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September 20, 2017

Chief Jon Lewis
Newport Beach Police Department
870 Santa Barbara Drive
Newport Beach, CA 92660

Re: Officer-Involved Shooting on April 15, 2017
Fatal Incident involving David Airth
District Attorney Investigations Case #S.A. 17-011
Newport Beach Police Department Case # 17-02908
Newport Beach Fire Authority #17-03452
Orange County Crime Laboratory Case FR #17-46615
Orange County Coroner's Office #17-01864-YA

Dear Chief Lewis,

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 Newport Beach Police Department (NBPD) Officer Matthew Biagi. David Airth, 56, died as a result of his injuries. The incident occurred in the City of Newport Beach on April 15, 2017.

OVERVIEW

This letter contains a description of the scope and the legal conclusions resulting from the OCDA's investigation of the April 15, 2017, fatal officer-involved shooting of David Airth. 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 Newport Beach 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 April 15, 2017, Investigators from the OCDA Special Assignment Unit (OCDASAU) responded to this incident. During the course of this investigation, six interviews were conducted, and eight additional witnesses were contacted during the supplemental canvass interviews. OCDASAU Investigators also obtained and reviewed the following: NBPD reports, 911 calls, dispatch logs and recordings; patrol video recordings; incident scene photographs, and other relevant reports and materials; Orange County Crime Laboratory (OCCL) reports, officer processing and firearms examination reports; crime scene investigation photographs; Newport Beach Fire Department (NBFD) reports; medical records and photographs related to the injuries sustained by Airth; Orange County Coroner's Office (OCCO) reports; media reports and recordings; and other relevant reports and materials, including audio recordings of the conducted neighborhood canvass.

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The OCDA conducted an independent and thorough investigation of the facts and circumstances of this incident and has reviewed all evidence and legal standards impartially. The scope and findings of this review are expressly limited to determining whether any criminal conduct occurred on the part of NBPB officers or personnel, specifically Officer Biagi. 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 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, TARGET/Gangs, and Special Prosecutions 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 eventually review and approve any 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 type of investigation is to attempt to obtain a statement from the involved officers. Officer Biagi declined to give a voluntary statement to the OCDA.

FACTUAL SUMMARY

Airth was a 56-year-old male, who was diagnosed 35 years prior with bipolar disorder. Airth and his wife had been married for 36 years. Prior to March 2017, Airth had three manic episodes, the last of which occurred 12 years prior. Airth did not have any criminal history. Airth's wife and numerous long term neighbors said he had no history of violence. On or about March 1, 2017, Airth displayed signs of persistent manic behavior. Airth was seen several times by mental health professionals and treated with medication. Airth could not work or be left alone, and his symptoms escalated at night.

On April 15, 2017, Airth was home with his wife and grew increasingly restless and agitated in the evening. At approximately 8:00 p.m., the power in their neighborhood went out, increasing Airth's distress. At approximately 9:00 p.m., Airth's wife attempted to wash dishes in the kitchen. Airth entered the kitchen naked and told her to stop. Airth grabbed her arm, took a pan out of her hand, and used it to strike her on the head. Airth's wife immediately ran out of their house, screaming for help.

Neighbors heard the screams and saw Airth's wife outside, bleeding from her head. At approximately 9:11 p.m., neighbor John Doe 1 contacted Airth's wife, who told him Airth struck her in the head with a pan. John Doe 1 called 911 and reported the domestic violence incident, and informed dispatch that Airth was having a manic episode and was under a doctor's care. Officers were dispatched to the scene. Still naked, Airth came out of his house. John Doe 1 told Airth to go back inside. Airth complied, then came back outside, still nude and holding a pan. Airth threw the pan at his wife and John Doe 1.

Airth went into his house a second time and came back outside in his underwear, but he was now holding a large butcher knife. Multiple witnesses described Airth's body language and behavior as "aggressive." At 9:13 p.m., John Doe 1 was still on the phone with the 911 dispatcher and said, "He's (Airth) got a knife right now ... he's out here waving a knife." John Doe 1 saw Airth holding the knife with his hand up and the blade out. John Doe 1 went into his house, and another

neighbor took Airth's wife to a nearby residence. Officers were enroute to the scene "Code 3," which designates an immediate emergency response with lights and sirens.

Officer Biagi arrived within one minute of being dispatched to the scene. The power was still out in the neighborhood, so he approached Airth's residence with a flashlight. John Doe 2 saw Officer Biagi moving fast and saw Airth holding the knife in "attack position." Officer Biagi had his weapon drawn and ordered Airth to drop the weapon at least five times, and to get on the ground at least twice. Airth immediately complied, dropped the knife, and laid down face first on the sidewalk. John Doe 2 said he and Officer Biagi were approximately 10 feet from Airth. Officer Biagi continued to tell Airth to stay on the ground and not move.

Officer Biagi notified dispatch that Airth had a knife, was complying, and had just dropped the knife. Officer Biagi requested units to respond Code 3. At 9:14 p.m., Officer Biagi updated dispatch, stating that Airth was on the sidewalk and complying. Officer Biagi also reported that the knife was 10 inches long and approximately three feet behind Airth.

Neighbors observed Airth lying on the ground, motionless, when he suddenly got up, holding the knife in his hand. Officer Biagi repeatedly ordered Airth to stay on the ground, but Airth did not comply. John Doe 2, who was next to Officer Biagi, said Airth raised the knife and lunged toward them from 5-10 feet away. John Doe 3, who watched the incident from across the street, said Airth jumped up, grabbed the knife and charged the officer, who repeatedly stated, "Don't do it." John Doe 3 described Airth as having a "psychotic look" on his face and said he challenged the officer.

The police radio channel recording captured Officer Biagi's statements to dispatch as the events occurred. After informing dispatch that Airth was complying, Officer Biagi then said, "He is getting the knife." Five seconds later, Officer Biagi announced, "Shots fired, shots fired." Officer Biagi fired his gun at Airth four times and Airth fell to the ground. The dispatch log was updated at 9:15 p.m. to reflect that shots had been fired, less than 20 seconds after Officer Biagi reported that Airth was compliant.

NBPD officers immediately provided medical aid to Airth. The NBFD arrived and transported Airth to the hospital, where he was pronounced deceased.

The shooting incident was not captured on the patrol video recording. After the incident, Officer Biagi's patrol video recording system captured his statements to fellow officers at the scene. Officer Biagi said Airth grabbed the blade and described Airth's demeanor as communicating, "Are you ready to go down?" Officer Biagi stated that Airth almost threw the knife at him, and he believed Airth, "was about to throw it at me."

John Doe 2 expressed sympathy for Officer Biagi and said he could not have acted any other way, "because he (Airth) was going to kill somebody." John Doe 2 said he was afraid Airth would harm him, his family, and Airth's wife. John Doe 3 said Officer Biagi did the right thing, had no time to do anything else, was justified in shooting Airth, and, "had no other option than to fire his weapon." John Doe 3, a neighbor and longtime friend of Airth, said, "As hard as it was to watch a friend and neighbor of over 20 years get killed in front of my face, the police officer did the right thing. He had no time to do anything else. He was justified in shooting him."

EVIDENCE COLLECTED

The following items of evidence were collected and examined:

- One kitchen knife with a single edged blade
- Glock Model 22 pistol, .40 Smith and Wesson
- Four cartridge cases, head stamp Speer S&W .40
- Three bullets from the autopsy

AUTOPSY

On April 19, 2017, a forensic pathologist from the OCCO conducted an autopsy on Airth's body. The forensic pathologist concluded that Airth's cause of death was from penetrating gunshot wounds of the neck and torso.

EVIDENCE ANALYSIS

Firearms Examination

Officer Biagi's Glock, Model 22 pistol, .40 Caliber, was test fired at the OCCL and operated without malfunction. The four cartridge cases collected from the scene were determined to have been fired from Officer Biagi's firearm.

Projectile Examinations:

Three bullets were removed from Airth's body and compared to the test fire bullets from the Glock pistol. All three bullets were determined to have been fired from Officer Biagi's handgun.

Toxicological Examination

A sample of Airth's postmortem blood was collected and examined for the presence of drugs and alcohol. The substances found in Airth's blood were consistent with those prescribed for his bipolar disorder.

STANDARD LEGAL PRINCIPLES IN OFFICER-INVOLVED SHOOTING CASES

Possible criminal charges against an officer involved in an on-duty shooting incident include murder [Penal Code Section 187]; manslaughter [Penal Code Section 192]; 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. Adrian* (1982) 135 Cal.App.3d 335, 340-342.) 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 the 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. (*Kortum v. Alkire* (1977) 69 Cal.App.3d 325, 332.) The felony must involve violence or the threat of violence. (*Id.* at 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." The Court of Appeal 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 p. 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/her mind, as a reasonable person, an honest fear and conviction that he/she 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 physical injury to the officer or others."

This limitation was, however, clarified subsequently by the United States Supreme Court in the seminal case of *Graham v. Connor* (1989) 490 U.S. 386, wherein the Supreme Court explained that an officer's right to use force [i.e., his/her 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 rapidly evolving—about the amount of force that is necessary in a particular situation" (*Id.* at 396-397.)

The United States Supreme Court's analysis and teachings in *Graham* are very much applicable to the circumstances surrounding the interactions of NBPD Officer Biagi with Airth.

LEGAL ANALYSIS

The issue in this case is whether Officer Biagi's actions on April 15, 2017, were criminally culpable and without justification. In order to charge Officer Biagi with a crime, the prosecution must have a good faith belief in the ability to prove, beyond a reasonable doubt, that no legal justification existed for his conduct and he did not act in lawful self-defense or defense of others. If Officer Biagi's actions were justifiable as lawful self-defense, or defense of others, criminal charges will not be warranted.

Where potentially dangerous, emergency conditions or other exigent circumstances exist, the California Courts of Appeal have 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*, 171 Cal.App.4th 516, 528.)

Officer Biagi did not provide a statement to the OCDA, but his statements at the scene communicated his fear that Airth was about to throw the knife at him. Officer Biagi's interpretation of Airth's demeanor and intent is consistent with numerous independent witness observations, and supports Officer Biagi's reasonable belief that Airth posed an immediate and unequivocal threat of death or serious physical injury to himself, the surrounding witnesses, and Airth's wife. Prior to his arrival, Officer Biagi was aware that Airth was having a manic episode, had injured his wife and was in possession of a large knife. The power outage created a more dangerous situation because Officer Biagi's view of the scene was limited to what he could see using his flashlight. Upon arrival, Officer Biagi saw Airth standing outside in his underwear and brandishing a 10-inch butcher knife in what witnesses described as an aggressive manner.

Officer Biagi ordered Airth to drop the knife and lay on the ground. Airth immediately complied and remained motionless for a short time. Quickly and without warning, Airth stood up with the knife in his hand. Officer Biagi told Airth, "Don't do it, don't do it," but Airth did not respond. With the knife in his raised hand, Airth lunged toward Officer Biagi and a neighbor, who stood no more than 10 feet away. Officer Biagi shot four times at Airth and Airth fell to the ground. Approximately five seconds elapsed from the time Officer Biagi notified dispatch that Airth was getting the knife, to the time Officer Biagi announced that shots were fired. Clearly, Officer Biagi was justified in using his weapon in self-defense and defense of others. Numerous witnesses said there was nothing else Officer Biagi could have done. John Doe 3, a neighbor and longtime friend of Airth, said, "As hard as it was to watch a friend and neighbor of over 20 years get killed in front of my face, the police officer did the right thing. He had no time to do anything else. He was justified in shooting him."

Certainly, it would have been preferable if the OCDA were able to obtain a voluntary statement from Officer Biagi regarding his state of mind at the time of the shooting. However, Officer Biagi's decision to decline to give the OCDA a voluntary statement may not legally and ethically be used to draw negative evidentiary inferences regarding the conduct and the state of mind of Officer Biagi.

It is the OCDA's burden to prove, beyond a reasonable doubt, that Officer Biagi did not act in reasonable and justifiable self-defense or defense of another when he shot at Airth. As should be apparent from the above-described analysis, 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 Officer Biagi to believe that his life, and the lives of others, were in danger, and he was justified when he shot at Airth. Officer Biagi did not commit a crime in connection with this incident. To the contrary, Officer Biagi had no other option than to act swiftly to protect himself and nearby witnesses, and he carried out his duties as a peace officer in a reasonable and justifiable manner.

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 reviewed, and pursuant to the applicable legal principles, it is our legal opinion that there is no evidence of criminal culpability on the part of Officer Biagi, and there is overwhelming evidence that his actions were reasonable and justified under the circumstances when he shot Airth on April 15, 2017.

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