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July 15, 2016

Chief Charles Celano
Tustin Police Department
300 Centennial Way
Tustin, CA 92780

Re: Officer-Involved Shooting on November 17, 2012
Non-Fatal Incident involving Larry Joseph Hernandez, Jr.
District Attorney Investigations Case # S.A. 12-028
Tustin Police Department Case # 12-6643
Orange County Crime Laboratory Case FR # 12-57184, 12-57249

Dear Chief Celano,

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 Tustin Police Department (TPD) Sergeant John Cartwright. Larry Joseph Hernandez, Jr., 46, survived his injuries. The incident occurred in the City of Tustin on Nov. 17, 2012.

OVERVIEW

This letter contains a description of the scope and the legal conclusions resulting from the OCDA's investigation of the Nov. 17, 2012, non-fatal, officer-involved shooting of Hernandez. 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 TPD 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 Nov. 17, 2012, Investigators from the OCDA Special Assignments Unit (OCDASAU) responded to this incident. During the course of this investigation, nine interviews were conducted, and nine additional witnesses were contacted during the supplemental canvass interviews. OCDASAU Investigators also obtained and reviewed the following: TPD reports, 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 Hernandez; criminal history records related to Hernandez including prior incident reports; and other relevant reports and materials including audio recordings of the conducted neighborhood canvass.

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The OCDA conducted an independent and thorough investigation of the facts and circumstances of this incident and has reviewed all evidence and legal standards impartially. The scope and findings of this review are expressly limited to determining whether any criminal conduct occurred on the part of TPD officers or personnel, specifically Sergeant Cartwright. The OCDA will not be addressing issues of 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 OCDA is not releasing any information that may be viewed as prejudicing 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 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. Sergeant Cartwright gave a voluntary statement to OCDA Investigators on Nov. 20, 2012.

FACTUAL SUMMARY

On Nov. 17, 2012, Hernandez and Jane Doe had been in a relationship for 16 months, had a 9-day-old child together, and lived together with Jane Doe's children from a prior relationship. They argued the day before, and on Nov. 17, 2012, they woke up still angry at each other and continued arguing. Jane Doe told Hernandez she was going to take their baby and he would never see the baby again. Hernandez became distraught and retrieved his portable safe from under his bed which contained a Ruger, Model P89, 9mm, semi-automatic pistol.

Hernandez carried the safe downstairs, removed the pistol, and placed it on the kitchen table in front of him. He covered the gun with a green towel. Hernandez was contemplating using the pistol to commit suicide. Even though Hernandez and Jane Doe were in the house together, they texted each other throughout the day. Jane Doe texted Hernandez that she was moving out. Hernandez responded, "No need to come back, there will be nothing to come back to."

Jane Doe was packing upstairs, and came downstairs to wash the baby's bottles. Jane Doe saw Hernandez seated at the kitchen table with the pistol in front of him, as well as two 32-ounce Tecate beer cans. When Jane Doe asked Hernandez what he was doing, Hernandez started crying and told Jane Doe to take the baby. Jane Doe tried to grab the pistol, but Hernandez held it away from her. Jane Doe's 17-year-old daughter was also present and observed Hernandez and Jane Doe struggle for the gun. Jane Doe's daughter called 911 and told the dispatcher that Hernandez was drunk, had a gun and, was threatening to kill himself.

At approximately 3:50 p.m., TPD Officer James Monsoor was dispatched to the residence in reference to a subject armed with a gun, threatening to kill himself. It was also broadcast over the police radio that a female was trying to take the gun away from the male in the kitchen and there was a newborn baby in the apartment. At approximately 3:52 p.m., TPD Sergeant John Cartwright and Officer Monsoor arrived on scene. Sergeant Cartwright arrived first and immediately removed his Glock, .45 caliber, semi-automatic service pistol from its holster. Sergeant Cartwright saw Jane Doe's daughter on the phone in the doorway of the apartment, and she made a hand gesture to Sergeant Cartwright indicating that Hernandez was in the kitchen. Sergeant Cartwright staged himself at the threshold of the apartment. Officer Monsoor deployed his AR-15 rifle and positioned himself behind Sergeant Cartwright.

From the doorway, the officers saw Hernandez seated at the kitchen table, facing them. Jane Doe was on Hernandez's left side, lying across him, grabbing him and covering his upper torso. Jane Doe's 16-year-old son was also struggling with Hernandez, trying to get the gun away. Jane Doe and her son were blocking the officers' view of Hernandez, and the officers were unable to see Hernandez's face or torso. Sergeant Cartwright announced "Police Department," and commanded Jane Doe and her son to step away from Hernandez. Jane Doe did not comply, but her son complied and left the apartment. Sergeant Cartwright and Officer Monsoor entered the apartment. Officer Monsoor took up a position behind a small protruding wall that separated the living room and kitchen areas. Officer Monsoor aimed the AR-15 rifle at Hernandez, but could not get a line of sight on him, because Jane Doe was blocking his view. Sergeant Cartwright was standing in the living room to Monsoor's left, without cover or concealment.

Both Sergeant Cartwright and Officer Monsoor ordered Hernandez to drop the pistol. From the officers' position, they could only see Hernandez's right arm extended out with his right hand on the grip of the pistol. Hernandez was holding the pistol on its side with his palm facing the floor, the back of his hand facing the ceiling and his finger along the side of the pistol's frame. The muzzle of the pistol was pointed toward the north wall of the apartment in a northwest direction. While Jane Doe was grabbing onto Hernandez's upper body, Hernandez's right arm moved toward his left, in a southern direction, where Sergeant Cartwright and Officer Monsoor were standing. Officer Monsoor described the muzzle of the pistol as "all over the place," as Hernandez and Jane Doe struggled for control. Sergeant Cartwright recalled the barrel of the firearm being pointed at him, stating, "The muzzle went past us at least three times."

According to Hernandez, he could not see the officers because Jane Doe was blocking his view. Hernandez admitted he heard the officers' commands and knew they were there. Hernandez claimed that he said out loud he was not going to do anything stupid and that he was going to put the pistol on the table. Jane Doe heard Hernandez make this statement, but she did not think the officers heard him because he said it softly. Hernandez lifted the pistol three to four inches above the table and over toward the south wall of the apartment, to his left, where Officer Monsoor and Sergeant Cartwright were standing. Sergeant Cartwright was approximately 12 feet away from where Hernandez was seated. Sergeant Cartwright was exposed in the living room without cover or concealment and could not get a clear sight of Hernandez, due to Jane Doe laying over him.

Sergeant Cartwright stated, "I was afraid... he was going to start shooting me, shooting [Officer Monsoor], shooting the family members, so I knew I had to stop him; but I didn't have any clear view of his torso, his head or anything... So I made the conscious decision to lie down on the carpet in a prone position." Sergeant Cartwright proceeded to lay down on the floor and announced to Officer Monsoor that he was going to shoot. Sergeant Cartwright stated, "...I was afraid he was going to hurt me, kill me, hurt [Officer Monsoor], kill [Officer Monsoor] or any of the family members, and it was the only option I had to make the guy stop at the time..."

Sergeant Cartwright aimed his firearm at Hernandez's groin area under the table. Sergeant Cartwright fired one gunshot, which struck Hernandez in the lower torso and exited his right flank. Hernandez immediately dropped the pistol and the officers secured it. Officer Monsoor administered first aid to Hernandez. Hernandez spontaneously stated to Officer Monsoor, "If you guys didn't do it, I was going to."

Officer Monsoor stated that inaction on his or Sergeant Cartwright's part would have led to someone being shot. Officer Monsoor believed the only way to control the situation was to use lethal force against Hernandez. Officer Monsoor

made up his mind to shoot Hernandez to stop the struggle, and stop the firearm from being pointed indiscriminately around the apartment, which placed all occupants in danger. Officer Monsoor pointed his AR-15 rifle, used the sights, and placed his finger on the trigger, in order to shoot and stop Hernandez. However, during the entire incident, Officer Monsoor was unable to get a line of sight on Hernandez because Jane Doe's body was covering him. Officer Monsoor never fired the AR-15 rifle, for fear that he would hit Jane Doe.

Officer Monsoor described the firearm he recovered from the table as a 9mm handgun with an exterior hammer. The firearm was loaded, with a cartridge in the chamber. A magazine containing additional cartridges was located in the magazine well of the firearm.

The Orange County Fire Authority (OCFA) was dispatched to the residence for a medical assistance. Hernandez told the paramedic that he pulled a gun and was going to use it on himself. Hernandez further stated that the police had told him to drop the gun and he lifted his hand with the weapon in it, his index finger extended over the trigger, to show his desire to comply. However, according to Hernandez, the weapon was pointed at the girl, so the officer shot him.

Hernandez was transported to Western Medical Center Santa Ana (WMCSA), where he was determined to have sustained one gunshot wound to his right chest wall and left pubic area. Hernandez's wounds were surgically repaired with no complications.

Hernandez's Voluntary, Post-Miranda Statement

Investigators from the TPD and OCDA interviewed Hernandez. Prior to the interview, they advised Hernandez of his Miranda rights, which he acknowledged and waived. Hernandez stated that he knew why the officer shot him, indicating that it was because the officer didn't know what Hernandez's true intentions were and "[the officer] had reacted the way he was supposed to... I feel bad for him." According to Hernandez, he [Hernandez] held the pistol in his right hand and had it pointed, in a northwestern direction, toward the north wall of the apartment. Hernandez stated that he brought the pistol over to his left, in the direction where the officer was standing, in order to place it on top of the table.

Hernandez stated that he never pointed the weapon at anyone in the house and had his finger extended along the firearm as he was putting it on the table when he was shot. Hernandez acknowledged that the officers' view was obstructed because Jane Doe was covering him. Hernandez acknowledged the officer really couldn't tell what was going on, and that the officer could have very well thought that Hernandez was going to point the gun at the officer. Hernandez admitted it was an "idiot move on my part, all the way around... stupid on my part, I should have just dropped it and let it go. I feel bad for him [the officer]."

EVIDENCE COLLECTED

The following items of evidence were collected from the scene:

- Expended .45 caliber cartridge casing
- Expended bullet
- P98 Ruger, 9mm pistol
- One 9mm cartridge case
- One 9mm pistol magazine

The following items of evidence were collected from Sergeant Cartwright

- Glock, model 21, .45 caliber, semi-automatic pistol
- One magazine from the Glock pistol containing 12 cartridges
- One cartridge from the chamber of the Glock pistol

EVIDENCE ANALYSIS

Firearms Examination

A forensic scientist employed by the OCCL examined the .45 caliber Glock pistol used by Sergeant Cartwright in this incident. The pistol was test fired and operated without malfunction. The cartridge case found on the floor of the living

room was compared to the test fired cartridges from Sergeant Cartwright's Glock pistol, and was positively determined to have been fired from Sergeant Cartwright's Glock pistol.

Blood Sample Examination

A sample of Hernandez's blood was collected at WMCSA. An Orange County Sheriff's Department forensic scientist examined the blood sample and detected hydromorphone and morphine. A blood alcohol examination was also conducted, and the blood alcohol result was determined to be 0.00%.

HERNANDEZ'S PRIOR CRIMINAL HISTORY

Hernandez's criminal history was reviewed and considered. His relevant criminal history includes assault with a firearm, vandalism, and violation of a court order.

HERNANDEZ'S POST-INCIDENT CONVICTION

On Nov. 20, 2012, the OCDA filed criminal charges against Hernandez in Orange County Superior Court case 12CF3368, accusing him of one count of felony exhibiting a firearm in presence of a peace officer, a violation of California Penal Code section 417(c); one count of felony assault with a firearm on a peace officer, in violation of California Penal Code section 245(d)(2); and three counts of felony child abuse, in violation of California Penal Code section 273a(a), as well as three sentencing enhancements for personal use of a firearm, in violation of California Penal Code section 12022.5(a). On July 15, 2016, pursuant to an offer from the court, Mr. Hernandez plead guilty to all charges and sentencing enhancements. He was sentenced to credit for time served and placed on five years of formal probation.

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's 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 TPD Sergeant Cartwright with Hernandez.

LEGAL ANALYSIS

The issue is whether the conduct of Sergeant Cartwright in shooting Hernandez on Nov. 17, 2012, renders him criminally culpable and without legal justification. In order for the prosecution to charge Sergeant Cartwright with a crime, the prosecution must be able to prove beyond a reasonable doubt that no legal justification existed for his conduct, and he did not act in lawful self-defense. If the actions of Sergeant Cartwright were justifiable as lawful self-defense or defense of others, criminal charges are not warranted. The evidence clearly supports the conclusion that Sergeant Cartwright did not commit a crime. On the contrary, he acted lawfully and appropriately when dealing with an armed and dangerous suspect.

Sergeant Cartwright was justified in believing that Hernandez posed a significant threat of death or serious physical injury to himself, Officer Monsoor, and those inside the apartment. Sergeant Cartwright and Officer Monsoor were dispatched to a call involving a suicidal subject, armed with a gun, struggling with a female, with a newborn in the apartment. Upon arrival, Sergeant Cartwright and Officer Monsoor saw Hernandez holding a gun in his right hand. Hernandez was struggling for control of the gun with Jane Doe and her 16-year-old son. The officers issued repeated commands for Hernandez to drop the gun and for Jane Doe to leave. Both refused to comply and kept struggling over the gun. Hernandez admitted he heard the officers' commands to drop the gun, and that "it was stupid on my part... I should have just dropped it."

Officer Monsoor stated that the barrel of the gun was being waved around all over the place, and he personally saw the muzzle of the gun pointed in the officers' direction at least three times. Sergeant Cartwright described Hernandez's right

hand as, "flailing," and said the gun went side to side and covered the officers at least three times. It was later discovered that Hernandez's gun was loaded, with a cartridge in the chamber of the gun.

Because Hernandez refused to drop the gun, and waved it in the direction of the officers, Sergeant Cartwright had an honest fear that Hernandez posed an imminent threat to himself [Sergeant Cartwright], Officer Monsoor, and other occupants of the residence. Based on that fear, Sergeant Cartwright felt it was necessary to use deadly force to subdue Hernandez and neutralize the imminent threat. Officer Monsoor came to the same conclusion, and would have shot Hernandez if he was able to do so without endangering Jane Doe.

In order for Sergeant Cartwright to be justly and lawfully charged and convicted of a crime in this incident, it is the OCDA's burden to prove beyond a reasonable doubt that Sergeant Cartwright did not act in reasonable and justifiable self-defense or defense of another when he shot at Hernandez. 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 Sergeant Cartwright to believe that his life and the lives of others in the residence were in danger. Hernandez himself stated, "The officer acted the way he's supposed to. I feel bad for him." Sergeant Cartwright was justified when he shot at Hernandez, and certainly Sergeant Cartwright did not commit a crime. To the contrary, Sergeant Cartwright took swift and necessary action to protect himself and others, 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 that there is no evidence of criminal culpability on the part of Sergeant Cartwright, and there is overwhelming evidence that his actions were reasonable and justified under the circumstances when he shot Hernandez on Nov. 17, 2012.

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



ERIN ROWE
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