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August 6, 2014

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

Re: Officer-Involved Shooting on September 10, 2012
Non-Fatal Incident involving Marcelino Valencia Almanza
District Attorney Investigations Case # S.A. 12-022
Santa Ana Police Department Case # 12-26768
Orange County Sheriff's Department # 12-205729
Crime Laboratory Case FR # 12-53567

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 David Enriquez. Marcelino Valencia Almanza, 39, was shot by Officer Enriquez and survived his injuries. The incident occurred in the City of Santa Ana on Sept. 10, 2012.

OVERVIEW

This letter contains a description of the scope and the legal conclusions of the OCDA's investigation into the Sept. 10, 2012, non-fatal, officer-involved shooting of Almanza. It 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 or any other SAPD personnel. 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 Sept. 10, 2012, Investigators from the OCDA Special Assignment Unit (OCDASAU) responded to this incident. OCDASAU Investigators interviewed 51 witnesses and obtained and reviewed the following: SAPD reports, audio recordings, dispatch and radio traffic recordings; Orange County Crime 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 Almanza; criminal history records related to Almanza including prior incident reports; the personnel records of Officer Enriquez; 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 SAPD officers or personnel, specifically Officer Enriquez. 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 Attorneys 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 a statement from the involved officer. Officer Enriquez voluntarily spoke to OCDA and SAPD Investigators on Sept. 12, 2012.

FACTS

On Sept. 10, 2012, at approximately 12:10 a.m., SAPD officers were dispatched to the area of 1300 W. Segerstrom Avenue in Santa Ana to investigate a report of a suspicious vehicle [a newer model silver Jeep Wrangler] and persons, possibly engaged in narcotic activity as well as an argument of some sort. One of the subjects was described as a male Hispanic, late 30s, with some facial hair and lots of tattoos, wearing a light brown baseball cap and white tank top (later identified as Almanza). The other person was described as a male in a wheelchair (later identified as Michael Jung Egberts). The calling party, John Doe, also informed SAPD that one of the subjects at the location had tried to burglarize his room at the Studio Inn a week prior.

SAPD Officer Enriquez was the first to arrive on scene at approximately 12:15 a.m. He drove into the parking lot of the shopping center located near the address to look for the vehicle matching the description. As he drove past a laundry place, located at 3005 South Bristol Street, he spotted the Jeep and the subjects matching the description. Officer Enriquez turned his patrol car to face the same direction as the Jeep, coming to a stop just to the side and behind the Jeep. Officer Enriquez illuminated his patrol car spotlight on the subjects and exited his car. As Officer Enriquez got out of his car, he observed Almanza yelling at Egberts in an aggressive manner. Officer Enriquez further observed that Almanza was holding a metal silver object in his hands, which he believed to be a handgun based on the manner in which Almanza held the object. Almanza had his hands close to his chest with his elbows at chest level, out to the sides; his right hand appeared to be in the shape of a fist while his left hand was under the right hand cradling the object.

When Almanza saw Officer Enriquez, he said, "Oh, s***," and ran toward the open driver's side door of the Jeep. Officer Enriquez told Almanza to "Stop," however, his commands were ignored. Almanza bent over into the Jeep and Officer Enriquez could see Almanza's arms moving. Within seconds, Almanza reemerged from the Jeep, shut the

driver's side door, ran to the front of the Jeep, squatted and crouched down. It was at this point that Officer Enriquez removed his duty weapon from its holster.

From Officer Enriquez's vantage point, to the side and behind the Jeep, he could see Almanza squatting in front of the Jeep, manipulating something with his hands and his elbows moving while looking around to determine Officer Enriquez's location. Officer Enriquez was unable to take cover and keep an eye on Almanza at the same time. Officer Enriquez was vulnerable and felt threatened. Believing Almanza was going to engage him in a gun-battle, Officer Enriquez fired off four rounds in Almanza's direction and then immediately moved to a different location. Officer Enriquez could see that Almanza was still crouched down, taking cover behind the front of the Jeep, with his hands still close to him as if he were still holding onto the object. Officer Enriquez fired two more rounds in Almanza's direction. Almanza screamed in pain, apparently having been hit by the shots, and yelled something to the effect of, "Okay, okay, stop, stop, okay!" Officer Enriquez saw Almanza on the ground, bleeding, and was finally able to radio for assistance at approximately 12:17 a.m. Other SAPD officers arrived at the scene within seconds. A Smith & Wesson 66-1 revolver, .357 caliber, was found at the scene in the area where Almanza was shot.

At approximately 12:32 a.m., Almanza was transported, by ambulance to University of California, Irvine Medical Center (UCIMC) to be treated for gunshot wounds to his right arm.

Post-Shooting, Voluntary Interview of John Doe

On Sept. 9, 2012, John Doe, his wife Jane Doe, and their minor son were residing at the Studio Inn. Their room was on the second floor, and their window provided an unobstructed view of the location where the incident took place. Earlier in the day, they returned to the Studio Inn and parked their car in a parking spot next to a silver Jeep Wrangler. John Doe recognized the occupant of the Jeep, Almanza, as the same person who tried to break into his room approximately a week prior to the incident. John Doe thought Almanza appeared to be under the influence of drugs based on the fact that Almanza was sweating heavily and had "lazy" eyes. He also thought that the Jeep Almanza was sitting in might be stolen because there was a rag draped over the steering column.

Shortly before midnight on Sept. 9, 2012, a flashing light emanating from outside John Doe's room's window caught John Doe's attention. He went to the window, looked outside, and saw the same silver Jeep from earlier in the day parked across the street with both doors on the driver's side open. As he continued to peer out his window, John Doe saw Almanza and Egberts next to the driver's side of the Jeep. John Doe knew Egberts as "crack for sale" because Egberts was known to sell drugs in that area. Both Egberts and Almanza had approached John Doe about two to three weeks prior in an attempt to sell him drugs. John Doe decided to call the police because he believed the Jeep was stolen and that Almanza and Egberts were engaging in illegal drug activity.

John Doe continued to watch as the first patrol car, driven by Officer Enriquez, arrived on scene. He observed Officer Enriquez exit his car and attempt to make contact with Almanza saying, "What's going on? ...Hey buddy, I'm talking to you." John Doe then saw Almanza run and reach into the Jeep, possibly take something out, and then run toward the front of the Jeep and crouch down. At that point, Officer Enriquez shouted, "Hey, let me see your hands. What are you doing? Don't do it." As Almanza took position behind the front of the Jeep, John Doe saw Officer Enriquez take his weapon out of its holster.

John Doe stated Almanza kept bobbing his head up and down in front of the Jeep in an effort to see where Officer Enriquez was located and kept standing up and aiming something at Officer Enriquez. John Doe described Almanza as reaching into his pockets, taking a shooting stance, with his hands together, pointing something at the officer. John Doe stated Officer Enriquez shot his gun a couple of times. John Doe then saw Almanza trying to get under the Jeep and point something at Officer Enriquez. After the first round of shots, John Doe saw Officer Enriquez move to the passenger side of the Jeep and heard two more shots, followed by Almanza yelling "Alright, alright. I'm sorry." Officer Enriquez maintained his distance from Almanza with his weapon drawn and did not put his gun away until other officers arrived on scene.

According to John Doe, up until the time Almanza got shot, he refused to comply with Officer Enriquez's commands to show his hands and get on the ground. John Doe videotaped the incident on his wife's notebook computer.

EVIDENCE COLLECTED AT THE SCENE

The scene was located in the rear of a multi-business complex (3005-3513 Bristol Street). East of the building was a silver Jeep Wrangler, facing north. The Jeep had apparent bullet holes in the rear and in the left rear fender.

The following items were collected from the scene in the area of where Almanza was at the time he was shot by Officer Enriquez:

1. Six Winchester .40 caliber shell casings
2. One chrome Smith & Wesson .357 Magnum revolver, Serial #53K5192
3. One lead fragment
4. One lead projectile
5. Six copper jacket fragments
6. Three pieces of a crack pipe
7. A plastic baggie
8. Unknown white powder
9. A baseball cap
10. A car key
11. A black mini flashlight
12. Two Nike tennis shoes
13. Two white socks
14. A lower back support belt

HANDWRITTEN STATEMENT BY ALMANZA

On Nov. 20, 2012, SAPD Detective Gustavo Moroyoqui received a telephone call from Orange County Sheriff's Department (OCSD) Sergeant Darryl Romero, who was a supervisor at the OCSD Theo Lacy Jail Facility, where Almanza was being housed. Sergeant Romero provided copies of several hand-written documents by Almanza, along with a copy of an incident report, detailing Sergeant Romero's interaction with Almanza.

The documents, authored by Almanza, detailed the events leading up to the shooting incident. In the documents, Almanza included a statement that he was in possession of a firearm when first contacted by Officer Enriquez. Almanza stated that, upon seeing "a patrol car," he walked to the front of the Jeep to "toss" the firearm. Almanza identified the firearm as being concealed in his pocket, "out of view of the patrol car." According to Almanza's statement, "Parket," the subject Almanza was with at the time of the incident (presumably Egberts), asked Almanza where he was going. Almanza told Parket, "To toss a gun." A partial statement provided by Almanza in the documents is as follows:

"I told him to toss a gun I didnt want to get caught with, at wich point I was infront of the vehicle and got the gun out and toss it as far as I could, I turn around to walk back and coming around the vehicle Peace Officer (John Doe) open Fire on me shooting close to 7 rounds." [sic]

EVIDENCE ANALYSIS

Firearms Examination

An OCCL forensic specialist examined the firearms and projectiles used in this case. Officer Enriquez's Glock 22 pistol, .40 caliber, was test-fired and operated without malfunction. The Smith & Wesson 66-1 revolver, .357 caliber, found at the scene, was test-fired and operated without malfunction.

Toxicological Examination

A sample of Almanza's blood taken at the hospital was tested and it came back positive for methamphetamine (160 ng/ml).

ALMANZA'S PRIOR CRIMINAL HISTORY

Almanza had a State of California Criminal History Record dating back to 1990. At the time of the incident, Almanza was on parole for possession of a controlled substance, and had failed to show up for his parole appointment on Sept. 7, 2012.

ALMANZA'S POST-INCIDENT CONVICTION

In August of 2013, a jury trial commenced in Orange County (Case # 12CF2702) in connection with charges filed against Almanza relating to the above-listed Sept. 10, 2012 incident. On Aug. 8, 2013, the jury found Almanza guilty of Possession of a Firearm by a Felon in violation of Penal Code section 29800(a)(1), and Unlawful Taking or Driving of a Vehicle in violation of Vehicle Code section 10851(a). Almanza was sentenced to 6 years in State Prison on December 6, 2013.

STANDARD LEGAL PRINCIPLES IN OFFICER-INVOLVED SHOOTING CASES

Possible criminal charges against an officer involved in a shooting include murder [Penal Code Section 187]; 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. 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.

Similarly, the relevant Criminal Jury Instructions 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*, are very much applicable to the circumstances surrounding the interaction of Officer Enriquez with Almanza.

LEGAL ANALYSIS

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.

In the present case, the entire incident unfolded in a matter of minutes. Officer Enriquez was dispatched to the scene to investigate a suspicious vehicle and activity. When he arrived at the nearly-deserted parking lot just past midnight, he observed what he believed to be Almanza yelling aggressively at Egberts. Officer Enriquez stopped his car, turned the spotlight on in the direction of the two subjects, exited his patrol vehicle and walked toward Almanza and Egberts. As he did so, Officer Enriquez noticed that Almanza appeared to be holding a silver, metallic object. Based on the manner in which Almanza was holding the object with his hands, as well as the position of his arms, Officer Enriquez reasonably feared that Almanza was holding a firearm. When Almanza spotted Officer Enriquez, he said, "Oh, s***," and immediately took off running toward the open driver's side door of the Jeep, ignoring the Officer's command to stop.

Almanza bent over into the driver's compartment, then re-emerged, closed the driver's side door, and took cover behind the front of the Jeep. Officer Enriquez could see Almanza taking multiple "peeks" back at him to determine his whereabouts. As Almanza continued to try to determine Officer Enriquez's location, he held his arms and hands in a position as if he was holding a firearm, waiting for an opportunity to take aim and fire at Officer Enriquez. Given the surrounding circumstances of the dispatch call-out, the time of night, and Almanza's actions ignoring Officer Enriquez's commands to stop and running to the open driver's side door of the Jeep, while holding an object in his hands, re-emerging from the Jeep and taking a position indicative of someone who is going to engage in a gun-battle, Officer Enriquez reasonably believed Almanza was going to shoot him, so he took aim with his department issued firearm and

fired four rounds in Almanza's direction. The shots did not deter Almanza. Instead, Almanza continued to take cover behind the front of the Jeep and maintained the position of his arms and hands as if he was holding a firearm.

Officer Enriquez seized an opportunity to move to a location that provided him a better view of Almanza. He observed that Almanza did not appear to have been hit by the shots fired and that he continued to hold his position by the front of the Jeep, with his hands still clasped together, as if he was holding a firearm. Officer Enriquez fired two additional rounds in Almanza's direction to minimize the threat before Almanza could shoot at him.

A logical interpretation of these facts is that Officer Enriquez reasonably believed that Almanza was holding a firearm, and given the opportunity, Almanza would have shot at Officer Enriquez. In such a case, Officer Enriquez's shooting would be justified self-defense. *Kortum v. Alkire, supra*, 69 Cal.App.3d at 33; *People v. Jackson, supra*, 233 Cal.App.2d 639, 641-642.

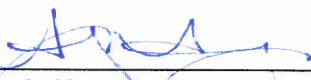
In order for Officer Enriquez to be justly and lawfully charged and convicted with a crime in this incident, it is the OCDA's burden to prove beyond a reasonable doubt that Officer Enriquez did not act in reasonable and justifiable self-defense or defense of another when he shot at Almanza. As should be apparent from the above-described analysis, the prosecution would be unable to carry this burden in this case. A jury analyzing these facts based on the law would justly conclude that it was reasonable for Officer Enriquez to believe that his life was in danger. Therefore, he was justified when he shot and wounded Almanza.

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 Officer Enriquez, and that his actions were reasonable and justified under the circumstances in the shooting of Almanza on Sept. 10, 2012.

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

Respectfully submitted,



Angela Hong
Deputy District Attorney
Special Prosecutions Unit



Read and Approved by **Ebrahim Baytieh**
Acting Assistant District Attorney
Head of Court – Special Prosecution Unit