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December 6, 2017

Chief Jerry Price
La Habra Police Department
150 North Euclid Street
La Habra, CA 90633

Re: Officer-Involved Shooting on May 22, 2017
Non-Fatal Incident involving John Doe
District Attorney Investigations Case # S.A. 17-014
La Habra Police Department Case # DR 17-2740
Orange County Crime Laboratory Case # FR 17-48971

Dear Chief Price,

Please accept this letter detailing the Orange County District Attorney's Office's (OCDA) investigation and legal conclusion in connection with the above-listed incident involving on-duty La Habra Police Department (LHPD) Officer Nicholas McDermott. John Doe, 16, survived his injuries. The incident occurred in the City of La Habra on May 22, 2017.

OVERVIEW

This letter contains a description of the scope and legal conclusions resulting from the OCDA's investigation of the May 22, 2017, non-fatal officer-involved shooting of John Doe. This 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 LHPD 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 May 22, 2017, Investigators from the OCDA Special Assignment Unit (OCDASAU) responded to this incident. During the course of this investigation, nine interviews were conducted, and 29 additional witnesses were contacted during the supplemental canvass interviews. OCDASAU Investigators also obtained and reviewed the following: LHPD reports; residential surveillance video recordings; civilian cellular phone recordings; Orange County Sheriff's Department aerial video recordings and photographs; audio dispatch and radio traffic recordings; Orange County Crime Laboratory (OCCL) reports, including DNA, latent print processing, toxicology, forensic alcohol examination, officer processing, and firearms

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examination reports; crime scene investigation photographs; and medical records related to the injuries sustained by John Doe; prior law enforcement contacts related to John Doe 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 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 the involved LHPD officers or personnel, specifically Officer McDermott. The OCDA will not be addressing any possible issues relating to policy, training, tactics, or civil liability.

In a case where there is an officer-involved shooting incident and the OCDA files a petition alleging criminal charges against a minor shot by the police, it is the OCDA's policy not to release the final report regarding the officer-involved shooting incident until after the petition has been adjudicated. This policy is in place to ensure that the OCDA does not release any information that may be viewed as prejudicial to the right of the minor to receive a fair trial while his/her petition is still pending.

There is no relevant video or audio evidence to be released in this case.

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 additional 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 is attempting to obtain a statement from the involved officers. Officer McDermott gave a voluntary statement to OCDA Investigators on May 22, 2017.

FACTUAL SUMMARY

On Monday, May 22, 2017, at approximately 12:30 a.m., John Doe took the keys to the family vehicle and left his residence in La Habra. John Doe, age 16, was unlicensed and did not have his parents' permission to take or drive the car. At approximately 1:47 a.m., John Doe's mother advised her daughter, Jane Doe, to call the police to report that he took the car without permission and was intoxicated. The LHPD documented the vehicle as stolen. At 7:30 a.m., John Doe's mother saw John Doe had returned home and was asleep in his room. She instructed Jane Doe to call the police to report he was home with the vehicle.

A LHPD Officer arrived at the home to complete the stolen vehicle recovery report. The officer arrested John Doe and took him to LHPD for processing. The officer attempted to book John Doe into the Orange County Juvenile Hall (OCJH),

but OCJH refused to take custody. John Doe's mother was notified that he was being released from custody and she picked him up at the police station at 9:28 a.m.

While driving home, John Doe told his mother he was going to punch his father in the face for calling the police. When he got home, John Doe got a silver handgun from his bedroom and brought it into the living room, where his mother, sister, and infant nephew were seated on the couch. John Doe told them the gun was next to him in bed when the police arrested him earlier that morning, and if they had seen it, somebody could have ended up dead. He used profanity toward his mother and said he was leaving and would be back the following day. John Doe also said he was going to "f*** up" his father for calling the police. When Jane Doe said she called the police, John Doe began punching her while her infant child was next to her on the couch. His mother yelled for another sibling to call the police. John Doe dared them to call the police and "see what happens."

John Doe took the silver gun from his rear waistband and pointed it at Jane Doe and his mother, who were approximately four to five feet away, standing next to each other while the baby was still on the couch. As he pointed the handgun in their direction, John Doe inserted a magazine, pulled the slide back, and racked a round in the chamber. His mother was afraid John Doe was going to shoot them, so she pushed Jane Doe out of the way and placed herself in the path of the handgun. John Doe pointed the gun at them for approximately three to four seconds, then put the gun back in his rear waistband. John Doe told his mother and sister, "I'm going to go shoot up somebody and I'm going to be on the news, just watch." John Doe said he would not let the police arrest him, then left the residence.

At 9:35 a.m., Jane Doe called the police to report the assault and brandishing of the loaded handgun. She also advised the police dispatcher that John Doe left the residence with a firearm in his back waistband, and said he was going to "shoot something up and be on the news." LHPD dispatch relayed this information to all patrol officers.

Officer McDermott had been briefed about the stolen vehicle report earlier that morning and recognized John Doe's name from previous contacts where he had been verbally combative and uncooperative. Officer McDermott was on patrol in full uniform, driving in a marked, black and white LHPD vehicle, when he heard the radio broadcast. Officer McDermott initially drove to a nearby market but was unable to locate John Doe. At 9:43 a.m., Officer McDermott found John Doe smoking marijuana and walking in Guadalupe Park, less than half a mile from John Doe's house. Guadalupe Park has a children's play area and is located in a residential neighborhood. Officer McDermott recognized John Doe from previous contacts and from the description given by dispatch. Officer McDermott was aware that John Doe had pointed a gun at his sister and mother, had threatened to shoot something up to be on the news, and left the house with the gun concealed in his back waistband.

Officer McDermott parked approximately 50 feet away from John Doe, who was walking in the park. John Doe stopped and looked over at Officer McDermott, who was unable to see John Doe's right hand. Officer McDermott ordered John Doe to show his hands and get on the ground, but John Doe did not comply and continued to walk away. Officer McDermott repeated his commands and elevated his tone, and John Doe did not respond. Officer McDermott drew his pistol because he was fearful John Doe would not comply. Officer McDermott estimated he told John Doe to show his hands approximately seven times, and to get on the ground approximately four times. Officer McDermott also stated he addressed John Doe by his first name.

Officer McDermott saw John Doe reach into his waistband and point a silver handgun directly at him. Afraid John Doe was going to shoot and try to kill him, Officer McDermott fired three rounds at John Doe. Officer McDermott stopped shooting to assess the situation and could not tell whether John Doe had been shot. John Doe then turned and ran through the park and jumped over a wall. Because John Doe still had the gun, Officer McDermott stopped chasing, fearing he would be ambushed. Officer McDermott estimated approximately one minute elapsed from the time he exited his police unit to the time of the shooting.

At 9:44 a.m., Officer McDermott informed dispatch shots had been fired and the suspect was fleeing with a gun. LHPD police officers responded to set up a perimeter. At approximately 9:46 a.m., officers located John Doe. He was compliant

with the officers' commands and went into custody without incident. John Doe was not carrying the handgun, but did possess a loaded magazine in his right front pant pocket. At 9:46 a.m., Los Angeles County Fire Department (LACFD) personnel responded to render medical assistance. They transported John Doe to the University of California-Irvine, Medical Center (UCIMC), where he was treated for one gunshot wound in the abdomen, and he is expected to fully recover. A bullet was recovered from John Doe's abdominal area during the surgery.

At approximately 11:27 a.m., police found a Llama Model Max-I .45 caliber handgun inside a trash can on a nearby street. The handgun did not contain a magazine, and was in the path of John Doe's flight from Officer McDermott.

Voluntary Statement of John Doe

John Doe gave a voluntary statement to OCDA investigators on May 22, 2017. John Doe admitted taking the family vehicle without permission, but said he did not recall everything that happened the night before because he drank alcohol and took Xanax. John Doe acknowledged he was angry at his sister because she called the police and admitted he pushed her.

John Doe initially denied having a firearm at his house, or in the park, and said his family and the officer were lying. John Doe did admit the magazine was his, and he later said he did have a gun at his house and put it in his pants when he walked out, but denied pointing it at his family.

John Doe also stated that the shooting, "was 100%, you know, 'cause I wasn't cooperating." John Doe said he saw the police officer in the black and white patrol car. The officer was 12-15 feet away and the officer ordered him to put his hands up and get on the ground. John Doe turned quickly to discard the magazine, and he said he lifted his shirt because he was going to throw the magazine, and guessed the officer saw the gun, because that's when he got shot. John Doe said it "felt like a punch." John Doe then called Officer McDermott a "f***ing pig" and ran. After jumping over the wall, John Doe said he threw the gun, but did not see where it landed, and he did not know why officers later found it in a trashcan.

John Doe admitted he did not cooperate with Officer McDermott, but claimed that he never pointed the gun at him. When asked what he could have done differently, John Doe responded, "Not, not try to reach into my pocket...I could've just put my hands up then got on the ground." John Doe said he wasn't trying to hurt anybody, and he "f***ed up."

EVIDENCE COLLECTED

The following items of evidence were collected and examined at the OCCL:

- One Llama Model Max-I pistol, .45 Auto caliber
- Three cartridge cases headstamp Federal S&W .40
- One magazine containing seven Federal Champion .45 Auto cartridges
- One bullet from the hospital

EVIDENCE ANALYSIS

Toxicological Examination

A sample of John Doe's pre-transfusion blood was collected prior to surgery. The blood was submitted to the OCCL and examined for the presence of drugs and alcohol. The following results and interpretations were documented:

DRUG	MATRIX	RESULTS & INTERPRETATIONS
Alprazolam	Pre-transfusion Blood	36.3 ± 2.6 ng/ml
Carboxy-THC	Pre-transfusion Blood	12.1 ± 1.4 ng/ml
THC	Pre-transfusion Blood	1.1 ± 0.2 ng/ml
Ethanol	Pre-transfusion Blood	0.000 ± 0.004 ng/ml

Firearm and Projectile Examination

A Glock, Model 22, .40 caliber handgun, collected from Officer McDermott during the officer processing, was tested and operated without malfunction. The three cartridge casings collected from the scene were determined to have been fired from Officer McDermott's handgun.

The Llama .45 auto caliber handgun, collected from the trash can, was test fired. The pistol fired the first two of three test fire cartridges without malfunction. The pistol failed to fire the last cartridge. Examination of the pistol revealed that between the second and third test fire attempt, a part of the internal safety broke off, rendering the pistol incapable of firing further cartridges.

The Llama .45 auto caliber handgun was swabbed for DNA, but the DNA obtained was of insufficient quantity for comparison. The magazine and Llama .45 auto caliber handgun were processed for latent fingerprints, but no areas of ridge detail were recovered.

JOHN DOE'S PRIOR LAW ENFORCEMENT CONTACTS

John Doe's prior law enforcement contacts were reviewed and considered. Because John Doe is a minor, the Orange County District Attorney's Office is prohibited from disclosing any information regarding a juvenile case file or its contents, pursuant to Welfare and Institutions Code section 827.

JOHN DOE'S ARREST AND LEGAL PROCEEDINGS

John Doe was arrested on May 22, 2017, for the conduct described in this letter. Because John Doe is a minor, the Orange County District Attorney's Office is prohibited from disclosing any information regarding a juvenile case file or its contents, pursuant to Welfare and Institutions Code section 827.

STANDARD LEGAL PRINCIPLES IN OFFICER-INVOLVED SHOOTING CASES

Possible criminal charges against an officer involved in an on-duty 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 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 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/herself from attack if, as a reasonable person, he/she had grounds for believing and did believe that bodily injury was about to be inflicted upon him/her or upon another person. In doing so, such person may immediately use all force and means which he/she 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 La Habra Police Department Officer McDermott with John Doe

LEGAL ANALYSIS

The issue in this case is whether the conduct of Officer McDermott on May 22, 2017, was criminally culpable and without justification. In order to charge Officer McDermott with a criminal violation, it is required that the prosecution has a good faith belief in the ability to prove, beyond a reasonable doubt, that no legal justification existed for the police officer's conduct, and that the officer did not act in lawful self-defense. If Officer McDermott's actions were 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 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, supra*, 171 Cal.App.4th at p. 528.)

Officer McDermott was justified in believing John Doe posed a significant threat of death or serious physical injury to himself and others. Jane Doe called the police and reported her brother pointed a gun at her and said he was going to shoot somebody up and be on the news. Jane Doe informed dispatch John Doe was walking in the neighborhood in possession of a handgun in his waistband, which was relayed to patrol officers via radio. Officer McDermott knew John Doe was also involved in the earlier stolen vehicle report, and had previous experience with him, when he had been verbally combative and uncooperative.

When Officer McDermott arrived at Guadalupe Park, he saw a person who matched the description given by dispatch, and immediately recognized him as John Doe. In addition to the danger personally posed to Officer McDermott in trying to apprehend an armed suspect who verbalized his intent to commit violence, Officer McDermott was also aware of the potential danger to the civilians present in the neighborhood and in their homes.

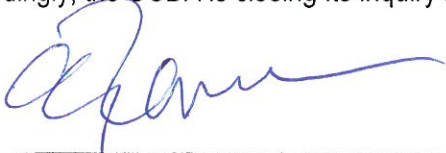
Officer McDermott was in police uniform, driving a clearly marked LHPD patrol vehicle. Officer McDermott told John Doe to put his hands up and get on the ground numerous times. John Doe confirmed he knew a police officer was giving him orders and he did not comply. John Doe walked away with his right hand concealed from Officer McDermott's view. Furthermore, John Doe turned and reached into his waistband behind his back. Officer McDermott saw a silver handgun. John Doe grabbed the gun and pointed it directly at Officer McDermott. Officer McDermott believed John Doe was going to shoot and try to kill him. Officer McDermott fired three shots and was unsure if John Doe had been hit. John Doe ran away while still holding the gun. Officer McDermott pursued him until John Doe was located and taken into custody. Officers found a handgun in the area of John Doe's flight, and he later admitted possessing a handgun during the incident. John Doe did acknowledge that he was shot because he did not cooperate and guessed the officer saw his gun in his waistband.

Given John Doe's previous conduct and statements to his family, Officer McDermott was in reasonable fear for his safety when John Doe refused to comply with his orders and pointed a gun at him. It should be noted that the act of pointing a gun at a police officer is a serious felony offense. In order for Officer McDermott 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 McDermott did not act in reasonable and justifiable self-defense or defense of another when he shot at John Doe. As should be apparent from the above-described facts and analysis, the prosecution would be unable to carry this burden in this case. A jury analyzing these facts would justly conclude it was reasonable for Officer McDermott to believe that his life and those of others were in danger. Therefore, Officer McDermott was justified when he shot at John Doe. Officer McDermott did not commit a crime, but instead protected himself and the community from an armed aggressor, and 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 there is no evidence whatsoever of criminal culpability on the part of Officer McDermott. There is overwhelming evidence Officer McDermott's actions were reasonable and justified under the circumstances when he shot John Doe on May 22, 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