OFFICE OF THE
DISTRICT ATTORNEY
ORANGE COUNTY, CALIFORNIA
TODD SPITZER

September 20, 2022

Sheriff Don Barnes
Orange County Sheriff's Department
550 N. Flower Street
Santa Ana, CA 92703

Re: Custodial Death on 6/28/2021
Death of Inmate Kenneth Alan McMillian
District Attorney Investigations Case #21-002371
Orange County Sheriff's Department Case #210628-0401
Orange County Crime Laboratory Case #21-48304

Dear Sheriff Barnes,

Please accept this letter detailing the Orange County District Attorney's (OCDA) Office's investigation and legal conclusion in connection with the above-listed incident involving the June 28, 2021 custodial death of 73-year-old inmate Kenneth McMillian (McMillian).

OVERVIEW

This letter contains a description of the scope and the legal conclusions resulting from the OCDA's investigation of the custodial death of McMillian. In this letter, the OCDA describes the criminal investigative methodology employed, evidence examined, witnesses interviewed, facts discovered, and the legal principles applied to review the conduct of any Orange County Sheriff's Department (OCSD) personnel or any other person under the supervision of the OCSD in connection with this custodial death incident. On June 28, 2021, OCDA Special Assignment Unit (OCDASAU) Investigators responded to Anaheim Global Medical Center (AGMC) where McMillian died while in custody.

On September 4, 2020, the Anaheim Police Department (APD) arrested McMillian for assault with a deadly weapon. Due to preexisting mental illness and various medical ailments, McMillian was housed in either a medical or mental health module his entire incarceration pending trial on his criminal case. On February 17, 2021, a judge found McMillian to be mentally incompetent to stand trial and ordered OCSD to deliver McMillian to the Department of State Hospitals (DSH) for restoration of competency. Due to lack of housing at DSH, McMillian was placed on a waiting list and remained in the custody of OCSD.

On June 3, 2021, McMillian was transported to the AGMC for a psychiatric evaluation, refusal to eat or drink and chronic abdominal pain. McMillian was uncooperative and combative with medical staff upon arrival. He was sedated so that a proper evaluation could be completed. The evaluation revealed McMillian was suffering from renal failure and a severely distended bladder. He was then admitted into the Intensive Care Unit (ICU) for a higher level of care. Over the next couple weeks, McMillian's health continued to decline. He had difficulty swallowing, respirations were weak, he refused medication, and medical intervention could only be conducted while sedated.

On June 28, 2021 at about 10:40 a.m., McMillian was receiving physical therapy from a physical therapist and a physical therapist assistant. He was noted to be alert and responsive at the time though he was having difficulty swallowing and there was liquid in his feeding tube. The therapists alerted a nurse who used a suction to remove the liquid. The nurse noted McMillian's heart and respirations were dropping and a Code Blue was initiated. A Code Blue is a common hospital code that indicates a medical emergency such as cardiac or respiratory arrest. Medical staff arrived but after receiving life-saving measures from medical staff, McMillian was pronounced dead at approximately 11:51 a.m.

During the course of this investigation, the OCDASAU interviewed four witnesses, as well as obtained and reviewed reports from the OCSD and Orange County Crime Laboratory (OCCL), incident scene photographs, and other relevant materials.

The OCDA conducted an independent and thorough investigation of the facts and circumstances of this event and impartially reviewed all evidence and applicable legal standards. The scope and findings of this review are expressly limited to determining whether any criminal conduct occurred on the part of OCSD personnel or any other person under the supervision of the OCSD. The OCDA will not be addressing policy, training, tactics, or civil liability.

INVESTIGATIVE METHODOLOGY

Among other duties, the OCDASAU is responsible for investigating custodial deaths within Orange County when an individual dies while in custody. 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, scene processing, evidence collection, 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 an experienced deputy district attorney for legal review. Deputy district attorneys from the Homicide, TARGET/Gangs, and Special Prosecutions Units review fatal and non-fatal officer-involved shootings and custodial death cases, and determine whether criminal charges are appropriate. Throughout the review process, the assigned prosecutor will be in consultation with the Assistant District Attorney supervising the Special Prosecutions Unit of the OCDA, who will eventually review any legal conclusions and resulting memos. The case may often be reviewed by several experienced prosecutors and their supervisors. The District Attorney personally reviews all officer involved shootings and custodial death letters. If necessary, the reviewing prosecutor may send the case back for further investigation.

EVIDENCE COLLECTED

The following items of evidence were collected and examined:

- A sample of McMillian's postmortem blood was collected for testing. The blood was examined for the presence of drugs and alcohol. No alcohol or illicit drugs were detected.

AUTOPSY

On July 2, 2021 (*Independent)* Forensic Pathologist Dr. Scott A. Luzi of Orange County Coroner's Office conducted an autopsy on the body of Kenneth McMillian. Autopsy findings revealed McMillian had other conditions such as hypertensive and atherosclerotic cardiovascular disease. There were no findings of major or minor injuries. The cause of death was Pneumonia.

EVIDENCE ANALYSIS

Toxicological Examination

A sample of Kenneth McMillian postmortem blood yielded the following results:

DRUG	MATRIX	RESULTS & INTERPRETATIONS
Ethanol/Volatiles	Postmortem Blood	Not Detected
Amphetamine and Related	Postmortem Blood	Negative
Barbiturates	Postmortem Blood	Negative
Methamphetamine and Related	Postmortem Blood	Negative
Cannabinoids	Postmortem Blood	Negative
QTOF Drug Identification (Positive Mode)	Postmortem Blood	Negative
Alkaline Drugs	Postmortem Blood	Benztropine
Benzodiazepines/Sedative Hypnotics	Postmortem Blood	Diphenhydramine 0.566 ± 0.077 mg/L

BACKGROUND INFORMATION

Kenneth Alan McMillian had a State of California Criminal History record that revealed arrests for the following violations:

- Assault & Battery
- Vandalism
- Non-Sufficient Funds: Checks
- Disorderly Conduct: Lodge Without Consent
- Battery on Peace Officer/Emergency Personnel
- Obstruct/ Resist Public Officer
- False Identification to Peace Officer
- Fight/Noise/Offensive Words in Public
- Trespass
- Tamper with Vehicle
- Assault with Deadly Weapon: Not Firearm

THE LAW

Homicide is the killing of one human being by another. Murder, voluntary manslaughter, and involuntary manslaughter are types of homicide. To prove that a person is guilty of murder, the

following must be proven:

a. The person committed an act that caused the death of another person;
b. When the person acted he/she had a state of mind called malice aforethought; and
c. He/she killed without lawful excuse or justification.

There are two kinds of malice aforethought, express malice and implied malice. Express malice is when the person unlawfully intended to kill. Implied malice requires that a person intentionally committed an act, the natural and probable consequences of the act were dangerous to human life, at the time he acted he knew his act was dangerous to human life, and he/she deliberately acted with conscious disregard for human life.

A person can also commit murder by his/her failure to perform a legal duty, if the following conditions exist:

a. The killing is unlawful (*i.e.*, without lawful excuse or justification);
b. The death is caused by an intentional failure to act in a situation where a person is under a duty to act;
c. The failure to act is dangerous to human life; and
d. The failure to act is deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.

A person can also commit involuntary manslaughter by failing to perform a legal duty, if the following conditions exist:

a. The person had a legal duty to the decedent;
b. The person failed to perform that legal duty;
c. The person's failure was criminally negligent; and
d. The person's failure caused the death of the decedent.

In *Giraldo v. California Dept. of Corrections and Rehabilitation* (2008) 168 Cal.App.4th 231, 250-251, the court held that there is a "special relationship" between jailer and prisoner:

> "[T]he most important consideration 'in establishing duty is foreseeability.' [citation] It is manifestly foreseeable that an inmate may be at risk of harm.... Prisoners are vulnerable. And dependent. Moreover, the relationship between them is protective by nature, such that the jailer has control over the prisoner, who is deprived of the normal opportunity to protect himself from harm inflicted by others. This, we conclude, is the epitome of a special relationship, imposing a duty of care on a jailer owed to a prisoner, and we today add California to the list of jurisdictions recognizing a special relationship between jailer and prisoner."

California Government Code 845.6 codifies that the special relationship that exists in a custodial setting gives rise to a legal duty, as follows:

> " [A] public employee, and the public entity where the employee is acting within the scope of his employment, is liable if the employee knows or has reason to know that the prisoner is in need of immediate medical care and he fails to take reasonable action to summon such medical care."

Criminal negligence involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with criminal negligence when he acts in a reckless way that creates a high risk of death or great bodily injury and a reasonable person would have known that acting in that way would create such a risk. In other words, a person acts with criminal negligence when the way he acts is so different from how an ordinarily careful person would act in the same situation

that his or her act amounts to disregard for human life or indifference to the consequences of that act.

An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes.

There may be more than one cause of death. An act causes death only if it is a substantial factor in causing the death. A substantial factor is more than a trivial or remote factor; however, it does not need to be the only factor that causes the death.

LEGAL ANALYSIS

There is no evidence of express or implied malice on the part of any OCSD personnel or any inmates or other individuals under the supervision of the OCSD. Accordingly, the only possible type of homicide to analyze in this situation is murder or manslaughter under the theory of failure to perform a legal duty.

Although the OCSD owed Kenneth McMillian a duty of care, the evidence does not support a finding that this duty was in any way breached -- either intentionally (as required for murder) or through criminal negligence (as required for involuntary manslaughter).

Thus, there is no evidence to support a finding that any OCSD personnel or any individual under the supervision of the OCSD failed to perform a legal duty.

CONCLUSION

Based on all the evidence provided to and reviewed by the OCDA, and pursuant to applicable legal principles, it is our conclusion that there is no evidence to support a finding that any OCSD personnel or any individual under the supervision of the OCSD failed to perform a legal duty causing the death of Kenneth Alan McMillian. The evidence shows that McMillian died as a result of pneumonia and that the death was a natural one.

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

Respectfully submitted,

David Paul Porter
Senior Deputy District Attorney
Homicide Unit

Read and Reviewed by **BRETT BRIAN**
Assistant District Attorney
Special Prosecutions Unit

Read and Approved by District Attorney **TODD SPITZER**