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December 16, 2013

Sheriff Sandra Hutchens
Orange County Sheriff's Department
550 N. Flower Street
Santa Ana, CA 92703

RE: Officer Involved Shooting Incident March 21, 2013
Fatal Incident Involving Ian Berrier
Huntington Beach Police Department Case # 13-003828
Orange County Crime Laboratory Case # FR 13-44235
Orange County Coroner's Office Case # 13-01365-CO
Orange County Sheriff's Department Case # 13-052359

Dear Sheriff Hutchens,

At your request, the Orange County District Attorney's Office (OCDA) conducted a legal review of the Orange County Sheriff's Department's (OCSD) investigation of the March 21, 2013, shooting incident by Officer Doug Martin from the Huntington Beach Police Department (HBPD), which caused the death of Ian Berrier. This investigation was conducted by the OCSD pursuant to the Orange County Chiefs' of Police and Sheriff's Association Operational & Procedural Protocol, dated Jan. 3, 1990.

Please note that the scope and findings of this legal review are **expressly** limited to determining whether any criminal conduct occurred on the part of any HBPD personnel, specifically Officer Martin, as it relates to the death of Berrier. The OCDA will not be addressing policy, training, tactics, or civil liability issues.

FACTUAL SUMMARY

The factual summary listed below is based on a case investigation by OCSD and interviews conducted by OCSD investigators.

On March 21, 2013, at approximately 4:30 p.m., HBPD Officer Martin was dispatched to a restaurant on Warner Avenue in Huntington Beach to respond to a disturbance. The restaurant's owner had called 911 and stated that he had been threatened by a man with a gun, later identified as Berrier. The owner also said that Berrier had a female companion who had accused Berrier of stealing her credit card. The owner had heard Berrier make threats but had not seen a gun on Berrier's person. He described Berrier as wearing a black shirt with white writing and a hat and carrying a backpack.

While en route to the scene, Officer Martin was advised by HBPD Officer Mark Wersching, who was flying in HBPD's observer helicopter, that the male and female had been spotted walking westbound through a

parking lot behind some businesses. As the helicopter was observing the subjects, Officer Martin decided to try and coordinate his arrival time with his backup officers.

When Officer Martin was on Warner Avenue near Bolsa Chica Street, the helicopter advised him that the subjects had jumped a fence and were in between some houses in the area of Green Lane headed west toward Hoskins Lane. Officer Martin turned north onto Hoskins Lane.

The following summary of events is primarily based on Officer Martin's statements to OCSD investigators:

Officer Martin saw a male matching Berrier's description walking down the middle of Hoskins Lane. As Officer Martin drove toward him, Berrier turned around. After seeing the police car, Berrier walked briskly west toward the curb. Officer Martin did not see a female with Berrier.

Officer Martin sped up to catch up with Berrier, who began side stepping, or walking north while facing east. Berrier's hands were in his waistband fidgeting, which caused Officer Martin to believe that Berrier was concealing a gun. Officer Martin opened the driver-side door of his patrol car as he began to get closer to Berrier. He also put his hand on his firearm and released the retention device on his holster.

Officer Martin came abreast of Berrier about 10 feet away from him. Berrier removed a gun from his waistband with his right hand and pointed it toward the ground. Officer Martin then drew his gun from his holster and shot at Berrier through the open door. Officer Martin believed he fired his gun approximately four or five times.

When Officer Martin fired his gun, he heard Berrier say something that sounded like, "I won't" or, "I don't." Officer Martin believes he told Berrier to stop, but he could not remember exactly what he had verbalized. Officer Martin said that he fired his gun because he was "shocked" when he saw Berrier's gun and believed Berrier was going to shoot him. Berrier doubled over after Officer Martin fired his gun.

At the time of the shooting, in the observing helicopter above, Officer Wersching saw Berrier grab a black object from his waistband, jump twice, and fall to the ground. Four cartridges collected from the scene were later determined by the Orange County Crime Laboratory to have been fired from Officer Martin's gun. After the shooting occurred, Officer Wersching began requesting paramedics, setting up a perimeter, and getting other resources to the scene.

HBPD Detective Steve Fong arrived on the scene shortly after the shooting. He saw Berrier on the ground with Officer Martin pointing a gun toward him. Detective Fong also saw another gun on the ground off to the side. HBPD Officer Rodney Besuzzi and Sergeant Guy Dove then arrived on the scene in separate patrol cars. Officer Besuzzi handcuffed Berrier and began administering first aid. Detective Fong applied pressure to a wound on Berrier's head. Officer Besuzzi cut open Berrier's shirt with a knife to look for additional wounds. Officer Martin put Berrier in a rescue position so that he could breathe better.

HBPD Officers John Mauger and Jeff Huss also responded to the scene. The paramedics arrived, intubated Berrier, and attached a cardiac monitor to him, which determined that Berrier did not have a pulse. Epinephrine was administered in an attempt to restart Berrier's heart. Berrier did not respond to life-saving measures, and he was pronounced dead at 4:58 p.m.

After the shooting, the observer pilot found Berrier's female companion jumping fences between apartment complexes in the area around Lynn Lane and Milo Drive. HBPD Officer Scott Marsh detained her and identified her as the mother of Berrier's young son. Berrier and the female had been involved in multiple, prior domestic violence disputes. In her statement to the police, she stated that she had fought with Berrier that afternoon. She claimed that Berrier had shown her a BB gun and had previously made a statement about committing "suicide by cop."

AUTOPSY

An autopsy of Berrier's body was conducted on March 22, 2013, by Dr. Aruna Singhania, a Forensic Pathologist with the Orange County Coroner's Office. Dr. Singhania found one gunshot wound in the left temporal area of Berrier's head and a small abrasion on the right side of Berrier's forehead. Dr. Singhania determined Berrier's cause of death to be a gunshot wound to the head.

TOXICOLOGY REPORT

A toxicology report of Berrier's postmortem blood revealed traces of cocaine, opiates, and amphetamine.

WEAPONS EXAMINATION

Four cartridge cases found at the scene were forensically determined to have been fired from Officer Martin's Glock 21 pistol. During testing, Officer Martin's pistol misfired once.

Berrier's Colt Defender .177 caliber BB pistol was found in a driveway on Hoskins Lane with the safety on. A CO₂ cartridge was inserted and charged, and four BBs were in the magazine.

LEGAL PRINCIPLES

Homicide is the killing of one human being by another. To prove that a person is guilty of murder, the prosecution is required to prove beyond a reasonable doubt, based on lawful and reliable evidence, the following elements:

1. The person committed an act that caused the death of another human being;
2. When the person acted he had a state of mind called malice aforethought; and
3. He killed without lawful excuse or justification.

There are two kinds of malice aforethought, express malice and implied malice. Express malice is when the person unlawfully intended to kill. Implied malice requires that a person intentionally committed an act, the natural and probable consequences of the act were dangerous to human life, at the time he acted he knew his act was dangerous to human life, and he deliberately acted with conscious disregard for human life.

An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes.

A homicide committed with malice aforethought but in a situation called "imperfect self-defense" is deemed to be voluntary manslaughter. "Imperfect self-defense" occurs when a person kills another person in the actual but unreasonable belief in the necessity to defend against imminent peril to life. Similarly, a homicide committed with malice aforethought but in a situation called a "sudden quarrel or heat of passion" is deemed to be voluntary manslaughter. The "sudden quarrel or heat of passion" which provokes the person who kills must be of the character and degree as naturally would arouse the mind of a reasonable person in the same circumstances to act rashly and without deliberation in order for a homicide committed with malice aforethought to be reduced to voluntary manslaughter.

Penal Code section 835a states that "any peace officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable force to effect the arrest, to prevent escape or to overcome resistance." In addition, Penal Code section 834a requires that if a person has either actual or constructive 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 Criminal Jury Instructions as written by the Judicial Council of California are referred to as CALCRIM instructions. CALCRIM 505 provides that a person who reasonably believes that he/she is in imminent danger of being killed or suffering great bodily injury is permitted to defend himself/herself from attack, if as a reasonable person, he/she had ground for believing and does believe that death or great bodily injury is about to be inflicted upon him/her or upon another person. In doing so, such person may use all force and means which he/she believes to be reasonably necessary and which would appear to a reasonable person, in the same or similar circumstances, to be necessary to prevent the death or injury which appears to be imminent.

The law as stated in CALCRIM 505 and in well-settled court opinions 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 death or great 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.) In evaluating the reasonableness of a person's actions in response to perceived danger, one must take into account all the circumstances known to that person, including any previous acts of violence or threatened violence committed by the person perceived to be dangerous. (*People v. Pena* (1984) 151 Cal.App.3d 462, 475). Furthermore, in the seminal case of *Graham v. Conner* (1989) 490 U.S. 386, the United States Supreme Court held that an officer's right to use his weapon is to be analyzed under the Fourth Amendment's "objective reasonableness" standard. The High Court further opined that the "calculus of reasonableness 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."

The United States Supreme Court's analysis and teachings in *Graham* are very much applicable to the circumstances surrounding Officer Martin's interactions with Berrier.

ANALYSIS

The available evidence establishes that, before Officer Martin discharged his weapon, Berrier pulled a gun out from his waistband. Officer Martin stated that he saw Berrier pull out a gun, and Officer Wersching in the helicopter above stated that he saw Berrier pull a black object from his waistband area. Additionally, Berrier's female companion told police that Berrier had earlier mentioned committing "suicide by cop."

As the California Supreme Court held in a recent case, it is well settled that "unlike private citizens, police officers act under color of law to protect the public interest. They are charged with acting affirmatively and using force as part of their duties, because the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effectuate it. Police officers are, in short, not similarly situated to the ordinary battery defendant and need not be treated the same. In these cases, then, the defendant police officer is in the exercise of the privilege of protecting the public peace and order [and] he is entitled to the even greater use of force than might be in the same circumstances required for self-defense." (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 527.)

In analyzing the conduct in this case, one of the questions to be asked is similar to what the Supreme Court observed in *Brown*: “The question is whether a peace officer's actions were objectively reasonable based on the facts and circumstances confronting the peace officer. The test is highly deferential to the police officer's need to protect himself and others.” (*Ibid.* at p. 527.) Furthermore, the Supreme Court held 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. The question is whether the officers’ actions are “objectively reasonable” in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. In calculating whether the amount of force was excessive, a trier of fact must recognize that peace officers are often forced to make split-second judgments, in tense circumstances, concerning the amount of force required.” (*Ibid.* at pp. 527-528.)

In the present case, it is well settled that, in evaluating Officer Martin's conduct, “we must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes ‘reasonable’ action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.” (*Brown v. Ransweiler* (2009) 171 Cal. App. 4th 516, 528.) The reality that Officer Martin was facing included the need to make a split-second decision when confronted with a gun and the possibility of being fired at. Simply stated, the law allows police officers to use deadly force when they reasonably believe that someone is trying to shoot them. Officer Martin was acting in reasonable reliance on the following background information about Berrier:

- He had earlier threatened the owner of the Huntington Beach restaurant with a gun;
- He was in possession of a gun and had removed it from his waistband.

This information, coupled with Berrier's brisk sidestepping while facing Officer Martin's patrol car, led Officer Martin to reasonably believe that Berrier was going to fire his weapon.

Where potential danger, 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 evidence collected by OCSD and presented to us supports the conclusion that the armed suspect in close proximity to Officer Martin engaged in suspicious behavior with an apparent firearm and that such conduct reasonably triggered Officer Martin's lawful use of deadly force in self-defense.

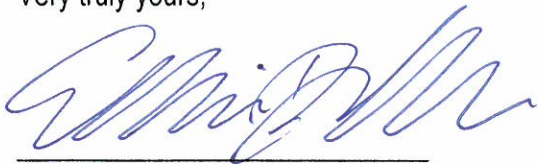
In order for Officer Martin to be justly and lawfully charged and convicted with a crime in this incident – whether it be murder or manslaughter – it is the prosecution's burden to prove beyond a reasonable doubt that Officer Martin did not act in reasonable and justifiable self defense when he shot at Berrier. As the evidence and above legal analysis indicates, the prosecution would be unable to carry this burden in a potential murder or voluntary manslaughter charge against Officer Martin.

CONCLUSION

Based on all the evidence provided to the OCDA by OCSD, and based on the entirety of the facts contained in all the available reports we reviewed, and pursuant to the applicable legal principles, it is our legal opinion that the evidence does not support a finding of criminal culpability on the part of Officer Martin. To the contrary, all the available evidence points to the conclusion that Officer Martin was justified in shooting Berrier.

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

Very truly yours,



EBRAHIM BAYTIEH

Senior Deputy District Attorney

Assistant Head of Court - Homicide Unit