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August 7, 2014

Chief of Police Corey Sianez
Buena Park Police Department
6640 Beach Blvd.
Buena Park, CA 90622

Re: Officer-Involved Shooting on March 1, 2012
Non-Fatal Incident involving Myung Jae Kim
District Attorney Investigations Case # S.A. 12-006
Buena Park Police Department Case # 12-07113
Orange County Crime Laboratory Case FR # 12-43389

Dear Chief Sianez,

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 Buena Park Police Department (BPPD) Officers Nathaniel Caruso, Jesse Alfonzo, John Bailey, Ryan Herst, and Sergio Lepe. Myung Jae Kim, age 56, survived his injuries. The incident occurred in the City of Buena Park on March 1, 2012.

OVERVIEW

This letter contains a description of the scope and the legal conclusions resulting from the OCDA's investigation of the March 1, 2012, non-fatal, officer-involved shooting of Kim. 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 BPPD 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 March 1, 2012, Investigators from the OCDA Special Assignment Unit (OCDASAU) responded to this incident. OCDASAU Investigators interviewed 76 witnesses and obtained and reviewed the following: BPPD reports, dispatch audio recordings and radio traffic recordings; Orange County Sheriff's Department (OCSD) reports, helicopter and bomb squad robot video; Saehan Bank surveillance video; Kim's audio recorder; Orange County Fire Authority reports; Orange County Sheriff Laboratory (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 Kim; criminal history records related to Kim including prior criminal history records and 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 BPPD officers or personnel, specifically Officers Caruso, Alfonzo, Bailey, Herst, and Lepe. The OCDA will not be addressing issues of policy, training, tactics, or civil liability.

INVESTIGATIVE METHODOLOGY

Among other duties, the OCDASAU is responsible for investigating officer-involved shootings within Orange County when someone has been injured as a result of police gunfire. An OCDASAU Investigator is assigned as a case agent and is supported by other OCDASAU Investigators, as well as Investigators from other OCDA units. Six Investigators are assigned to the OCDASAU on a full-time basis. There are additional OCDA Investigators assigned to other units in the Office trained to assist when needed. On average, eight Investigators respond to an incident within an hour of being called. The Investigators assigned to respond to an incident perform a variety of investigative functions that include witness interviews, neighborhood canvass, crime scene processing and evidence collection, vehicle processing, and hospital investigative responsibilities as needed. The OCDASAU audio records all interviews, and 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 or Gang Units review fatal, officer-involved shootings and custodial death cases and determine whether criminal charges are appropriate. Deputy District Attorney assigned to the Special Prosecutions Unit review the non-fatal officer-involved shooting cases for possible criminal filings. Throughout the review process, the assigned prosecutor will be in consultation with his or her supervisor, and this Assistant District Attorney 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 statements from the involved officers. Officers Caruso, Alfonzo, Bailey, Herst, and Lepe provided voluntary statements on March 1, 2012.

FACTS

Background

In 2006, Jane Doe was the manager of Hanmi Bank (Hanmi) in Garden Grove. That year, Kim's wife opened a personal money market account with Hanmi and also obtained access to a safe deposit box. Hanmi used a dual-control system to ensure that only authorized persons had access to safe deposit boxes. Therefore, the presence of both a bank employee and Kim's wife were required to open the box. In March 2007, Kim's wife claimed that \$235,000 in cash was missing from her safe deposit box. Shortly thereafter, Kim filed a report with the Garden Grove Police Department (GGPD) on behalf of his wife. Kim contacted Jane Doe several times yearly regarding the missing money and Jane Doe explained that she could not discuss the account with him because he was not the "signer" on the account. In October 2011, Jane Doe became the manager of Saehan Bank (Saehan) in Buena Park.

GGPD closed Kim's case against Hanmi and he contemplated suicide. Kim also purchased a gun and planned to "hurt" Jane Doe by cutting off her feet, and then kill himself.

Synopsis

On March 1, 2012, at approximately 11:00 a.m., Kim entered Saehan carrying a white cardboard box, approximately 8" x 18" x 2". In addition to Jane Doe, present in the bank were employees, customers, and a uniformed security guard. Kim walked toward the rear of the bank and contacted Jane Doe. He placed the box on Jane Doe's desk and removed a shotgun from the package.

At approximately 11:06 a.m., BPPD dispatch received a call from a Saehan employee reporting that an armed man was inside the bank. Within 20 minutes, Kim instructed all customers and employees – with the exception of Jane Doe – to exit the bank. At approximately 11:50 a.m., BPPD Korean-speaking Officer James Woo telephoned a land line inside of Saehan and spoke with both Kim and Jane Doe via “speaker phone.” During this and subsequent telephone conversations, Kim explained his version of the events leading up to this incident.

At approximately 11:53 a.m., BPPD dispatchers made a radio broadcast advising all personnel that they had confirmation that Kim was armed, had made a ransom demand, and was willing to shoot Jane Doe and himself. The BPPD Special Weapons and Tactics (SWAT) Detail deployed a “reaction team” (React Team), staged inside of the Jang Mo Restaurant, located three businesses east of Saehan. React Team’s “point man” stood at the north-facing door and looked westbound, along the front of the building.

Two SWAT sniper teams, call signs Sierra-one and Sierra-two, were also deployed. Sierra-one, consisting of Officers Alfonzo and Alex Hong, took position on top of a nearby gas station canopy above the gas pumps. Sierra-two, consisting of Officers Caruso and Edward Flores, took position on the roof of the nearby car wash, below Sierra-one. The sniper teams had a view of Saehan’s front entrance; however, due to glare from the bank’s glass doors, their ability to see inside the bank was limited.

At approximately 12:29 p.m., Kim approached Saehan’s front entrance with a sawed-off shotgun in one hand and papers in the other. Kim slid the papers through the space between the front doors, and then walked toward the back of the bank and out of the officers’ sight. Officer Woo telephoned Saehan’s landline several times over the course of the next couple of hours, but Kim hung up immediately each time.

At approximately 3:00 p.m., Officers Alfonzo and Caruso observed Kim and Jane Doe approach Saehan’s front entrance. Jane Doe walked up to the glass doors. Kim stood beside Jane Doe and pointed his gun at her. Officers Alfonzo and Caruso feared for Jane Doe’s life. Officer Caruso relayed his observations to SWAT Commander Lieutenant Gary Worrall and requested permission to fire at Kim. Lieutenant Worrall granted permission and Officer Caruso fired one round. Officer Alfonzo heard Officer Caruso’s shot and observed no response from Kim or Jane Doe, so Officer Alfonzo took a “follow-up shot.” The glass storefront remained intact; however, Jane Doe flinched and Kim moved westerly to look outside.

Pursuant to SWAT training, the sound of the snipers’ shots cued the React Team officers to approach Saehan and initiate a hostage rescue. React Team members Bailey, Nghia Nguyen, Herst, Patrick Carney, Lepe, Eric Burciaga, and Frank Nunes exited the Jang Mo restaurant and moved westbound on the sidewalk toward Saehan. Within approximately six seconds of Officer Alfonzo’s shot, Officers Bailey and Nguyen led the React Team to the front entrance of the bank.

Kim pointed his shotgun toward Officers Bailey and Nguyen and began to retreat to the back of the bank. Officer Nguyen grabbed the door handle and the glass shattered. Officer Nguyen fell backward. Officer Carney stepped backwards, knocking Officer Herst onto his back. The React Team believed that Kim had fired the shot. Officer Bailey observed Kim still standing, pointing a shotgun in his direction, and Officer Bailey fired. Officer Bailey continued to fire at Kim, who fell backwards and down while pointing his shotgun at Officer Bailey. At approximately the same time, Officer Herst shot at Kim through the window of the business to the east, with the intention of his round going through the wall which separated that business from Saehan. Officer Herst’s aim point was the area where he had last observed Kim prior to getting knocked over by Officer Carney.

Kim fired his shotgun and the pellets struck the stationary window, approximately three feet west of Jane Doe. Officer Bailey stepped inside Saehan, grabbed Jane Doe, and pulled her outside to safety. Officer Lepe observed Kim on the floor in a seated position, still moving. Officer Lepe commanded Kim to show his hands; however, Kim did not comply. Believing that Kim posed a continuing threat, and that he had already discharged a shotgun, Officer Lepe fired approximately four rounds at Kim.

As the shooting stopped, Officer Mike Galos, who did not approach initially with the React Team, grabbed Jane Doe and walked her to the Jang Mo restaurant, where he placed her in the care of Detective Rick Pino. Several React Team members entered Saehan to apprehend Kim. Officer Carney observed a shotgun on the ground near Kim and kicked it away. The officers observed what they believed to be a pipe bomb in Kim's rear pocket. They evacuated Saehan immediately due to the risk posed by the bomb.

An armored vehicle parked in the parking lot in front of Saehan. Officer Herst entered the armored vehicle and trained his weapon on Kim, who was still moving. Kim was ordered to remove the pipe bomb from his pocket and he complied. After Kim removed the bomb, React Team members went back inside Saehan and apprehended Kim. Due to the threat of the live bomb, SWAT officers transported Kim outside Saehan via a backboard to wait for paramedics. Kim was transported to University of California, Irvine Medical Center, where he was treated for multiple apparent gunshot wounds.

OCSD Bomb Squad Investigators entered the bank, where they recovered the pipe bomb which had been in Kim's pocket, as well as three additional pipe bombs which were located on a table in Jane Doe's office. Investigators later determined these to be viable explosive devices.

EVIDENCE COLLECTED AT THE SCENE

The following items were collected at the scene in side Saehan:

- CAI double barreled shotgun, and shotgun shells from barrels;
- Remington 700 rifle, and magazine with cartridges;
- Box with 12 unfired shotgun shells and 13 shotgun shells from table;
- 17 unfired shotgun shells, wad cup, and pellets;
- Black shoes;
- Swabs from shotgun;
- Metal, copper, and bullet fragments;
- Folding knife;
- Bic lighter, lighter, and possible lighter parts;
- Key fob ;
- Gray fibrous material;
- 12 cartridge cases, and 2 cartridge cases from the Shell gas station;
- Keyboard box.

EVIDENCE ANALYSIS

Firearms Examination

An OCCL forensic specialist examined the firearms and projectiles collected in this case. Officers Alfonzo and Caruso's Remington model 700 rifles, .308 Winchester caliber, were test-fired and operated without malfunction. Officers Lepe, Bailey, and Herst's Colt model M4 Commando select fire rifles, 5.56x45mm caliber, were test-fired in both semiautomatic and full automatic modes of firing and operated without malfunction. Kim's shotgun was test fired and operated without malfunction.

KIM'S POST-INCIDENT CONVICTION

In April 2014, a jury trial was held and Kim was found guilty (Orange County Superior Court Case #12NF0672) of the following felony charges:

1. Assault with a firearm on Jane Doe in violation of Penal Code section 245(a)(2);
2. False Imprisonment in violation of Penal Code section 210.5;
3. Personal use of a deadly weapon in the commission and attempted commission of a kidnapping in violation of

Penal Code sections 207(a) and 12022(b)(1);

4. Assault with a firearm on Officers Bailey, Carney, and Nguyen in violation of Penal Code section 245(d)(1);
5. Possession of a destructive device in a public space in violation of Penal Code section 18715(a)(2);
6. Explosion of a destructive device in violation of Penal Code section 18740; and
7. Use of a firearm in the commission and attempted commission of criminal threats in violation of Penal Code sections 422 and 12022.5(a).

Kim's sentencing in connection with the above listed charges is currently set for August 29, 2014, in Department C43 of the Central Justice Center.

STANDARD LEGAL PRINCIPLES IN OFFICER-INVOLVED SHOOTING CASES

Possible criminal charges against an officer involved in a 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 officers' 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 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." 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.

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

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

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

LEGAL ANALYSIS

In order for Officers Caruso, Alfonzo, Bailey, Herst, and Lepe, or any one of them separately, to be justly and lawfully charged and convicted of a crime in this incident, it is the prosecution's burden to prove beyond a reasonable doubt that they did not act in reasonable and justifiable self-defense, or defense of others, when they shot at Kim.

Kim entered Saehan with a box containing a "sawed-off" shotgun and several pipe bombs. He approached Jane Doe in her office and made statements to law enforcement about shooting himself and Jane Doe. Kim proceeded to hold Jane Doe hostage for over four hours, subsequently refusing to communicate with BPPD or comply with requests to show his hands. When Jane Doe and Kim approached the glass doors of the bank, Officers Alfonzo and Caruso observed Kim brandish his shotgun and point it at Jane Doe. Both officers indicated that they believed Jane Doe's life was in danger. They were absolutely right and justified in so believing.

Officer Caruso received permission to take a shot from Lieutenant Worrall, and Officer Alfonzo fired a "follow-up shot." The entire glass storefront remained intact, and several SWAT team members approached the front entrance of Saehan. Kim pointed his shotgun at the officers and retreated toward the back of the bank. As Officer Nguyen grabbed one of the door handles, the glass shattered, and the officers reasonably believed that Kim had fired a shot that caused the glass to shatter. At this point, Officers Bailey and Herst fired at Kim, who fell backwards. Kim returned fire and the pellets struck the front window, approximately three feet west of Jane Doe. Kim did not comply with Officers Lepe's commands to show his hands, so Officer Lepe fired at Kim to prevent him from further accessing his weapon.

Under these circumstances, Officers Caruso, Alfonzo, Bailey, Herst, and Lepe used reasonable force in defense of Jane Doe and themselves. Where potential dangerous, emergency conditions or other exigent circumstances exist, the Supreme Court's definition of reasonableness is comparatively generous to the police. 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* (2009) 171 Cal. App. 4th 516, 528.

As should be clearly apparent from the above-described analysis, the prosecution would be unable to carry this burden in this case because the officers were all justified in discharging their weapons. A jury analyzing these facts would justly and fairly conclude that it was reasonable for the officers to believe that their lives were in danger, along with the life of Jane Doe. Therefore, they were justified when they shot and wounded Kim and they did not commit a crime in doing so.

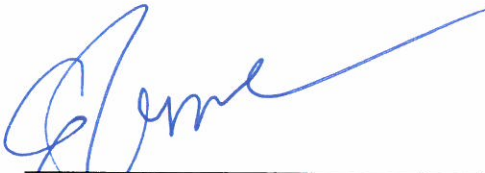
CONCLUSION

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 Officers Caruso, Alfonzo, Bailey, Herst, and Lepe, or any other officer involved in this incident, and there is overwhelming evidence that the officers' actions were reasonable and justified under the circumstances in the shooting of Kim on March 1, 2012.

Officers Caruso, Alfonzo, Bailey, Herst, and Lepe did not commit a crime in dealing with the dangerous situation created by Kim. To the contrary, the officers acted lawfully and appropriately under the circumstances, and their conduct on March 1, 2012, undoubtedly saved the life of an innocent human being. For doing so they deserve to be commended and not prosecuted.

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

Respectfully submitted,



ERIN ROWE
DEPUTY DISTRICT ATTORNEY
Special Prosecutions Unit

Read and Approved by **EBRAHIM BAYTIEH**
Acting Assistant District Attorney
Head of Court - Special Prosecutions Unit