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April 19, 2016

Chief Carlos Rojas
Santa Ana Police Department
20 Civic Center Plaza
Santa Ana, CA 92701

Re: Officer Involved Shooting on Jan.4, 2013
Non-Fatal Incident involving John Berry Horton
District Attorney Investigations Case # S.A. 13-001
Santa Ana Police Department Case # 13-00302
Orange County Crime Laboratory Case # 13-40176
Orange County Fire Authority Incident Report # 13-000990

Dear Chief Rojas,

Please accept this letter detailing the Orange County District Attorney's (OCDA) Office's investigation and legal conclusion in connection with the above-listed incident involving on-duty Santa Ana Police Department (SAPD) Officer Gabriel Esparza. John Berry Horton, 46, Santa Ana, survived his injuries. The incident occurred in the City of Santa Ana on Jan. 4, 2013.

OVERVIEW

This letter contains a description of the scope of and the legal conclusions resulting from the OCDA's investigation of the Jan. 4, 2013, non-fatal officer-involved shooting of Horton. The letter includes an overview of the OCDA's investigative methodology and procedures employed, as well as a description of the relevant evidence examined, witnesses interviewed, factual findings, and legal principles applied in analyzing the incident and determining whether there was criminal culpability on the part of the SAPD officers 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 Jan. 4, 2013, Investigators from the OCDA Special Assignment Unit (OCDASAU) responded to this incident. OCDASAU Investigators interviewed 28 witnesses and obtained and reviewed the following: SAPD reports, audio recordings and dispatch and radio traffic recordings; Orange County Fire Authority reports; Orange County Crime Lab (OCCL) reports including toxicology, forensic alcohol examination, latent print, officer processing and firearms examination reports; crime scene investigation photographs; medical records and photographs related to the injuries sustained by Horton; criminal history records related to Horton including prior criminal history records and prior incident reports; the personnel records of Officer Esparza; and other relevant reports and materials including audio recordings of the conducted neighborhood canvass.

The OCDA conducted an independent and thorough investigation of the facts and circumstances of this incident and has impartially reviewed all evidence and legal standards available. The scope and findings of this review are expressly limited to determining whether any criminal conduct occurred on the part of the SAPD officers or personnel, specifically Officer Esparza. 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 criminal charges against the individual 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 issue of guilt is decided in the underlying filed criminal case. This policy is in place to ensure that the OCDA does not release any information that may prejudice the defendant's right to receive a fair trial while his or her case is still pending.

INVESTIGATIVE METHODOLOGY

Among other duties, the OCDASAU is responsible for investigating officer-involved shootings within Orange County when someone has been injured as a result of police gunfire. An OCDASAU Investigator is assigned as a case agent and is supported by other OCDASAU Investigators, as well as Investigators from other OCDA units. Six Investigators are assigned to the OCDASAU on a full-time basis. There are additional OCDA Investigators assigned to other units 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, Gang, 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 and witnessing officers. SAPD Officer Noe Rodriguez gave a voluntary statement to OCDA Investigators on Jan. 4, 2013. Additionally, SAPD Officer Frank Gutierrez gave a voluntary statement to OCDA Investigators on Jan. 8, 2013. However, Officer Esparza refused to give a statement to the OCDA.

FACTUAL SUMMARY

On the evening of Jan. 3, 2013, Officer Gutierrez was off duty and missed several phone calls from a confidential informant. It was not until approximately 12:45 a.m. on Jan. 4, 2013, that he was able to make a return phone call to the confidential informant. At that time, Officer Gutierrez was informed that Horton, a parolee, was in possession of a .44 Magnum handgun. In addition, the confidential informant told Officer Gutierrez that Horton wanted to sell the gun that night, and was currently headed to the 76 Gas Station located at the intersection of 17th Street and Harbor.

Officer Gutierrez then called Officer Esparza, who was patrolling the northeast area of Santa Ana. When Officer Esparza received the telephone call, he was in a parking lot, in the area of Eastside Avenue and 17th Street, along with Officer Rodriguez. Officer Gutierrez informed Officer Esparza that Horton was a parolee, had gang ties to the Hispanic criminal prison gang and a criminal street gang occupying a specific turf in Santa Ana, and was in possession of a handgun. Officers Esparza and Rodriguez drove to the location of the 76 Gas Station; however, they did not find Horton in the surrounding area.

On Jan. 4, 2013, at approximately 1:15 a.m., the confidential informant sent a text message to Officer Gutierrez stating that Horton was in his house garage smoking methamphetamine with Jane Doe 1 and John Doe 1. The garage was located in a cul-de-sac at the 3000 block of West Morningside in Santa Ana. After receiving the text message, Officer Gutierrez passed the address to Officer Esparza, and both Officers Esparza and Rodriguez drove to the address. Officers Esparza and Rodriguez parked their police cars on Morningside Avenue and approached the house on foot. Officer Rodriguez approached the west-side of the garage and attempted to look through the windows, and then started to walk back to the northwest-side of the garage. At the same time, Officer Esparza approached the garage from the east-side, and proceeded to walk toward the northeast corner of the garage toward the front of the residence. As Officer Rodriguez walked back to the northwest corner of the garage, he heard the sound of a door opening and heard Officer Esparza state, "Drop the gun! Police!" Approximately one second later, Officer Rodriguez heard the sound of two to three shots fired and ran toward Officer Esparza. Officer Rodriguez saw Horton lying on the ground near the front doorway of the house, with a gun on the ground, partially underneath him.

Officer Rodriguez used his left foot to move the gun away from Horton, radioed dispatch that there was an officer involved shooting, and requested an ambulance. This was the first radio traffic with SAPD regarding the incident. Officer Rodriguez asked Horton why he was in possession of a gun and Horton responded that he carries a gun all the time because there was a hit out on him by the Hispanic criminal prison gang.

Paramedics arrived at approximately 1:52 a.m., and found Horton lying on his right side alert and oriented. Horton was not handcuffed and responded to the paramedic's questions regarding where he had been shot, and what happened to him. Paramedics cut off Horton's clothing to examine and treat his injuries. There appeared to be gunshot wounds to Horton's left and right side of his chest, as well as two gunshot wounds on his left arm.

At approximately 2:04 a.m., Horton was transported to the University of California, Irvine Medical Center (UCIMC). Horton did not make any statements while in the ambulance. At approximately 2:10 a.m., the ambulance arrived at UCIMC, where Horton was relinquished for care to UCIMC personnel. In the emergency room, Horton stated that at the time of the incident he heard three to four gunshots, but did not otherwise elaborate on the incident. After a computed tomography (CT) scan was conducted, medical personnel determined that the chest injury did not require surgery; however, surgery was done on Horton's left arm and he was expected to make a "meaningful recovery."

VOLUNTARY, CONSENSUAL STATEMENTS OF OFFICERS

Voluntary, Consensual Statement of Officer Noe Rodriguez

Officer Rodriguez gave a voluntary, consensual statement to the OCDA on Jan. 4, 2013. In his statement, Officer Rodriguez stated the following: on the night of Jan. 3, 2013, and the morning of Jan. 4, 2013, Officer Rodriguez was working as a patrol officer in the northeast patrol section, along with Officer Esparza. Officers Rodriguez and Esparza were in a parking lot in the area of Eastside Avenue and 17th Street when Officer Esparza received a telephone call from Officer Gutierrez about an armed subject headed toward the 76 Gas Station located on 17th Street and Harbor Boulevard. Officer Rodriguez stated that 17th Street and Harbor Boulevard was not a normal part of his patrol area, however it was not uncommon for officers to go to other districts for various reasons.

Officers Esparza and Rodriguez drove to the location of the 76 Gas Station; however they did not find Horton in the surrounding area. Officer Gutierrez then called Officer Esparza, stating that Horton was located in his residence's garage at 3602 West Morningside Avenue, so both Officers Rodriguez and Esparza drove to the location of the residence. When Officer Rodriguez arrived at the residence he did not see anyone outside. However, when both Officers approached the driveway to a closed garage door, they could hear voices coming from inside the garage. Officer Rodriguez went to the west-side of the garage, and as he was approaching the northwest corner of the garage he heard a door opening, and then heard Officer Esparza say, "Drop the gun! Police!" Officer Rodriguez ran toward Officer Esparza and saw Horton lying on the ground near the front doorway to the house. Officer Rodriguez could see a gun lying on the ground, partially underneath Horton. Officer Rodriguez then radioed dispatch that there had been an officer involved shooting, and requested an ambulance.

Voluntary, Consensual Statement of Officer Frank Gutierrez

Officer Gutierrez gave a voluntary, consensual statement to the OCDA on Jan. 8, 2013. In his statement, Officer Gutierrez stated the following. On the night of Jan. 3, 2013, Officer Gutierrez received multiple phone calls from a confidential informant; however he was not working that night. On Jan. 4, 2013, at approximately 12:45 a.m., Officer Gutierrez called the confidential informant, who relayed that Horton had a .44 Magnum Handgun. Officer Gutierrez knew Horton had a prior felony conviction, was on probation, and had ties to the Mexican Mafia and Santa Nita Criminal Street Gang.

Officer Gutierrez telephoned Officer Esparza, and told him about Horton being a convicted felon in possession of a handgun. Officer Gutierrez called Officer Esparza approximately five to seven times to provide him with updated information he was receiving from the confidential informant. Officer Gutierrez gave OCDA consent to view and photograph his work cell phone to document the call logs and messages between him and the confidential informant.

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

Post-Shooting, Voluntary Interview with John Doe 1

John Doe 1 gave a voluntary, consensual statement to the OCDA on Jan. 4, 2013. John Doe 1 indicated that he knew Horton for approximately six years, and that Horton is known to use drugs. John Doe 1 stated that he never saw Horton in possession of a gun. On January 3, 2013, John Doe 1 and Horton walked to a liquor store to purchase "Four Loko" malt liquor to drink. As they were approaching the house on Morningside Avenue, Jane Doe 1 was waiting in the front yard, and all three subsequently entered the garage and locked the door.

All three smoked methamphetamine and listened to music while in the garage. Approximately 20 minutes later, John Doe 1 heard a banging on the garage door and possibly a banging on one of the parked cars in the driveway. Horton turned the lights off inside the garage and told Jane Doe 1 to get down on the ground. Horton then told Jane Doe 1 to telephone Jane Doe 2, who was inside the main residence, and to tell her to not go outside. Horton then exited the garage, and a few moments later John Doe 1 heard three gunshots.

Post Shooting, Voluntary Interview with Jane Doe 1

Jane Doe 1 gave a voluntary consensual statement to the OCDA on Jan. 4, 2013, and stated the following. On Jan. 4, 2013, Jane Doe 1 arrived at Horton's home at approximately 1:15 a.m. When she arrived, she called Horton and he stated that he was walking home from the 76 Gas Station. Approximately one minute later, Horton and John Doe 1 arrived at the house and they went into the garage to "hang out." Ten minutes later, an unknown man began knocking at the east pedestrian door to the garage stating something to the effect of "Hey, ese." Horton asked who it was, and according to Jane Doe 1, Horton "started freaking out" and turning off the lights in the garage. Horton also told Jane Doe 1 to stay on the ground and call Jane Doe 2, to tell her to look outside and see who was at the door.

Approximately 30 seconds later, Jane Doe 1 witnessed Horton walk out of the garage, but she did not see if Horton was carrying anything as he left the garage. Jane Doe 1 heard gunshots, Jane Doe 2 say, "Oh my God!" and someone else say, "Santa Ana Police," or, "Police." Ten to 15 minutes later, officers kicked the garage door open, and Jane Doe 1 yelled that there were people inside the garage. Officers detained Jane Doe 1 and John Doe 1. Jane Doe 1 was found to be in possession of methamphetamine and pills.

Post-Shooting, Voluntary Interview with Jane Doe 2

Jane Doe 2 gave a voluntary, consensual statement to the OCDA on Jan. 4, 2013, and stated the following. Jane Doe 2 is Horton's mother and she has resided at the incident location for the past 32 years. According to Jane Doe 2, Horton has been in and out of the prison system most of his life. On Jan. 3, 2013, at approximately 11:30 p.m., Jane Doe 2 heard some noises coming from the garage and assumed that Horton was inside the garage. On Jan. 4, 2013, Jane Doe 2 received a telephone call from an unknown female that someone was by the cars in front of the garage. Jane Doe 2 walked out of her bedroom to the front door and knocked on the garage. Horton opened the garage door and yelled at her to "Get in the house, because someone is out there." Jane Doe 2 stated that upon her return to the

residence, she saw two individuals approach the house. Jane Doe 2 did not see the individuals fire their weapons, and eventually determined that the two individuals were uniformed police officers. Jane Doe 2 stated that she saw Horton's gun get kicked away. However, shortly thereafter she contradicted herself and claimed that she didn't see any gun. Jane Doe 2's statement appeared inconsistent.

Post Shooting, Voluntary Interview with Jane Doe 3

Jane Doe 3 gave a voluntary, consensual statement to the OCDA on January 4, 2013, and stated the following. Jane Doe 3 rented a bedroom at the house on Morningside Avenue for approximately one year. On Jan. 4, 2013, at approximately 2:00 a.m., Jane Doe 3 was in her bedroom watching television when she heard what she believed to be two to three gunshots. Jane Doe 3 then heard someone screaming, "They shot him, they shot him." Jane Doe 3 subsequently called 911. Jane Doe 3 did not see the incident, nor did she see Horton get shot.

Post Shooting, Voluntary Interview with Jane Doe 4

Jane Doe 4 gave a voluntary consensual statement to the OCDA on Jan. 4, 2013, and stated the following. Jane Doe 4 rented a bedroom at the house on Morningside Avenue for approximately four and a half years. On Jan. 4, 2013, Jane Doe 4 was in her bedroom and heard Horton say, "Mom, go back in the house." Jane Doe 4 then stated she heard a bang, but she did not believe it to be a gunshot. Subsequently, Jane Doe 4 left her bedroom, and saw Jane Doe 2 standing in the front door. Jane Doe 2 told Jane Doe 4 to get dressed because Horton had been shot. Jane Doe 4 did not see the shooting incident, nor had she seen any firearms within the residence.

John Berry Horton's Consensual, Voluntary Statements of Events

Officer Rodriguez asked Horton why he had a gun, and Horton responded that there was a hit out on him by the Hispanic criminal prison gang, and he carries a gun all the time. In addition, in the emergency room, Horton stated that at the time of the incident he heard three to four gunshots, but did not otherwise elaborate on the incident.

EVIDENCE COLLECTED

Evidence Collected at the Scene

Orange County Sheriff's Forensic Scientist Linda Huber collected and released the following items of evidence to the Forensic Science Services Evidence Control Unit:

- One cartridge casing with a head stamp of "Winchester 45 Auto"
- One cartridge casing with a head stamp of "Winchester 45 Auto"
- One broken bracelet
- One pair of blue jeans with a blue bandana in the left rear pocket and two black t-shirts (the items were covered in blood)
- One stainless steel Ruger Redhawk .44 Magnum revolver, serial number: 501-02312, loaded with six cartridges containing head stamp of "WW Super 44 Rem Mag."

Evidence Collected at the SAPD

Evidence collected from Officer Gabriele Esparza:

- Glock, Model 21, .45 caliber semi-automatic pistol, Serial Number: LAM189
- One Magazine from the pistol containing 11 rounds and one round from the chamber of the pistol
- Two additional magazines from magazine pouch each containing 13 rounds
- Taser X-26, Serial Number: X00-660703, with one Taser cartridge Serial Number: C31008NR9. These items were only photographed.

Evidence Collected from Officer Noe Rodriguez:

- Glock, Model 22, .40 caliber semi-automatic pistol, Serial Number: CWY308
- One magazine from the pistol containing 15 rounds and 1 round from the chamber of the pistol
- Two additional magazines from the magazine pouch, each containing 15 rounds
- Smith & Wesson, Model SW SPL, .38 caliber revolver, Serial No.: BDZ7758, containing five .38 caliber bullets

EVIDENCE ANALYSIS

Firearms Examination

Officer Esparza's Glock Model 21 pistol, .45 caliber, serial #LAM189, was test fired and operated without malfunction. The two cartridge cases recovered from the scene were microscopically compared to the test fired cartridge cases from Officer Esparza's the Glock pistol. The cartridge cases recovered from the scene were determined to have been fired from Officer Esparza's weapon.

Horton's gun, the Ruger Redhawk .44 Magnum revolver recovered at the scene, was test fired and operated without malfunction in both single and double action.

JOHN BERRY HORTON'S MEDICAL CONDITION

An Examination of Horton at the UCIMC revealed that he had sustained the following injuries:

- A gunshot wound to the right side of the chest
- A gunshot wound to the left side of the chest
- A gunshot wound to the left wrist
- A gunshot wound to the left forearm

JOHN BERRY HORTON'S PRIOR CRIMINAL HISTORY

John Berry Horton's criminal history was reviewed and considered. Horton's criminal history dates back to 1988 indicating that he had been previously arrested for the following charges:

- First degree burglary
- Possession of drug paraphernalia
- Possession of hypodermic needle/syringe
- Under the influence of a controlled substance
- Assault with a deadly weapon
- Possession of a controlled substance
- Possession of burglary tools
- Unlawful possession of ammunition by a felon
- Elder abuse, assault and battery
- Auto theft, possession of stolen property
- Participation in a criminal street gang

JOHN BERRY HORTON'S POST-INCIDENT CONVICTION

On Dec. 16, 2014, and in connection with the above described incident, Horton pled guilty in Orange County Superior Court, Case No. 13CF0077, to being a felon in possession of a firearm in violation of Penal Code section 29800. As part of his guilty plea, Horton gave the court the following admission:

"On January 4, 2013, I willfully, knowingly, and unlawfully as a convicted felon, having been convicted of a violation of Penal Code section 459, Residential Burglary, on December 16, 1988, under Orange County Superior Court case C-71389, possessed and displayed a loaded and operable chrome Ruger .44 magnum revolver in the immediate presence of Santa Ana Police Officer G. Esparza, # 3164, and I further admit that I failed to drop the gun when ordered by Officer G. Esparza."

STANDARD LEGAL PRINCIPLES IN OFFICER-INVOLVED SHOOTING CASES

In order to convict an officer of any criminal charges stemming from this on-duty incident, it would be necessary for the prosecution to prove beyond a reasonable doubt that no legal justifications existed for the officer's actions. (*People v. Banks* (1977) 67 Cal. App. 3d 379, 383-84.) Several such justifications may apply in any given case and they are set forth in Penal Code sections 196, 197 and 835a.

California Penal Code Section 196 provides that use of deadly force by a public officer is justifiable when necessarily used in arresting persons who are "charged with a felony" and who are fleeing from justice or resisting such arrest. Section 196 applies both where the suspect in question is "charged with a felony" and where the officer has "reasonable cause" to believe that the person has committed a felony. (*People v. Kilvington* (1894) 104 Cal. 86, 89.) The felony must involve violence or the threat of violence. (*Kortum v. Alkire* (1977) 69 Cal. App. 3d 325, 333.) California Penal Code section 197 provides that the use of deadly force by any person is justifiable when used in self-defense or in defense of others.

California Penal Code section 835a allows any police officer who has reasonable cause to believe that a person to be arrested has committed a felony [public offense] to use reasonable force to effect the arrest, to prevent escape, or to overcome resistance. This section further provides that a police officer "who makes or attempts to make an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance." As with Penal Code section 196, section 835a only allows use of deadly force by the police officer when the suspect's felony involves violence or the threat of violence. (*Kortum v. Alkire* (1977) 69 Cal. App. 3d 325, 333.) The court in *Kortum* further held that deadly force against a fleeing felony suspect is justifiable only when the felony "is of the violent variety, i.e., a forcible and atrocious one which threatens death or serious bodily harm, or there are other circumstances which reasonably create a fear of death or serious bodily harm to the officer or to another." (*Kortum v. Alkire, supra*, 69 Cal. App. 3d at 333.) In addition, Penal Code section 834a requires that if a person has knowledge, or by the exercise of reasonable care, should have knowledge, that he is being arrested by a peace officer, that person must refrain from using force or any weapon to resist such arrest.

Similarly, the relevant Criminal Jury Instruction as written by the Judicial Council of California and set forth in CALCRIM 3470 permits a person being assaulted to defend himself from attack if, as a reasonable person, he had grounds for believing and did believe that bodily injury was about to be inflicted upon him or upon another person. In doing so, such person may immediately use all force and means which he believes to be reasonably necessary and which would appear to a reasonable person, in the same or similar circumstances, to be necessary to defend against that danger and to prevent the injury which appears to be imminent.

The law as detailed in CALCRIM 3470 and in well-settled case law therefore permits a person, if confronted by the appearance of danger which arouses in his/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 bodily injury to the officer or others."

This limitation was, however, subsequently clarified by the United States Supreme Court in the seminal case of *Graham v. Conner* (1989) 490 U.S. 386, wherein the Supreme Court explained that an officer's right to use force [i.e., his or 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 evolving." (*Id.* at 397.) Thus, the Court cautioned that the "reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." (*Id.* at 396.)

The United States Supreme Court's analysis and teachings in *Graham, supra*, are very much applicable to the circumstances surrounding the interactions of Officer Esparza with Horton.

LEGAL ANALYSIS

The issue in this incident is whether the conduct of Officer Esparza, on January 4, 2014, is criminally culpable and without justification. In order to lawfully charge and convict Officer Esparza with a crime, the prosecution would have to prove beyond a reasonable doubt that a lawful justification for the shooting did not exist. We conclude that there is insufficient evidence to prove beyond a reasonable doubt that Officer Esparza's conduct warrants criminal prosecution as a result of this shooting.

When Officer Esparza exited his patrol vehicle at the residence on Morningside Avenue at approximately 1:40 a.m., he knew that Horton was a parolee with ties to the Hispanic criminal prison gang and the criminal street gang. Furthermore, Officer Esparza believed that Horton was in possession of a gun, and that Horton possessed the gun in the garage he was approaching.

According to Jane Doe 1, Horton, John Doe 1 and Jane Doe 1 were smoking methamphetamine inside the garage when Horton heard Officers Esparza and Rodriguez approach, although Horton did not know it was the police at the time, he "started freaking out" and turned off the lights in the garage. He ordered Jane Doe 1 to get on the floor and for Jane Doe 2 to stay inside the main house. Horton admitted that he believed there was a hit out on him, and that he always kept a gun on himself. It appeared that Horton was preparing himself, and those around him, for a shootout when he told his companion to get on the floor and Jane Doe 2 to stay away inside the house.

When Horton exited the garage armed with a .44 caliber revolver, Officer Esparza saw Horton and identified himself as a police officer. Horton then ignored the commands of Officer Esparza to put the gun down. Horton admitted that he failed to drop the gun even when ordered to do so by Officer Esparza. Officer Esparza discharged two rounds at Horton striking him in the chest and forearm. Immediately following the shooting, a chrome .44 caliber revolver was found partially underneath Horton and was kicked away by Officer Rodriguez. The .44 caliber handgun clearly belonged to Horton based on where it was found, and the fact that it was covered in Horton's own blood. In addition, Horton's himself admitted possessing the firearm at the time he was confronted by Officer Esparza.

Unfortunately, and since Officer Esparza refused to provide a voluntary statement to OCDA, we do not have any direct evidence regarding what Officer Esparza saw or believed at the time of his interaction with Horton leading up to the shooting. This information would have been very valuable to our determination since it allows us to better evaluate Officer Esparza's state of mind at the time of the shooting, especially since Officer Rodriguez was on the other side of the garage when Officer Esparza discharged his weapon. While the fact that Officer Esparza refused to provide a statement to OCDA is unfortunate and counterproductive to a transparent and complete investigation, it may not be a determinative part of our legal analysis. In our legal system, the undisputable fact remains that Officer Esparza's refusal to provide a statement does not constitute evidence that may be used against him in a criminal prosecution; the Fifth Amendment to the United States Constitution guarantees that a person's exercise of his right to remain silent cannot be used as evidence to incriminate him.

Therefore, and based on the totality of all the available evidence, it is reasonable to conclude that the following took place: Officer Esparza was approaching a residential garage during the night time knowing that Horton was an apparent gang member and that he was armed with a handgun. Horton then exited his garage side door and faced Officer Esparza while holding a .44 caliber handgun. During this very dangerous situation, Officer Esparza identified himself as a police officer and ordered Horton to drop the handgun. Horton failed to drop the handgun he was holding. Believing that his life was in imminent peril, Officer Esparza discharged his weapon striking Horton with two rounds. Therefore, a jury would likely find a reasonable basis to believe that Horton posed an imminent deadly threat to Officer Esparza. When applying the legal standard of "reasonableness," which is "highly deferential" to the tense, rapidly-evolving circumstances confronting police officers in the streets, it is clear that the prosecution will be unable

to prove beyond a reasonable doubt that Officer Esparza's conduct was unreasonable and not justified. To the contrary, the available evidence suggests that Officer Esparza was justified in his action and that he carried out his duties as a peace officer in a reasonable and lawful manner.

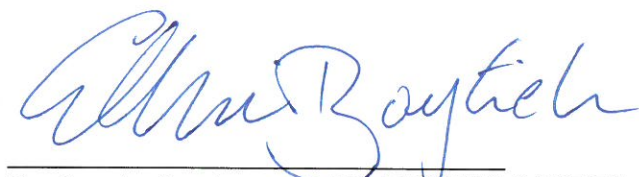
CONCLUSION

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 based on the applicable legal principles, it is our legal opinion that there is insufficient evidence of criminal culpability on the part of Officer Esparza when he shot Horton on Jan. 4, 2013.

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



DREW HAUGHTON
Deputy District Attorney
Gang and TARGET Unit



Read, revised and approved by **EBRAHIM BAYTIEH**
Assistant District Attorney
Supervising Head of Court - Special Prosecutions Unit