

**In-Custody Death of Thomas Binkley
Burbank Police Department**

Officer Alex Gutierrez, #12791

J.S.I.D. File #16-0509



JACKIE LACEY

District Attorney

JUSTICE SYSTEM INTEGRITY DIVISION

May 2, 2018

MEMORANDUM

TO: CHIEF SCOTT LACHASSE
Burbank Police Department
Investigation Division
200 Third Street
Burbank, California 91502

FROM: JUSTICE SYSTEM INTEGRITY DIVISION
Los Angeles County District Attorney's Office

SUBJECT: In-Custody Death of Thomas Binkley
J.S.I.D. File #16-0509
B.P.D. File #16-9827

DATE: May 2, 2018

The Justice System Integrity Division of the Los Angeles County District Attorney's Office has completed its review of the October 4, 2016, in-custody death of Thomas Binkley involving Burbank Police Department (BPD) Officer Alex Gutierrez. It is our conclusion that Officer Gutierrez applied lawful force in attempting to detain Binkley and is not criminally liable for his death.

The District Attorney's Command Center was notified of this in-custody death on October 4, 2016, at approximately 10:21 p.m. The District Attorney Response Team responded and was given a briefing and walk-through of the scene.

The following analysis is based on reports submitted to our office by BPD Sergeant Adam Baumgarten. The reports include photographs, videos, audio-recorded interviews of witnesses, and radio transmissions. The compelled statement of Officer Gutierrez was considered in this analysis.

FACTUAL ANALYSIS

On October 4, 2016, at approximately 6:42 p.m., BPD Detective Stephen Santiago and Officer Gutierrez were dispatched to a criminal threat call reported at [REDACTED] in the City of Burbank. Upon arrival, Santiago and Gutierrez spoke with Melissa B., who told Santiago and Gutierrez her father-in-law, Thomas Binkley, came to her home and threatened her. She stated Binkley revved the engine of his truck, which was parked in the middle of the street, to get her attention to come outside. Melissa B. went outside and approached Binkley's vehicle. He asked her, "Are you ready?" Melissa B. asked, "Ready for what?" Binkley responded, "I haven't seen my grandson in years! Ian's going to be well taken care of after you're dead. He'll

have millions and you'll be dead!" Binkley then accelerated and drove his truck down the street.¹

Santiago and Gutierrez responded to Binkley's residence and made contact with him in the driveway. During the interview, Binkley became hostile and an altercation ensued. Binkley's brother, Stephen, also became involved and threatened to come out of his home with a gun. Below is the audio captured by Gutierrez and Santiago utilizing their PUMA recording devices during the encounter with Binkley:

Gutierrez: Hello sir, it's the police. Burbank Police.

Binkley: Yeah?

Gutierrez: Are you Tom?

Binkley: Yes.

Gutierrez: Can I speak to you? Please?

Binkley: Are you kidding me?

Gutierrez: No. We got a call from a...

Binkley: Melissa.

Gutierrez: Yeah.

Binkley: Yes?

Gutierrez: We just want to talk to you regarding ahh something that might have happened out there. She said that you drove by and like said.

Binkley: I talked to her.

Gutierrez: Okay.

Binkley: I offered her a million dollars to see my grandson.

Gutierrez: Okay. Unfortunately, she took it as a ugh . . .

Binkley: Okay, but . . .

Gutierrez: She said she took it as a little bit of a threat . . .

Binkley: I gotta tell you that.

Gutierrez: and stuff like that.

¹ Melissa stated Binkley's eyes were glassy and his speech was slurred, and she believed he was drunk. Melissa also stated Binkley has threatened her in the past and has always harassed her. She took his threats seriously and has seen Binkley with guns in the past. She felt the reason he threatened her was because Binkley believed she prevented him from visiting with his grandson.

Binkley: You have guns on you right now.

Gutierrez: Okay.

Binkley: Okay. You've come back... You're not chasing anyone.

Gutierrez: No.

Binkley: You have no reason to be here.

Gutierrez: Well the fact of the matter is we can come back here. I mean it's a long driveway and you're over here. So, we're not here. ...You're not in any trouble. Okay. She just . . .

Binkley: First of all, I'm Captain Tom.

Gutierrez: Okay Captain Tom. This is a big deal.

Binkley: I'm a federal marine officer.

Gutierrez: Okay. I don't care.

Binkley: You don't care?

Gutierrez: No. Don't go over there anymore. You understand that?

Binkley: Go over where?

Gutierrez: Don't go by her house anymore. Don't talk to her anymore. She doesn't want you to speak to her. If you go back on her property, you can be arrested for trespassing. Okay?

Binkley: I didn't go on her property.

Gutierrez: I'm just letting you know.

Binkley: I was . . .

Gutierrez: She doesn't want you talking to her anymore. Okay? Good night. That's it.

Binkley: Are you dicking her?

Gutierrez: That's it.

Binkley: Are you dicking her?

Gutierrez: No, I'm not. You can go back inside, sir.

Binkley: Why you in my property?

Gutierrez: You can go back inside now.

Binkley: Why are you on my property?

Santiago: To talk to you because she feels like you're threatening to kill her.

Binkley: What?

Santiago: Yeah. She feels like you're telling her that she shouldn't be around anymore.

Gutierrez: Alright. So you can get in serious trouble for something like that. Okay? That's why we're here. Just to talk to you.

Binkley: Serious trouble?

Gutierrez: Yes. You could. Okay?

Binkley: Get in trouble? For what?

Gutierrez: For criminal threats.

Binkley: Criminal threats?

Gutierrez: Yes.

Binkley: Does she have any . . . I offered her a million dollars

Gutierrez: Sir. That's it. That's the only thing we're here for.

Binkley: To see my grandson.

Gutierrez: She doesn't want you going over there anymore.

Binkley: Doesn't matter . . .

Gutierrez: That's it.

Binkley: . . . that she wants. It doesn't matter what she wants.

Gutierrez: No. You're right, okay. But please don't go back over there. You can get in trouble.

Binkley: I know you. I know you.

Santiago: I don't think I know you.

Binkley: I don't know you. Umm. She killed my son.

Gutierrez: Sir.

Binkley: You don't know how to answer that, do you?

Gutierrez: No. It doesn't matter, sir. It doesn't matter because your son died in a car crash. Okay.

Binkley: A motorcycle accident.

Gutierrez: A motorcycle crash. Same thing.

Binkley: You don't know what the fuck you're talking about, do you?

Gutierrez: Sir.

Binkley: You're on my property. You're not chasing me. You have no right to come on my property right now.

Gutierrez: How else would we be able to speak to you, sir?

Binkley: You have no right to come on my property right now.

Gutierrez: Okay. We're not gonna get anywhere with this.

Binkley: It is not . . .

Gutierrez: Alright, sir.

Binkley: It's not probable cause. No.

Gutierrez: Sir.

Binkley: I'm telling you!

Gutierrez: Back up. Back up away from me. Do you understand that?

Stephen Binkley: Guys. You said your peace, now leave.

Binkley: Do you understand that you have a gun on you right now?

Stephen Binkley: Guys . . .

Gutierrez: Back up, sir.

Stephen Binkley: . . . you leave now.

Santiago: I don't think we need people telling us what to do, alright?

Binkley: Don't touch that.

Stephen Binkley: You get off of this property now.

Gutierrez: Sir.

Binkley: Don't touch that.

Gutierrez: Back up right now. Back up.

Binkley: Back up? You're on my property.

Stephen Binkley: You want me to make a citizen's arrest to you two? Get out now!

Gutierrez: We're just letting you know, sir.

Santiago: We have the right to be here, sir.

Binkley: Okay. Stop. Stop.

Stephen Binkley: No you don't.

Santiago: We're investigating a crime

Binkley: Stop. Stop. Stop.

Stephen Binkley: You need to get out of here now!

Gutierrez: Sir. Don't touch him.

Binkley: Don't touch . . . Oh, really?

Gutierrez: Hey!

Stephen Binkley: Don't fucking touch him again!

Santiago: Guys, both of you to back off.

Gutierrez: Get on the ground.

Binkley: You're gonna get shot. You're gonna get shot.

Stephen Binkley: You need to leave!

Gutierrez: Get on the ground. Get on the ground right now

Santiago: You need to control yourself.

Binkley: Get on the ground?

*****Sound of Taser*****

Binkley: You fucking asshole!

Stephen Binkley: I'm getting my gun.

Santiago: Get back. Get back.

Gutierrez: Hey dude.

Stephen Binkley: Get out of here!

Santiago: Code 3 back. We will be in the back unit. Do not come out here with a gun!

Gutierrez: Dude, get behind the car.

Santiago: Do not come back out here with a gun.

Stephen Binkley: You guys need to move!

Santiago: Do not come out here with a gun!

Gutierrez: 20 . . . Subject at the front house says he's gonna grab a gun and come on out. We're gonna be at [REDACTED]. We're gonna be on the north driveway. Units be aware don't park in front of the location.

Gutierrez: Watch your back, Steve. I'll watch the door.

Santiago: Stay inside, sir. Do not come out with a gun.

Stephen Binkley: You guys need to leave.

Santiago: We are not leaving. Sir, you need to go put that gun down. Put it where you can't access it.

In fear, Santiago and Gutierrez retreated and took cover until additional units arrived. When additional officers arrived, a perimeter was established. Binkley appeared to have stopped moving since he had been struck by the Taser. Officers utilized a protective ballistic shield to approach Binkley. The officers moved Binkley to a secure and safe location to have paramedics render aid. Paramedics arrived and attempted medical intervention, but were not able to resuscitate Binkley.

After barricading himself in his home for approximately 45 minutes, Stephen Binkley surrendered to officers and was advised of his rights. Stephen waived his rights and told officers he was inside his home when he heard his brother, Binkley, arguing in the driveway with officers. He went to the door to see what was going on when he heard a "pop" and saw Binkley fall to the ground. He believed the officers shot and killed Binkley. He did not have a clear view from his vantage point and only saw the back of one of the officers. Stephen said he stayed inside his home after the incident and refused to come out in fear he would also be shot and killed by the officers.

A search warrant was issued to search Stephen's home, which resulted in the seizure of multiple firearms, including three handguns located in his bedroom, unsecured. Stephen denied ever retrieving a firearm during the incident and also claimed he was not holding anything in his hands that could have been mistaken for a firearm. Stephen also stated he never made any comments to the officers during the incident. After listening to the audio recordings of the encounter from Gutierrez and Santiago's PUMA device, Stephen was booked for a violation of Penal Code section 69, resisting an officer.²

Santiago was interviewed and told investigators he was working patrol with his partner Gutierrez when they received a call for possible threats. They responded to the location of the reporting party, Melissa B. Gutierrez spoke with Melissa B. regarding what had occurred, while Santiago spoke with Melissa B.'s neighbor.³ After speaking with Melissa B., Gutierrez and Santiago left to Binkley's home to speak with him regarding the incident.

² Penal Code section 69 states, "Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon the officer by law, or who knowingly resists, by the use of force or violence, the officer, in the performance of his or her duty..." is guilty of a crime.

³ The neighbor did not see anything and only heard the screeching of tires from Binkley's truck.

Gutierrez and Santiago arrived at Binkley's home and Gutierrez knocked on Binkley's screen door. Binkley came to the door, shirtless, and appeared to be intoxicated, slurring his speech. Binkley was immediately confrontational towards Santiago and Gutierrez and would not listen to them. Binkley opened the door and exited his home with closed clenched fists and told Santiago and Gutierrez to get off his property. Binkley kept walking closer and closer to Santiago and Gutierrez. Gutierrez told Binkley to get back inside and not to go to Melissa B.'s home anymore. Binkley kept arguing with Santiago and Gutierrez and kept advancing towards them.

At this point, Santiago heard another voice coming from his right, in a second doorway. Santiago shined his flashlight in the direction of the voice and saw another man, later identified as Binkley's brother, Stephen. Stephen told Santiago and Gutierrez to leave the property. Santiago still had his flashlight focused on Stephen when he felt Binkley grab his forearm. Gutierrez told Binkley to get off of him and pushed Binkley in the chest, causing him to move backwards, hitting his head on the security door. Binkley, with clenched fists, told Gutierrez, "You're gonna get shot. You're gonna get shot." Santiago was pointing his flashlight back and forth between Binkley and Stephen and heard the sound of a Taser being deployed.⁴ He saw the Taser probes make contact with the front of Binkley's body. Binkley bent forward at the waist, fell down hitting his forehead on the ground, and then rolled onto his back.

Immediately after, Santiago heard Stephen say he was going to get a gun and saw him walk away from the doorway where he was standing. Stephen came back to the doorway with a gun in his right hand.⁵ Santiago told Stephen, "Don't come out with a gun!" Santiago and Gutierrez retreated and took cover. Santiago could see Binkley lying on his back and could hear him snoring. Santiago requested a rescue ambulance for Binkley and notified dispatch that a Taser was deployed and Binkley was down, but was breathing. Santiago also advised dispatch that Stephen had a gun and requested assistance.

Officer Gutierrez provided a compelled statement to investigators.⁶



⁴ Santiago did not see Gutierrez tase Binkley and only heard the sound of the Taser.

⁵ Santiago described Stephen's gun as a small handgun held in his right hand by his side, with the barrel pointed toward the ground.

⁶ Unlike private citizens, public sector employees can be forced to submit to questioning regarding the performance of their official duties and, so long as they are not required to waive their privilege against self-incrimination, their refusal to submit to such questioning can result in administrative discipline including termination from public service. *Gardner v. Broderick* (1968) 392 U.S. 273, 278; *Uniformed Sanitation v. City of New York* (1968) 392 U.S. 280, 284-285. The officer involved in this incident was interviewed and ordered to submit to questioning concerning the performance of his official duties. Like any other individual, the officer possesses a right under the Fifth Amendment of the United States Constitution to be free from being compelled to give testimony against himself. *Uniformed Sanitation v. City of New York, supra*, at 284-285. Because the BPD ordered Officer Gutierrez to answer questions which might expose him to criminal liability, the BPD compelled him to participate in an interview. The effect of this legal compulsion is that the officer's statements cannot be used against him in a criminal proceeding, nor can any material derived from the compelled interview be used against him. *Garrity v. New Jersey* (1967) 385 U.S. 493, 496-497; *Spielbauer v. County of Santa Clara* (2009) 45 Cal.4th 704, 715. Further, because the compelled statement is part of the officer's police personnel file, the statement is confidential and may not be disclosed absent an evidentiary showing and court order. *Penal Code* section 832.7.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

On October 6, 2016, Deputy Medical Examiner J. Daniel Augustine, M.D., performed a post-mortem examination of Binkley's body. Binkley's death was attributed to the combined effects of dilated cardiomyopathy, coronary atherosclerosis, and electrical conduction device use.

A toxicology analysis revealed that Binkley had the presence of alcohol, 0.153 g%, in his heart blood, and 0.181 g% in his femoral blood, at the time of his death.

CONCLUSION

“The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than 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

⁷ Gutierrez stated Binkley had blood shot, watery eyes, was slurring his words, and his breath smelled like alcohol.

⁸ Gutierrez estimated that Binkley was approximately five feet away at the time he deployed his Taser. Gutierrez pulled the Taser trigger twice. A download of the Taser's internal data revealed the Taser was activated for a 23 second cycle, and again for a five second cycle.

⁹ Gutierrez never saw Stephen with a gun.

the amount of force that is necessary in a particular situation.” Graham v. Connor (1989) 490 U.S. 386, 396-397.

A police officer may use reasonable force in making an arrest, preventing an escape, or in overcoming resistance. Penal Code § 835a. Reasonableness is judged from the perspective of a reasonable officer at the scene considering the circumstances surrounding the use of force including: (1) whether the suspect poses an immediate threat to the safety of the officers or others, (2) whether the suspect is actively resisting arrest or attempting to evade arrest by flight, and (3) the severity of the crime at issue. Graham v. Connor (1989) 490 U.S. 386.

The use of a Taser falls within the category of non-lethal force. Bryan v. McPherson (9th Cir. 2010) 630 F.3d 805, 815. This use constitutes an "intermediate, significant level of force that must be justified by the governmental interest involved." The most important factor in Graham is whether the suspect posed an immediate threat to the safety of the officers or others. Bryan, supra, at 826. Courts may also examine "the availability of alternative methods of capturing or subduing a suspect." Smith v. City of Hemet (9th Cir. 2005) 394 F.3d 689, 701. When feasible, officers must normally provide a warning and the failure to give such a warning is a factor to consider. Bryan, supra, at 831. Finally, officers are not required to use the least intrusive means available. Rather, they must act within the range of reasonable conduct. See, Scott v. Henrich (1994) 39 F.3d 912.

The evidence examined in this investigation shows that Santiago and Gutierrez made contact with Binkley in response to an allegation that he made a criminal threat. Binkley was uncooperative and grabbed Santiago. Gutierrez ordered Binkley multiple times to "Back up!" and to "Get on the ground!" but he refused to comply. Again, Binkley attempted to assault Santiago. Gutierrez pushed Binkley back and ordered him to stop. Binkley clenched his fists as if he were going to further assault Santiago and Gutierrez. Gutierrez again ordered Binkley multiple times to "Back up!" and to "Get on the ground!" but he would not comply and instead threatened Gutierrez, "You're gonna get shot. You're gonna get shot!" To prevent Binkley from assaulting them, Gutierrez retrieved his Taser and deployed it on Binkley.

After the incident, Stephen threatened to retrieve a gun from inside his home. In fear for their lives, Santiago and Gutierrez retreated and took cover. Due to the threat made by Stephen, Santiago and Gutierrez were unable to safely approach Binkley to immediately render aid to him until additional units arrived to secure the location.

We find that Thomas Binkley threatened Melissa B. and Gutierrez placing Gutierrez and Santiago in a situation where either one of them could have been injured. Gutierrez' use of the Taser under these circumstances was objectively reasonable, as Binkley posed a physical threat to both Gutierrez and Santiago.

We conclude that Officer Gutierrez used reasonable force under the circumstances and is not criminally responsible for Binkley's death. We are closing our file and will take no further action in this matter.