



OFFICE OF THE

DISTRICT ATTORNEY

ORANGE COUNTY, CALIFORNIA

TONY RACKAUCKAS, DISTRICT ATTORNEY

JIM TANIZAKI
SENIOR ASSISTANT D.A.
VERTICAL PROSECUTIONS/
VIOLENT CRIMES

MARY ANNE MCCAULEY
SENIOR ASSISTANT D.A.
BRANCH COURT OPERATIONS

JOSEPH D'AGOSTINO
SENIOR ASSISTANT D.A.
GENERAL FELONIES/
ECONOMIC CRIMES

MICHAEL LUBINSKI
SENIOR ASSISTANT D.A.
SPECIAL PROJECTS

JEFF MCLAUGHLIN
CHIEF
BUREAU OF INVESTIGATION

LISA BOHAN - JOHNSTON
DIRECTOR
ADMINISTRATIVE SERVICES

SUSAN KANG SCHROEDER
CHIEF OF STAFF

June 20, 2012

Police Commissioner Paul Walters
Santa Ana Police Department
60 Civic Center Plaza
Santa Ana, CA 92701

Re: Officer-Involved Shooting Incident on December 16, 2010
Fatal Shooting of Elmer Alexander Perez
District Attorney Investigations Case # SA 10-026
Santa Ana Police Case # 10-40608
Orange County Crime Lab Case # FR 10-55712
Orange County Sheriff- Coroner Case # 10-06477-SH

Dear Police Commissioner Walters:

Please accept this letter detailing the Orange County District Attorney's (OCD A) Office's investigation and legal conclusion in connection with the above-listed incident involving on-duty Santa Ana Police Department (SAPD) Corporal Manny Moreno and Officers David Prewett, Tony Lee and Brandon Sontag. Elmer Alexander Perez, 27, Santa Ana, died as a result of his injuries. The incident occurred in the City of Santa Ana on Dec. 16, 2010.

OVERVIEW

This letter contains a description of the scope of and the legal conclusions resulting from the OCD A's investigation of the Dec. 16, 2010, fatal officer-involved shooting of Perez. The letter includes an overview of the OCD A's investigative methodology and procedures employed, as well as a description of the relevant evidence examined, witnesses interviewed, factual findings, and legal principles applied in analyzing the incident and determining whether there was criminal culpability on the part of the SAPD officers involved in the shooting. The format of this document was developed by the OCD A, at the request of many Orange County police agencies, to foster greater accountability and transparency in law enforcement.

On Dec.16, 2010, Investigators from the OCD A Special Assignment Unit (OCDASAU) responded to the shooting scene located in a condominium on the 3000 block of South Bradford Place in Santa Ana. During the course of this investigation, OCD A Investigators interviewed 85 witnesses during the crime scene canvass and an additional 10 witnesses, including family members and police officers. Additionally, we reviewed SAPD reports; audio recordings and dispatch and radio traffic recordings; Other agency incident reports; Orange County Sheriff Crime Lab (OCCL) reports including autopsy and toxicology, crime scene investigation photographs; and other relevant reports and materials.

The OCD A conducted an independent and thorough investigation of the facts and circumstances of this incident and impartially reviewed all evidence in light of the applicable legal standards. In addition, the OCD A reviewed and

considered information and material provided by the family of Perez. The scope and findings of this review are expressly limited to determining whether any criminal conduct occurred on the part of any SAPD personnel as it relates to the death of Perez. The OCDA will not be addressing policy, training, tactics, or civil liability issues.

INVESTIGATIVE METHODOLOGY

Among other duties, the OCDASAU is responsible for investigating officer-involved shootings within Orange County when someone has been injured as a result of police gunfire. An OCDASAU Investigator is assigned as a case agent and is supported by other OCDASAU Investigators, as well as Investigators from other OCDA units. Six Investigators are assigned to the OCDASAU on a full-time basis. There are additional OCDA Investigators assigned to other units in the Office trained to assist when needed. On average, eight Investigators respond to an incident within an hour of being called. The Investigators assigned to respond to an incident perform a variety of investigative functions that include witness interviews, neighborhood canvass, crime scene processing and evidence collection, vehicle processing, and hospital investigative responsibilities as needed. The OCDASAU audio records all interviews, and the OCCL processes all physical evidence related to the investigation.

When the OCDASAU Investigator has concluded the investigation, the file is turned over to a veteran deputy district attorney for legal review. Deputy district attorneys from the Homicide or Gang Units review fatal, officer-involved shootings and custodial death cases and determine whether criminal charges are appropriate. Prosecutors assigned to the Special Prosecutions Unit review the non-fatal officer-involved shooting cases for possible criminal filings. Throughout the review process, the assigned prosecutor will be in consultation with his or her supervisor, and this Assistant District Attorney will eventually review and approve any legal conclusions and resulting memos. The case may also be reviewed by a Senior Assistant District Attorney, the Chief of Staff, and the District Attorney. If necessary, the reviewing prosecutor may send the case back for further investigation.

The officers who fired their weapons in this case – Corporal Manny Moreno and Officers David Prewett, Tony Lee and Brandon Sontag -- refused to make statements to OCDASAU Investigators. The below factual summary is based largely upon the voluntary statement given by non-shooting officer Adam Aloyian.

FACTUAL SUMMARY

Perez was a 27-year-old male who lived with his mother, step-father, sister, girlfriend, and 2-year-old son Alexander in Santa Ana.

Perez's mother, Maria Herrera, had observed Perez under the influence of drugs in the past. Perez's behavior in the past was mild in comparison to the extreme behavior leading up to the shooting incident, which Maria Herrera described as non-responsive, agitated and acting strangely. Perez's girlfriend, Diana Elizabeth Alvarado Pineda, noticed Perez acting strangely three days prior to the shooting incident. Perez was desperate, imagining things, and had not slept in the three days leading up to the shooting incident. Perez's sister, Kimberly Perez, said approximately three days prior to the shooting incident, Perez's behavior was extremely erratic, he displayed signs of paranoia, and described him as, "Weird, like a crazy person," and, "Out of control." Kimberly Perez knew Perez was under the influence of drugs and described him as a "bully" and completely out of character. She blamed Perez's frustration and anger on his drug use and the facts that he did not have a job and spent most of his time in jail.

On Dec. 16, 2010, sometime between 4:00 a.m. and 5:00 a.m., Kimberly Perez awoke, hearing voices. Kimberly Perez heard Pineda talking to Perez, and Kimberly Perez opened her bedroom door and observed them in the hall area outside her bedroom door. Perez had a "scary" look about him and told Kimberly Perez to stay in her bedroom. She noticed Perez was playing with a toy gun in his left hand. Perez was pointing the toy gun in all directions; toward her, toward Pineda, at the walls, and in the direction of downstairs. Perez was not saying anything while he was waving the toy gun, which belonged to Alexander.

According to Francisco Gerardo Herrera, Perez' step-father, Perez had a drug problem. Perez denied he had a drug problem and, despite the family's urging, refused to seek assistance or rehabilitation. When Perez was under the influence of drugs, his demeanor changed and he would yell and become aggressive. Francisco Herrera heard a verbal argument between Perez and Pineda. Francisco Herrera observed Perez holding a "pistol" and described it as

a black semi-automatic pistol. Francisco Herrera questioned his wife about the pistol, and Maria Herrera explained it was a pellet-type toy pistol.

Due to Perez's state of mind, Francisco Herrera feared Perez would harm Pineda and/or his son Alexander, therefore, Francisco and Maria Herrera made the decision to call the police. According to Francisco Herrera, he used his cellular telephone to call 911. Francisco Herrera said that told the dispatcher that his son was armed with a toy gun, was in an altered state, speaking loudly to his girlfriend, and might possibly injure his girlfriend or his own son. At the conclusion of his conversation with the police dispatcher, Francisco Herrera said that he exited his bedroom to meet the police outside. Perez was still standing on the second floor landing, holding the pistol in his right hand.

At approximately 5:08 a.m., SAPD Dispatch received a 911 call from Francisco Herrera at the condominium. Francisco Herrera told the dispatcher his 26-year-old step-son, identified as Perez, was under the influence of narcotics, agitated with his 7-months-pregnant wife, and had a toy gun in his possession. At approximately 5:10 a.m., SAPD Dispatch dispatched Santa Ana Police Officer Thomas Hernandez and Santa Ana Police Cpl. Moreno, to Perez's location reference a domestic violence incident. At approximately 5:23 a.m., Santa Ana Police Officer Prewett made contact with Francisco Herrera. Officer Prewett advised and updated dispatch that Francisco Herrera did not know if the gun was real or a toy.

At approximately 5:27 a.m., Cpl. Moreno requested additional units to respond to the dispatched location. At approximately 5:31 a.m., Officer Prewett told dispatch that the suspect had remained upstairs and was not allowing his wife and child to leave the residence. At approximately 5:36 a.m., Santa Ana Police Officer Lee advised dispatch that it sounded as if somebody was being assaulted inside the residence and the suspect threatened suicide.

Santa Ana Police Officers Sontag and Adam Aloyian heard a radio call regarding a family fight involving a son or brother possibly under the influence of drugs and involving either a real or toy gun. Officers Aloyian and Sontag began driving toward the incident location to assist dispatched units. As Officers Aloyian and Sontag were driving to the incident location, Officer Aloyian heard officers via radio traffic asking for additional officers to respond to the dispatched location, as well as officers requesting less-than-lethal rounds.

The investigation revealed that the following officers were involved in the shooting: Cpl. Moreno and Officers Prewett, Lee and Sontag. Due to the fact that Cpl. Moreno and Officers Prewett, Lee and Sontag did not provide voluntary statements, the following sequence of events is based solely on Officer Aloyian's statement.

At approximately 5:30 a.m., Officers Aloyian and Sontag arrived and Officer Aloyian observed officers standing at the open front door of the incident location, yelling for Perez to come out. Officer Aloyian described the incident of the as being of highest priority, knowing there was a woman and a baby in the residence with an uncooperative and unstable family member armed with a firearm. Officer Aloyian believed that the gun was real and could not rely on a family member's expertise or possible lack of expertise about the gun being real or a toy.

Officers Aloyian and Sontag took positions at the open front door of the incident location. Officer Aloyian described hearing Pineda screaming and the baby crying along with the sound of somebody being struck with a board or knocked around. Officer Aloyian believed they had no choice but to enter into the condominium.

Cpl. Moreno and Officers Prewett and Lee entered the condominium through the open front door. Officer Aloyian followed as the fourth officer inside the condominium. As the officers were filing into the condominium with their guns drawn, they continued to yell for Perez to "come out."

Their attention was drawn to the noise coming from upstairs. Officers took positions up against the base of the switchback staircase; Cpl. Moreno, Officers Lee, Prewett, Aloyian and Sontag, in that order from left to right.

Officer Aloyian initially observed Perez through the stairwell railing, standing on the first or second step down from the second floor landing. Perez was an adult male Hispanic, with a shaved head, numerous tattoos, dressed in a white tank top, and holding what Officer Aloyian believed to be a Beretta handgun in his right hand. Based on his training and experience, Officer Aloyian thought the gun was real. The gun was pointed downward along Perez's right side. Based on Perez's aggressive actions, erratic behavior, and objective symptoms, Officer Aloyian formed the opinion that Perez was under the influence of methamphetamine.

Officer Aloyian and his fellow officers repeatedly yelled in English for Perez to drop the gun. Officer Aloyian could not see Pineda or the baby, but he could hear them crying and screaming. He believed they were behind and to the right of Perez.

Perez was not listening, never stopped moving, and was not following the officers' commands. Based on the appearance that the gun was real and Perez's demeanor, uncooperativeness, and actions, Officer Aloyian was not only in fear for his life, but the lives of his fellow officer's and Pineda and the baby.

Officer Aloyian observed Perez step down another step toward the officers' positions at the base of the staircase to approximately the third or fourth step down from the second floor landing. Perez continued to move his body while keeping his feet planted on the step. Perez turned his back toward the officers, and then turned to face the officers, while he continued to hold the gun in his right hand pointed in a downward direction. Officer Aloyian felt that Perez, by his behavior, was challenging officers to shoot him; however, the officers continued to yell for Perez to drop the gun.

Officer Aloyian observed Perez turn toward, focus and lock on the officers positioned to the left of him, including Cpl. Moreno and Officers Lee and Prewett. At the same time, he observed Perez raise the gun, still in his right hand, and point it directly toward the three officers. Officer Aloyian heard multiple gunshots and then observed Perez fall backwards onto his back at the top of the second floor landing, where only his feet were visible.

Officer Aloyian observed Perez's feet moving and believed Perez might have rolled his body over. Due to the fact that Perez was still a threat, Officers Sontag and Aloyian and Cpl. Moreno moved up the staircase to the second floor landing. Officer Aloyian approached and found Perez lying on his left side, still moving and breathing, with the gun lying to the right side of Perez' mid-torso area. Officer Aloyian observed Perez's right arm to be bent at the elbow with the right forearm positioned under his upper body. Pineda was screaming and coming toward the officers and Perez.

Officer Aloyian immediately kicked the gun to the side and away from Perez, while backing Pineda and the baby away from Perez and into one of the bedrooms. It was later determined that the gun Perez had in his possession was a replica handgun, identified as a Pietro Beretta Badone/PB-MOD M93R.

BALLISTICS TESTING

Ballistics testing of ejected cartridges collected at the scene and the officers' guns showed that Officers Prewett, Lee, and Sontag and Cpl. Moreno all fired their weapons. The bullet which killed Perez lacked sufficient quality of ballistics markings to identify which weapon fired the fatal round.

AUTOPSY

On Dec.17, 2010, at approximately 9:13 a.m., Dr. Anthony Juguilon, Orange County Chief Forensic Pathologist, conducted the post-mortem examination of Perez at the Orange County Sheriff-Coroner Forensic Science Center.

Dr. Juguilon conducted an extensive visual examination of Perez's body and located three gunshot wounds. A gunshot wound to the right upper chest penetrated the right lung, leading to extensive bleeding in the right chest cavity, passed through and severed the spinal cord, and ultimately lodged in the upper back. The apparent trajectory was front to back, right to left, and in an upward direction. Dr. Juguilon noted a graze wound on the right inner forearm, which could represent the same trajectory as the gunshot wound to the right upper chest, but it is not definitive. He also noted a gunshot wound to the right foot.

Postmortem blood and brain matter was sampled and sent to the crime lab for analysis. Following the autopsy, Dr. Juguilon concluded that the cause of death was a penetrating gunshot wound to the thorax.

TOXICOLOGY

The OCCL conducted a toxicological exam on Perez's post-mortem blood sample and brain matter for prescription drugs and common drugs of abuse. The following results were obtained:

DRUG	MATRIX	RESULTS
Amphetamine	Postmortem blood	0.14 mg/L
Methamphetamine	Postmortem blood	1.8 mg/L
Amphetamine	Brain	0.63 mg/kg
Methamphetamine	Brain	6.3 mg/kg

These findings fall within the high-abuse range.

STANDARD LEGAL PRINCIPLES IN OFFICER-INVOLVED SHOOTING CASES

Possible criminal charges against an officer involved in a shooting include murder [Penal Code Section 187]; attempted murder [Penal Code Section 664/187]; assault with a deadly weapon [Penal Code Section 245]; and assault by a police officer [Penal Code Section 149]. In order to convict an officer of any of these charges, however, it would be necessary to prove beyond a reasonable doubt that no legal justifications existed for the officer's actions. *People v. Banks* (1977) 67 Cal. App. 3d 379, 383-84. Several such justifications may apply in any given case and they are set forth in Penal Code Sections 196, 197 and 835a.

California Penal Code Section 196 provides that use of deadly force by a public officer is justifiable when necessarily used in arresting persons who are "charged with a felony" and who are fleeing from justice or resisting such arrest. Section 196 applies both where the suspect in question is "charged with a felony" and where the officer has "reasonable cause" to believe that the person has committed a felony. *People v. Kilvington* (1894) 104 Cal. 86, 89. The felony must involve violence or the threat of violence. *Kortum v. Alkire* (1977) 69 Cal. App. 3d 325, 333.

California Penal Code Section 197 provides that the use of deadly force by any person is justifiable when used in self-defense or in defense of others.

California Penal Code Section 835a allows any police officer who has reasonable cause to believe that a person to be arrested has committed a felony [public offense] to use reasonable force to effect the arrest, to prevent escape, or to overcome resistance. The section further provides that a police 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 officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance." As with Penal Code Section 196, Section 835a only allows use of deadly force by the police officer when the suspect's felony involves violence or the threat of violence. *Kortum v. Alkire* (1977) 69 Cal. App. 3d 325, 333. The court in *Kortum* further held that deadly force against a fleeing felony suspect is justifiable only when the felony "is of the violent variety, i.e., a forcible and atrocious one which threatens death or serious bodily harm, or there are **other circumstances which reasonably create a fear of death or serious bodily harm to the officer or to another.**" *Kortum v. Alkire, supra*, 69 Cal. App. 3d at 333.

In addition, Penal Code section 834a requires that if a person has knowledge, or by the exercise of reasonable care, should have knowledge, that he is being arrested by a peace officer, that person must refrain from using force or any weapon to resist such arrest.

Similarly, the relevant Criminal Jury Instruction as written by the Judicial Council of California and set forth in CALCRIM 3470 permits a person being assaulted to defend himself from attack if, as a reasonable person, he had grounds for believing and did believe that bodily injury was about to be inflicted upon him or upon another person. In doing so, such person may immediately use all force and means which he believes to be reasonably necessary and

which would appear to a reasonable person, in the same or similar circumstances, to be necessary to defend against that danger and to prevent the injury which appears to be imminent.

The law as detailed in CALCRIM 3470 and in well-settled case law therefore permits a person, if confronted by the **appearance of danger** which arouses in his mind, as a reasonable person, an honest fear and conviction that he or another person is about to suffer bodily injury, to act in self-defense or defense of others upon such appearances, and from such fear and honest convictions. The person's right of self-defense is the same **whether the danger is real or merely apparent**. *People v. Jackson* (1965) 233 Cal.App.2d 639, 641-642.

Nevertheless, the above justifications must be interpreted in light of United States Supreme Court precedent that limits the right of a police officer to use deadly force. *People v. Martin* (1985) 168 Cal. App. 3d 1111, 1124. Thus, in *Tennessee v. Garner* (1985) 471 U.S. 1, 3, the United States Supreme Court ruled that a police officer is entitled to use deadly force only when "the officer has probable cause to believe that the suspect poses a significant threat of death or serious bodily injury to the officer or others."

This limitation was, however, subsequently clarified by the United States Supreme Court in the seminal case of *Graham v. Conner* (1989) 490 U.S. 386, wherein the Supreme Court explained that an officer's right to use force [i.e., his weapon] is to be analyzed under the Fourth Amendment's "objective reasonableness" standard. The Supreme Court further stated that the determination of the reasonableness of an officer's use of force "must embody allowance for the fact that police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain and evolving." *Id.* at 397. Thus, the Court cautioned that "[t]he 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." *Id.* at 396.

The United States Supreme Court's analysis and teachings in *Graham, supra*, are very much applicable to the circumstances surrounding the interactions of Cpl. Moreno and Officers Prewett, Lee and Sontag with Perez.

LEGAL ANALYSIS

The facts in this case are determined largely by considering Officer Aloyian's statement as a percipient witness. The shooting officers in this case did not make statements to OCDA Investigators. Officer Aloyian has been a police officer for nine years, including five years with the Colton Police Department and four years with SAPD.

Officer Aloyian has come into contact with numerous persons under the influence of methamphetamine during his tenure as a police officer and opined based on his experience that Perez was under the influence of methamphetamine. Officer Aloyian based his opinion on the following facts surrounding Perez: He was huffing and puffing as he was standing on the staircase; wearing a tank top and sweating on a cool morning; licking his lips; not following directions/commands; was zombie-like; and was aggressive. Officer Aloyian's opinion was corroborated after the fact by the toxicology reports showing that Perez had a level of methamphetamine in his blood that was in the high-abuse range.

Officer Aloyian indicated that the police made numerous requests for Perez to drop the gun; however, Perez never complied. Officer Aloyian could hear Perez's girlfriend screaming and Perez's 2-year-old son crying. He then heard what he thought was someone being hit with something. He then saw Perez holding the gun in his right hand. Based on his training and experience, he thought the gun was a real Beretta semi-auto handgun. There was nothing on the gun to indicate it was a replica or toy gun, for example, an orange tip. Perez initially had the gun to his side pointed at the ground. Officer Aloyian then saw Perez turn towards his girlfriend, who was holding his 2-year-old son. When Perez turned back toward the officers, he appeared to focus and lock on them. Perez then raised the gun above his waist and pointed it directly at the officers. Officer Aloyian indicated that he was afraid for his life and the lives of his partner officers. He indicated that in all of his years in law enforcement, this was the most fear he has ever experienced. He described this as a life or death situation. As Perez turned, raised the gun and pointed it at the officers, he was shot. Officer Aloyian stated that he did not shoot because he was not in the proper position. The shooting officers had a better vantage point.

Where potential dangerous, emergency conditions or other exigent circumstances exist, the Supreme Court's definition of reasonableness is comparatively generous to the police. In effect, "the Supreme Court intends to surround the police who make these on-the-spot choices in dangerous situations with a fairly wide zone of protection in close cases. A police officer's use of deadly force is reasonable if the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. Thus, an officer may reasonably use deadly force when he or she confronts an armed suspect in close proximity whose actions indicate an intent to attack." (*Brown v. Ransweiler* (2009) 171 Cal. App. 4th 516, 528.)

It should also be noted that, in order for the shooting officers to be justly and lawfully charged and convicted with a crime in this incident – be it murder, voluntary manslaughter or involuntary manslaughter, it is the OCDA's burden to prove beyond a reasonable doubt that the officers did not act in reasonable and justifiable self-defense or defense of another when they shot at Perez.

CONCLUSION

Based on all the evidence provided to and obtained by the OCDA, and based on the entirety of the facts contained in all the available reports we reviewed, and pursuant to the applicable legal principles, it is our legal opinion that there is insufficient evidence to prove beyond a reasonable doubt that any Santa Ana Police Officer committed a crime on Dec. 19, 2010, in the shooting-death of Perez.

Accordingly, the OCDA is closing its inquiry into this incident.

Very truly yours,



SCOTT A. SIMMONS

Senior Deputy District Attorney
Homicide Unit



Read and Approved by Dan Wagner
Assistant District Attorney
Head of Homicide Unit