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

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

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

CRAIG HUNTER
CHIEF
BUREAU OF INVESTIGATION

LISA BOHAN - JOHNSTON
DIRECTOR
ADMINISTRATIVE SERVICES

SUSAN KANG SCHROEDER
CHIEF OF STAFF

July 13, 2015

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

Re: Custodial Death on Oct. 7, 2014
Death of Inmate Beter Nader Nashed
District Attorney Investigations Case # SA 14-016
Orange County Sheriff's Department Case # 14-193789
Orange County Crime Laboratory Case # FR 14-53332

Dear Sheriff Hutchens,

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 October 7, 2014, custodial death of 26-year-old inmate, Beter Nader Nashed.

OVERVIEW

This letter contains a description of the scope and the legal conclusions resulting from the OCDA's investigation of the custodial death of Nashed. In this letter, the OCDA describes the investigative methodology employed, evidence examined, witnesses interviewed, facts discovered, and the legal principles applied to determine whether criminal culpability exists on the part of any Orange County Sheriff's Department (OCSD) personnel or any other person under the supervision of the OCSD.

On Oct. 7, 2014, OCDA Special Assignment Unit (OCDASAU) Investigators responded to the Western Medical Center Santa Ana (WMCSA). During the course of this investigation, 10 interviews were conducted, along with 46 canvass interviews. In addition, OCDASAU Investigators 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 custodial death incident 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 any possible issues relating to 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 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. Throughout the review process, the assigned prosecutor will be in consultation with his or her supervisor, and this Assistant District Attorney eventually will review and approve any legal conclusions and resulting memoranda. 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.

FACTS

Nashed suffered from cryptogenic cirrhosis (liver disease) since he was 5 years old. On April 28, 2013, OCSD deputies responded to a family disturbance call at Nashed's residence located in the city of Stanton. Nashed was arrested for battery of his mother and possession of concentrated cannabis. On May 13, 2013, Nashed pleaded guilty to the above charges and was sentenced to serve 60 days in the Orange County Jail (OCJ). Upon his release from the OCJ, Nashed was placed on formal probation for a term of three years and was required to complete a 52-week batterer's program. Nashed lived with his father until the beginning of August 2014, and then moved in with his mother and sister at their residence in the City of Anaheim. Nashed moved in with his mother and sister because they were concerned that Nashed was not acting normal, uncharacteristically quiet, and not eating regularly.

On Sept. 7, 2014, Nashed complained to his mother of pain to his left side and told her that he was vomiting blood. Nashed's mother took him to West Anaheim Medical Center (WAMC) where he was admitted to the Emergency Room (ER). Nashed was diagnosed with an enlarged spleen and failing liver. Nashed was discharged from WAMC the following day and he was instructed to follow-up with his primary care physician within two days.

On Sept. 9, 2014, in the early afternoon hours, Nashed's sister came home to find Nashed arguing with their father. The tone of the conversation escalated to a level that concerned Nashed's sister, so she called Nashed's Probation Officer, Sheryl Gulla-Miller. Nashed's sister advised Officer Gulla-Miller of Nashed's actions and told her that their landlord had complained about Nashed's "odd behavior" as well. Nashed's sister told Officer Gulla-Miller that she did not want Nashed residing with her any longer, and he had refused her request to leave. Nashed's sister also believed that Nashed was abusing illegal narcotics, and it was beyond her ability to provide him care and control. After speaking with Nashed's sister, Probation Officer Gulla-Miller contacted the Anaheim Police Department (APD) and requested that uniformed officers respond to the residence. Probation Officer Gulla-Miller also informed APD that she had placed a "probation hold" on Nashed for failing to attend anger management classes, and she wanted him taken into custody. At the request of the Probation Department, APD Officers Kacey Costa and David Hermann arrived at the residence and made contact with Nashed's sister, who told them that Nashed was no longer there. Nashed's sister told the APD Officers that she believed Nashed had gone to a nearby Jack in the Box restaurant with her parents. Shortly thereafter, Officers Costa and Hermann responded to the Jack in the Box restaurant, contacted Nashed, and placed him in custody without incident. According to Officer Hermann, Nashed was cooperative until he was seated in the back of the police vehicle, where he began to curse at the officers. Prior to transporting Nashed to the APD jail facility, Nashed's parents explained to Officers Costa and Hermann that Nashed suffered from complications related to his liver and that he had been seen by a doctor the previous day for liver-related problems.

Officers Costa and Hermann transported Nashed to the APD detention facility and released him to the APD jail staff. During the booking process, Nashed was asked a series of questions related to his medical condition and substance abuse. Nashed told the jail staff that he was bi-polar and suffered from liver problems and heartburn. He also informed the booking officer that

he was taking Prilosec and Lithium. In light of Nashed's responses, APD Jail Supervisor Edward Bennett recommended that Nashed "be transported and booked into OCJ on the next run, due to his pre-existing medical and mental health issues."

On Sept. 10, 2014, Nashed was transported to the OCJ Intake Reception Center (IRC) and booked for a probation violation pursuant to California Penal Code section 1203.2. After completing the intake process at the IRC, Nashed was housed in Module D, Tank #22, where he remained until Sept. 26, 2014, when he was relocated to Ward C, the medical ward.

On Sept. 28, 2014, at approximately 12:20 p.m., the attending Orange County Adult Correctional Health Services Physician was conducting routine medical inmate check-ups. While visiting Nashed, the attending physician noted that Nashed was non-responsive when asked questions and would not move from his bunk. The attending physician opined that Nashed was experiencing "some type of altered mental state" and needed to be transported to the hospital for treatment. A CARE Ambulance was notified and responded to the OCJ to transport Nashed to Western Medical Center-Anaheim (WMCA). OCSD Deputy John Patterson provided security during Nashed's transportation to WMCA. Deputy Patterson described Nashed as being conscious and cooperative, but had trouble understanding "routine commands." Deputy Patterson did not observe any visible injuries to Nashed. Nashed was admitted to WMCA at approximately 1:29 p.m. on Sept. 28, 2014, for complaint of "anxiety/situational crisis," and he was treated by the attending physician at WMCA.

By approximately 5:55 p.m., Nashed's condition had improved and he was cleared by the attending physician to return to a custodial setting. Notes on Nashed's medical record indicated that he was to continue on current medications and follow up with a psychiatric consultation. Nashed's "Discharge Medication Reconciliation Order Report" from WMCA prescribed the following medications:

- Tylenol - 650 milligrams every four hours for fever
- Olanzaoine - 7.5 milligrams daily for psychosis
- Lithium - 300 milligrams three times daily for bipolar disorder
- Triamcinolone Acetonide Cream - One application, twice daily for dermatological issues
- Lactulose - 20 grams hourly for 24 hours for constipation
- Psyllium - 2.08 grams three times daily for constipation
- Omeprazole - 20 milligrams daily for four weeks for ulcers

At approximately 6:30 p.m., Deputy Patterson was given Nashed's discharge paperwork and he arranged for transportation back to the OCJ. Deputy Patterson observed Nashed "stiffen up" and lean onto his right side upon being seated in the police vehicle. Nashed's eyes appeared to be "glazed over" as he stared out of windows of the vehicle. Upon arriving back at the OCJ, Nashed's care was relinquished to the triage nurses, and he returned to Ward C. In the comment section of the nursing assessment completed upon Nashed's return to custody, the following was noted: "Presents diaphoretic with rigid flexing of entire body and extremities; unable to hold his own head up during nurse assessment." Progress notes further indicated that Nashed presented as confused but that he was still able to follow commands.

On Sept. 29, 2014, during the early morning medical call, Nashed was reported to be lethargic, diaphoretic and hyperventilating. Shortly thereafter, the attending registered nurse examined Nashed and he responded only to painful stimuli. Nashed displayed non-responsive behavior when asked questions, and he was shaking and wouldn't move out of his bunk. The registered nurse administered oxygen to Nashed via a non-rebreather mask and placed an intravenous (IV) line in Nashed's left arm to supply fluids. The registered nurse advised jail deputies of Nashed's condition and expressed her belief that he needed to be transported to the hospital, as he was experiencing "an altered mental state, dehydration and hypoglycemia." Orange County Fire Authority (OCFA) was contacted at approximately 6:00 a.m., arrived on scene at approximately 6:13 a.m., and made contact with Nashed at approximately 6:20 a.m. to transport him to WMCSA.

OCSD Deputy Art Lucero was directed by his supervisor to provide security for Nashed during his transport to WMCSA. Deputy Lucero responded to what he referred to as the "outside dock" area of the OCJ where an ambulance was waiting to

transport Nashed. Deputy Lucero observed Nashed laying on a gurney in a semi-conscious state, with his eyes open. Deputy Lucero did not observe any visible injuries on Nashed. At approximately 6:30 a.m., OCFA was en route to WMCSA with Nashed. While en route to the hospital, paramedics attached Nashed to an electrocardiogram (EKG) machine to monitor his heart rhythm. Upon arrival at WMCSA, at approximately 6:37 a.m., Nashed's care was turned over to the attending physician and other ER staff. Nashed underwent a computed tomography scan of his head, which showed that he suffered from a left frontal epidural hematoma. Nashed was immediately prepped for surgery and was intubated, sedated, and taken to the operating room for an emergency decompressive craniectomy to alleviate the symptoms caused by the subdural hematoma. The physician who performed the craniectomy noted that "it became quite obvious that this hematoma had been in existence for quite some time as arachnoid adhesions had developed around the brain." Thereafter, Nashed remained as an admitted patient at WMC-SA until Oct. 7, 2014.

On Oct. 7, 2014, the WMCSA attending physician prepared a nephrology consultation report regarding Nashed's condition. The report stated that "Postoperatively, Nashed had a poor neurologic recovery. Subsequently, he became progressively hypotensive, requiring multiple pressers for blood pressure support, currently on three pressers for blood pressure support. His urine output had been declining and the patient is now hypoxic on ventilator with evidence of fluid overload on chest x-ray." The attending physician also noted that Nashed suffered from "acute kidney injury," and that his "clinical status appear[ed] terminal." At approximately 6:25 p.m., a registered nurse was in Nashed's room when a monitor attached to Nashed sounded, indicating that Nashed's heart had "arrested." The registered nurse immediately called out a "code blue," alerting ER personnel that they needed to respond to Nashed's room. Nashed's pupils were dilated and he did not have a pulse, so cardio pulmonary resuscitation (CPR) was initiated. At approximately 6:28 p.m., Nashed was defibrillated, and CPR was continued, however, Nashed did not regain a pulse. A couple of minutes later, Nashed was defibrillated again and given 300 milligrams of Amiodarome, a medication used for various types of life threatening heart rhythm problems. At approximately 6:32 p.m., the attending physician determined that the advanced life saving measures were ineffective, and Nashed was pronounced deceased.

AUTOPSY

On Oct. 12, 2014, a postmortem examination of Nashed was conducted by Dr. Scott Luzi, an independent pathologist. During the examination, Dr. Luzi noted the absence of significant external injuries to Nashed's body, but observed an anterior right rib fracture, consistent with chest compressions during CPR. Dr. Luzi also noted that Nashed had an enlarged liver, which he believed was consistent with Nashed having sustained liver failure. Following the autopsy, Dr. Luzi determined that Nashed's cause of death was due to "complications of cryptogenic liver cirrhosis."

EVIDENCE ANALYSIS

Toxicological Examination

A sample of Nashed's postmortem blood was examined and tetrahydrocannabinol caboxy-acid was detected. The presence of other drugs, commonly used in the application of life-saving measures, was noted as well.

BACKGROUND INFORMATION

Nashed had a California Criminal History dating back to 2008, including arrests for driving under the influence, public intoxication, and possession of concentrated cannabis.

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 human being;
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/she acted he/she knew his/her 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:

> "The most important consideration 'in establishing duty is foreseeability.' ... It is manifestly foreseeable than 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/she 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/she acts is so different from how an ordinarily careful person would act in the same situation that his/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

In this case, there is no evidence whatsoever 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 Nashed 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). Nashed was diagnosed with cryptogenic cirrhosis (liver disease) at 5 years old. He was hospitalized for liver-related problems several days before he was taken into custody, and he was placed in the Medical Ward once incarcerated. Less than two weeks before his death, Nashed was hospitalized because he was unresponsive to questioning and experiencing "some type of altered mental state." The morning following his return to the OCJ from the hospital, Nashed was found laying in his bunk while unresponsive to questioning. Nashed was treated by medical personnel at the OCJ before an ambulance transported him to a local hospital. The treating physicians determined that Nashed suffered from a subdural hematoma, which had "been in existence for quite some time." Despite the continued application of life-saving measures, Nashed's heart stopped, and he was unable to regain a pulse leading to his death.

Based on the totality of the evidence, it is clear that there is no evidence whatsoever to support a finding that any OCSD personnel or any individual under the supervision of the OCSD failed to perform any legal duty owed to Nashed. Therefore, no crime was committed by any OCSD personnel or any individual under the supervision of the OCSD in connection with Nashed's death.

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 of criminal culpability on the part of any OCSD personnel or any individual under the supervision of the OCSD. The evidence shows that Nashed died from natural causes as a result of complications of cryptogenic liver cirrhosis.

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

Respectfully submitted,

PATRICK MOSS
Deputy District Attorney
TARGET Unit

Read and Approved by **EBRAHIM BAYTIEH**
Assistant District Attorney
Supervising Head of Court – Special Prosecutions Unit