



OFFICE OF THE
DISTRICT ATTORNEY
ORANGE COUNTY, CALIFORNIA
TONY RACKAUCKAS, DISTRICT ATTORNEY

November 29, 2017

Acting Chief David Valentin
Santa Ana Police Department
60 Civic Center Plaza
Santa Ana, CA 92701

Re: Officer Involved Shooting on Aug. 2, 2015
Non-Fatal Incident involving Armando Antunez
District Attorney Investigations Case #SA 15-015
Santa Ana Police Department Case #15-19816
Orange County Crime Laboratory Case #15-52249

JIM TANIZAKI
CHIEF ASSISTANT D.A.

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

MICHAEL LUBINSKI
SENIOR ASSISTANT D.A.
SPECIAL PROJECTS

JAIME COULTER
SENIOR ASSISTANT D.A.
BRANCH COURT OPERATIONS

SCOTT ZIDBECK
SENIOR ASSISTANT D.A.
VERTICAL PROSECUTIONS/
VIOLENT CRIMES

PAUL M. WALTERS
CHIEF
BUREAU OF INVESTIGATION

JENNY QIAN
DIRECTOR
ADMINISTRATIVE SERVICES

SUSAN KANG SCHROEDER
CHIEF OF STAFF

Dear Chief Valentin,

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 on-duty Santa Ana Police Department (SAPD) Detective Sergio Gutierrez. Armando Antunez, 24, Santa Ana, survived his injuries. The incident occurred in the City of Santa Ana on Aug. 2, 2015.

OVERVIEW

This letter contains a description of the scope and legal conclusions resulting from the OCDA's investigation of the Aug. 2, 2015, non-fatal officer-involved shooting of Antunez. The letter includes an overview of the OCDA'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 officer involved in the shooting. The format of this document was developed by the OCDA, at the request of many Orange County police agencies, to foster greater accountability and transparency in law enforcement.

On Aug. 2, 2015, Investigators from the OCDA Special Assignment Unit (OCDASAU) responded to this incident. During the course of this investigation, eight interviews were conducted, and 30 additional witnesses were contacted during the supplemental canvass interviews. OCDASAU Investigators also obtained and reviewed the following: SAPD reports, audio recordings, dispatch, and radio traffic recordings; Orange County Crime Lab (OCCL) reports including toxicology, forensic alcohol examination, officer processing and firearms examination reports; crime scene investigation photographs; medical records and photographs related to the injuries sustained by Antunez; criminal history records related to Antunez; and other relevant reports and materials, including audio recordings of the conducted neighborhood canvass.

The OCDA conducted an independent and thorough investigation of the facts and circumstances of this incident and has 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 SAPD officers or personnel, specifically Detective Gutierrez. The OCDA will not be addressing herein any possible issues relating to policy, training, tactics or civil liability.

In an officer-involved shooting where the OCDA files criminal charges against the individual shot by the police, it is the OCDA's policy to release the final report regarding the incident after the issue of guilt is decided in the underlying filed criminal case. This policy is in place to ensure that the OCDA is not releasing any information that may be viewed as prejudicial to the defendant's right to receive a fair trial while his/her case is still pending.

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 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 which 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, TARGET/Gangs, and Special Prosecution Units review fatal, as well as 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, who will review and approve the final legal conclusions and resulting memos. The case may often be reviewed by multiple veteran prosecutors, their supervisors, the Chief of Staff, and the District Attorney. If necessary, the reviewing prosecutor may send the case back for further investigation.

An important part of the investigation is to obtain a statement from the involved officers. Detective Gutierrez gave a voluntary statement to OCDA Investigators on Aug. 19, 2015.

FACTS

On Sunday, August 2, 2015, at approximately 6:00 p.m., SAPD Gang Detectives Gutierrez, Pedro Duran, Matthew Clear, Tyler Salo, Armando Chacon, and Detective Corporal Abelardo Oropeza conducted proactive gang suppression patrols in the 700 to 900 block of South Townsend Street. Townsend Street is an area populated by a documented criminal street gang. The six law enforcement officers were working in two officers teams, in three separate marked SAPD black and white "Gang Unit" police cars. All six wore distinctive SAPD gang enforcement uniforms, consisting of navy blue polo shirts with SAPD patches on each sleeve; an embossed police badge on the front breast; the words "Police" and "Gang Detail" in moderate size white lettering on the back; gun belts with a metal police badges; firearms; and other standard equipment. None of the officers were in possession of audio or video recording devices at the time of the shooting.

Prior to entering the Townsend Street neighborhood, the officers coordinated a plan for each team to patrol a specific area. Based on their prior contacts and collective experience, it was common knowledge that Townsend Street gang members routinely congregated mid-block on Townsend Street between McFadden and West Monte Vista Avenue, including the alleys to the east and west of Townsend Street. It was also common knowledge that gang members often flee on foot when contacted by the police.

The three teams entered the neighborhood at the same time from McFadden Avenue and began traveling northbound. One team drove on Townsend Street, and the remaining two teams drove in the east and west alleys, respectively. Detectives Duran and Gutierrez traveled northbound on Townsend Street. Detectives Salo and Clear traveled northbound in the west alley while Detectives Chacon and Oropeza traveled northbound in the east alley. The teams communicated with each other on a designated radio channel, "Green 4."

At approximately 6:02 p.m., Detectives Salo and Clear observed four suspected gang members in the west alley of 806 South Townsend Street. As Detectives Salo and Clear got closer, they saw the four males run eastbound towards to courtyard between 806 and 810 South Townsend Street. Detective Salo recognized two of the four males as Edgar Calvo and Armando Antunez. Detective Salo knew Calvo and Antunez were documented Townsend Street gang members. Detective Salo broadcasted his observations, describing the subjects' clothing and their direction of travel. Detectives Salo and Clear exited their police car and chased after the four males. Detective Salo observed Antunez running while holding the front waistband of his pants with his right hand and suspected Antunez was armed with a weapon.

At the time of Detective Salo's broadcast, Detectives Duran and Gutierrez were traveling northbound on Townsend Street, approximately one to two apartment complexes south of the subjects' reported location. Detectives Duran and Gutierrez stopped their police unit in front of 806 and 810 Townsend Street. Detective Duran was very familiar with this location and knew both apartment complexes at 806 and 810 Townsend Street shared a common courtyard area between them. Detective Duran had contacted numerous Townsend Street gang members in that courtyard on several prior occasions.

Detective Duran saw Antunez running eastbound through the center of the apartment complex towards Townsend Street. Detective Duran recognized Antunez from multiple prior contacts. Detective Duran observed Antunez try to hide next to several parked vehicles on Townsend Street. Detective Duran stopped his police unit and exited northwest of Antunez's location. Detective Gutierrez saw two males "ducking down" behind several parked vehicles on the street. As Detective Gutierrez exited the passenger side of the police car, he momentarily lost sight of them. Suddenly, Detectives Gutierrez and Duran observed one of the males, whom Detective Gutierrez also recognized as one of the three Antunez brothers who lived in the area, look in his direction and start running southbound on the sidewalk. Detectives Gutierrez and Duran chased after Antunez. Detective Gutierrez ran southbound in the street, and was slightly ahead of Detective Duran who was running southbound behind Antunez on the sidewalk. From prior contacts and arrests, Detective Gutierrez knew there were three Antunez brothers who lived on Townsend Street, and all were documented Townsend Street gang members. Detective Gutierrez knew there was a court ordered gang injunction in place and all three brothers were included in the court order. Detective Duran knew Armando Antunez was on probation with search and seizure terms, and had been added to the Townsend Street gang injunction.

While giving chase, Detective Gutierrez observed Antunez running with his right hand holding onto the front waistband area of his pants. Antunez's left arm was moving freely, in an up and down motion consistent with normal running. This indicated to Detective Gutierrez that Antunez was concealing something in his waistband that he did not want to drop. Based on his training and experience, Detective Gutierrez believed Antunez was in possession of a gun. As Antunez ran southbound on the sidewalk, he looked back over his right shoulder in the direction of Detective Gutierrez. Detective Duran, who was running behind Detective Gutierrez, yelled to Antunez, calling him by his last name. Detective Duran identified himself and his partner as "Police Officers" and told Antunez, "Stop, police, stop, police," several times. Detective Duran recalled yelling this at least three times. Antunez refused to stop and kept running. Detective Duran broadcasted Antunez's direction of travel over the police radio, which included information that Antunez was holding his front waistband while he was running. Detective Salo heard Detective Duran's broadcast.

While on Townsend Street, Detective Salo saw Detectives Duran and Gutierrez run westbound into the courtyard of 818 South Townsend Street and out of his sight. It appeared to Detective Salo that Antunez had split from the group and was being chased by Detectives Duran and Gutierrez. Detective Salo observed the other three subjects continue

running eastbound across Townsend Street. Detective Salo decided to chase after Antunez because he believed Antunez was possibly armed with a handgun.

Upon hearing the radio traffic, Detectives Chacon and Oropeza stopped and exited their police vehicle in the east alley of Townsend Street and in the general area of the foot chase. Detective Chacon ran westbound through an apartment complex toward Detectives Duran and Gutierrez's location. At 818 South Townsend Street, a 2-story apartment complex, Antunez changed his direction of travel and turned westbound from the sidewalk onto a pedestrian walkway leading directly into that apartment complex. Just before turning westbound, Antunez again looked back over his right shoulder at Detective Gutierrez and made direct eye contact. From a distance of approximately 20 feet, Detective Gutierrez observed Antunez use his right hand to remove a "black, semi-automatic handgun" from his front waistband. Detective Duran, who was still on the sidewalk trying to catch up to Antunez, also observed Antunez, "reach into his front waistband area with his right hand and remove a black gun."

Antunez continued to run westbound into the apartment complex with the gun in plain view, in his right hand. Based on his observations, Detective Gutierrez unholstered his duty weapon and continued to chase after Antunez. Detective Duran continued to follow them. Antunez ran westbound into the apartment complex, remaining on the ground level, and then he ran northbound around a staircase, then westbound in front of apartments 1 and 2. Detectives Gutierrez and Duran continued to close the distance between themselves and Antunez. Detective Gutierrez who was several feet in front of Detective Duran, observed Antunez still holding the gun in his right hand when he turned westbound. As Antunez ran past the large window of apartment 2, he slowed down, and for a third time looked back over his right shoulder in the direction of Detective Gutierrez. Antunez also rotated his body and his gun to the right and in Detective Gutierrez's direction. Detective Gutierrez had a clear, unobstructed view of Antunez's gun while Antunez was turning towards him. At that moment, Detective Gutierrez believed Antunez was going to shoot him and felt his life was in danger. From approximately 10 feet away, Detective Gutierrez fired two rounds from his duty weapon, striking Antunez both times.

Antunez immediately began falling to the ground. As Antunez's right wrist impacted the ground, he lost control of his gun, which spun several feet away. When Antunez's gun hit the ground, it slid westbound several feet into the wall of the apartment building. The impact caused gouges and scratches to the gun and left stucco material from the wall affixed to the area just below the gun's barrel. Detective Duran did not witness the shooting incident. As Detective Duran was rounding the staircase and heading northbound, he heard the two gunshots. As Detective Duran arrived in front of apartments 1 and 2, he observed Antunez's black handgun on the ground several feet west of Antunez.

Detectives Duran and Gutierrez detained Antunez and rendered first aid. Antunez was transported to the hospital where he was treated for gunshot wounds. He was expected to recover from his injuries.

Voluntary, Consensual Statement of Detective Gutierrez

Detective Gutierrez gave a voluntary, consensual statement to the OCDA on Aug. 19, 2015. The following is a summary of Detective Gutierrez's statement.

Detective Gutierrez was working with the Gang Suppression Unit on Aug. 2, 2015. He and his team decided to go to Townsend Street, which he and his team knew to be an area with the presence of a very active and violent gang in the city. Detective Gutierrez knew Townsend Street gang members generally congregated in three or four buildings, about mid-block on either the west or the east side of Townsend Street. The gang unit officers coordinated a plan to enter the area in three separate cars, with two officers in each. One car would enter the west alley, the second car would enter the street, and the third car would enter the east alley at approximately the same time. Detective Gutierrez and his partner, Detective Duran, were assigned to the street assignment and all the assigned officers were in communication with each other on their designated radio channel.

As Detectives Gutierrez and Duran drove northbound, Detective Gutierrez heard Detective Salo, in the west alley, say he saw a group of gang members in the mid-block area of 806 and 810 South Townsend, on the west side of the street. According to Detective Gutierrez, this was one of the main apartment buildings where the gang members congregated. Detective Gutierrez described it as a U-shaped apartment building with two levels. There is a wide walkway which allows access from the alley into the courtyard and the street. Detective Gutierrez indicated that Detective Salo said that there were several gang members in the alley.

Detectives Gutierrez and Duran were driving northbound, one or two apartments south of the alley, when they saw two males run into the courtyard towards the street. Detectives Gutierrez and Duran stopped in front of 806 and 810. Detective Gutierrez saw two males duck behind cars parked on the west side of the street. Detective Gutierrez got out of the patrol car and lost sight of them. Detective Gutierrez looked back and saw a male whom he recognized as one of the Antunez brothers. Detective Gutierrez knew there were three Antunez brothers in the neighborhood. All three brothers were documented Townsend Street gang members, and he had contact with all three brothers several times. Detective Gutierrez knew they were all very active gang members and had several arrests for various crimes.

Detective Gutierrez saw Antunez looking in his direction while running southbound on the sidewalk, with his right hand on his waistband. Detective Gutierrez said Antunez was pumping his left arm while running, but he was not pumping his right arm. That indicated to Detective Gutierrez that Antunez was holding something in his waistband he did not want to drop. In Detective Gutierrez's experience, that usually meant the person was holding a gun.

As Antunez ran south, he looked back toward Detective Gutierrez and ran to an apartment building. Right before turning into a walkway toward the apartments, Antunez looked over his right shoulder again at Detective Gutierrez. Antunez made eye contact with Detective Gutierrez. At that time, Detective Gutierrez saw Antunez pull a gun out of his waistband with his right hand and run west towards the courtyard. According to Detective Gutierrez, upon entering the courtyard, there is a set of stairs that leads to the second floor landing where there are several apartments arranged in a U-shape. Detective Gutierrez was trying to catch up to Antunez. Detective Gutierrez pulled out his gun and heard Detective Duran yelling, "Police stop, police stop!" several times. The third time, Detective Gutierrez heard Detective Duran yell, "Antunez, stop!" or something similar to those words. This confirmed to Detective Gutierrez that the subject was one of the Antunez brothers. Antunez did not stop and continued running west of the staircase with his gun still out and in his right hand.

Detective Gutierrez continued to chase Antunez. According to Detective Gutierrez, underneath the stairs the walkway turns to the north slightly for 15 to 20 feet, then continues west underneath the second floor landing. As Detective Gutierrez made it to the beginning of the walkway, he was forced to turn northbound. There is a tall wrought iron fence blocking access to the courtyard. The only place Detective Gutierrez and Antunez could have run was down the walkway or up the stairs. Antunez made the northbound turn and Detective Gutierrez ran to the south to maintain visual contact. To their left was the high wrought iron fence, to the right was the apartment building, and above them was the landing to the second floor. As Antunez was running, Detective Gutierrez noticed Antunez started to slow down. Antunez still held the gun and was 10 to 15 feet away from Detective Gutierrez. As Antunez started to slow a third time, he looked back at Detective Gutierrez over his right shoulder and turned his body to the right. Detective Gutierrez could still see Antunez holding the gun. As Antunez slowed down, Detective Gutierrez feared Antunez was going to turn around and shoot him, so Detective Gutierrez shot twice. Detective Gutierrez immediately saw that his shots were effective. As Antunez fell, Detective Gutierrez saw Antunez's right hand hit the ground. The force of his right hand hitting the ground caused Antunez to lose control of the gun, which spun away.

Detectives Gutierrez initially detained Antunez and received assistance from Detective Duran, who arrived within moments of the shots. After Antunez was handcuffed, Detective Gutierrez looked towards the gun and saw the magazine had been released from the gun. Detective Gutierrez saw bullets in the magazine. Additional officers arrived and provided first aid to Antunez. A crowd gathered, becoming belligerent towards the officers.

Post-Shooting, Voluntary Interviews with Civilian Witnesses in the Neighborhood

A neighborhood canvass was conducted. Most witnesses heard two or three gunshots, and most hid in their back rooms or bedrooms and did not observe the shooting or hear voices. Some witnesses heard running, a person shouting, "Stop, stop!" and gunshots. Two neighborhood witnesses saw police officers chase Antunez. One witness did not see anything in Antunez's hand and said the officer fired shots when Antunez fell. A second witness said officers yelled, "Stop, stop!" while they chased Antunez, Antunez stopped and the officer fired shots. The second witness told another civilian she saw Antunez throw something while running, and opined that what he threw probably made the police react, but denied making that statement when questioned by law enforcement.

Antunez's Post-Miranda Consensual, Voluntary Statement

On Aug. 2, 2015, Antunez was advised of his *Miranda* rights and waived his rights agreeing to provide a statement. During his interview, Antunez told law enforcement he was in the alley on Townsend Street and ran from the Gang Unit cars. Antunez said he tried to hide from the Gang Unit, "Because I had a gun." He did not know the type of gun, but described it as black .45. He said it was a "neighborhood gun," and he'd had it for five minutes before he saw the police officers. Antunez did not hear them say anything, he just started running.

The gun, according to Antunez, was in his pants and he began to fall down the stairs and he tried grabbing the gun. After he fell down and was on the ground, he put his hands up, but the officer started shooting at him. After Antunez fell and slipped down the stairs, he said the gun slipped away from him, so he put his hands out so the police could see he did not have anything. Antunez estimated that the gun, after he fell, was at least eight to 10 feet from him.

Antunez initially said that the gun was in his pants and he never held it. Antunez later admitted he held the gun with his shirt around it, but claimed he never took the gun out. Antunez admitted the tattoo of "CT" on his chest stands for "Calle Townsend" and he admitted membership in the Townsend Street gang for two or three years. Antunez stated that he had not been "jumped" in the gang, but his moniker is 'Little Rhino.'

Antunez said he had the gun for protection because there had been a lot of gang shootings around his neighborhood. Antunez said that he knew it was wrong to have a gun, and that's why he ran. Antunez claimed he did not know whether or not the gun was loaded, and he stated that he got the gun from a stash spot that a friend of his told him about. Antunez stated that he had not shot the gun before. Antunez admitted he drank beer 10 minutes before the Gang Unit arrived, and he used crystal methamphetamine the morning of the shooting. Antunez acknowledged knowing that there were two schools nearby, and he knew it was wrong to carry guns near schools.

ANTUNEZ'S MEDICAL CONDITION

Antunez was transported to the University of California, Irvine Medical Center, where he was treated for gunshot wounds. A bullet was removed from Antunez's right wrist and collected as evidence. Antunez was expected to make a full recovery.

EVIDENCE COLLECTED

The following items of evidence were collected and examined:

- Two cartridge cases, head stamp "Winchester .40 S&W"
- One copper jacketed hollow point bullet from the scene
- One black Hi-Point Firearms Model JHP .45 ACP pistol, with one round in the chamber and a loaded magazine (Antunez's gun)
- Detective Gutierrez's Glock, Model 22, .40 caliber Smith and Wesson pistol
- One bullet collected at the hospital

EVIDENCE ANALYSIS

Firearms Examination

Detective Gutierrez's Glock, Model 22, .40 caliber Smith and Wesson pistol was collected as evidence. It was test fired by a forensic scientist at the OCCL and operated without malfunction. Antunez's gun, the Hi-Point pistol, was test fired by a forensic scientist at the OCCL and operated without malfunction.

Projectile Examinations

The two cartridges from the scene were determined to have been fired from Detective Gutierrez's Glock pistol.

Toxicological Examination

Antunez was tested for alcohol and drugs at the hospital. Both alcohol and amphetamines were detected in Antunez's blood.

ANTUNEZ'S PRIOR CRIMINAL HISTORY

Antunez's criminal history was reviewed and considered. In 2014, Antunez was convicted of illegal possession of a loaded, concealed firearm in a vehicle and promoting a criminal street gang. Antunez was on felony probation at the time of the shooting.

ANTUNEZ'S POST-INCIDENT CONVICTION

On Aug. 4, 2015, the OCDA filed criminal charges against Antunez in Orange County Superior Court case 15CF1723, consisting of felony counts, including possession of a firearm by a probationer, a violation of California Penal Code section 29815(a); possession of firearm by a felon, in violation of California Penal Code section 29800(a)(1); possession of a firearm within 1,000 feet of a school, a violation of California Penal Code section 626.9(b); and street terrorism, a violation of California Penal Code section 186.22(a). An additional enhancement was charged against Antunez for criminal street gang activity, in violation of California Penal Code section 186.22(b)(1). Prior convictions were alleged pursuant to California Penal Code sections 667(d) and e(1), 1170.12(b) and (c)(1), and 667(a)(1). On November 29, 2017, Antunez plead guilty to all the charges and was sentenced to 10 years in state prison.

STANDARD LEGAL PRINCIPLES IN OFFICER-INVOLVED SHOOTING CASES

Possible criminal charges against an officer involved in a non-fatal shooting include 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 lawfully charge and convict Detective Gutierrez of criminal charges in this case, it would be necessary for the prosecution to prove beyond a reasonable doubt that no legal justifications existed for his 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. This 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 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.” (*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 SAPD Detective Gutierrez with Antunez.

LEGAL ANALYSIS

The issue is whether the conduct of Detective Gutierrez on Aug. 2, 2015, was criminally culpable and without justification. In order to lawfully charge Detective Gutierrez with a crime, the prosecution must have a good faith belief in the ability to prove, beyond a reasonable doubt, that he did not act in lawful self-defense. If the actions of Detective Gutierrez are justifiable as lawful self-defense or defense of others, criminal charges will not be warranted.

Where potential dangerous, emergency conditions or other exigent circumstances exist, the California Court of Appeal has noted that the United States Supreme Court's definition of reasonableness is comparatively generous to the police. The court in *Brown* noted that 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, supra*, 171 Cal.App.4th at p. 528.)

Based on the totality of all the available evidence, it is clear that Detective Gutierrez was justified in believing Antunez posed a significant threat of death or serious physical injury to himself and others. Detective Gutierrez and the gang suppression team chose that specific area of Townsend Street to patrol because it was known for its high level of gang activity. The Townsend Street gang was known to be violent and possess firearms, and was the subject of a gang injunction. When the officers arrived, they saw gang members congregating, then running away after the officers were recognized. Detectives Gutierrez and Duran recognized Antunez as a gang member and gave chase. While Antunez was running, detectives saw that he was running with his right hand holding something in his waistband. This indicated to Detective Gutierrez that Antunez was concealing something in his waistband that he did not want to drop. Based on his training and experience, Detective Gutierrez suspected Antunez was holding a handgun. Detective Gutierrez was absolutely correct and justified in his suspicions.

During the chase in the apartment complex, Antunez continued to look back at Detective Gutierrez. Despite being told, "Stop, police!" numerous times, Antunez continued to run. Detectives Gutierrez and Duran both saw Antunez remove a black semi-automatic handgun from his front waistband and hold it in his right hand. Antunez ran into the apartment complex holding the gun in his right hand. The apartment complex housed numerous residents.

Detective Gutierrez saw Antunez slow down and look back at Detective Gutierrez. Antunez then turned the right side of his body, with the gun still in his right hand, toward Detective Gutierrez. At that time, Detective Gutierrez believed Antunez was going to shoot him and felt his life was in danger, as well as that of his fellow law enforcement officers and the civilians present in the apartment complex. This was a reasonable belief on the part of Detective Gutierrez based on the totality of the circumstances. Detective Gutierrez then shot Antunez two times. After the shots, Detective Gutierrez saw Antunez drop the handgun when he fell to the ground. The magazine detached from the handgun, revealing bullets inside. Later inspection of Antunez's gun revealed a bullet was in the chamber.

Antunez was interviewed and admitted he was carrying a firearm from a neighborhood stash. Antunez also admitted he was trying to hide from the police because he knew it was wrong to have the gun. Antunez admitted that he kept the gun in his pants and grabbed the gun while running because it was beginning to fall. Antunez eventually admitted he held the gun with his shirt, but denied taking it out. Antunez also confirmed that the gun slipped away when he fell.

In order for Detective Gutierrez to be justly and lawfully charged and convicted with a crime in this incident, it is the prosecution's burden to prove beyond a reasonable doubt that Detective Gutierrez did not act in reasonable and justifiable self-defense or defense of others when he shot Antunez. As should be apparent from the above-described legal analysis and legal conclusion, the prosecution would be unable to carry this burden in this case. A jury analyzing these facts would justly conclude that it was reasonable for Detective Gutierrez to believe that his life and the lives of others were in danger. Therefore, Detective Gutierrez was justified when he shot at Antunez. Simply stated, Detective Gutierrez did not commit a crime, but carried out his duties as a peace officer in a reasonable and justifiable manner. The only person who committed multiple crimes during this incident was Antunez.

CONCLUSION

Based upon a review of all of the evidence provided to and obtained by the OCDA, and based on the entirety of the facts contained in all the available reports and interviews we reviewed, it is our legal opinion that there is insufficient evidence of criminal culpability on the part of Detective Gutierrez, and there is substantial evidence that the officer's actions were reasonable and justified under the circumstances when he shot at Antunez on Aug. 2, 2015.

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



Erin Rowe
Deputy District Attorney
Special Prosecutions Unit



Read and approved by **Ebrahim Baytieh**
Assistant District Attorney
Supervising Head of Court - Special Prosecutions Unit