



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

JENNY QIAN
DIRECTOR
ADMINISTRATIVE SERVICES

SUSAN KANG SCHROEDER
CHIEF OF STAFF

August 11, 2016

Chief Raul Quezada
Anaheim Police Department
425 S. Harbor Boulevard
Anaheim, CA 92805

Re: Officer-Involved Shooting on Feb. 9, 2016
Fatal Incident involving Gustavo Adolfo Najera
District Attorney Investigations Case #SA 16-006
Anaheim Police Department Case #16-21509
Orange County Crime Laboratory Case #FR 16-42172

Dear Chief Quezada,

Please accept this letter detailing the Orange County District Attorney's Office's (OCD A) investigation and legal conclusion in connection with the above-listed incident involving on-duty Anaheim Police Department (APD) Officer German Alvarez. Gustavo Adolfo Najera, 22, died as a result of his injuries. The incident occurred in the City of Anaheim on Feb. 9, 2016.

OVERVIEW

This letter contains a description of the scope and the legal conclusions resulting from the OCD A's investigation of the Feb. 9, 2016, fatal, officer-involved shooting of Gustavo Adolfo Najera. The letter includes an overview of the OCD A's investigative methodology and procedures employed, as well as a description of the relevant evidence examined, witnesses interviewed, factual findings, and legal principles applied in analyzing the incident and determining whether there was criminal culpability on the part of the APD officer involved in the shooting. The format of this document was developed by the OCD A, at the request of many Orange County police agencies, to foster greater accountability and transparency in law enforcement.

On Feb. 9, 2016, Investigators from the OCD A Special Assignment Unit (OCDASAU) responded to this incident. During the course of this investigation, eight interviews were conducted, and 16 additional witnesses were contacted during the supplemental canvass interviews. OCDASAU Investigators also obtained and reviewed the following: APD reports, interview of Officer Alvarez, body camera footage, audio dispatch and radio traffic recordings; Orange County Crime Laboratory (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 Najera; criminal history records related to Najera including prior incident reports; and other relevant reports and materials including audio recordings of the conducted neighborhood canvass.

REPLY TO: ORANGE COUNTY DISTRICT ATTORNEY'S OFFICE

WEB PAGE: www.OrangeCountyDA.com

☒ ☒ MAIN OFFICE
401 CIVIC CENTER DR. W
P.O. BOX 808
SANTA ANA, CA 92701
(714) 834-3600

☐ ☐ NORTH OFFICE
1275 N. BERKELEY AVE.
FULLERTON, CA 92631
(714) 773-4480

☐ ☐ WEST OFFICE
8141 13TH STREET
WESTMINSTER, CA 92683
(714) 896-7261

☐ ☐ HARBOR OFFICE
4601 JAMBOREE RD.
NEWPORT BEACH, CA 92660
(949) 476-4650

☐ ☐ JUVENILE OFFICE
341 CITY DRIVE SOUTH
ORANGE, CA 92668
(714) 935-7624

☐ ☐ CENTRAL OFFICE
401 CIVIC CENTER DR. W
P.O. BOX 808
SANTA ANA, CA 92701
(714) 834-3952

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 APD officers or personnel, specifically Officer Alvarez. 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 investigation of an incident such as this is attempting to obtain a statement from the involved officers. Officer Alvarez was fully cooperative in this investigation and gave a voluntary statement to OCDA Investigators on Feb. 12, 2016.

FACTUAL SUMMARY

On the morning of Feb. 8, 2016, Najera's father went looking for Najera after he did not return home the night before. Najera's father found Najera sleeping on a park bench. Najera's father indicated that Najera had a drinking problem and suspected that he also used illegal drugs. Najera's father described him as "desperate," and it was not uncommon for Najera to go missing for three to four days at a time. Najera's brother described him as living on the streets off and on, and as someone that needed help because, "[Najera] was on drugs and wasn't all there."

A witness, John Doe 1, described an encounter on the morning of Feb. 8, 2016, with a subject that matched the description of Najera. John Doe 1, a resident who lived in an apartment complex adjacent to Sage Park on West Lido Place, encountered a man being hit by a skateboard by another unknown male. John Doe 1 described the man being hit with the skateboard as a male Hispanic, 22 years old, between 5'5" and 5'6" tall, 175 pounds, with black curly hair, possibly brown eyes, with a mustache and unshaven, wearing a white fedora hat, black jacket, black shorts, and had his left arm in a cast. This general description provided by John Doe 1 matched specific characteristics of Najera when he was found by APD on Feb. 9, 2016, including Najera's age, stature, hair style, facial hair, clothing, the cast on his left hand and the white fedora hat found near his body. John Doe 1 indicated that at approximately 11:30 a.m. on Feb. 8, 2016, he told an unknown male, a possible gang member, to stop hitting Najera with a skateboard. The unknown male with the skateboard told John Doe 1 that he hit Najera because Najera attempted to steal the unknown male's cell phone. John Doe 1 was able to prevent any further altercation between the unknown male and Najera. John Doe 1 then observed the unknown male leave the scene, as he was leaving, the unknown male yelled out a gang name and verbally threatened Najera.

John Doe 1 then attempted to help Najera, who had been hit with the skateboard. When John Doe 1 came closer to Najera, he realized that Najera was under the influence of some drug and asked him what drugs he was taking. Najera told John Doe 1 he was 22 years old and that he was "tweaked out." John Doe 1 could see that Najera's demeanor was not normal and was acting "erratic." While John Doe 1 was trying to help him, Najera suddenly pulled out a red box cutter with the blade extended. Najera then demanded money from John Doe 1 and tried to force his way into John Doe 1's car. John Doe 1 told Najera that he was trying to help him, and Najera then asked John Doe 1 for money to buy alcohol. When John Doe 1 refused, Najera told him that he was then going "to rob someone or steal something." Najera began to walk toward the apartment complex where John Doe 1 lived. John Doe 1 told Najera to go somewhere else.

Later that same night, at approximately 11:30 p.m. on Feb. 8, 2016, John Doe 1 returned to his apartment complex on West Lido Place and noticed that his storage unit was broken into and many of his tools had been stolen. John Doe 1 had only seen Najera once before about a week prior to this incident near the dumpsters in the apartment complex. John Doe 1 did not call the police regarding the encounter with Najera or the theft of his tools. At the time of the shooting described below, it does not appear that Officer Alvarez was aware of Najera's encounter with John Doe 1 on Feb. 8, 2016.

Nearby, at approximately 11:30 p.m., an unknown suspicious male was turning door knobs and ringing door bells at an apartment complex located at 1300 West Lido Place in Anaheim. At approximately 11:50 p.m., one of the residents in the apartment complex called 911 to report the unknown suspicious male and described him as a male Hispanic, 5'6", wearing a black trench coat and a black hat. Officers Robert Benavidez and Alvarez were on duty in separate patrol cars and were dispatched at 11:57 p.m. to 1300 West Lido Place in Anaheim to investigate the unknown suspicious male. Officers Benavidez and Alvarez responded at approximately 12:03 a.m. on Feb. 9, 2016, to the apartment complex and spoke with the reporting party, who recounted the suspicious person and his activity at the apartment complex. Officer Alvarez activated his body camera during the call for service. The reporting party indicated that the male suspect appeared to be "high" and described the black hat as similar to a fedora. Both Officers Benavidez and Alvarez checked the complex but they were unable to locate the subject and both officers then cleared the call around 12:38 a.m. Both Officers checked the alleys in the apartment complex but they did not locate anyone. At some point after speaking with the reporting party, Officer Alvarez deactivated his body worn camera until just moments before the shooting. Officers Benavidez and Alvarez then separated. Officer Benavidez exited the complex toward North Street and left the cul-de-sac of Lido Place.

Officer Alvarez, alone in his patrol car, decided to check Sage Park, located just north of the apartment complex at 1313 West Lido Place. Officer Alvarez drove through the park because of the frequency of transient people living in the park. When facing Sage Park from the apartment complex on Lido Place, there is a parking lot on the left hand side, a grass area in the forefront, a baseball field on the right hand side of the parking lot behind the grass, two basketball courts behind that baseball field, and a playground area with sand behind and to the left of the basketball courts. As Officer Alvarez drove through the park, it initially appeared to be completely empty of cars and people.

Officer Alvarez drove northbound into the park and cruised through the park along the concrete pathway. Initially, Officer Alvarez did not see anyone in the bleachers, the barbeque area, or the playground area. Officer Alvarez continued driving into the park along the pathway. While along the eastern part of the park, Officer Alvarez made note of the second entrance into Sage Park on the northeastern edge of the park and noticed the other entrance was closed because the gate was chained off. As Officer Alvarez made his way back westbound toward the playground and parking lot on the concrete pathway, he scanned the area, glancing at his on-board computer, then looked up again toward the playground and he noticed someone in the playground area approximately 50 yards in front of him. Unknown to Officer Alvarez at the time, this person was Najera.

Based on prior experiences, Officer Alvarez assumed that based on the time of night, the person in the park was probably a transient and expected him to leave after noticing the police vehicle. Officer Alvarez continued to drive closer, scanning the area, and glancing at his on-board computer. At this point Najera and Officer Alvarez were only about 25 yards apart. Officer Alvarez noticed that Najera actually started to move toward his vehicle. Officer Alvarez

saw that Najera was wearing black clothing with either a coat or jacket, and he was holding a flashlight in his left hand. Najera shined the flashlight directly into Officer Alvarez's vehicle. Officer Alvarez could not see Najera's right arm, and it appeared to him that Najera was intentionally concealing it. In Officer Alvarez's opinion, this was not considered to be the "usual" behavior or demeanor of a transient because most transients avoid police interaction. Once Officer Alvarez realized that Najera was purposely keeping his right arm and hand out of sight, Officer Alvarez unholstered his weapon and set it on his lap. Officer Alvarez indicated that he struggled to keep his weapon secure while driving, and tried to shine the spotlight in Najera's direction while continuing to scan the area for any other suspects.

Officer Alvarez rolled down his window, and Najera continued to move toward the police vehicle. Officer Alvarez had his weapon in his hand, while attempting to turn on the vehicle spotlight to move it toward Najera's direction. Officer Alvarez's police car came to a stop, within shouting distance of Najera, all while Najera continued to shine the flashlight on the police vehicle. Officer Alvarez could see Najera was wearing dark or black clothing; however, Najera continued to conceal his right arm and continued to shine his flashlight directly into Officer Alvarez's vehicle. Officer Alvarez tried to raise his hand to block the light from Najera's flashlight. Officer Alvarez attempted to give Najera verbal commands by shouting to Najera, "You gotta go!" To which Najera responded, "Why?" Then Officer Alvarez countered with an additional verbal command by telling Najera, "Park's closed!" Najera kept his right arm concealed and continued to move toward Officer Alvarez while shining a flashlight at him and ignoring the officer's verbal commands. Officer Alvarez perceived that he was at a disadvantage, his life was in danger, and he was vulnerable because his vest would not protect all of his upper body, vital organs, or his head. Officer Alvarez was never able to maneuver his patrol car spotlight onto Najera. Additionally, as Najera continued to move toward Officer Alvarez and when he was within six feet of Officer Alvarez, Najera yelled out, "I hate cops!" As Najera was closing in on Officer Alvarez, the officer was able to observe Najera's facial expression and described it as a "1,000 foot stare." Officer Alvarez explained when interviewed that for him a "1,000 foot stare" is an indication of an intent or purpose to do something, which he interpreted based on all the surrounding circumstances as Najera's intent to inflict bodily injury on him.

Approximately 13 seconds before the shooting, Officer Alvarez was able to re-activate his body worn camera. The body camera footage clearly shows the beam of Najera's shining flashlight illuminating the interior of Officer Alvarez's patrol car. Officer Alvarez can be seen seated in the driver's seat of his patrol car. The body worn camera is pointed forward when Najera approached from Officer Alvarez's left side of the patrol car. Although not depicted on the body worn camera because of the angle from which Najera approached, Officer Alvarez described that as Najera came within a few feet of him, Najera began to bring his right arm forward from behind his back and Officer Alvarez could see Najera's right hand was clenched but was unsure if Najera had a weapon. Within seconds of Najera approaching him, Officer Alvarez observed Najera bringing his right arm forward from a concealed position behind his back toward Officer Alvarez. Officer Alvarez indicated that he believed Najera was bringing his right arm forward in his direction as an indication of his intent to kill Officer Alvarez. Consistent with this description, Officer Alvarez's body worn camera clearly shows that as he is seated in the driver's seat, the whole patrol car appeared to shake violently as if it were struck by something thrown by Najera. The body worn camera shows a substance appearing to be sand showering the interior and exterior of the patrol car. Immediately after that, Officer Alvarez fired a single round from his firearm at Najera. Officer Alvarez indicated that based on the totality of the circumstances, he "feared for his life." In Officer Alvarez's estimation, the whole incident unfolded quickly. From the moment Officer Alvarez saw Najera from a distance of approximately 40-50 yards, Officer Alvarez estimated approximately 25 seconds passed until he fired his weapon.

After firing his weapon, Officer Alvarez was forced to close his eyes in reaction to the sand hitting his face and then reopened his eyes in time to see Najera's body falling down. The interior of Officer Alvarez's car was covered in sand, as was his uniform, hair, and even his lips. Officer Alvarez put the police car into park, reholstered his weapon and then put out a "998" on the radio indicating an officer involved shooting took place. Officer Alvarez got out of his vehicle, shined the flashlight on Najera, and saw that Najera was bleeding. The body worn camera shows that Officer Alvarez immediately and without hesitation informed dispatch of the incident and immediately went to get the first aid kit out of the trunk of his patrol car to render aid to Najera. After retrieving the first aid kit from the trunk of his patrol car, Officer Alvarez moved to where Najera had fallen and began to immediately administer first aid on Najera with a compression of gauze on the wound.

Other APD police units inquired on the radio if there were any outstanding weapons or suspects, but Officer Alvarez determined that there were none. Officer Alvarez's fellow officers arrived quickly, while Officer Alvarez attempted to put a blood stopper on the wound because he could still feel a pulse. He was soon relieved by his fellow officers and was asked to step away from the location. Over a dozen APD officers arrived and immediately designated a crime scene to secure the park. Other officers took control of the first aid by providing CPR and chest compressions from the moment they arrived up until the paramedics arrived. Najera was found lying on the ground with a single gun-shot wound to his face. A small LED flashlight was found next to his body. Najera was wearing a dark black jacket with dark colored shorts and different colored shoes. Najera had unkempt curly hair, a slight mustache, and he was wearing a black glove on his right hand and a cast on his left hand. A few feet from Najera's body, in the playground area, Najera's wallet was found next to two shirts and a white fedora hat. No weapons, including a box cutter, were located on or near Najera's person or property.

Paramedics arrived at approximately 12:53 a.m., took control of Najera's first aid and quickly transported him to UC Irvine Medical Center (UCIMC) in Orange. The paramedics arrived at UCIMC at 1:15 a.m. Najera was pronounced deceased by the attending physician at 1:21 a.m.

At approximately 1:00 a.m. on Feb. 9, 2016, Officer Benavidez returned to re-interview the initial reporting party. The reporting party stated that at approximately 11:30 p.m. on Feb. 8, 2016, an unknown male was turning door knobs, ringing the door bell, saying "wrong house," and then kept going back and ringing the doorbell again and again. The initial reporting party said the unknown male looked like "he was on drugs." The reporting party described the unknown male as a male Hispanic, 5'6", 180 pounds, with a mustache, wearing a large black trench coat and a black hat, described as a fedora. Officer Benavidez asked the reporting party if the unknown suspicious male was wearing gloves or had a cast on either hand. The reporting party indicated that the person with a cast was the local "drunk at the park," and not the unknown male who was turning door knobs and ringing door bells that generated the need to call the police.

Later on the morning of Feb. 9, 2016, around 7:00 a.m., OCDA Investigators, along with APD, canvassed the neighboring apartment complexes and asked the residents facing the park if they had seen or heard anything, but there was no useful information from the residents other than one resident who did not witness the shooting but only saw Officer Alvarez provide first aid to Najera.

A review of Najera's background revealed that he had come into contact with APD on numerous occasions since his time in high school. Najera's history included long term drug abuse of tetrahydrocannabinol (THC), methamphetamine, and alcohol. The toxicology report from Najera's autopsy concluded that Najera had THC, methamphetamine, and amphetamine in his system at the time he was shot by Officer Alvarez. Najera lived intermittently with his parents since high school and otherwise spent much of his time living in Sage Park or Pearson Park, both in Anaheim.

EVIDENCE COLLECTED

Including Najera's clothing and personal items, the following items of evidence were collected from the scene and examined:

- EM 1 – one 45mm caliber casing; head stamp "WINCHESTER 45. AUTO"
- EM 2 – one silver flash light.
- EM 3 – one pair of "Dickies" gray shorts.

No weapons were located on or near Najera's person.

AUTOPSY

On Feb. 10, 2016, Forensic Pathologist Dr. Yong-Song Kim of the Orange County Sheriff-Coroner conducted an autopsy on the body of Najera. Dr. Kim determined that the cause of death was a penetrating gunshot wound of the head. The cartridge entered the left side of the head and traveled in almost a straight line from the front of the head to the back of the head.

EVIDENCE ANALYSIS

Firearm Examination

Officer Alvarez's Glock pistol was test fired at the OCCL and fired without malfunction. The 45mm caliber casing collected from the scene at Sage Park was determined to have been fired from Officer Alvarez's Glock pistol.

Toxicological Examination

A sample of Najera's blood was collected at the Orange County Sheriff Coroner Facility. An OCSD forensic scientist examined the blood sample for alcohol, prescription drugs, and common drugs of abuse. The following results were obtained:

DRUG	MATRIX	RESULTS & INTERPRETATIONS
Amphetamine	Postmortem Blood	0.124 ± 0.0008 mg/L
Methamphetamine	Postmortem Blood	1.02 ± 0.008 mg/L
THC	Postmortem Blood	0.0019 ± 0.0003 mg/L
Carboxy-THC	Postmortem Blood	Detected
Hydroxy-THC	Postmortem Blood	Detected

NAJERA'S PRIOR CRIMINAL HISTORY

Najera's criminal history was reviewed. Najera had a California Criminal History that dates back to 2011, with arrests for the following charges:

- Burglary
- Vandalism
- Assault and Battery
- Petty Theft
- Provide False Identification

STANDARD LEGAL PRINCIPLES IN OFFICER-INVOLVED SHOOTING CASES

Possible criminal charges against an officer involved in a shooting 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 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 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 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 applicable to the circumstances surrounding the interactions of APD Officer Alvarez with Najera.

LEGAL ANALYSIS

The facts in this case are determined by considering Officer Alvarez’s statements to the OCDA Investigators, which was supplemented by other relevant available material.

The issue in this case is whether the conduct of Officer Alvarez on Feb. 9, 2016, was criminally culpable and without justification. As stated above, in order to charge Officer Alvarez with a criminal violation, it is required that the prosecution be able to prove beyond a reasonable doubt that no legal justification existed for his conduct. Therefore, in order to lawfully charge Officer Alvarez with a crime, the prosecution must prove beyond a reasonable doubt that he did not act in lawful self-defense. If the actions that day of Officer Alvarez were justifiable as lawful self-defense or defense of others, then criminal charges will not be warranted.

As the Court of Appeal held in a recent case, it is well settled that “unlike private citizens, police officers act under color of law to protect the public interest. They are charged with acting affirmatively and using force as part of their duties, because ‘the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effectuate it.’ Police officers are, in short, not similarly situated to the ordinary battery defendant and need not be treated the same. In these cases, then, the [] police officer is in the exercise of the privilege of protecting the public peace and order and he is entitled to the even greater use of force than might be in the same circumstances required for self-defense.” (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 527.)

Where potential dangerous, emergency conditions or other exigent circumstances exist, the California courts 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, supra*, 171 Cal.App.4th at p. 528.)

Therefore, in the present case, the totality of the available evidence supports the following conclusion: the prosecution will not be able to prove beyond a reasonable doubt that at the time of the shooting Officer Alvarez was not justified in believing that Najera posed a significant threat of death or serious physical injury to Officer Alvarez. This conclusion is based on the totality of the circumstances as established from the statement of Officer Alvarez and the conduct, demeanor and actions of Najera as he approached Officer Alvarez moments before the shooting.

Officers Alvarez and Benavidez responded to a call of a suspicious man who was harassing the residents of the apartment complex late at night and was described as being “high” or under the influence of drugs. Officer Alvarez initially found the park to be completely empty but then observed Najera near the playground area about 50 yards from his patrol vehicle. Based on his training and experience, he believed Najera to be a transient and thought Najera would exit the park upon seeing the Officer's patrol car. Instead, Najera initiated contact with Officer Alvarez by shining a flashlight directly in Officer Alvarez's direction.

However, Officer Alvarez did not use force without proper consideration. Officer Alvarez readied his weapon to defend himself but tried to diffuse the situation with verbal commands, however, Najera ignored all verbal commands and continued moving toward Officer Alvarez with Najera's right arm concealed. Officer Alvarez was alone, seated in the driver's seat of his patrol car, the window rolled down, his bullet proof vest left portions of his upper body and head exposed, Najera was ignoring verbal commands, moving toward Officer Alvarez while beaming a flashlight at Officer Alvarez. More importantly, Najera continued to conceal his right arm behind his body. Based on his training and experience, the totality of circumstances, Officer Alvarez reasonably believed Najera was a threat to Officer Alvarez's life.

As Najera continued to move toward Officer Alvarez, Najera made a statement that a reasonable person would understand as a threat and intent to do harm. As Najera was approximately within six feet of Officer Alvarez, Najera yelled out, “I hate cops!” Although not fully illuminated, Officer Alvarez was able to observe Najera's facial expression and described it as a “1,000 foot stare,” indicating to Officer Alvarez an intent or purpose to do something, which based on Najera's statement, “I hate cops,” and his failure to obey any verbal commands and concealing his right arm, Officer Alvarez interpreted as an intent to do Officer Alvarez lethal harm. From a legal standpoint, based on the totality of circumstances, Najera appeared to be a real and apparent threat to Officer Alvarez. Additionally, although unknown to Officer Alvarez at the time of the incident, Najera's family, the toxicology report and the encounter with John Doe 1 on the morning of Feb. 8, 2016, all corroborate that Najera was an active substance abuser with erratic and violent tendencies.

Officer Alvarez was able to activate his body worn camera approximately 13 seconds prior to the shooting. On the body worn camera, Najera's flashlight can clearly be seen illuminating Officer Alvarez's patrol car. Although not depicted on the body worn camera because of the angle from which Najera approached, Officer Alvarez described that as Najera came within a few feet of Officer Alvarez, Najera began to bring his right arm forward from behind his back and Officer Alvarez could see Najera's right hand was clenched but was unsure if Najera had a weapon. Within seconds of Najera approaching within a few feet of Officer Alvarez, Najera brought his right arm forward from a concealed position toward Officer Alvarez. Officer Alvarez reasonably believed Najera was a real and apparent threat while Najera was bringing his right arm forward in Officer Alvarez's direction. The body worn camera shows a substance appearing to be sand showered the interior and exterior of the patrol car. According to Officer Alvarez, he fired a single shot out of fear for his life because of Najera's conduct. Even after the single shot, the body worn camera footage demonstrates Officer Alvarez's swift response to provide critical first aid to Najera. All the available evidence makes it fairly clear that the prosecution will not be able to prove beyond a reasonable doubt that Officer Alvarez was not acting in lawful self-defense.

Although no weapon was ever found on Najera, based on Najera's demeanor, conduct and threatening manner in which he approached Officer Alvarez, Najera appeared to be a real and apparent threat to Officer Alvarez which reasonably justified the use of lethal force in self-defense. It should also be noted that, in order for Officer Alvarez to be justly and lawfully charged and convicted with a crime in this incident, it is the OCDA's burden to prove beyond a reasonable doubt that Officer Alvarez did not act in reasonable and justifiable self-defense when he shot at Najera. 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 Alvarez to believe that his life was in danger.

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 Officer Alvarez acted reasonably under the circumstances, and that there is a lack of sufficient evidence to justify the filing of criminal charges against Officer Alvarez in connection with the Feb. 9, 2016, shooting of Najera.

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



Rahul Gupta
Senior Deputy District Attorney
Target/Gangs Unit



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