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DISTRICT ATTORNEY

ORANGE COUNTY, CALIFORNIA

TONY RACKAUCKAS, DISTRICT ATTORNEY

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VIOLENT CRIMES

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BUREAU OF INVESTIGATION

LISA BOHAN - JOHNSTON
DIRECTOR
ADMINISTRATIVE SERVICES

SUSAN KANG SCHROEDER
CHIEF OF STAFF

July 2, 2013

Chief David Valentin
Santa Ana Unified School District Police Department
1601 E. Chestnut Ave.
Santa Ana, CA 92701

Re: Officer Involved Shooting on January 11, 2011
Non-Fatal Incident involving Gabriel Giovanni Hernandez
District Attorney Case # 11-001
District Attorney Investigations Case # 11-001
Santa Ana Police Department DR # 11-01036
Santa Ana Unified School District Police Department DR # 11-43
Orange County Crime Laboratory Case # FR 11-40463

Dear Chief Valentin,

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 Unified School District Police Department (SAUSDPD) Officer Rick Lopez. Gabriel Giovanni Hernandez, 19, survived his injuries. The incident occurred in the City of Santa Ana on Jan. 11, 2011.

OVERVIEW

This letter contains a description of the scope of and the legal conclusions resulting from the OCDA's investigation of the non-fatal officer-involved shooting of Hernandez. The letter includes an overview of the OCDA's investigative methodology and procedures employed, as well as a description of the relevant evidence examined, witnesses interviewed, factual findings, and legal principles applied in analyzing the incident and determining whether there was criminal culpability on the part of the SAUSDPD 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 Jan. 11, 2011, Investigators from the OCDA Special Assignment Unit (OCDASAU) responded to this incident. OCDASAU Investigators interviewed 66 witnesses and obtained and reviewed the following: Santa Ana Police Department reports; Orange County Fire Authority incident reports; Orange County Sheriff's Department incident reports; Orange County Crime Laboratory (OCCL) reports including toxicology and firearms examination reports; Hernandez's prior criminal record; and medical records and photographs related to the injuries sustained by Hernandez. All officers involved gave voluntary statements.

REPLY TO: ORANGE COUNTY DISTRICT ATTORNEY'S OFFICE

WEB PAGE: www.OrangeCountyDA.com

☒ MAIN OFFICE
401 CIVIC CENTER DR. W
P.O. BOX 808
SANTA ANA, CA 92701
(714) 834-3600

☐ NORTH OFFICE
1275 N. BERKELEY AVE.
FULLERTON, CA 92631
(714) 773-4480

☐ WEST OFFICE
8141 13TH STREET
WESTMINSTER, CA 92683
(714) 896-7261

☐ SOUTH OFFICE
30143 CROWN VALLEY PKWY.
LAGUNA NIGUEL, CA 92677
(949) 249-5026

☐ HARBOR OFFICE
4601 JAMBOREE RD.
NEWPORT BEACH, CA 92660
(949) 476-4650

☐ JUVENILE OFFICE
341 CITY DRIVE SOUTH
ORANGE, CA 92668
(714) 935-7624

☐ CENTRAL OFFICE
401 CIVIC CENTER DR. W
P.O. BOX 808
SANTA ANA, CA 92701
(714) 834-3952

The OCDA conducted an independent and thorough investigation of the facts and circumstances of this incident and has impartially reviewed all evidence and legal standards available. The scope and findings of this review are expressly limited to determining whether any criminal conduct occurred on the part of SAUSD PD officers or personnel, specifically Officer Lopez. The OCDA will not be addressing herein 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 the OCCL processes all physical evidence related to the investigation.

When the OCDASAU Investigator has concluded the investigation, the file is turned over to a veteran deputy district attorney for legal review. Deputy district attorneys from the Homicide or Gang Units review fatal, officer-involved shootings and custodial death cases and determine whether criminal charges are appropriate. Prosecutors 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.

FACTUAL SUMMARY

On Jan. 11, 2011, at around 10:11 a.m., Officers Lopez and Jean-Pierre Nadeau were monitoring and enforcing traffic laws in the area of North Fairview Street and Civic Center Drive West due to concerns and complaints from parents and teachers about traffic violations in that area. Community Day High School, Spurgeon Intermediate School, and the school district's warehouses are all in the vicinity of the intersection the officers were monitoring. Traffic safety in and around school district property is one of the responsibilities school district police officers have in addition to investigating crimes committed on campuses and providing general campus safety. Officer Lopez has approximately 26 years of law enforcement experience with various agencies. Officer Nadeau has approximately 21 years of law enforcement experience.

On this date, Officers Lopez and Nadeau were in full navy blue police uniforms with patches on the sleeves and wearing their duty belts. Officer Nadeau is a motorcycle police officer and Officer Lopez was driving a marked police vehicle. Both parked their vehicles to the side of the road in a driveway in full view of passing motorists. Both officers exited their vehicles and were standing on the side of the road.

According to Officer Lopez, he was observing the intersection at North Fairview Street and Civic Center Drive West when he saw a dark blue Hyundai Azera in the number three lane, driven by Hernandez, violate California Vehicle Code section 22101(d), failure to negotiate a mandatory right turn. Hernandez was in a right-turn-only lane, which turns into the school district parking lot, but instead of turning right, he drove straight through the intersection from the right-turn-only lane. Both Officers Lopez and Nadeau walked into the southbound lanes of traffic and motioned Hernandez to stop his vehicle along the west curb in order to issue him a citation for the traffic violation.

An unrelated female driver saw the officers and stopped in the number two lane. Hernandez slowed, pulled in partially behind the female driver's car, and stopped. Officer Lopez motioned for the female driver to continue, which she did, and motioned with his hands for Hernandez to pull his car to the curb. Hernandez made eye contact with Officer Lopez and pointed to himself, apparently confirming that the officer was referring to him, and then turned his right blinker on. Hernandez had his windows rolled up.

Hernandez started to slowly move forward, straightening out his vehicle as if he was going to comply with Officer Lopez's commands. At approximately 20 to 30 feet away, Hernandez accelerated rapidly toward Officer Lopez. Officer Lopez described Hernandez as "gunn[ing]" and "floor[ing]" his car.

Officer Nadeau was in front and to the left of Officer Lopez, closer to Hernandez's vehicle. Officer Nadeau was fearful of being run over by Hernandez and jumped out of the way of the oncoming car toward his motorcycle. Officer Lopez, fearful of being run over by Hernandez, took out his duty weapon and fired two quick rounds at Hernandez, who made no effort to slow, stop, or swerve to avoid Officer Lopez.

Officer Lopez moved as quickly as he could out of the way toward the direction of his patrol car while firing two more rounds at the car as it passed. Officer Lopez stated that, if he had not moved out of the way of the oncoming car, he would have been hit. Officer Lopez stated that the driver was "aiming to hit me." Officer Lopez said that he ran as quickly as he could out of the way while simultaneously firing at the vehicle. Officer Lopez was not aware at the time if any of the rounds had hit Hernandez.

Officer Lopez was unaware of Officer Nadeau's location at that time, as he said he had tunnel vision looking at the car coming toward him. Officer Lopez tried but was unable to get the license plate number of the vehicle Hernandez was driving. Officer Lopez ran back to his vehicle to pursue Hernandez, but Hernandez's was out of sight. This was the first time in Officer Lopez's 26 years of law enforcement that he had ever shot at a person.

Officer Lopez's account of what happened was corroborated by Officer Nadeau, who gave essentially the same version of events in a separate interview. Officer Nadeau initially was talking with Officer Lopez with his back toward the oncoming traffic when Officer Lopez alerted him to the traffic violation that had just occurred. Officer Nadeau then turned around to see Hernandez going through the intersection in the number three lane instead of making the mandatory right turn. At that point, Officer Nadeau now had his back turned to Officer Lopez and was facing Hernandez. In addition to Officer Lopez signaling to Hernandez to pull his car over, Officer Nadeau was signaling with his fingers and pointing at Hernandez to pull over.

Officer Nadeau initially thought Hernandez was complying with the directives because he made eye contact with Officer Nadeau, put his right blinker on, and was traveling at a slow rate of speed. Officer Nadeau stated that when Hernandez was about 10 to 12 feet away from Officer Nadeau, however, he heard the engine rev and Hernandez "gunned" the engine toward Officer Nadeau, who jumped out of the way of the vehicle so that he would not be hit.

Officer Nadeau estimated that Officer Lopez was between five to 15 feet behind him, but could not be sure of his exact location, as he had his back turned to Officer Lopez. Officer Nadeau said that almost simultaneously to the car passing him, he heard three to four gun shots. At first Officer Nadeau did not know if the shots were coming from the car that tried to run him over. He looked in the direction of Officer Lopez, saw him with his gun out, and realized that Officer Lopez had fired his weapon. Officer Nadeau saw Officer Lopez drive off in his patrol vehicle to chase Hernandez. By the time Officer Nadeau got his helmet on and started his motorcycle, Officer Lopez had broadcast that he lost sight of the suspect's vehicle.

Santa Ana Police Officers Geraldo Verdugo and Paul McClasky were in an undercover vehicle stopped at the red traffic light at North Fairview at 5th Street. As the light changed to green, Officer Verdugo observed a dark colored vehicle with a paper plate affixed to the rear drive southbound on North Fairview Street at a high rate of speed. Within a few seconds, Officer Verdugo observed Officer Lopez in his marked police vehicle with the lights and sirens activated pursuing the dark colored vehicle. Officer Lopez stopped at a red light at 1st Street and Officer Verdugo pulled up and asked him if he needed assistance. Officer Lopez told Officer Verdugo that he was chasing a vehicle that tried to run over SAUSDPD officers. Officer Verdugo and Officer McClasky attempted to locate the vehicle but were unsuccessful.

Hernandez drove to an acquaintance's home in the neighborhood where Hernandez's grandmother used to live in Santa Ana. He knocked at the security screen door and asked for his acquaintance, John Doe. John Doe's relative came to the door and told Hernandez that John Doe was sleeping. Hernandez then asked to enter the residence to wash his hands because they had blood on them. When John Doe's relative asked Hernandez what happened, Hernandez told the relative that he had been involved in a fight. John Doe's relative told Hernandez to go someplace else.

Five minutes later, Hernandez returned to the front door and again asked for John Doe. Hernandez was sitting on the front porch and wrapping his arm up with something. John Doe's relative observed an apparent gunshot wound to Hernandez's arm, but does not recall if he had said that he had been shot. Police officers arrived at the house and Hernandez tried to hide behind some shrubbery, but was located and detained by police.

Another resident of a house saw Hernandez through a bedroom window knocking on John Doe's door. This resident heard Hernandez ask to wash his hands and heard Hernandez state that he had been shot by the police. The resident saw the gunshot wound to Hernandez's upper arm area and called 911. During the 911 call, this resident told the police that Hernandez was hiding in the bushes. The resident then saw the police apprehend Hernandez.

The police located the vehicle Hernandez was driving, a 2007 Hyundai Azera, a few blocks from where he was apprehended; approximately three-tenths of a mile away. The vehicle had paper license plates. A records check of the vehicle revealed that it had been stolen on Jan. 5, 2011, from a home in Fountain Valley when the resident left the car running in his garage and briefly went back inside his home to retrieve something. When the vehicle was taken, it had both front and rear license plates. The vehicle had bullet-hole damage in the rear passenger door and quarter panel as well as a shattered front passenger window.

Hernandez was interviewed by an OCDA Investigator and Santa Ana Police Detective Gus Moroyoqui at the University of California, Irvine (UCI) Medical Center on Jan. 11, 2011, at 11:55 a.m. Detective Moroyoqui read Hernandez his Miranda rights, and Hernandez agreed to speak about the incident. Hernandez admitted to driving the vehicle. Hernandez stated that he did not know the vehicle was stolen. Hernandez said that a girl named "Sarah" with an unknown last name, whom he had known for two weeks and whom he did not know how to contact, lent him the car the night prior because Hernandez is homeless.

In regard to the shooting, Hernandez said the police were stopping traffic near Spurgeon Intermediate School. He said he saw two officers directing traffic with their hands. He admitted he saw the police, but he panicked because he did not have a license and thought the car would be towed by police. He drove around the police officers, following the car in front of him, and when he did, they shot at him twice. Hernandez said he was driving approximately 10 to 15 miles per hour and had no idea why the police shot him. He said he was driving slowly and the shooting was unprovoked. He denied ever speeding up or driving toward the officers.

Hernandez said he initially did not know he had been shot. He said he felt pain in his arm and drove into a nearby housing tract because he felt pain in his arm. He saw two bullet holes in his right arm. He started to walk to his grandmother's house off of Harbor Boulevard, but it was too far to walk. Hernandez did not want to drive the car to his grandmother's house because he did not want to scare her with the bullet holes in the car. Hernandez said he had used marijuana the night prior and methamphetamine approximately two to three weeks prior.

According to the treating physician for Hernandez's injuries, Hernandez had a through-and-through gunshot wound to his right upper arm. Hernandez did not have any broken bones. Hernandez was conscious and able to answer questions when he was brought into the hospital. When medical staff asked Hernandez what happened to him, he told them he tried to drive around a police barrier and the police shot him. Hernandez told medical staff the police tried to shoot him in the head.

EVIDENCE ANALYSIS

OCCL came to the crime scene to look for and process evidence. Officer Lopez's firearm was collected. It had a 13-round capacity with four bullets missing. Four bullet shell casings were located at the scene in the number two and three lanes of Fairview Street. Three bullets were recovered from the vehicle Hernandez was driving. An apparent bullet strike mark was in the hood of the vehicle and bullet holes were in the right rear door, the right rear fender, the right front window, and on the interior side of the driver's door. In addition, a swab of apparent blood was taken from the driver's seat back.

An OCCL Forensic Scientist conducted a firearms examination comparing the shell casings located at the scene to Officer Lopez's Glock duty firearm. He concluded that the shell casings came from Officer Lopez's Glock firearm. He was unable to say conclusively whether or not the three bullets located in the vehicle were from Officer Lopez's gun. He did conclude, however, that they were of the same type and caliber and had some shared markings, just not enough to say conclusively they were from Officer Lopez's gun. Another Forensic Scientist was unable to put rods in the bullet holes of the vehicle to determine the bullet trajectory.

The apparent blood on the driver's seat and the bullet in the driver's door was analyzed for DNA and compared to a voluntary buccal swab of Hernandez. It was concluded that the DNA profile on the apparent blood on the driver's seat, the bullet in the driver's door, and Hernandez's buccal swab were the same. The frequency of choosing a random individual with that same profile would be one in one trillion unrelated individuals.

Blood samples were taken from both Officer Lopez and Officer Nadeau, as well as Hernandez. Alcohol examinations were conducted for the officers and found to be negative. Hernandez's blood sample was tested for illegal narcotics and tested negative.

DISPOSITION OF CRIMINAL CASE AGAINST HERNANDEZ

On Jan. 12, 2011, the OCDA charged Hernandez with two felony criminal offenses in Orange County Case # 11CF0132. Hernandez was charged with: one felony count of Penal Code (PC) 245(c), Assault with a Deadly Weapon, a motor vehicle, and one felony count of Vehicle Code (VC) section 10851(a), Unlawful Driving of a Vehicle. He pleaded guilty to the felony charges on June 27, 2012, and was sentenced to three years in state prison on this case.

Hernandez signed under penalty of perjury the following factual basis for his plea:

"In Orange County, California, on 1/11/11, I did willfully and unlawfully commit an assault with a deadly weapon (a motor vehicle – specifically a 2007 Hyundai Azera with CA license plate # 6BKU307) upon the persons of Santa Ana Unified School Police Officers Lopez and Nadeau, knowing they were police officers engaged in the performance of

their duties. At the time I committed the assault, I was unlawfully driving the aforementioned Hyundai Azera which was not my own without the consent of the owner and with the intent to temporarily and permanently deprive the owner of their possession of the vehicle.”

Hernandez also pleaded guilty in another felony case on June 27, 2012, in Orange County Case # 12CF1218 for various charges including another felony violation of VC10851(a), Unlawful Driving of a Vehicle, which he committed on April 24, 2012, while out on bail in then-pending Case # 11CF0132. He also pleaded guilty to a felony violation of PC1320.5, Failure to Appear, for failing to appear in court on March 27, 2012, in Case # 11CF0132. He was sentenced to 16 months in state prison consecutive to Case # 11CF0132. These other offenses demonstrate Hernandez’s total disregard for the law, and lend credibility to Officer Lopez’s and Officer Nadeau’s version of events.

STANDARD LEGAL PRINCIPLES IN OFFICER-INVOLVED SHOOTING CASES

This review was conducted pursuant to the joint protocol between this office and all Orange County law enforcement agencies calling upon the District Attorney to conduct an independent assessment of the circumstances surrounding the use of deadly force. This review does not examine such issues as compliance with the policies and procedures of any law enforcement agency, ways to improve training or tactics, or any issues related to civil liability. Accordingly, such a review should not be interpreted as expressing an opinion on these matters.

Under California law, peace officers may use deadly force to protect themselves from the threat of death or great bodily harm. Penal Code §835a allows any police officer who has reasonable cause to believe that the person to be arrested has committed a public offense to use reasonable force to effect the arrest, to prevent escape, or overcome resistance. That section states the officer need not retreat or end his effort to effectuate an arrest because of that person’s resistance.

In accordance with Penal Code §196, peace officers may use deadly force in the course of their duties under circumstances not available to members of the general public. We are mindful, however, that certain limits on the use of deadly force apply to peace officers. The U.S. Ninth Circuit Court of Appeals, in the case of Scott v. Henrich (9th Cir. 1994) 39 F.3d 912, delineated those circumstances under which deadly force may be used:

“‘[P]olice may use only such force as is objectively reasonable under the circumstances. An officer’s use of deadly force is reasonable only if ‘the officer has probable cause to believe that the suspect poses a significant threat of death or serious injury to the officer or others.’ All determinations of unreasonable force ‘must embody allowance for the fact that the police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.’” [Citations omitted.]

This statement of law is also iterated in the United States Supreme Court case of Graham v. Conner (1989), 490 U.S. 386.

The California 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 detailed in CALCRIM 505 and in well settled cases 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.]

LEGAL ANALYSIS

In this case, there is no question that Officer Lopez shot at the vehicle Hernandez was driving based on Officer Lopez's statements, the firearms analysis of the casing at the scene, and the bullets recovered from the vehicle. There is no question that Hernandez was driving the vehicle that Officer Lopez shot at based on Hernandez's statements, his injuries, and Hernandez's DNA inside of the vehicle and on the bullet recovered from the vehicle. The exact location of Officer Lopez relative to the vehicle at the time he shot cannot be verified, as the trajectory of the bullets fired into the vehicle could not be determined. Based on the interviews of Officers Lopez and Nadeau, however, it would appear that the vehicle was fired upon nearly simultaneously to the vehicle advancing toward and passing Officer Lopez.

Officer Lopez had the right to defend himself and the life of Officer Nadeau, who was in closer proximity to the vehicle Hernandez was driving. Officer Nadeau had to jump out of the way of the vehicle to avoid being struck. This occurred in front of Officer Lopez, who saw the vehicle accelerating rapidly toward him and making no effort to slow or swerve away. Officer Lopez reasonably believed that he was in imminent harm of being run over by the vehicle, and ran out of the way as quickly as he could while simultaneously removing and firing his gun at Hernandez.

Officer Lopez is a 26-year law enforcement veteran who reportedly has never before shot at a suspect. Officer Lopez's account of what occurred is corroborated by Officer Nadeau, who was separately interviewed out of the presence of Officer Lopez. Both stated that Hernandez "gunned" the engine before driving directly toward the officers. Hernandez's actions appeared deliberate, as he had put his right hand blinker on, had made eye contact with the officers previously, and confirmed they were referring to him by pointing his finger at himself while looking at them. Hernandez straightened out his vehicle and accelerated rapidly toward the officers, who were standing in the street.

Hernandez's report that Officer Lopez shot at him two times for no reason does not ring true.

Hernandez made several incredulous claims, casting serious doubt on his credibility. Hernandez claimed that he did not know the car he was driving was stolen, but has no way of contacting the girl who loaned him the car. Hernandez's claim that a girl he barely knew for two weeks and did not know how to contact loaned him a 2007 Hyundai Azera is unlikely at best. Hernandez made one statement that he was driving around the officers, as other drivers were, at approximately 10 to 15 miles per hour, but then also said that he "panicked" because he did not have a license and thought the car would be towed, suggesting that Hernandez willfully did not comply with officer directives. It is more probable that Hernandez "panicked" because he knew the car he was driving was stolen and was driving faster than he admits due to "panicking." Also, if one adopts Hernandez's version of events, there appears to be no reason for officers to single out Hernandez over other drivers.

Hernandez left the car some distance away from the house where he eventually asks for aid. The fact that he left the car at a different location suggests he knew the car was stolen. Hernandez stated that he left the car because he intended to walk to his grandmother's house and did not want her to see the bullet holes in the car. This doesn't make sense, however, because Hernandez himself stated that his grandmother's house was too far to walk from where he left the car. If his intention was only to conceal the car from his grandmother, he would have parked somewhere much closer but still out of sight from his grandmother's home.

Hernandez also was knowingly driving on a suspended license, suggesting a disregard for the law. Furthermore, Hernandez knew he had been shot and needed medical care, but did not ask the residents at his acquaintance's home to call and get him any medical care. Instead, Hernandez hid in the bushes when the police arrived, suggesting a consciousness of guilt on Hernandez's behalf.

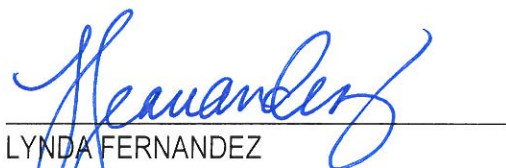
Based on all of the circumstances, Officer Lopez had probable cause to believe "that the suspect pose[d] a significant threat of death or serious injury to the officer or others." This determination is made with the allowance that Officer Lopez acted in a "tense, uncertain, and rapidly evolving situation." Based on a review of all available evidence, the conduct of the involved officer does not support a finding of criminal culpability, and supports a finding that Officer Lopez reasonably acted in self defense.

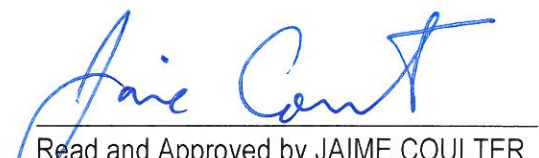
CONCLUSION

Based on all the evidence provided to and obtained by the OCDA, 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 there is insufficient evidence to prove beyond a reasonable doubt any criminal culpability on behalf of Officer Lopez on Jan. 11, 2011, when he shot Hernandez. The actions of the officer were reasonable in light of the situation confronting him.

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

Very truly yours,



LYNDA FERNANDEZ
Senior Deputy District Attorney
Special Prosecutions Unit

Read and Approved by JAIME COULTER
Assistant District Attorney, Special Prosecutions Unit