

ORIGINAL

OFFICE OF THE

01-1119



# DISTRICT ATTORNEY

SACRAMENTO COUNTY

JAN SCULLY  
DISTRICT ATTORNEY

CYNTHIA G. BESEMER  
CHIEF DEPUTY

June 11, 2001

Arturo Venegas  
Chief of Police  
Sacramento Police Department  
900 Eighth Street  
Sacramento, CA 95814

Re: Officer involved shooting: SPD case number 01-11119  
Coroner's case number 01-0693  
Shooting officer: Joseph Ellis (Badge no. 441)  
Person shot: Donald Edward Venerable

Dear Chief Venegas:

The District Attorney's Office, as an independent agency in cooperation with other agencies, has dealt with this matter as an original investigation of an officer involved shooting. Our review does not address issues of civil liability, tactics, or departmental policies or procedures. We address only whether the case presents a basis for criminal prosecution of Officer Ellis in the matter of the death of Donald Venerable. For the reasons described below, we conclude the shooting was justified.

## I. MATTERS REVIEWED:

The day of the incident, I was contacted and responded to the Police Department, where I monitored the early development of the investigation, and some of the witness interviews. I have received the reports of the district attorney investigators who responded in the case; the reports submitted from your department; the audio/video tapes and photographs; and the reports from the District Attorney's crime lab. I have also received the Coroner's Final Report of Investigation and Report of Autopsy, and visited the scene of the shooting.

## II. FACTS:

### A. Detailed Chronology

On February 8, 2001, uniformed patrol Officers Casey Dionne (#395) and Joseph Ellis were partners in a marked patrol vehicle. Officer Dionne was driving. Shortly after 1 A.M., they were dispatched to a call of a vandalism-in-progress (a woman breaking out car windows) at a residence at [REDACTED] Mandy Drive in Sacramento.

When the officers arrived, they contacted a group of people standing in front of the residence. Donald Venerable told the officers he had called the police because his wife had smashed out the windows of his car. A blue Nissan 300ZX at the scene had all its windows broken, as well as the T-tops. As the officers stood talking to the group, [REDACTED] approached the officers. She identified herself as Donald Venerable's wife. Officers learned [REDACTED] had come home that evening and found Venerable with another woman. [REDACTED] had become incensed and broke out the windows of her husband's car with a wooden board. She then walked to the Beacon gas station on Franklin Blvd. and telephoned her parents for assistance. Her parents ([REDACTED] and [REDACTED]) and sister ([REDACTED]) came to the scene. Also present was [REDACTED] a friend of Venerable.

The officers advised everyone that the car [REDACTED] had damaged was community property (as much hers as Donald's), and attempted to diffuse the situation. When it appeared to the officers that things were under control, everyone began to disperse. [REDACTED] mother and sister got into a green Toyota SUV, while [REDACTED] and her father got into [REDACTED] Cadillac. Before [REDACTED] and her father got into the Cadillac, [REDACTED] said [REDACTED] told her Dad that "DJ" (Venerable) had said they wouldn't get far in the car. Both the SUV and the officers in the patrol vehicle headed north on Mandy. The Cadillac headed south.

As [REDACTED] father drove the Cadillac away, he and [REDACTED] realized the emergency brake was engaged, and they could not disengage it. They drove only a short distance before they pulled to the side of the road. Seeing that the Cadillac had stopped, [REDACTED] mother and sister made a U-turn to go back and check on [REDACTED] and her father. The officers made the same observation, turned around and headed back toward the Cadillac.

At about that time, Venerable approached the Cadillac swinging a 4x4 piece of wood. While [REDACTED] and her father were still inside, Venerable started hitting the Cadillac with the 4x4, smashing out the driver's side front windshield. [REDACTED] and her father got out of the car. When the officers pulled up, Venerable had already smashed the windshield and was swinging the 4x4 around in a threatening manner. Both [REDACTED] and her sister said that Venerable swung the 4x4 at their father.

Officer Dionne put out information over the radio that they had a felony assault (PC 245, assault with a deadly weapon) in progress. He asked for the "beeper" (a clear radio channel to be used for emergencies only). Dionne and Ellis pulled up, got out of the patrol car and began yelling at Venerable to drop the board. A Dodge Ram was parked in front of [REDACTED] Mandy, and Officer Dionne took up a position behind it. He lost sight of Venerable for a moment, and when he saw



him again, Venerable did not have the board in his hand. Dionne saw the board lying in the front yard of [REDACTED] Mandy.

Venerable was walking toward the officers at this point, with his hands in the pockets of the baggy jacket he was wearing. The officers began yelling at Venerable to show his hands. Witness accounts differ regarding the exact commands yelled by the officers, but several witnesses agree the officers ordered Venerable to show his hands or get his hands up. At some point during this confrontation, Officer Dionne took out his taser and Officer Ellis took out his handgun. The officers pointed their weapons at Venerable and continued to yell commands at him. Officer Dionne stated that Venerable was yelling in a loud and angry manner, and his hands remained in his pockets.

At this point, the positions of the officers and Venerable formed a triangle, the officers being about 15 feet from each and 10 to 15 feet from Venerable. Officer Dionne stated Venerable continued to keep his hands in his pockets and the officers continued to yell commands at him to see his hands. At about this time, according to Dionne, Venerable's hands came out of his pockets. Officer Dionne observed a black object in Venerable's right hand. To Dionne, it appeared to be a small gun, about 6 inches long. He described the object as all black with a pointed "thing" at the end. He thought it was either the barrel or the hammer. Officer Dionne recalled Venerable saying something like, "It's nothing, this ain't nothing."

Officer Dionne stated at first Venerable held the object at about shoulder height, and then he brought it down, pointing it at Dionne. Dionne thought it was a firearm, and that he was going to be shot. He screamed and fired his taser, because that was all he had in his hand at that time. Dionne stated that if he had been holding his gun, he would have fired his gun. Dionne immediately ran to the rear of the patrol car, thinking he was going to be shot. As he ran, he heard gunfire. He did not know if Venerable or his partner (or both) were firing the shots. He dropped the taser and pulled out his handgun, taking up a position behind the patrol car.

Ellis told a Lieutenant at the scene that Venerable refused to take his hands out of his pockets. Ellis stated that when Venerable did take his hands out of his pockets, he thought Venerable was going to shoot Dionne and so he (Ellis) fired at Venerable. Ellis fired 6 shots, two of which struck Venerable.

When Officer Dionne looked up from his crouched position behind the patrol car, he saw that Venerable was down on the grass in front of [REDACTED] Mandy. He immediately broadcast over the radio that shots had been fired and requested fire and ambulance, Code 3. At that point, Officer Ellis was approaching Venerable, yelling at him to show his hands. Officer Dionne took his gun out and both officers approached Venerable. Officer Dionne remembers Venerable saying, as he lay on the ground, "I ain't got nothing. I ain't got nothing." Officer Dionne kept his gun trained on Venerable while Officer Ellis put his gun away and approached Venerable, patting him down and handcuffing him. Officer Dionne recalls Venerable saying something like, "You shot me over a phone." Officer Dionne scanned the area with his flashlight and saw a cell phone lying in the grass.



Radio transmission tapes show that between the time officers requested the beeper at the beginning of the confrontation, and the time they requested the ambulance, less than 30 seconds had elapsed.

While waiting for the ambulance, Officer Dionne checked Venerable's wounds. Venerable had been struck in the left torso and right leg above the ankle. Officer Dionne stated he applied a compress and pressure to the bullet wound in the torso.

The shooting occurred at approximately 1:37 a.m. The fire department's patient care report reflects that they were dispatched at 1:40 a.m., arrived at 1:47, contacted the patient at 1:49 and transported him at 2:06 a.m. Venerable was taken to UCD Medical Center. During exploratory surgery (laparotomy and thoracotomy), he died.

According to the coroner's report, Venerable was 5 feet 5 inches tall, weighed approximately 230 pounds, and was 33 years old. The cause of death was a gunshot wound of the abdomen. The fatal bullet entered the left torso, coursed through organs and tissue and came to rest on the right side of the body. The wound track was left to right, with minimal deviation from front to back and minimal deviation in the horizontal plane. A second bullet entered the right leg above the ankle, traveling left to right, slightly downward in angle and slightly front to back. This bullet exited the other side of the leg. Venerable's blood alcohol level was .06%.

## B. Additional Relevant Detail

Several civilians witnessed the shooting, each from a different vantage point. Besides [REDACTED] her parents and her sister, there was witness [REDACTED] (Venerable's friend) and an unconnected witness, neighbor [REDACTED]. As is common when many persons view the same incident, the details vary from witness to witness.

[REDACTED], the neighbor, watched the events unfold from his front yard on Mandy. Venerable was actually standing in [REDACTED] yard when he was shot. [REDACTED] stated the officers ordered Venerable at various time to drop the "stick," to show his hands, to stop and to "get down". He said he saw Venerable's right hand come out of his pocket holding what looked like a black semi-automatic pistol. When Venerable was pulling the object out of his pocket, it appeared to [REDACTED] that it got hung up on something and that Venerable had to work it out of the pocket. [REDACTED] said he saw Venerable raise his right arm toward the officers and thought Venerable was going to shoot one of the officers. When he heard the shots, he thought Venerable had fired at the officer until he saw Venerable fall to the ground. After Venerable fell, [REDACTED] heard Venerable say, "It's only a cell phone, you motherfuckers." [REDACTED] did not hear Venerable say anything about a cell phone before he was shot.

[REDACTED] who was across the street roughly 80 feet away, has given more than one statement. He spoke with officers as well as with KFBK radio/talk show host Mark Williams. Portions of [REDACTED] various statements are mutually inconsistent. [REDACTED] stated to police that the officers yelled for Venerable to drop the board, which Venerable did. He also stated the officers at various points ordered Venerable to put his hands up, to show his hands, to "stay still," and to turn around. In one of his statements to police, [REDACTED] said that Venerable wouldn't listen to the



ORIGINAL

01-11119

officers. [REDACTED] also said that Venerable eventually turned and faced the officers with his hands up. [REDACTED] said he could not see whether Venerable had anything in his hands. He said that before the shooting, Venerable told officers, that he didn't have a gun and that it was a cell phone. Significantly, [REDACTED] gave three statements about the movement of Venerable's arm just before the shots were fired. In his first statement to the police, [REDACTED] said that Venerable "motioned" his (right) arm down toward the ground or his pocket just before he was shot. In his second statement to police (which was video taped), [REDACTED] said and demonstrated that Venerable's right arm (with the cell phone in it) was initially raised above shoulder height, and then came down to a position where it was pointing at Officer Dionne. He characterized the motion as "like showing him my cell phone," but the motion he demonstrated was the same as one would make when pointing a gun. [REDACTED] told the KFBK interviewer that Venerable did not point the cell phone at the officers, and that his (Venerable's) hands were in the air, high above his head, when he was shot.

The remaining witnesses ([REDACTED]) all stated that Venerable had his hands in the air when shot. [REDACTED] said that after Venerable dropped the board, the officers ordered him to "get down," "get on the ground," and put his hands up. She said she did not see a cell phone in Venerable's hand because she was too far away. She said he went to put his hands up and the officers started shooting. She said she didn't hear anyone say anything about a cell phone before the shooting.

[REDACTED] stated in his interview at the Police Department that after Venerable dropped the board, the officers' ordered Venerable to get his hands up and turn around. He said Venerable turned to face the officers with his hands up. He said he couldn't hear what Venerable was saying because the officers were hollering at him to get his hands up, even though his hands were up. He said Venerable's hands were in the air when the officers shot him. To officers at the scene, [REDACTED] stated that Venerable wasn't listening to the cops prior to being shot.

[REDACTED] stated she heard the cops tell Venerable to stop and not to move. She said Venerable then said, "I'm not making a move, my cell phone just dropped." She said she did not see the cell phone drop, but neither did she see anything in Venerable's hands. She said the taser went off and Venerable said, "Why do you have this on me?" She said Venerable also said he didn't have a weapon, he didn't have anything. She said she was yelling, "Why do you guys have your guns drawn? He does not have a weapon." She said Venerable had his hands in the air the whole time. She said Venerable was shot as he moved backwards.

[REDACTED] stated Venerable was ordered to halt by the officers and then he threw the stick down and started walking away. She said the officers also told Venerable to get down on the ground, which he did not do. She said that at one point, before being shot, Venerable said, "get my cell phone." She said Venerable was shot after he threw his hands in the air.

### III. ANALYSIS:

A peace officer, as well as any citizen, may use deadly force under circumstances where it is reasonably necessary for self-defense or defense of another. In addition, a peace officer may use deadly force in order to apprehend a person who has committed a dangerous felony (i.e. one



involving threatened infliction of serious physical harm). Penal Code sections 196 and 197. Tennessee v. Garner (1985) 471 U.S. 1; Kortum v. Alkire (1977) 69 Cal. App. 3d 325.

California law permits the use of deadly force if the person actually and reasonably believed he or another was in imminent danger of death or great bodily injury. It is the reasonable appearance of danger to the officer, and his honest belief in that danger, which is controlling. CalJIC 5.51. Further, the officer need not prove that he had the right to use deadly force. Rather, it is the prosecution which must prove that the officer did not have the right. The question therefore becomes whether the evidence proves, beyond a reasonable doubt, that Officer Ellis did not have an honest, reasonable belief in the threat and the need to use deadly force. In this case, several points are important.

First, when the officers confronted Venerable, the situation was unpredictable and volatile, with a clear potential for violence. Venerable had broken the windshield of the Cadillac while [REDACTED] and her father were still inside, then swung the board in a threatening manner, particularly toward [REDACTED] father. He did not respond right away to the officers' commands to drop the board. When he finally did drop it, he walked toward the officers with his hands in his pockets. He ignored repeated orders to show his hands. Both his friend [REDACTED] and his father-in-law [REDACTED] said Venerable did not listen to the officers, and [REDACTED] described Venerable as failing to follow the officers' instructions.

Second, when Venerable finally did take his hands out of his pockets, he had a dark black object in his right hand. The officers and the neighbor [REDACTED] all believed the object was a gun. Officer Dionne said he believed the black object to be a small gun. Officer Ellis said that when Venerable removed his hands from his pockets, he thought Dionne would be shot. [REDACTED] saw Venerable working something out of his pocket and coming out with what he thought was a black semi-automatic pistol.

Third, despite orders by the officers, there is no evidence that Venerable did drop the object from his hand before he was shot.

Fourth, the officers, [REDACTED] and [REDACTED] all described movements by Venerable that could be interpreted as moving the hand holding the object into a position that was threatening to Officer Dionne. Officer Ellis said that he thought Officer Dionne was going to be shot. Officer Dionne also said he thought he was going to be shot when Venerable brought the object down from shoulder height and pointed it at him. Dionne screamed and fired his taser, running for cover to escape what he believed was impending peril. [REDACTED] said he saw Venerable raise his right arm toward the officers and thought Venerable was going to shoot one of the officers. In fact, he thought Venerable had shot an officer until he saw Venerable fall to the ground. While [REDACTED] was too distant to see any object in Venerable's hand, he did say that Venerable was not listening to the officers and that he motioned his right arm down toward the ground or his pocket before he was shot. [Note: [REDACTED] gave conflicting statements on this point, as described above] Given the position of the arm before it moved and the position of Officer Dionne, this movement could readily be interpreted as bringing that hand (if it held a gun) into a position where it threatened Dionne.

ORIGINAL

01-11119

It is understandable that some of the witnesses, watching the events unfold from different vantage points, could perceive things differently. Not only was the situation emotionally charged, it was 1:30 in the morning, and dark. However, while the family member witnesses said that Venerable had his hands up when he was shot, the other witnesses did not describe the action that way.

Ellis was forced to make a decision in an instant, faced with a man who had reacted violently, not responded to officer's orders, was holding an object which other witnesses agreed looked like a handgun, and was apparently bringing it to bear on another officer. Under these facts, it cannot be said Ellis' conclusion – that Venerable had a gun and was about to shoot Dionne – was unreasonable. While it is tragic that in fact Venerable was holding a cell phone rather than a gun, the law judges the officer's action based upon the reasonable perception of the threat. The evidence simply does not prove that Ellis acted criminally under the circumstances.

The evidence of what Venerable may have said before he was shot does not change this conclusion. Again, the witness accounts differ. [REDACTED] said Venerable told officers before he was shot that it was a cell phone. [REDACTED] sister said Venerable said he didn't have a weapon, he didn't have anything. Dionne reported that Venerable said, "It's nothing, this ain't nothing." [REDACTED] said Venerable didn't say anything about a cell phone until after he was shot and had fallen to the ground. Given the other evidence, these varying and conflicting versions of what Venerable did or did not say do not provide sufficient additional proof to establish criminal conduct on the part of Officer Ellis

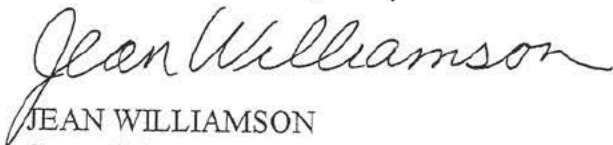
#### IV. CONCLUSION:

This case presents a tragic situation for all involved. We can have nothing but sympathy for the family of Donald Venerable. Still, our decision here, as in any case, must be based on what the evidence proves. We find the shooting was lawful, and will not take any further action in the matter.

Thank you for referring the case for our review.

Very truly yours,

JAN SCULLY  
DISTRICT ATTORNEY

  
JEAN WILLIAMSON  
Supervising Deputy District Attorney

cc: Lt. Steve Campas  
Officer Joseph Ellis  
Don Casimere, Office of Police Accountability

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**Report Number: 2001-11119**

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