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December 22, 2020

Special Agent Dustin Dorough
CDC Office of Internal Affairs—Central Region
5100 Young St. Bldg. A, Ste. 110
Bakersfield, CA 93311

Re: Officer-Involved Shooting of Inmate Joseph Somvilay by C.O. Bradley Atkinson on March 27, 2020 at Kern Valley State Prison. OIA report # C-KVSP-125-20-C.

Dear Special Agent Dorough,

The Kern County District Attorney's Officer-Involved Shooting Committee has reviewed reports and other materials submitted by your agency 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 March 27, 2020, inmates Somvilay and Yang were both beating inmate Tommy Reyes in the Upper Yard of Facility B at Kern Valley State Prison. Inmate Reyes was not responding and appeared to be defenseless on the ground with the other two inmates assaulting him. It appeared to officers that Somvilay was making stabbing motions. In an effort save inmate Reyes from what appeared to be lethal harm, Officer Atkinson fired once from his Mini-14 rifle, striking Somvilay in the arm and ending the assault. No weapon was located among the inmates involved in the assault. CDC's Internal Affairs submitted this case for potential criminal liability against Officer Atkinson for using deadly force against what turned out to be an unarmed inmate.

Legal Principles and Analysis

Under Penal Code section 835a(c)(1)(A), an officer is justified in using deadly force only when the officer reasonably believes, based on the totality of the circumstances, that such force is necessary…[t]o defend against an imminent threat of death or serious bodily injury to the officer or to another person.

Penal Code section 835a(a)(4) states, "the decision by a peace officer to use force shall be evaluated from the perspective of a reasonable officer in the same situation, based on the totality of circumstances known to or perceived by the officer at the time, rather than with the benefit of hindsight, and that the totality of

the circumstances shall account for occasions when officers may be forced to make quick judgments about using force."[1]

There is a special relationship between jailer and prisoner, imposing a duty of care to the latter. (*Giraldo v. California Dept. of Corrections* (2008) 168 Cal.App.4th 231, 250; duty of care to protect against reasonably foreseeable harm caused by third parties.)

It is clear that Officer Atkinson intentionally fired once from the Mini-14 rifle at Somvilay during the assault of Reyes. The only question is whether or not he acted reasonably in defense of inmate Reyes.

The affirmative legal defense of "defense of another" requires the following three elements: 1) The person reasonably believed that someone else was in imminent danger of suffering bodily injury, 2) the person reasonably believed that the immediate use of force was necessary to defend against that danger, and 3) the person used no more force than was reasonably necessary to defend against that danger. (CALCRIM 3470, Right to Self-Defense or Defense of Another in a Non-Homicide)

Officer Atkinson was concerned for inmate Reyes' safety initially when he observed what he claimed were three inmates attacking Reyes. He saw Reyes fall to the ground. It looked like Reyes was unconscious. He saw Reyes being kicked while he was down. He also saw what he thought were stabbing motions being made towards Reyes by two other attackers. He believed inmate Reyes was in danger of imminent great bodily injury.

The argument in support of that belief being unreasonable stems from the later discovered facts that no weapon was located, and inmate Reyes does not appear to have any stab wounds. However, the use of force which would appear to be necessary to a reasonable person must be analyzed from a similar situation and with similar knowledge of the officer at the time of the decision to use deadly force. "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 v. Connor*, supra at p. 396. Officer Atkinson did not have the benefit of knowing that no weapon was involved at the time he chose to shoot.

Furthermore, it is the appearance of danger that is necessary to use deadly force. Actual danger is not required. (*People v. Toledo* (1948) 85 Cal.App.2d 577; *People v. Jackson* (1965) 233 Cal.App.2d 639.) Officer Estrada, Officer Martinez, and Sgt. Walinga were all in the Yard and observed inmate Somvilay making what appeared to be "stabbing motions." These observations by other officers corroborate an appearance of danger that Officer Atkinson claims he observed. They support the reasonableness of Officer Atkinson's belief that inmate Reyes was actually being stabbed. Even in his interview with Special Agents from Internal Affairs, inmate Somvilay gave a description of assaulting inmate Reyes consistent with a stabbing motion.

Not everyone supports this observation. Officer Rosales never mentioned seeing stabbing motions. She just saw inmate Reyes on the ground with two inmates beating him on the face while he lay there motionless. However, even under this scenario, Reyes is at risk of great bodily injury which includes

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[1] This standard of review from PC 835a is consistent with decades of Federal precedent stemming from *Graham v. Connor* (1989) 490 U.S. 386.

being knocked unconscious.[2] All of the officers, including Officer Rosales described inmate Reyes as lying motionless while being beaten. Off. Atkinson specifically stated it appeared to him that Reyes fell unconscious to the ground and was motionless on the ground. Even without a weapon involved, this was an incident where great bodily injury was still an issue.

Should a less lethal alternative have been utilized?

The United States Supreme Court has addressed the issue of officers choosing between two forms of force.[3] In *Mullenix v. Luna* (2015) 136 S.Ct. 305, officers had prepared a spike strip to stop a lengthy, dangerous pursuit. One officer, however, fired a rifle at the suspect's moving car from an overpass in an attempt to destroy the engine and disable the vehicle. The officer did so just prior to the vehicle reaching the spike strip. Instead of hitting the engine block, the officer struck the suspect killing him. The court supported the officer's use of force—choosing to fire instead of waiting to try the spike strip.

The Court cited a previous car chase case where the person evading in a stolen police car had not done anything dangerous yet in the pursuit. "[T]he law does not require officers in a tense and dangerous situation to wait until the moment a suspect uses a deadly weapon to act to stop the suspect..." (*Id.* at 311; *citing Long v. Slaton* (2007) 508 F.3d 575, 581-582) "The court rejected the notion that the deputy should have first tried less lethal methods, such as spike strips…we think the police need not have taken that chance and hoped for the best." (*Id.* at 312; *citing Long v. Slaton* (2007) 508 F.3d 575, 583)

Unlike the cases noted above, in the present case there was more than just imminent harm, there was actual harm happening at the moment Officer Atkinson pulled the trigger. It is possible that Officer Atkinson could have stopped the incident by simply firing a warning shot without hitting any of the inmates. However, the question is not whether a lesser alternative was available, but if shooting Somvilay with a single shot from the rifle was reasonable.

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 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)[4]

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[2] Serious bodily injury includes loss of consciousness. *People v. Wade* (2012) 204 Cal.App.4th 1142; Serious bodily injury and great bodily injury are the same. *People v. Johnson* (2016, 5th District) 244 Cal.App.4th 384

[3] California's amended version of PC 835a that goes into effect on Jan. 1, 2020 may disagree with this statement by the US Supreme Court. However, officer-involved shootings have been analyzed by Federal courts as a Constitutional issue under the 4th Amendment relating to the seizure of a person since 1985. *Tennessee v. Garner* (1985) 105 S.Ct. 1694.

[4] 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.

In this case there were at least three efforts made to stop the perceived deadly assault on Reyes. The first was non-lethal. Multiple officers made multiple orders for the attacking inmates to stop what they were doing and get down. All of the officers described the entire Yard getting down on the ground prior to the shooting. This is consistent with Officer Atkinson's statement that he made his first order over the public address system. Even inmate Somvilay did not deny that an order was given or that inmates went to the ground before the shooting. He simply said he did not hear the order nor see inmates getting down prior to the shooting due to his "tunnel vision" during the assault of Reyes.

The second non-lethal effort made was when Officer Atkinson presented and aimed the rifle while ordering the inmates once again to stop the assault. Drawing a firearm is considered a use of force. (*Tekle v. U.S.*, 511 F.3d 839, 845 (9th Cir. 2006); *Robinson v. Solano County*, 278 F.3d 1007, 1014-15 (9th Cir. 2002); *Baker v. Monroe Township*, 50 F.3d 1186, 1193 (3d Cir. 1995) "…use of guns and handcuffs must be justified by the circumstances.") Despite this show of force coupled with another verbal command, inmate Somvilay did not comply. It is possible that from 100 yards away the inmates, particularly Somvilay with his "tunnel vision," did not hear the order, and perhaps did not see the rifle out. However, this is another effort that Officer Atkinson tried before deciding that it was necessary to use deadly force.

The final effort was the lethal one. This was not done excessively. After firing just one round the assault stopped, and Officer Atkinson's use of deadly force also stopped.

Conclusion

Based upon a review of the evidence submitted by OIA, Officer Atkinson responded reasonably to a reasonably perceived lethal threat in defense of inmate Reyes (who Officer Atkinson had an affirmative legal duty to protect). There is no state criminal liability for the use of deadly force under the circumstances of this case because the shooting is legally justified.

Sincerely,

Cynthia Zimmer

Cynthia J. Zimmer
District Attorney