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September 27, 2019

Today, the San Joaquin County District Attorney's Office (SJCDA) released its findings in the November 14, 2017 officer-involved shooting that resulted in the death of Keian Jones. It is the decision of the SJCDA that the use of deadly force by Stockton Police Officers was justified under the circumstances.

This decision was made after SJCDA Office's Officer-Involved Critical Incident Review Committee reviewed the investigations by the San Joaquin County District Attorney's Bureau of Investigations, the Stockton Police Department, the San Joaquin County Sheriff-Coroner's Office, and the California Department of Justice.

The findings and conclusion of this investigation was completed on September 25, 2019 and has been memorialized in a report. On that date, this Office notified the Stockton Police Department of the findings.

In addition, family members of Mr. Jones were also notified of this decision. A copy of the report has been provided to them.

The memorandum detailing the SJCDA's findings and conclusion follow below.

SAN JOAQUIN COUNTY DISTRICT ATTORNEY
MEMORANDUM OF
OFFICER-INVOLVED CRITICAL INCIDENT
OF NOVEMBER 14, 2017
AT DEER CREEK CIRCLE, STOCKTON



TORI VERBER SALAZAR, DISTRICT ATTORNEY
OFFICER-INVOLVED CRITICAL INCIDENT UNIT

SEPTEMBER 25, 2019



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MEMORANDUM

TO: ERIC JONES, CHIEF
STOCKTON POLICE DEPARTMENT

FROM: SAN JOAQUIN COUNTY DISTRICT ATTORNEY

DATE: SEPTEMBER 25, 2019

SUBJECT: INVESTIGATION OF THE FATAL SHOOTING OF
KEIAN JONES, (SPD DR #17-43198).

Pursuant to the provisions of the San Joaquin County Officer-Involved Critical Incident Protocol, effective August 1, 1994, the responsibility of the Office of the District Attorney is to review the facts and determine what, if any, criminal charges should be filed whenever there is an officer-involved fatality or life-threatening incident.

This memorandum reviews the officer-involved shooting of Keian Jones on November 14, 2017. The investigation was jointly conducted by investigators from the San Joaquin County District Attorney's Investigation Unit, the Stockton Police Department, the San Joaquin County Sheriff-Coroner's Office, and the California Department of Justice.

INVESTIGATION SUMMARY

On November 14, 2017, at approximately 3:45 p.m., Stockton Police Officers Kenneth Tuy, Nicholas Fogal, and Miguel Morales responded to the 8700 block of Deer Creek Circle, Stockton, for a report of an assault with a deadly weapon, a vehicle, and a man, later identified as Keian Jones (DOB 04/18/1966), armed with a knife. The first officers on scene observed Mr. Keian Jones with a knife. Mr. Jones refused to drop the knife and advanced toward officers who deployed a less-than-lethal force: beanbag projectiles fired from a shotgun. When the beanbag projectiles failed to deter Mr. Jones, two officers fired their weapons fatally striking Mr. Jones.

Officers rendered life-saving measures until paramedics arrived at approximately 4:11 p.m., and took over. Mr. Jones succumbed to his injuries and was pronounced deceased at 4:12 p.m.

As provided by the Memorandum of Understanding for the San Joaquin County Officer-Involved Critical Incident Protocol (hereinafter referred to as “Protocol”), the Stockton Police Department invoked the Protocol. A multi-agency task force was created that included San Joaquin County District Attorney’s Office’s Bureau of Investigations (hereinafter “BOI”), the Stockton Police Department (hereinafter referred to as “SPD”), the San Joaquin County Sheriff-Coroner’s Office (hereinafter referred to as “Coroner”), and the California Department of Justice (hereinafter referred to as “DOJ”).

FACTUAL SUMMARY

On November 14, 2017 at around 3:45 p.m., Witness #1 and Witness #2¹ were doing repairs on a 1966 Buick Skylark in the driveway of a residence on the 8700 block of Deer Creek Circle. Witness #3 was visiting and talking to Witness #1. All three noticed an acquaintance they only knew as “Ken”, later identified as Mr. Jones. Mr. Jones was driving a black Lincoln Navigator sport utility vehicle. Witness #1 saw Mr. Jones stop in the street and then accelerate towards him.



Damage to Witness #1, Witness #2, and Mr. Jones’s vehicles.

¹ See, “Confidential Page APPENDIX A: Civilian Witness Information.”

Before Witness #1 could get out of the way, he was struck. It's unclear if he was struck by Mr. Jones's car or another car that was pushed into Witness #1 by Mr. Jones. Both the Skylark and Witness #2's car were damaged. Witness #2 also saw the Navigator coming at them. He jumped out of the way but was still hit on his leg by the vehicle. Witness #3 saw the Navigator coming at them as well and was able to avoid being struck. Witness #1, severely hurt, was on the ground and saw Mr. Jones with a large knife saying he wanted to kill himself as he started cutting his wrists.

Mr. Jones then walked down Deer Creek Circle, approximately 350 feet to the bend.

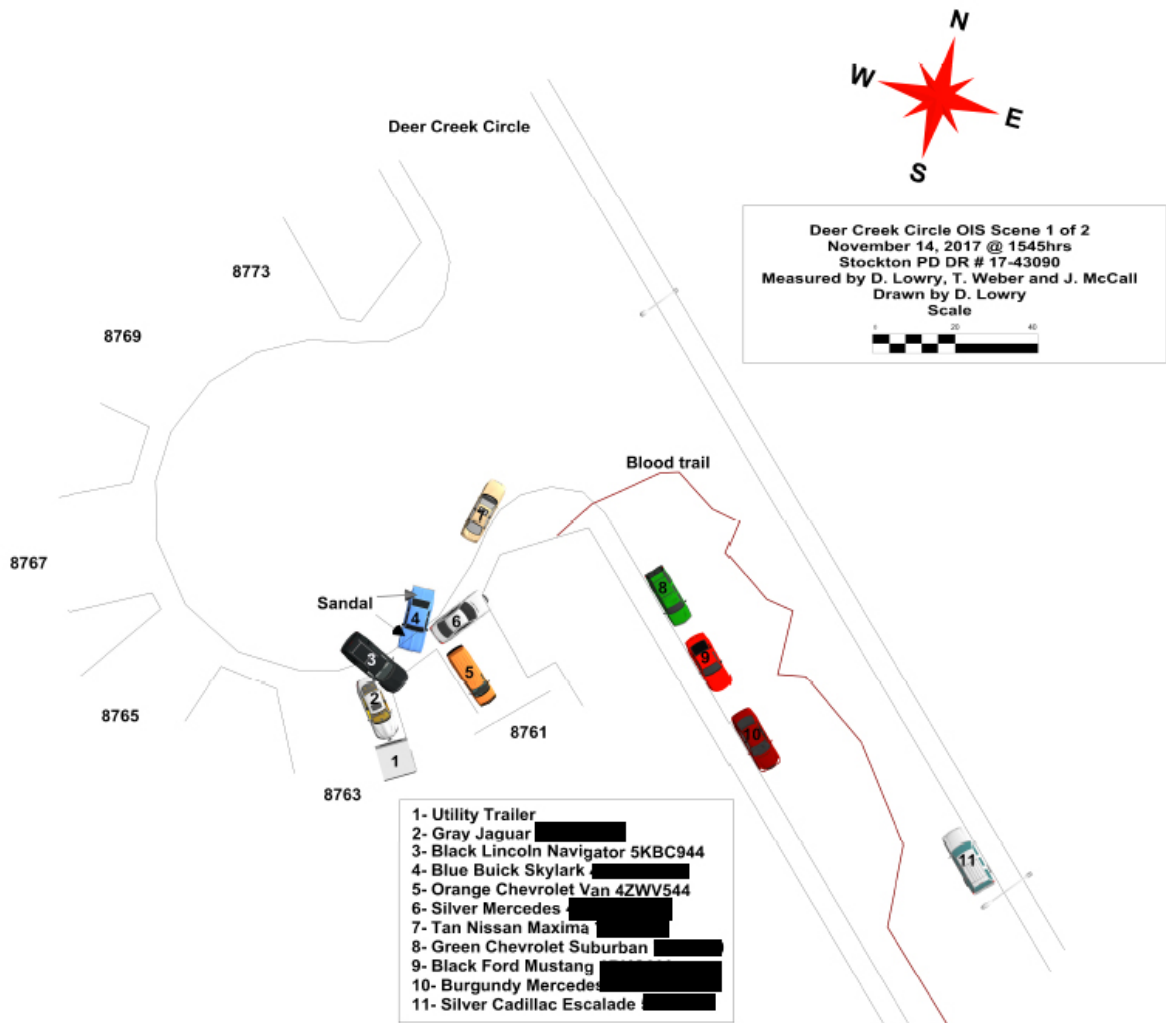


Diagram of collision site – SPD



Collision site relative to the site of the shooting – Google Maps.

Officers Kenneth Tuy and Nicholas Fogal were on patrol together when they heard a call of an assault with a vehicle, and possibly a man with a knife. Officer Miguel Morales was alone on patrol when he too heard the same dispatch. All three officers proceeded to Deer Creek Circle.

Officers Kenneth Tuy and Nicholas Fogal were first on scene and observed Mr. Jones in the street with a knife. At this position, the collision site was not in their line of sight. Both officers gave multiple commands for Mr. Jones to drop his knife and to stop walking toward them. Mr. Jones refused to comply. Officer Fogal asked Mr. Jones several times to drop his knife, telling Mr. Jones that he did not

want to be forced to kill Mr. Jones. Mr. Jones responded, “[unintelligible] kill me,” and continued advancing on the officers with his knife.

Officer Tuy used a less-than-lethal shotgun by firing four beanbag projectiles at Mr. Jones. The projectiles failed to stop Mr. Jones from advancing toward Officer Fogal. Officer Miguel Morales arrived on scene and due to the proximity of Mr. Jones to Officer Fogal, immediately ran to the right of Officer Fogal. Officers Morales and Fogal continued to give Mr. Jones verbal commands to stop and drop the knife but, Mr. Jones refused to comply. When Mr. Jones was within six feet of the officers, Officers Fogal and Morales fired their service weapons fatally wounding Mr. Jones.

WITNESS STATEMENTS

Investigators from the San Joaquin County District Attorney’s Office and Stockton Police Department detectives jointly interviewed the involved officers, medical personnel, and civilian witnesses. Whenever possible, these interviews were recorded. The investigators also conducted an area canvas to locate witnesses. Not every witness interviewed is summarized here. The individual witness synopses below are to assist the reader in supplementing the above Factual Summary. Civilian witnesses are identified in this memorandum as “Witness #” to protect their privacy rights.²

Stockton Police Officer Nicholas Fogal

Stockton Police Department Officer Nicholas Fogal was interviewed on November 14, 2017, by investigators at the Stockton Police Department, and stated the following:

Officer Nicholas Fogal was a two-month police officer of the Stockton Police Department. This day, Officer Nicholas Fogal was working patrol, in a marked unit, with his Field Training Officer Kenneth Tuy, wearing his department-issued uniform. He was the passenger. He was armed with his service weapon: a .40 caliber Sig Sauer P226 semi-automatic pistol.

They were driving on the Crosstown Freeway eastbound toward State Route 99 when they received a dispatch of possible shots fired. While responding to the call location, they began receiving several updates of a possible assault with a

² See, “Confidential Page APPENDIX A: Civilian Witness Information.”

vehicle; a person who was under the influence; a person armed with a knife; and a person who was down in the street and injured.

When they arrived at Deer Creek Circle, he saw Mr. Jones holding a knife in his right hand. Officer Tuy stopped the patrol unit approximately twenty to twenty-five yards away from Mr. Jones. They both exited the patrol vehicle and began giving Mr. Jones commands to drop the knife.

Mr. Jones was holding the knife in a downward position, at shoulder height and was telling the Officers to kill him. Officer Fogal told Mr. Jones several times that he did not want to kill him, and repeated the commands to drop the knife. Mr. Jones refused to comply with the commands and was advancing on Officer Fogal.

When Mr. Jones was within five to ten yards of the patrol vehicle, he heard Officer Tuy fire the less-than-lethal beanbag shotgun, and could see the projectiles striking Mr. Jones. When the first bag struck, Mr. Jones only flinched; the beanbags had little to no effect on Mr. Jones who continued to advance.

Officer Fogal was still behind his unit's passenger door as Mr. Jones continued to walk toward him. Officer Fogal continued to give Mr. Jones commands to stop and to drop the knife. Mr. Jones was making eye contact with Officer Fogal as commands to drop the knife were yelled. Mr. Jones ignored the commands and continued to move toward him with the knife still being held at shoulder level and in a stabbing or downward position.

Mr. Jones had moved past the front bumper of Officer Fogal's patrol unit and was within six feet of Officer Fogal. Officer Fogal, at this point, became fearful of being seriously hurt or killed, and feared for Officer Tuy's life. Officer Fogal fired his service weapon he believed to be three times. Officer Fogal was aware another officer had fired his service weapon at the same time; however, he did not realize that it was Officer Morales who had also fired until after Mr. Jones had fallen to the ground.

After Officer Fogal discharged his service weapon, he immediately radioed shots fired. Officer Thomas Heslin arrived and checked Mr. Jones for a pulse. When no pulse was found, Officer Heslin began chest compressions and continued until paramedics arrived and took over life saving measures.

Stockton Police Officer Miguel Morales

Stockton Police Department Officer Miguel Morales was interviewed on November 14, 2017, by investigators at the Stockton Police Department, and stated the following:

Officer Miguel Morales was a four-year police officer of the Stockton Police Department. This day, Officer Morales was working patrol, in a marked unit, wearing his department-issued uniform. He was armed with his service weapon: a .40 caliber Sig Sauer P226 semi-automatic pistol.

Officer Morales was on patrol when he heard a dispatch regarding a disturbance on Deer Creek Circle, and something about a gun. As he drove to the location, he received updates regarding a subject with a knife and heard that Officers had a man with a knife at gunpoint. When Officer Morales arrived on scene, he immediately saw Mr. Jones in the street with a knife in his hand.

Officer Morales saw Mr. Jones with a knife in his right hand walking briskly toward the Officers Fogal and Tuy. Officer Fogal was on the passenger side of his unit, with his service weapon drawn. Officer Morales exited his patrol vehicle and ran to the back to grab a shield. As he did this, he realized that that Mr. Jones was much closer to Officer Fogal than he had first thought. Officer Morales immediately ran to the passenger side of Officer Tuy's patrol vehicle and stood to the right of Officer Fogal. Officer Morales yelled commands to Mr. Jones to drop his knife. Mr. Jones was not complying with orders and was within six to eight feet from him. Officer Morales, fearing for his life and the life of Officer Fogal, fired his service weapon four times.

Officer Morales stopped firing his weapon as soon as he saw Mr. Jones start to fall down. Officer Morales was aware that Officer Tuy had attempted to use the less lethal beanbag shotgun, but it was ineffective and felt there was no other option but to use his service weapon due to the proximity of Mr. Jones with the knife, to him and Officer Fogal. He said at the time he fired his service weapon, he believed he had fired it three to five times.

Stockton Police Officer Kenneth Tuy

Stockton Police Department Officer Kenneth Tuy was interviewed on November 14, 2017, by investigators at the Stockton Police Department, and stated the following:

Officer Kenneth Tuy was a four-year police officer of the Stockton Police Department. This day, Officer Tuy was working patrol, in a marked unit, wearing his department-issued uniform. He was acting as Officer Fogal's Field Training Officer. He was armed with his service weapon. It was not fired this day.

While on patrol, Officers Tuy and Fogal received a dispatch of a man on the ground; gunshots; and, potentially a suspect with a knife. However, due to the various updates, it was difficult for either of them to tell what was happening but because of the report of gunshots, they proceeded with lights and siren. When they arrived at Deer Creek Circle, Officer Tuy saw Mr. Jones in the street with a knife in his hand. Officer Tuy parked the patrol unit approximately thirty feet away, and exited.

Officer Tuy initially had his rifle out, but when he saw the knife, he put the rifle down and transitioned to a less-than-lethal beanbag shotgun. He and Officer Fogal began yelling commands to Mr. Jones to drop the knife and to stop moving toward them. Mr. Jones refused to comply with the orders and continued to advance towards the both of them. When Mr. Jones was approximately 12 feet away, Officer Tuy fired a beanbag projectile, striking Mr. Jones in the upper torso. Mr. Jones flinched when he was struck, but he kept moving toward Officer Fogal. Officer Tuy fired three beanbags in succession but they were ineffective in deterring his movement. The beanbag shotgun only holds four rounds

Knife in hand, Mr. Jones was now within five to six feet of Officer Fogal. Officer Tuy then heard gunshots. Once the shots were fired, Mr. Jones fell to the ground. Other officers arrived and started life-saving measures on Mr. Jones until paramedics arrived and took over treatment.

Witness #1 (Victim)

Witness #1 was interviewed on November 14, 2017, by investigators at the San Joaquin County General Hospital and again later on November 17, 2017, and stated the following:

Witness #1 was staying at a residence on Deer Creek Circle. Witness #1 had met Mr. Jones a few months earlier but did not know him well, and only knew him by his first name.

On this date, Witness #1 was in the driveway of the residence he was staying at, working on a car with Witness #2. As he was working on the car, Witness #1 saw Mr. Jones drive up and stop his vehicle in the middle of the Deer Creek Circle.

Witness #1 saw Mr. Jones suddenly accelerate and drive straight at him. Witness #1 tried to get out of the way but was struck by the car.

Witness #1 was on the ground in pain and saw Mr. Jones get out of the car. Mr. Jones was mumbling to himself over and over, "I need to die. I just need to die." Witness #1 told Mr. Jones it was all right and to stop. Mr. Jones then sat down on the grass and began cutting his wrists with a knife. He told Mr. Jones to put the knife down and Mr. Jones responded, "Nah, I'm just going to kill myself." Witness #1 tried to get up to stop Mr. Jones, but he was unable to stand; it was later determined that Witness #1 suffered an open tibia and fibula break to his left leg and a dislocated left shoulder. Mr. Jones then stood up and walked down the street. Witness #1 did not see anything further.

Witness #1 had a cordial relationship with Mr. Jones and could not provide a reason why Mr. Jones would try to injure him.

Witness #2 (Victim)

Witness #2 was interviewed on November 14, 2017, by investigators at the location of the scene and later at the Stockton Police Department and stated the following:

Witness #2 was at a Deer Creek residence helping Witness #1 work on a car. Witness #2 was standing next to the car when he saw Mr. Jones pull up and stop in the street. Mr. Jones had the window down and Witness #2 thought Mr. Jones was laughing. Mr. Jones was stopped there for approximately five minutes. Mr. Jones backed the car up slightly, sat for a second, and then drove the car towards Witness #2 and Witness #1.

At first, Witness #2 thought Mr. Jones was joking around but the car continued to accelerate towards them. Witness #2 tried to avoid the car but was struck in the leg and thrown to the ground. Witness #2 stood back up and ran away. After a few moments, he saw Mr. Jones slowly walk away. Witness #2 then returned to the driveway to check on Witness #1.

At some point, Witness #2 heard Witness #3 say that he was going to call the police. Mr. Jones replied, "Go ahead and call them. I want them to kill me."

Witness #2 saw the police arrive. He heard officers yelling, "Put it down!" He heard one gunshot and then heard them yell again "Put it down!"

It was the opinion of Witness #2 that the police officers "did what was necessary."

Witness #3 (Victim)

Witness #3 was interviewed on November 14, 2017, by investigators at the location of the scene and later at the Stockton Police Department and stated the following:

Witness #3 stopped by Deer Creek Circle to see Witness #1 and hang out. When he arrived, he saw Witness #1 working on a car. Approximately thirty minutes later, he noticed Mr. Jones arrive in his vehicle. Mr. Jones was sitting in his car looking at them and appeared to be laughing. Mr. Jones remained parked for two to five minutes and then started to rev his engine. This caused Witness #3 to move towards the sidewalk. Suddenly, Mr. Jones accelerated and drove towards the three of them.

Mr. Jones's vehicle ricocheted off a car and then struck Witness #3's car. Witness #3 was able to avoid being hit. He called 9-1-1 and believing he had heard gunshots, told the dispatcher that Mr. Jones might have a gun.

Witness #3 noticed Witness #1 on the ground and saw Mr. Jones with a knife in his hand cutting his wrists. Witness #3 asked for someone to call the police again. Mr. Jones repeatedly replied, "Call the police. So they can kill me." Mr. Jones then walked away down Deer Creek Circle towards the bend.

Shortly thereafter, police officers arrived and he saw Mr. Jones holding his knife and advancing towards the officers. Witness #3 could hear the officers yelling for Mr. Jones to stop and drop his knife. Mr. Jones would not obey the commands and continued to walk toward them. Witness #3 could hear the Officers pleading with Mr. Jones to drop the knife, "We don't want to kill you. Stop, Stop, put the knife down." Witness #3 then heard several gunshots. Witness #3 believed that the Officers "did everything in [their] power not to hurt that guy. [...] They pleaded with him, he wanted to die."

Witness #4

Witness #4 was interviewed on November 14, 2017, by investigators at the location of the scene and stated the following:

Witness #4 was inside his house when he heard a loud crash. Witness #4 went outside and saw Witness #1, a neighbor, on the ground, and a man, later

identified as Mr. Jones, walking around. Witness #4 called 911 and saw Mr. Jones sitting on the grass cutting his wrists with a large knife. Mr. Jones then stood up and began stumbling around in the street and mumbling to himself.

As Mr. Jones walked to the end of Deer Creek Circle, the police arrived. Witness #4 heard Officers yelling several times to Mr. Jones to drop his knife. Mr. Jones ignored them and started walking toward them with his knife in hand. Witness #4 then heard about a half dozen shots fired.

SUBSEQUENT INVESTIGATION

Video Documentation

Officer Nicholas Fogal's Body Worn Camera (BWC)

The body worn camera of Officer Fogal was obtained and reviewed. The recording shows the following:

The patrol unit arrives on scene and parks approximately forty feet away from Mr. Jones. Mr. Jones is seen holding a knife at shoulder height with the sharp end pointed downward. Mr. Jones begins walking towards the patrol unit and it appears that Officer Fogal has taken cover behind the passenger door with his service weapon drawn.

Officer Fogal is heard approximately a dozen times ordering Mr. Jones to put his knife down. A half dozen times, Officer Fogal tells Mr. Jones, "I don't want to kill you." Mr. Jones is seen moving toward the officers and then specifically toward Officer Fogal. A beanbag from Officer Tuy's shotgun strikes Mr. Jones, who flinches. Mr. Jones continues walking toward Officer Fogal and says, "[unintelligible] kill me." Mr. Jones walks past the bumper of the patrol vehicle with his knife still at shoulder height, and then there is a rapid succession of gunshots.

Officer Fogal uses his radio to dispatch that shots have been fired. Seconds later Officer Thomas Heslin appears and checks Mr. Jones for a pulse. Officer Heslin then asks for a bag, and begins chest compressions.

From the time the patrol unit arrived on scene to the last shot fired was approximately 41 seconds.

Officer Miguel Morales's Body Worn Camera (BWC)

The body worn camera of Officer Miguel Morales was obtained and reviewed. The recording shows the following:

Officer Morales arrives at the scene and he immediately exits the vehicle. Officer Morales goes to the rear of his unit and begins searching for something in the back of his unit. Officer Morales immediately abandons the search and runs around the back of the other patrol unit, to the right of Officer Fogal. By the time Officer Morales reaches the point near Officer Fogal, Mr. Jones has already walked past the bumper of the patrol unit and is within six feet of both officers. Almost immediately, there is a rapid succession of gunshots that cease when Mr. Jones begins to fall.

Firearm Examination

The scene was taped off and secured. Members of BOI, DOJ, and Field Evidence Technicians from SPD examined and documented the scene. Evidence found had placards placed next to them and were photographed. Items found of significance were eight .40 caliber casings and four expended beanbags, consistent with Officer Tuy's less-than-lethal shotgun.

Officer Nicholas Fogal's

Officer Fogal's .40 caliber Sig Sauer P226 semi-automatic pistol was inspected and it was determined that four expended rounds were fired.

Officer Miguel Morales's Firearm

Officer Morales's 40 caliber Sig Sauer P226 semi-automatic pistol was inspected and it was determined that four expended rounds were fired.

The expended rounds in each officer's firearms was consistent with the DOJ's documentation of eight .40 caliber S&W shells casings located at the scene.

Officer Kenneth Tuy's "Beanbag" Shotgun

Officer Tuy's Remington 870 Wingmaster Shotgun is orange in color with the words, "Beanbag Shotgun" on the side. It is outfitted with 12 gauge sock-style beanbags. All four beanbag projectiles were fired and located at the scene.

Scene Evidence

At the shooting scene, apart from what was discussed above, four feet from Mr. Jones's body was a nine and one-half inch knife with what appeared to have blood on the blade.



Mr. Jones's knife

Pathologist's Report

On November 16, 2017, San Joaquin Pathologist Susan J. Parson, conducted an autopsy on Mr. Jones. Dr. Parson's autopsy revealed that Mr. Jones suffered seven gunshot wounds:³ 1) – 3) penetrating gunshot wounds to the upper medial chest; 4) – 5) penetrating gunshot wounds to the anterior right hip; 6) a perforating gunshot wound to the left thigh; and, 7) a tangential gunshot wound to the medial left thigh.

In addition, Dr. Parson documented two lacerations on the right forearm; one each on the right wrist and hand; and, a four centimeter incised wound on the left wrist.

³ *The order of the wounds here or in the autopsy report do not reflect the order in which Mr. Jones was shot or struck. This normally is not possible to do and it was not done in this case.*

Dr. Parson noted that at 10:42 a.m, the day of the shooting, Mr. Jones had been brought by ambulance to an area hospital complaining of anxiety. He denied suicidal thoughts and was released forty-five minute later.

Toxicology results showed Mr. Jones had a blood alcohol level of .02. Additionally, blood tests showed presence of Citalopram at .55 mg/L, and Naproxen at 2.6 mg/L. Citalopram is generally taken as an antidepressant, and Naproxen is a common anti-inflammatory medication. On his person, Mr. Jones had a prescription bottle for Citalopram (filled 10/26/17) and Buspirone (filled 09/12/16). Buspirone is used to treat certain anxiety disorders or to relieve the symptoms of anxiety.

Dr. Parson determined the cause of death to be “Gunshot wounds of the Torso.”

Legal Analysis

Under Penal Code sections 197 and 198, homicide is justifiable and not unlawful when committed by a person who reasonably believed that he, or someone else, is in imminent danger of being killed, suffering great bodily injury, or to prevent a forcible and atrocious crime (*People v. Ceballos* (1974) 12 Cal.3d 470, 478). For a homicide to be in self-defense, the person must actually and reasonably believe in the need to defend with deadly force (*People v. Flannel* (1979) 25 Cal.3d 668, 674). If the belief both subjectively exists and is objectively reasonable, it constitutes “perfect self-defense” and the homicide is considered legally justified. (*In re Christian S.* (1994) 7 Cal.4th 768, 783).

Penal Code Section 197 states:

Homicide is also justifiable when committed by any person in any of the following cases:

1. When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person; or,
2. When committed in defense of habitation, property, or person against one manifestly intends or endeavors, by violence or surprise, to commit a felony, or against one who manifestly intends and endeavors, in violent, riotous or tumultuous manner. To enter the habitation of another for the purpose of offering violence to any person therein; or

3. When committed in the lawful defense of such person, or of a wife or husband, parent, child, master, mistress, or servant of such person, when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished; but such person, or the person in whose behalf the defense was made, if he was the assailant or engaged in mutual combat, must really and in good faith have endeavored to decline in further struggle before the homicide was committed.

4. When necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed, or in lawfully suppressing any riot, or in lawfully keeping and preserving the peace.

Homicide committed by a law enforcement officer is governed by Penal Code section 196 (*Kortum v. Alkire* (1977) 69 Cal.App.3d 325, 333). Penal Code section 196 states⁴:

Homicide is justifiable when committed by public officers and those acting by their command in their aid and assistance, either-

1. In obedience to any judgment of a competent Court; or,
2. When necessarily committed in overcoming actual resistance to the execution of some legal process, or in the discharge of any other legal duty; or,
3. When necessarily committed in retaking felons who have been rescued or escaped, or when necessarily committed in arresting persons charged with felony, and who are fleeing from justice or resisting such arrest.

The test whether a police officer may use deadly force to apprehend a fleeing felon was announced in *Tennessee v. Garner* (1985) 471 U.S. 1, 11-12: “Where the officer has probable cause to believe the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.”

4

The test of reasonableness is judged by an objective standard of “a reasonable officer on the scene, rather than with the 20/20 vision of hindsight....The calculus of reasonableness 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.” (*Graham v. Conner* (1989) 490 U.S. 386, 396-397, see also, *Jeffers v. Gomez* (9th Cir. 2001) F.3d 895, 909, “broad discretion...must be afforded to police officers who face tense situations.”)

Penal Code section 835a also states that, “[a] peace 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 an officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest or prevent escape or to overcome resistance.” As stated above, “if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary.” (*Garner, supra*, 471 U.S. at 11-12.)

The test for determining whether a homicide was justifiable under Penal Code section 196 is whether the circumstances “reasonably created a fear of death or serious bodily harm to the officer or to another.” (*Martinez v. County of Los Angeles* (1996) 47 Cal.App.4th 334). Reasonableness must be considered in the context of the “dangerous and complex world” police officers face every day, because “what constitutes ‘reasonable’ action might seem quite different to someone facing a possible assailant than to analyzing the question at leisure.” (*Martinez, supra*, 47 Cal.App.4th at 343, quoting *Smith v. Freeland* (6th Cir. 1992) 954 F.2d 343, 347).

Penal Code sections 196 and 835a, *supra*, have recently been amended by Assembly Bill (A.B.) 392. Passed by the legislature this year, Governor Gavin Newsom signed the bill into law on August 19, 2019. A.B. 392 incorporates the language of section 196, relevant United States Supreme Court case law - discussed in this memorandum - and placed it within section 835a. Additionally, in the new language of the amended statute, emphasis is placed on “imminent” threats and “necessary” use of force. While the law will not be in effect until January 1, 2020, the standard set forth by A.B. 392 is consistent with the standard in current use by the District Attorney’s Office and is applied in this case.

Application of Law

In analyzing the reasonableness of the decision by Officer Fogal and Officer Morales to use deadly force, the totality of the circumstances, including the information that the individual officer possessed at the time of his decision, is examined. 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.” (*Graham*, supra, 490 U.S. at 396.)

In the instant case, the following set of facts have been sufficiently established:

1) Officer Tuy was acting within reason when he deployed of less-than-lethal force (beanbag projectiles) after he used verbal de-escalation techniques.

2) Officer Fogal was acting within reason when he provided lethal cover for Officer Tuy during the deployment of less-than-lethal force.

3) Officer Fogal’s and Officer Morales’s use of lethal force was reasonable and necessarily committed to prevent their own and each other’s imminent threat of death or great bodily injury from being stabbed.

CONCLUSION

In applying the prevailing legal standards, and based upon the totality of the circumstances and in light of all of the evidence obtained from the multi-task force investigation, it is the opinion of the District Attorney that the use of non-lethal force by Officer Kenneth Tuy and the use of lethal force by Officer Nicholas Fogal and Officer Miguel Morales on November 14, 2017, was justified, and that no criminal charges are warranted.

CONFIDENTIAL APPENDIX SECTION
(Intentionally Left Blank)