Doe 2 walked onto his patio, which faced the beach, and observed Abraham walk quickly out onto his own adjacent patio. John Doe 2 observed that Abraham was armed with a handgun. Abraham announced "Here's one... (Bam), here's two...(Bam)," as he fired two shots from the handgun toward the beach. Abraham then re-entered his residence. At approximately 9:41 p.m., John Doe 2 called NBPD to report his observations, and informed dispatch that Abraham was wearing only black boxers. NBPD dispatched numerous units to Abraham's residence on a report of "shots fired." NBPD Sergeant Ryan Peters arrived on scene within minutes of the initial "shots fired" call. Sergeant Peters directed responding units to set up a containment and perimeter, and he arranged for additional units to meet at the corner of 46th Street and Seashore Drive. A Huntington Beach Police Department (HBPD) helicopter also responded to the area to assist. Shortly thereafter, NBPD Officers Christine Maroney, Beau Rains and Andrew Shen arrived in the area of 46th Street and Seashore Drive. NBPD officers were concerned for the safety of the people on the beach at that time, and the officers gave verbal instructions for all members of the public to leave the beach immediately.

During this time, NBPD dispatchers made multiple calls to Abraham's residence in order to speak with him, but none of their calls were answered. Officers were aware that Abraham had been detained one month prior on a 5150 mental health hold because he was believed to be a danger to himself and others, and there were numerous firearms, as well as marijuana, in his home at that time. Therefore, officers took positions at 46th Street and Seashore Drive, monitoring Abraham's residence. Sergeant Peters established a command post at 47th Street and Neptune Avenue. Additional NBPD officers responded to 47th Street and Seashore Drive. At approximately 9:52 p.m., while setting up the containment, Sergeant Peters heard what he believed to be a single gunshot from the area of 4603 Seashore Drive and advised other NBPD units via his police radio. In addition, several civilian witnesses approached Sergeant Peters and reported that a male, wearing only black shorts, was armed with a handgun and just fired several shots toward the ocean.

An NBPD Ford Explorer police unit was staged at the end of 46th Street, on the edge of the sand. From this location, officers had an unobstructed view of the south side and patio of Abraham's residence at 4603 Seashore Drive. NBPD Officers Kent and Gilbert maintained their position of cover behind the police unit. Officer Gilbert was armed with a Remington 870 shotgun. Officer Kent was armed with a Colt AR-15 rifle. At the time they got into position, they did not see Abraham. Officer Gilbert was aware of an incident one month prior, where Abraham was placed under a 5150 hold and various weapons were confiscated for safekeeping. Officer Gilbert was also aware that earlier in the day, a subject from the same house was walking around with a screwdriver, confronting neighbors. Officer Kent also heard about Abraham's history, but did not realize the suspect at 4603 Seashore was the same person.

NBPD Officer Neal Schuster responded to the scene and took a position which gave him an unobstructed view of the west side of 4603 Seashore, all the way to the beach. While there, Officer Schuster observed Abraham suddenly appear on his patio facing east. Abraham's left arm was extended out from his side, but Officer Schuster could not see Abraham's right hand. Officer Schuster advised the other NBPD units of his observations over the police radio. As Officer Schuster watched Abraham, Officer Schuster heard other officers yelling, "Drop it... drop it!" Abraham yelled back "f*** you" several times. Officers Kent and Gilbert also saw Abraham enter his patio area. From their position, they could not see if Abraham had anything in his right hand. Abraham faced south for several seconds, while staring at the beach and straight upward. Abraham began pacing frantically, moving his head from side to side and talking to himself. Abraham turned toward the east and directed his attention toward Officers Gilbert and Kent. When Abraham turned, Officer Gilbert saw "a glint of steel in (Abraham's) right hand," which Officer Gilbert believed was a handgun. Officer Gilbert immediately gave commands for Abraham to, "drop the weapon!"

Officer Gilbert realized Abraham was armed with what he believed to be a handgun. According to Officer Gilbert, it appeared to him that Abraham did not have his mental faculties at this point. Officer Gilbert yelled at Abraham several more times to put down the weapon. According to Officer Gilbert, Abraham appeared very agitated and was "talking gibberish," but not directing his words toward the police officers. Officer Gilbert announced himself as a police officer several more times and repeatedly told Abraham to put down the weapon. Abraham did not comply.

Abraham was illuminated by the police unit spotlight, as well as the lights mounted on Officers Gilbert's and Kent's weapons. According to Officer Gilbert, Abraham puffed his chest out and raised his arms to his sides. Abraham then lowered his hands to his side, immediately brought his right hand up in Officer Gilbert's direction, and fired what Officer Gilbert believed was four to eight shots in their direction. When Abraham began firing, Officer Gilbert stopped giving commands, and aimed his weapon at Abraham's chest and fired one round. Officer Gilbert believed if he did not fire at Abraham and stop him, than Abraham would continue shooting. Just prior to the shooting, Officer Gilbert saw people on the beach, and also was aware that there were neighbors' houses nearby that had not yet been evacuated. Officer Gilbert was afraid someone was going to be hurt or killed by Abraham's discharge of his firearm towards the officers and other people.

Officer Kent saw Abraham exit the residence with a "dark gun" in his right hand. According to Officer Kent, when Abraham appeared, Officer Gilbert yelled repeated commands at Abraham to drop the gun. Abraham did not comply; instead, he faced Officers Kent and Gilbert with his hands in the air with the gun in his right hand. Officer Kent focused her rifle sights on Abraham, while watching the gun in his right hand. Officer Kent saw Abraham suddenly grab and fire his gun with both hands. When Abraham began firing his gun, it was pointed at Officers Gilbert and Kent and slightly toward the beach. Officer Kent stated that she fired two shots at Abraham because she believed Abraham was an immediate threat to herself, Officer Gilbert, and anyone else on the beach at that time. After Officers Gilbert and Kent fired their weapons, Abraham fell down and out of their sight. HBPD's helicopter assisting overhead advised officers on the ground that Abraham was down on the patio. Officers rushed to the scene and located a handgun near Abraham.

At approximately 10:12 p.m., Officer Shuster advised units via his police radio that shots had been fired by officers. At approximately 10:14 p.m., the Newport Beach Fire Department (NBFD) was requested to respond. NBFD treated Abraham and transported him to Western Medical Center Santa Ana (WMCSA) for gunshot wounds. Abraham was cooperative during transport, and did not make any statements regarding the incident. Surgery was performed and Abraham was later discharged.

EVIDENCE COLLECTED

The following items of evidence were collected and examined:

- One .223 cartridge case, head stamp "HS223REM"
- One .223 cartridge case, head stamp "FC11223"
- One shotgun shell casing
- Four .45 cartridge cases, head stamp "FED 45 AUTO"
- Six .45 cartridge cases, head stamp "BLAZER 45 AUTO"
- One Wilson Combat Model Tactical Supergrade pistol, .45 auto caliber, serial number WCT26119
- One Colt Model AR15A3 Tactical Carbine rifle, .223 Remington caliber
- Remington Model 870 Wingmaster shotgun, 12-gauge

EVIDENCE ANALYSIS

Firearms Examination

Abraham's Wilson Combat Model Tactical Supergrade pistol, .45 auto caliber, serial number WCT26119, was test fired at the Orange County Crime Lab and operated without malfunction.

Officer Kent's Colt Model AR15A3 Tactical Carbine rifle was test fired at the Orange County Crime Lab and operated without malfunction.

Officer Gilbert's Remington Model 870 Wingmaster shotgun, was test fired at the Orange County Crime Lab and operated without malfunction.

Projectile Examinations:

Ten .45 caliber cartridge cases collected from the scene were determined to have been fired from the Wilson Combat pistol, serial number WCT26119, operated by Abraham.

Two .223 cartridge cases recovered from the scene were determined to have been fired in the Colt rifle, operated by Officer Kent.

One shotshell recovered from the scene was determined to have been fired in the Remington shotgun, operated by Officer Gilbert.

Toxicological Examination

When OCDA Investigators attempted to obtain a pre-transfusion sample of Abraham's blood, taken at WMCSA, they were told the hospital destroyed the blood and it was no longer available.

ABRAHAM'S PRIOR CRIMINAL HISTORY

Abraham's criminal history was reviewed and considered. His criminal history includes arrests for possession of an assault weapon, theft, trespass, driving on a suspended license, and possession of more than 28.5 grams of marijuana.

ABRAHAM'S POST-INCIDENT CONVICTION

On July 15, 2014, the OCDA filed criminal charges against Abraham in Orange County Superior Court case 14HF1963, consisting of two felony counts of assault with a semiautomatic firearm, a violation of California Penal Code section 245(b), two felony counts of assault with a semiautomatic rifle on a peace officer, in violation of California Penal Code section 245(d)(2), and one felony count of discharging a firearm with gross negligence, in violation of California Penal Code section 246.3(a). On April 6, 2015, Abraham pleaded guilty to two felony counts of assault with a semiautomatic firearm on Officers Kent and Gilbert, with the remaining counts dismissed. Abraham was sentenced to 240 days in jail and five years of supervised probation. As a result of his guilty plea, Abraham is prohibited from possessing any weapons or ammunition. Abraham must also cooperate with probation in any plan for psychological treatment, and is to continue with monitoring regarding medication.

Pursuant to his guilty plea, Abraham admitted the following:

"In Orange County, on July 11, 2014, I did willfully and unlawfully commit an assault with a loaded semi-automatic firearm upon Michelle Kent and Adam Gilbert."

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 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. 333.)

In addition, Penal Code section 834a requires that if a person has knowledge, or by the exercise of reasonable care should have knowledge, that he is being arrested by a peace officer, that person must refrain from using force or any weapon to resist such arrest.

Similarly, the relevant Criminal Jury Instruction as written by the Judicial Council of California and set forth in CALCRIM 3470 permits a person being assaulted to defend himself from attack if, as a reasonable person, he had grounds for believing and did believe that bodily injury was about to be inflicted upon him or upon another person. In doing so, such person may immediately use all force and means which he believes to be reasonably necessary and which would appear to a reasonable person, in the same or similar circumstances, to be necessary to defend against that danger and to prevent the injury which appears to be imminent. The law as detailed in CALCRIM 3470 and in well-settled case law therefore permits a person, if confronted by the appearance of danger which arouses in his/her mind, as a reasonable person, an honest fear and conviction that he/she or another person is about to suffer bodily injury, to act in self-defense or defense of others upon such appearances, and from such fear and honest convictions. It is also well settled that the person's right of self-defense is the same whether the danger is real or merely apparent. (*People v. Jackson* (1965) 233 Cal.App.2d 639, 641-642.)

Nevertheless, the above justifications must be interpreted in light of United States Supreme Court precedent that limits the right of a police officer to use deadly force. (*People v. Martin* (1985) 168 Cal.App.3d 1111, 1124.) Thus, in *Tennessee v. Garner* (1985) 471 U.S. 1, 3, the United States Supreme Court ruled that a police officer is entitled to use deadly force only when “the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.” This limitation was, however, clarified subsequently by the United States Supreme Court in the seminal case of *Graham v. Connor* (1989) 490 U.S. 386, wherein the Supreme Court explained that an officer's right to use force [*i.e.*, his/her weapon] is to be analyzed under the Fourth Amendment's “objective reasonableness” standard. The Supreme Court further stated that the determination of the reasonableness of an officer's use of force “must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation” (*Id.* at 396-397.) The United States Supreme Court's analysis and teachings in *Graham* are very much applicable to the circumstances surrounding the interactions of NBPD Officers Kent and Gilbert with Abraham.

LEGAL ANALYSIS

The issue is whether the conduct of Officer Kent and Officer Gilbert, on July 11, 2014, was criminally culpable and without justification. In order to lawfully charge Officer Kent or Officer Gilbert with a criminal violation, the prosecution must prove beyond a reasonable doubt that no legal justification existed for the police officers' conduct and they did not act in lawful self-defense. However, if the actions of Officer Kent and Officer Gilbert were justifiable as lawful self-defense or defense of others, criminal charges will not be warranted. Without any doubt, it is abundantly clear that the only person who committed a crime in this incident was Abraham, and that the involved officers acted appropriately and lawfully to protect themselves, the innocent neighbors, and the people on the beach.

Based on a review of all available evidence, it is clear that Officer Kent and Officer Gilbert were justified in believing Abraham posed a significant threat of death or serious physical injury to themselves and others. NBPD officers were dispatched to Abraham's residence in reference to "shots fired." The officers were aware of Abraham's previous conduct and possession of weapons, as well as an earlier report of erratic and aggressive behavior with his neighbors. Upon arrival, officers observed Abraham, shirtless and dressed only in his boxers, pacing frantically and talking gibberish. Both officers observed a dark colored handgun in Abraham's right hand, which was consistent with the basis of the call.

Abraham ignored repeated commands by Officer Gilbert to put the gun down. Instead, Abraham brought his right hand up in the direction of officers and fired multiple shots from his handgun in their direction. Officers Gilbert and Kent were aware of people on the beach minutes before, and also knew the Seashore residents had not been fully evacuated. Both officers stated they were afraid for the safety of the public, neighbors, and themselves. The evidence proves that both officers were honest and reasonable in having such fear. Once Abraham opened fire in their direction, the officers felt the use of deadly force was necessary because their safety, and that of the public, was in imminent danger. The officers believed, accurately and reasonably, that Abraham's actions posed an immediate and grave threat of serious injury or death, and they needed to act immediately to eliminate the threat. Given the totality of the circumstances, Officer Kent and Officer Gilbert acted reasonably in that situation. When Abraham fired his handgun in the direction of Officer Kent and Officer Gilbert, at close range, the officers were justified in returning fire. Their decision to do so was both lawful and appropriate in the circumstances they encountered that night.

As should be apparent from the above-described analysis, the prosecution would be unable to prove beyond a reasonable doubt that no legal justification existed for the police officers' conduct and that they did not act in lawful self-defense. A jury analyzing these facts would justly conclude that it was reasonable for Officer Kent and Officer Gilbert to believe that their lives, and the lives of others in the area, were in immediate and significant danger. Therefore, Officer Kent and Officer Gilbert were justified when they shot Abraham and carried out their duties as peace officers in a reasonable and justifiable manner.

CONCLUSION

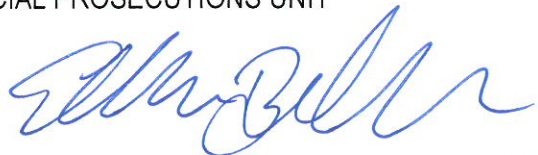
Based upon a review of all of the evidence provided to and obtained by the OCDA, and based on the entirety of the facts contained in all the available reports and interviews reviewed, and pursuant to the applicable legal principles, it is our legal opinion that there is no evidence of criminal culpability on the part of Officer Kent and Officer Gilbert. To the contrary, there is overwhelming evidence that their actions were reasonable and justified under the circumstances when they shot Abraham on July 11, 2014, and Officers Kent and Gilbert are to be commended for their protection of the citizens of Newport Beach.

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



ERIN ROWE

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