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November 22, 2019

Lieutenant Curtis Fouyer
California Highway Patrol – Ft. Tejon
1033 Lebec Road
Lebec, CA 93243

Re: Fatal shooting of Marvin Urbina by CHP Officer Jeffrey Burdick on August 4, 2019 near I-5 and Laval Road; Kern County Sheriff case# 2019-00125502.

Dear Lieutenant Fouyer,

The Kern County District Attorney's Officer-Involved Shooting Committee has reviewed reports and other materials submitted by the Kern County Sheriff's Office regarding the shooting noted above. The OIS Committee reviews cases for criminal liability under state law. The OIS Committee has completed its review. The findings are noted below.

Summary

On August 4, 2019, the CHP received a call of a reckless driver on I-5. CHP Officer McCarthy found the car driven by Marvin Urbina. Urbina led Off. McCarthy on a high-speed pursuit. Urbina took an off ramp for Laval Road too fast and crashed his car into another vehicle. Airbags covered the windows to Urbina's car and officers could not see inside of it. Urbina refused to get out of his car. He also refused to show his hands. When Off. Ruiz opened a car door Urbina reached for his waistband causing the officers to fear that he was armed. After fifteen minutes Urbina suddenly exited the car. He immediately reached into his waistband while facing Off. Burdick. Believing Urbina was reaching for a weapon, Off. Burdick shot him with a department issued rifle. Urbina did not go all the way down after the initial shooting. He continued reaching for his waistband and he was shot again by Off. Burdick. Urbina was pronounced dead at the scene. He was not armed. The incident is captured on MVARs. The autopsy report shows Urbina tested positive for Ecstasy and Xanax.

Legal Principles and Analysis

A homicide is justified by a peace officer when necessary to overcome actual resistance to the

discharge of his legal duty.¹ A peace officer may use deadly force under circumstances where it is reasonably necessary for self-defense or defense of others.

Can the shooting be justified when Urbina was unarmed?

Urbina made his hand in the shape of a gun and pointed at his waistband while saying something to Off. Burdick while in the car. Urbina made a motion towards his waistband when Off. Ruiz attempted to enter the car. This caused Off. Ruiz to exit the car in fear that Urbina had a gun. Off. Ruiz conveyed this belief to the other officers. The MVARs shows that when Urbina exited the car, he immediately moved both hands towards his waistband as if he was reaching for something. Even though Urbina turned out not to be armed, an officer may be justified using deadly force based upon the reasonable *appearance* of danger rather than *actual* danger.²

Why didn't Off. Burdick wait to see if Urbina really had a firearm in his waistband?

In short, because there is not time. The “split-second decision” on whether or not to shoot is literally that. A study entitled, “The Reasonableness of Reaction Time,” conducted numerous simulations where officers knew they were responding to a call of a person with a firearm and were looking for a firearm when they made contact. A split-second decision had to be made based upon the reaction or lack thereof by the suspect. Even though the officers already had their guns drawn and pointed at the suspects—they were still shot at and hit by half of the suspects where the suspects attempted to shoot them. The authors concluded that “even when a police officer has his or her gun aimed at a suspect and the suspect is not aiming at the police officer, the police officer is still in extreme danger.”³

Courts give deference to officers acting under the pressure of these split-second decisions. “The calculus of reasonableness must embody allowance for the fact that peace 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...The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene rather than with the 20/20 vision of hindsight.”⁴

Was shooting at Urbina six times with a rifle excessive force?

In 1992, the Federal Court of Appeal (9th Circuit) held that police do not have to use the least intrusive alternative available when responding to an exigent situation. “Requiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgment. In the heat of battle with lives potentially in the balance, an officer would not be able

¹ Penal Code 196

² *People v. Toledo* (1948) 85 Cal.App.2d 577; *People v. Jackson* (1965) 233 Cal.App.2d 639.

³ “Reasonableness and Reaction Time,” by Professor J. Pete Blair, published in *Police Quarterly* 2011.

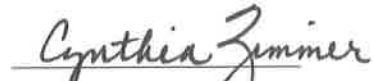
⁴ *Graham v. Connor* (1989) 490 U.S. 386, 396.

to rely on training and common sense to decide what would best accomplish his mission. Instead, he would need to ascertain the *least* intrusive alternative (an inherently subjective determination) and choose that option and that option only. Imposing such a requirement would inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves. It would also entangle the courts in endless second-guessing of police decisions made under stress and subject to the exigencies of the moment. Officers thus need not avail themselves of the least intrusive means of responding to an exigent situation; they need only act within that range of conduct we identify as reasonable.” (*Scott v. Henrich* (1992) 39 F.3d 912, 915)⁵

Conclusion

Based upon a review of the evidence, Officer Burdick responded reasonably to a perceived threat in self-defense. There is no state criminal liability for Officer Burdick’s use of deadly force under the circumstances of this case because the shooting is legally justified.

Sincerely,


Cynthia J. Zimmer
District Attorney

⁵ The case revolved around whether the officers were reasonable to kick down a motel room door and then shoot the armed suspect, rather than wait, have a standoff, and allow him the opportunity to surrender through negotiations, etc.