



OFFICE OF THE

DISTRICT ATTORNEY

ORANGE COUNTY, CALIFORNIA

TONY RACKAUCKAS, DISTRICT ATTORNEY

JIM TANIZAKI
SENIOR ASSISTANT D.A.
VERTICAL PROSECUTIONS/
VIOLENT CRIMES

MARY ANNE MCCAULEY
SENIOR ASSISTANT D.A.
BRANCH COURT OPERATIONS

JOSEPH D'AGOSTINO
SENIOR ASSISTANT D.A.
GENERAL FELONIES/
ECONOMIC CRIMES

MICHAEL LUBINSKI
SENIOR ASSISTANT D.A.
SPECIAL PROJECTS

CRAIG HUNTER
CHIEF
BUREAU OF INVESTIGATION

LISA BOHAN - JOHNSTON
DIRECTOR
ADMINISTRATIVE SERVICES

SUSAN KANG SCHROEDER
CHIEF OF STAFF

May 22, 2014

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

RE: Officer Involved Shooting Incident August 3, 2013
Fatal Incident Involving Eric Marquez
Huntington Beach Police Department Case # 13-011488
Orange County Crime Laboratory Case # FR 13-50887
Orange County Coroner's Office Case # 13-03157-MT
Orange County Sheriff's Department Case # 13-150548

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 Aug. 3, 2013, shooting incident by Officer Jason Heilman from the Huntington Beach Police Department (HBPD), which caused the death of Eric Marquez. 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 Heilman, as it relates to the death of Marquez. The OCDA will not be addressing policy, training, tactics, or civil liability issues.

FACTS

Summary

The following summary of events is based on the totality of the available evidence, but primarily based on Officer Heilman's statements to OCSD investigators:

On Aug. 3, 2013, at approximately 7:45 a.m., HBPD Officer Heilman was driving on Silver Lane ("Silver") and observed two Hispanic males on the south sidewalk of Glencoe Avenue ("Glencoe") walking away from a parked pickup truck. One suspect was wearing light-colored clothing, later identified as Marquez, and the other wore dark-colored clothing. Officer Heilman noticed that the right tail light of the truck was broken and covered with a piece of tape.

Officer Heilman decided to conduct a "consensual encounter" with the subjects to find out "what they were up to." Officer Heilman pulled up next to the subjects and spoke with Marquez. Officer Heilman asked the subjects where they were going and they said that they were visiting family who lived on Glencoe. Officer Heilman asked Marquez if he was on parole or probation and he said, "No." Suspecting that Marquez was a gang member, Officer Heilman asked Marquez what neighborhood he was from (i.e., what gang he was from). According to Officer Heilman, the typical response is "I'm not a gang member," if in fact, the subject is not affiliated with a gang. Marquez stated that he was from Venice, and Officer Heilman clarified by asking him if he was from a specific Hispanic criminal street gang in the City of Venice. Marquez responded, "No, I'm just from L.A., from Venice."

Officer Heilman exited his vehicle and asked the subjects about the broken tail light on the truck. Officer Heilman also inquired about who owned the truck. Marquez claimed that he owned the truck, and he offered the keys to Officer Heilman, who declined. Officer Heilman told both subjects to sit on the curb and they complied.

As Officer Heilman prepared to broadcast his activity over the police radio, he noticed that Marquez's hands were concealed by a black coat. Officer Heilman was concerned because he thought that Marquez "should have known to keep his hands visible." Officer Heilman moved his right hand near his gun and instructed Marquez to show his hands. Marquez began to stand and Officer Heilman told him that he did not need to stand, but that he needed to show his hands. Marquez continued to stand, and then he started running away.

Marquez ran eastbound along the south sidewalk of Glencoe and Officer Heilman "initiated a foot pursuit." Marquez was not running at a full sprint because he was "fiddling" with something in his jacket. Officer Heilman followed Marquez and told him to get on the ground, but he did not comply. Marquez stopped a few feet from the sidewalk and "spun around," facing Officer Heilman. Marquez was holding an object, later identified as a "Ruger Security-Six Revolver," covered by a white handkerchief. Marquez brought both of his arms up "like he was bringing up a gun." Although the object in Marquez's hands was covered by the handkerchief, Officer Heilman said that he knew it was a gun because of the way Marquez pointed it at him.

Based on Officer Heilman's experience, he was aware that gang members commonly place guns in socks or wrap them in handkerchiefs. According to Officer Heilman, Marquez "comes up with this thing like it is a gun. That's when I draw, and he's looking dead at me . . . pointing at me – both hands together. I draw my gun and I shoot at him." Officer Heilman recalls firing a couple of rounds at Marquez from approximately eight to 10 feet away. Officer Heilman was not sure whether he hit Marquez, as Marquez did not act like he had been shot; rather, he continued to run eastbound on Glencoe.

While Marquez ran, he turned toward Officer Heilman with his gun and fired several rounds at the officer. Officer Heilman returned fire in Marquez's direction. Marquez ran to the north sidewalk of Glencoe and then doubled back and headed west toward the south side of the street. Marquez periodically turned around to "crank off a few more rounds," and then continued running. Marquez ran to the south sidewalk of Glencoe toward Silver, where his truck was parked. Officer Heilman fired several rounds at Marquez from the middle of Glencoe, and he did not know if Marquez had been hit. Officer Heilman ran westbound on Glencoe and paralleled Marquez's movement.

Officer Heilman and Marquez continued past Marquez's truck and Marquez's unidentified companion in dark-colored clothing approached Officer Heilman with his hands up. The subject asked several times for Officer Heilman to stop and Officer Heilman told him to "get out of the way." Officer Heilman was able to broadcast, "Shots fired. Glencoe and Silver."

Officer Heilman continued to run west on Glencoe past Marquez's truck and then southeast on Silver, near the sidewalk. Marquez ran into the middle of Silver, stopped, and turned toward Officer Heilman. Marquez raised his gun with both hands and stared at him. Officer Heilman thought that he might get shot because Marquez was "taking his time and aiming." Officer Heilman stopped advancing toward Marquez and began running laterally across Silver. Marquez shot at Officer Heilman and Officer Heilman returned fire as he ran. Officer Heilman heard Marquez shout, "Ouch," and saw blood on Marquez's left torso area.

Officer Heilman reached the west side of Silver and took cover behind a parked truck. He heard another shot fired from the middle of Silver. Officer Heilman peaked around the truck's tailgate (driver's side) and saw Marquez walking on the east side of Silver. Officer Heilman aimed his weapon at Marquez and fired eight to 10 rounds. Marquez reached one of the vehicles on the east side of the road when he was struck by one or more bullets. He dropped to the ground and remained motionless.

Officer Heilman ceased fire and put information out over the radio about his location and the description of the second subject. Officer Heilman looked toward Marquez's vehicle to locate the second subject, but he was no longer present. Sergeant David Derezynski arrived on the scene approximately 30 to 45 seconds after Marquez collapsed. Sergeant Derezynski asked Officer Heilman to coordinate a perimeter search for the second subject. Officer Heilman noticed a female Hispanic who was yelling hysterically, "You shot my son!" She ran directly toward Marquez and Officer Heilman intercepted her by grabbing her in a "bear hug." Officer Heilman held onto the female until Officer Jennifer Marlatt arrived on the scene and assisted him in restraining her.

At approximately 10:30 a.m., forensic specialists and Orange County Crime Laboratory personnel arrived on the scene to document and collect potential evidence. The crime scene investigators noted "numerous" bullet casings on Glencoe and Silver. In addition, bullet holes or strikes were found at the following locations:

- The north exterior wall of 7762 Glencoe. A bullet was removed from an interior wall of the residence.
- A screen/window of 7772 Glencoe (Apt. A). A bullet was removed from the refrigerator.
- The wood gate enclosing a dumpster in driveway between 7762 and 7772 Glencoe. A bullet was recovered from the ground near the dumpster.
- The rear window of a Toyota Camry parked in the driveway of 7743 Silver.
- The upper-right eave of the garage door of 7743 Silver.
- A front window of 16391 Silver. The residence was on the west side of Silver and the window faced an easterly direction. The bullet (non-hollow point) faced a northerly direction when embedded in the residence.
- A metal security door frame at 7752 Glencoe. The residence was located on the south side of Glencoe and the front door faced a northerly direction.

Post-Incident, Voluntary Interviews with Civilian Witnesses

The statements of John Doe 1, John Doe 2, and Jane Doe are consistent with the facts stated above.

Statement of John Doe 1

John Doe 1 gave a voluntary statement on Aug. 3, 2013. Earlier that day, John Doe 1 was in his residence on Silver when he heard "pops," which he recognized as gunshots. John Doe 1 exited his home, stood in his driveway, and saw a male subject in a "seated position," facing north on Silver. John Doe 1 noticed that the subject was holding a gun and firing it in a northbound direction. John Doe 1 believed that the subject fired between two to three rounds. John Doe 1 could not see the subject's target; however, he did see a police officer approach the subject from the north and order him to "stay down." The officer then instructed John Doe 1 to return to his residence.

Statement of John Doe 2

John Doe 2 gave a voluntary statement on Aug. 3, 2013. Earlier that day, John Doe 2 was in his bedroom when he heard approximately three "pops," which he recognized as gunshots. John Doe 2 looked outside and saw a male Hispanic subject running across Silver, "looking back," firing a couple of rounds northbound towards a uniformed police officer. John Doe 2 watched the officer run and position himself behind John Doe 2's truck and fire a "few rounds." John Doe 2 stated that the subject and the officer "kind of did a back and forth thing, dodging each other."

The officer was behind John Doe 2's truck and the subject was in the middle of Silver. The officer went to the left of the truck, fired a couple of rounds, and "dropped" the subject. John Doe 2 estimated that the subject "got maybe four shots off," and that the officer shot "a clip of nine to ten rounds." John Doe 2 confirmed that the body lying in the street, Marquez, was the subject who shot at the officer.

Statement of Jane Doe

Jane Doe gave a voluntary statement on Aug. 3, 2013. Earlier that day, Jane Doe was standing on her driveway, looking toward Glencoe, when she saw a male subject running in the middle of the street toward Beach Boulevard. Jane Doe described the subject as a male Hispanic with short dark hair and checkered shirt. Jane Doe observed the subject stop, turn around, and shoot six or seven rounds toward Silver. Jane Doe noted that the subject's gun appeared to be covered by a "white shirt" or "something white." The subject stopped shooting and began running back toward Silver.

AUTOPSY

An autopsy of Marquez's body was conducted on Aug. 7, 2013, by Dr. Etol Davenport, a Forensic Pathologist with the Orange County Coroner's Office. Dr. Davenport noted apparent gunshot wounds to Marquez's head, left shoulder, chest, left hand, left forearm, left leg, and left buttock. Dr. Davenport determined Marquez's cause of death to be multiple gunshot wounds.

TOXICOLOGY REPORT

A toxicology report of Marquez's post-mortem blood revealed traces of amphetamine and methamphetamine.

WEAPONS EXAMINATION

Officer Heilman's Glock Model 17 pistol, 9mm Luger caliber, #NLK785

Officer Heilman's Glock pistol was test-fired and operated without malfunction. 23 cartridge cases from the scene were determined to have been fired by the pistol.

Marquez's Ruger Model Security-Six Revolver, .38 Special caliber, #150-62606

Marquez's Ruger revolver was test-fired and operated with malfunction. The trigger spring was broken, requiring a manual reset of the trigger after each shot. The broken trigger spring and failure of the trigger to reset may have prevented the revolver from cocking for single action firing, and may have caused the revolver to fire without trigger involvement if the hammer was pulled back and released.

The front face of the cylinder of the revolver had three smoke rings that correspond with the three chambers containing a fired cartridge case. Smoke rings were not observed on the three chambers that each contained an unfired cartridge. One bullet from the scene was determined to have been fired from the revolver.

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.

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. (*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 Heilman's interactions with Marquez.

ANALYSIS

The available evidence establishes that, before Officer Heilman discharged his weapon, Marquez engaged in several acts indicating that he had a gun. Initially, Marquez concealed his hands beneath his coat. Then, when asked to reveal his hands, Marquez fled on foot. While running, Marquez kept "fiddling" with something in his jacket. Finally, Marquez "spun around" toward Officer Heilman, raised a gun covered by a white handkerchief, and took a "shooting stance."

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 [] 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 Heilman'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 Heilman 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 Heilman was acting in reasonable reliance on the following events:

- Marquez's appearance indicated gang affiliation.
- Marquez concealed his hands under his coat and did not comply with Officer Heilman's requests to

make his hands visible.

- Marquez fled on foot before Officer Heilman was able to conduct a weapons search.
- Marquez was "fiddling" with something in his coat as he ran from Officer Heilman.
- Marquez "spun around" toward Officer Heilman, raised an object covered in a handkerchief, and took a "shooting stance."

This information, coupled with Officer Heilman's knowledge that gang members often conceal guns in handkerchiefs, led Officer Heilman to reasonably believe that Marquez was in possession of a firearm and intended to use it. Officer Heilman also noted that most of the suspects he has contacted previously have "thrown their guns away" when running. Marquez, on the other hand, made a concerted effort to gain control of his gun.

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 the OCDA supports the conclusion that the armed suspect in close proximity to Officer Heilman engaged in suspicious behavior with an apparent firearm, and that such conduct reasonably triggered Officer Heilman's lawful use of deadly force in self-defense.

In order for Officer Heilman 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 Heilman did not act in reasonable and justifiable self defense when he shot at Marquez. As the evidence and above legal analysis indicate, the prosecution would be unable to carry this burden in a potential murder or voluntary manslaughter charge against Officer Heilman.

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 Heilman. To the contrary, all the available evidence points to the conclusion that Officer Heilman was justified in shooting Marquez.

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