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May 2, 2017

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

Re: Officer-Involved Shooting on Jan. 17, 2016
Non-Fatal Incident involving Max Lopez
District Attorney Investigations Case # SA 16-002
Santa Ana Police Department Case #16-01592
Orange County Crime Laboratory Case #FR 16-40865 and 16-41421

Dear Chief Rojas,

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 Santa Ana Police Department (SAPD) Detective Corporal Roland Andrade. Max Lopez, 23, survived his injuries. The incident occurred in the City of Santa Ana on Jan. 17, 2016.

OVERVIEW

This letter contains a description of the scope and legal conclusions resulting from the OCDA's investigation of the January 17, 2016, non-fatal, officer-involved shooting of Lopez. 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 officer involved in the shooting. The format of this letter 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. 17, 2016, Investigators from the OCDA Special Assignment Unit (OCDASAU) responded to this incident. During the course of this investigation, eight interviews were conducted, and 37 additional witnesses were contacted during the supplemental canvass interviews. OCDASAU Investigators also obtained and reviewed the following: SAPD reports, audio dispatch and radio traffic recordings; Orange County Crime Laboratory (OCCL) reports, including DNA, toxicology, forensic alcohol examination, officer processing and firearms examination reports; crime scene investigation photographs; medical records and photographs related to the injuries sustained by Lopez; criminal history records related to Lopez; 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 SAPD officers or personnel, specifically SAPD Gang Unit Detective Corporal Andrade. 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 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 information which may be viewed as prejudicial to the right of a defendant 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/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 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. Detective Corporal Andrade gave a voluntary statement to OCDA Investigators on Feb. 9, 2016, which is included in the factual summary below.

FACTUAL SUMMARY

On Jan. 17, 2016, at approximately 9:20 p.m., SAPD Gang Unit Detective Corporal Andrade, SAPD Gang Unit Detective Danny Alcala, and SAPD Gang Detective Sergio Gutierrez were in the area of 1000 North Parton Street in Santa Ana. The Gang Unit was conducting extra patrols in response to a gang-related shooting that occurred earlier that evening, as it is common for gang members to arm themselves and gather at the scene after a shooting. On the way to North Parton Street, Detective Corporal Andrade passed a nearby soccer field which contained several hundred people.

Detective Alcala was alone and parked his unmarked police vehicle in the area of 1000 North Parton Street. Detective Alcala observed three males, later identified as Lopez, John Doe 1, and John Doe 2, standing in the street with two females. Detective Alcala suspected the three males might be gang members. Via radio, Detective Alcala informed Detective Corporal Andrade and Detective Gutierrez of the group's location. Detective Corporal Andrade and Detective Gutierrez were together in a marked SAPD police vehicle, which they parked on Washington Avenue and Parton Street, one block north of 1010 North Parton Street. Detective Corporal Andrade and Detective Gutierrez started walking southbound on Parton Street, to approach the group and ask questions regarding the earlier shooting incident. Detective Corporal Andrade and Detective Gutierrez were aware that the group noticed them and identified them as police officers, because they heard someone say, "jura, jura," which is slang for "police." The three males, identified as Lopez, John Doe

1, and John Doe 2, then walked across the street and southbound towards 10th Street. At this time, Lopez, John Doe 1, and John Doe 2 separated from the group of females and continued walking on southbound Parton Street. Detective Corporal Andrade and Detective Gutierrez were approximately 40 yards north of the group. As the detectives approached at a faster pace, Lopez broke away from the group and started walking ahead of them. Detective Corporal Andrade saw Lopez look over his shoulder and manipulate something in his pocket or waistband area. Detective Corporal Andrade was concerned that Lopez might have a gun or a weapon based on his behavior. At this time, Detective Corporal Andrade told Detective Gutierrez to watch out for Lopez.

Lopez suddenly started running southbound while continuing to clench the object in his waistband. Detective Alcala, who had concealed himself behind a van, confronted the group and ordered them to get on the ground at gunpoint. John Doe 1 and John Doe 2 complied with Detective Alcala's orders. Lopez disregarded the orders, turned and ran northbound on Parton Street, in the direction of Detective Corporal Andrade and Detective Gutierrez. As Lopez turned, Detective Alcala saw Lopez place his hands in his front waistband area. Detective Alcala believed Lopez might have been arming himself with a weapon. Detective Corporal Andrade observed Lopez run back towards him on the east sidewalk of Parton Street. Detective Corporal Andrade saw Lopez remove a handgun from his waistband, hold it in his right hand, and point it at Detective Corporal Andrade and Detective Gutierrez while they were in the middle of the street.

Detective Corporal Andrade identified himself as a police officer and ordered Lopez to stop and get on the ground. Lopez continued to run towards Detective Corporal Andrade and Detective Gutierrez. All three officers were issuing commands, which Lopez ignored. At this time, Lopez removed the gun from his waistband and pointed it at Detective Corporal Andrade and Detective Gutierrez. Detective Corporal Andrade saw Lopez dip his left shoulder and turn towards him. Detective Corporal Andrade initially thought that Lopez might have fired his weapon because his movement was odd. Detective Gutierrez was approximately 15 yards behind Detective Corporal Andrade and described Lopez as running as fast as he could towards them. Detective Gutierrez saw Lopez reach into his waistband and pull out a black handgun.

Detective Corporal Andrade feared for himself and his partners and believed Lopez posed a danger to the community because Lopez was brandishing a firearm and acting in a strange manner. Detective Corporal Andrade felt that Lopez had ample time to discard the gun and comply with the officers' commands. Based on Lopez's actions, Detective Corporal Andrade felt Lopez was intent upon engaging the police in an armed confrontation, and Detective Corporal Andrade felt he had to act to protect himself, his partner, and the citizens in the neighborhood and on the nearby soccer field.

Detective Corporal Andrade initially fired two to three shots from approximately 30 feet away, but Lopez was still holding the gun and continued to run. Detective Corporal Andrade fired two more shots before Lopez let go of the gun. Lopez ran 10 to 15 feet further and collapsed in the street. Detective Corporal Andrade estimated that Lopez ran one and a half car lengths with the gun in his hand.

Detective Gutierrez heard the gunshots but did not know if they were from Detective Corporal Andrade's gun, and he did not see any muzzle flash coming from Lopez's gun. Right before Lopez fell, Detective Gutierrez heard something metallic fall. Detective Gutierrez did not fire his weapon because Detective Corporal Andrade was in his line of fire. Detective Gutierrez also believed Lopez posed a threat to law enforcement and the community, and said he also would have fired if he had been in Detective Corporal Andrade's position.

Immediately after the shooting, Detective Corporal Andrade advised SAPD Communications that he had been involved in an officer involved shooting and requested paramedics to treat Lopez. Paramedics arrived and rendered aid to Lopez at the scene. Lopez was transported to Orange County Global Medical Center (OCGMC) and he was treated for two gunshot wounds. Lopez was expected to make a full recovery.

After the shooting, Detective Gutierrez heard bystanders stating they saw Lopez carrying a weapon. DNA was collected from the gun Lopez carried and it was determined to be consistent with Lopez's DNA. It was later discovered that the gun in Lopez's possession was stolen from a residence in Los Angeles in 2015.

Lopez's Voluntary, Post-Miranda Statement

Investigators from the OCDA interviewed Lopez on January 18, 2016. Prior to the interview, they advised Lopez of his Miranda rights, which he acknowledged and waived, indicating that he agreed to voluntarily provide a statement. Lopez stated he was in the area of 1000 Parton Street and witnessed the earlier drive by shooting. After SAPD police personnel processed the crime scene and left the area, Lopez was walking down the street with two males and three females, but only knew one of the individuals he was with.

Lopez indicated that he heard someone in the group say, "Jura," which he understood to mean "cops." Lopez saw an individual wearing a black shirt and blue jeans shining a flashlight and pointing a gun at the group. Lopez heard the person say, "Let me see your hands." At this point, Lopez claims he did not know if the individual was a police officer because the person did not identify themselves by saying, "Police."

Lopez stated that he had a glass methamphetamine pipe in his sweatshirt pocket and admitted to smoking methamphetamine three to four hours prior to being contacted by the police. Lopez started running northbound on 1000 Parton Street in an attempt to flee and discard the methamphetamine pipe. Lopez saw Detective Corporal Andrade and Gutierrez approach from his left side, but claimed that he did not know they were police officers. Lopez stated he was holding his cell phone in one hand and reaching for the methamphetamine pipe in his sweater pocket when he heard four to five gunshots. At this time, Lopez realized he had been shot.

Lopez denied possessing the Davis Industries handgun collected from the scene, or that he discarded the handgun when he was shot. When investigators questioned whether his DNA would be on the handgun, Lopez stated that it might be because it resembled a handgun he touched two days prior.

EVIDENCE COLLECTED

The following evidence was collected at the scene:

- Five cartridge casings, head stamp "WIN 40 S&W"
- One bullet core
- One Davis Industries Model P380 black semiautomatic handgun, containing one cartridge in the chamber and five cartridges loaded in the magazine [handgun seen in Lopez's hand]
- One glass narcotics pipe
- One black cellular phone

EVIDENCE ANALYSIS

Firearms Examination

Detective Corporal Andrade's Glock pistol was test fired at the OCCL and operated without malfunction. The five cartridge casings from the scene were determined to have been fired from the Glock handgun.

The Davis Industries Model P-380 pistol, .380 caliber [handgun seen in Lopez's hand], was test fired at the OCCL and operated without malfunction.

DNA Analysis

The OCCL processed the Davis Industries handgun for DNA. A partial DNA profile was obtained from the swab of the magazine of the Davis Industries handgun. The DNA detected was consistent with Lopez's DNA. The frequency of choosing an individual, at random, who could be a possible source of the DNA from the magazine is more rare than one in one trillion. Therefore, Lopez's DNA was found on the handgun.

Toxicological Examination

A sample of Lopez's blood was collected at OCGMC and tested at the OCCL. The results were positive for amphetamine and methamphetamine and negative for alcohol.

LOPEZ'S PRIOR CRIMINAL HISTORY

Lopez's criminal history was reviewed and considered. Since 2011, Lopez has been convicted of domestic violence, weapons possession, drug possession, commercial burglary, violation of a court order, false information to a police officer, possession of narcotics paraphernalia, and driving on a suspended license.

LOPEZ'S POST-INCIDENT CONVICTION

On Jan. 20, 2016, OCDA filed criminal charges against Max Lopez in Orange County Superior Court case 16CF0153 consisting of felony possession of a firearm on school grounds, a violation of California Penal Code section 626.9(b); felony unlawful possession of a loaded firearm in public, in violation of California Penal Code section 25850(a)(c)(4); and felony carrying a loaded stolen firearm in public, in violation of California Penal Code section 25850(a)(c)(2). On December 13, 2016, the OCDA added another felony charge for exhibiting a firearm in the presence of a peace officer, a violation of California Penal Code section 417 (c). On April 26, 2017, Lopez plead guilty to all the charges and provided a complete admission including that he willfully and unlawfully exhibited a firearm in the presence of Corporal Andrade. The court sentenced Lopez to a term of 3 years in State Prison.

STANDARD LEGAL PRINCIPLES IN OFFICER-INVOLVED SHOOTING CASES

Possible criminal charges against an officer involved in a 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 that the person has committed a felony. (*Kortum v. Alkire* (1977) 69 Cal.App.3d 325, 332.) The felony must involve violence or the threat of violence. (*Id.* at 333.)

California Penal Code Section 197 provides that the use of deadly force by any person is justifiable when used in self-defense or in defense of others.

California Penal Code Section 835a allows any police officer who has reasonable cause to believe that a person to be arrested has committed a felony [public offense] to use reasonable force to effect the arrest, to prevent escape, or to overcome resistance. The section further provides that a police officer "who makes or attempts to make an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance." The Court of Appeal in *Kortum* further held that deadly force against a fleeing felony suspect is justifiable only when the felony "is of the violent variety, *i.e.*, a forcible and atrocious one which threatens death or serious bodily harm, or there are other circumstances which reasonably create a fear of death or serious bodily harm to the officer or to another." (*Kortum v. Alkire*, *supra*, 69 Cal.App.3d at p. 333.)

In addition, Penal Code section 834a requires that if a person has knowledge, or by the exercise of reasonable care should have knowledge, that he is being arrested by a peace officer, that person must refrain from using force or any weapon to resist such arrest. Similarly, the relevant Criminal Jury Instruction as written by the Judicial Council of California and set forth in CALCRIM 3470 permits a person being assaulted to defend himself from attack if, as a reasonable person, he had grounds for believing and did believe that bodily injury was about to be inflicted upon him or upon another person. In doing so, such person may immediately use all force and means which he believes to be reasonably necessary and which would appear to a reasonable person, in the same or similar circumstances, to be necessary to defend against that danger and to prevent the injury which appears to be imminent.

The law as detailed in CALCRIM 3470 and in well-settled case law therefore permits a person, if confronted by the appearance of danger which arouses in his/her mind, as a reasonable person, an honest fear and conviction that he/she or another person is about to suffer bodily injury, to act in self-defense or defense of others upon such appearances, and from such fear and honest convictions. The person's right of self-defense is the same whether the danger is real or merely apparent. (*People v. Jackson* (1965) 233 Cal.App.2d 639, 641-642.)

Nevertheless, the above justifications must be interpreted in light of United States Supreme Court precedent that limits the right of a police officer to use deadly force. (*People v. Martin* (1985) 168 Cal.App.3d 1111, 1124.) Thus, in *Tennessee v. Garner* (1985) 471 U.S. 1, 3, the United States Supreme Court ruled that a police officer is entitled to use deadly force only when "the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others."

This limitation was, however, clarified subsequently by the United States Supreme Court in the seminal case of *Graham v. Connor* (1989) 490 U.S. 386, wherein the Supreme Court explained that an officer's right to use force [*i.e.*, his/her weapon] is to be analyzed under the Fourth Amendment's "objective reasonableness" standard. The Supreme Court further stated that the determination of the reasonableness of an officer's use of force "must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation" (*Id.* at 396-397.)

The United States Supreme Court's analysis and teachings in *Graham* are very much applicable to the circumstances surrounding the interactions of SAPD Detective Corporal Andrade with Lopez.

LEGAL ANALYSIS

The issue in this case is whether the conduct of Detective Corporal Andrade on Jan. 17, 2016, was criminally culpable and without justification. As stated above, in order to charge Detective Corporal Andrade with a criminal violation, it is required that the prosecution have 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 he did not act in lawful self-defense. If Detective Corporal Andrade's actions were justifiable as lawful self-defense or defense of others, then 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.)

Detective Corporal Andrade was justified in believing that Lopez posed a significant threat of death or serious physical injury to himself and others. Detective Corporal Andrade knew that during the month of January, there had been a significant number of gang related shootings in Santa Ana and additional patrols were deployed to reduce gang violence. Detective Corporal Andrade was conducting patrols with the Gang Suppression Unit in response to a drive-by gang shooting that occurred hours before this incident. Gang members will commonly arm themselves and congregate at the scene following a shooting. Initially, Detective Corporal Andrade's plan was to approach Lopez's group to ask questions regarding the previous shooting. Lopez and the group immediately started walking away from the detectives.

Lopez started walking ahead of the group and Detective Corporal Andrade could see him looking over his shoulder, manipulating something in his pocket or waistband area. At this time, Detective Corporal Andrade became concerned that Lopez might be armed and warned his partner, Detective Gutierrez, to watch out for Lopez. Detective Corporal Andrade and Detective Gutierrez drew their firearms and ordered the group to stop. The group refused to comply and continued walking.

Detective Alcala approached the group and ordered Lopez, John Doe 1, and John Doe 2 to get on the ground. While the other two individuals obeyed Detective Alcala's orders, Lopez refused to comply. Lopez turned to run in the direction of Detective Corporal Andrade and Detective Gutierrez. At this time, Detective Alcala observed Lopez placing his hands in his waistband, possibly attempting to arm himself.

Lopez ran north on Parton Street, toward Detective Corporal Andrade and Detective Gutierrez. Detective Corporal Andrade identified himself as a police officer and ordered Lopez to stop. At that time, Detective Corporal Andrade could see Lopez manipulating something in his waistband. Detective Corporal Andrade then saw Lopez holding what he believed to be a black, semi-automatic handgun at waist level. Detective Gutierrez, who was fifteen yards away from Detective Corporal Andrade, saw Lopez reach into his waistband and pull out a black, semi-automatic handgun, while running in their direction. The evidence clearly establishes that Lopez was in possession of the gun. Lopez pointed the gun in the direction of Detective Corporal Andrade and Detective Gutierrez. Detective Corporal Andrade saw Lopez dip his shoulder and believed Lopez may have fired his weapon based on his movements.

At this time, Detective Corporal Andrade feared for his safety, as well as that of his partners and the public. This fear is clearly justified based on all the circumstances and the facts known to Detective Corporal Andrade. Detective Corporal Andrade fired two to three shots at Lopez, but Lopez continued to hold the gun. Detective Corporal Andrade fired two more shots before Lopez dropped the gun and collapsed in the street. Detective Gutierrez heard the sound of a metal object hit the ground shortly before Lopez collapsed. Detective Corporal Andrade immediately called for paramedics to treat Lopez for his injuries.

In order for Detective Corporal Andrade 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 Detective Corporal Andrade did not act in reasonable and justifiable self-defense, or defense of another, when he shot at Lopez. 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 and appropriately conclude that it was reasonable for Detective Corporal Andrade to believe that his life and the lives of others in the area were in danger. Therefore, Detective Corporal Andrade was justified when he shot at Lopez. Detective Corporal Andrade did not commit a crime, but carried out his duties as a peace officer in a reasonable and justifiable manner.

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CONCLUSION

Based upon a review of all of the evidence provided to and obtained by the OCDA, and based on the entirety of the facts contained in all the available reports and interviews reviewed, and pursuant to the applicable legal principles, it is our legal opinion that there is no evidence of criminal culpability on the part of Detective Corporal Andrade, and there is substantial evidence that his actions were reasonable and justified under the circumstances when he shot Lopez on Jan. 17, 2016.

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