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October 8, 2013

Santa Ana Police Department
Chief of Police Carlos Rojas
60 Civic Center Plaza
Santa Ana, CA 92702

**Re: Officer Involved Shooting Incident on May 30, 2010
The Non-fatal shooting of Graham Islas
DA Case # SA 10-013
Santa Ana Police Department Case # 10-17419**

Dear Chief Rojas,

Please accept this letter detailing our Office's investigation and legal conclusion in connection with the above-listed incident during which Santa Ana Police Officer Nivaldo Alvarez shot 27 year-old Graham Lee Islas, who survived his injuries.

OVERVIEW

This letter contains a description of the scope of and the legal conclusions resulting from the OCDA's investigation of the May 30, 2010, non-fatal officer-involved shooting of Islas. 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 Santa Ana Police Department (SAPD) 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 May 30, 2010, Investigators from the OCDA Special Assignment Unit (OCDASAU) responded to this incident. OCDASAU Investigators interviewed more than 20 witnesses and obtained and reviewed the following: reports prepared by SAPD, Orange County Fire Authority (OCFA), and the Orange County Sheriff's Department (OCSd). We also obtained and reviewed audio and video recordings and dispatch and radio traffic recordings; Orange County Sheriff Crime Lab (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 Graham Islas; criminal history records related to Islas including prior criminal history records and prior incident reports; the

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personnel records of Officer Alvarez; and other relevant reports and materials including audio recordings of the conducted neighborhood canvass. All officers involved gave voluntary statements with the exception of Officer Alvarez, who declined to make a statement.

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 SAPD officers or personnel, specifically Officer Alvarez. The OCDA will not be addressing herein issues of policy, training, tactics or civil liability.

INVESTIGATIVE METHODOLOGY

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 investigators from the Unit and others units. Six Investigators are assigned to the OCDASAU on a full-time basis. Approximately 25 additional Investigators assigned to other units in the office are trained to assist when needed. On average, eight investigators respond to the incident within an hour of being called and perform a variety of investigative functions that include: witness interviews, canvass, crime scene processing and evidence collection, vehicle processing, and hospital investigative responsibilities as needed. OCDASAU investigators audio record all interviews and physical evidence is processed by the Orange County Crime Lab.

When the OCDASAU has concluded the investigation, the file is turned over for legal review. A veteran deputy district attorney in the Homicide Unit or the Gang Unit reviews the case for criminal filing in fatal officer involved shootings and a prosecutor in the Special Prosecutions Unit reviews non-fatal shootings. The prosecutor will be in consultation with his or her supervisor throughout, and an assistant district attorney will review their legal conclusion and the memo. Often, the case may be reviewed by multiple veteran prosecutors, their supervisors, the Chief of Staff and the District Attorney. The case may be sent back for further investigation.

FACTUAL SUMMARY

Islas lived at 2801 N. Bristol Street Apt. #3, Santa Ana, CA, and was reportedly breaking into a neighbor's apartment.

Officer Alvarez was assigned to patrol duties. He was accompanied by his partner, Officer Romero Vergara. California Highway Patrol (CHP) Officers Florentine Olivera and Expedito Chavez assisted in the arrest of Mr. Islas.

Around 11:40 p.m. on May 30, 2010, Islas was reportedly breaking into a neighbor's apartment through an open living room window. The resident, who was in the apartment with his wife and four children, attempted to strike Islas with a lamp and forced Islas to back out of the window. The resident closed the window, and Islas then began breaking out the windows both to the living room, and the resident's bedroom. At 11:42 p.m., the resident called 9-1-1 and reported a male white with a shaved head and dark clothing was breaking his windows and attempting to enter his apartment. Prior to burglarizing the resident's apartment, Islas had aggressively approached other residents of the complex, and assaulted one of them. Santa Ana Police Officers Nivaldo Alvarez and Romero Vergara responded to the location. They were accompanied by two CHP officers who happened to be in the area, Officers F. Olivera, and E. Chavez. Residents at the location pointed Islas out to the officers. When Islas saw the officers, he fled on foot and a foot pursuit ensued.

Islas ran in a southwest direction on Bristol into traffic. Officer Alvarez was behind Officer Vergara throughout the foot pursuit. According to Officer Vergara, Islas reached for his waistband numerous times during the pursuit. Officer Vergara stated Islas kept looking down and grabbing at his waistband and had a blank stare. Officer Vergara did not know if Islas was reaching for a gun, or if he was under the influence of a controlled substance. Officer Alvarez told Officer Vergara to watch traffic. This diverted some of Officer Vergara's attention from Islas as he tried to direct traffic so there wouldn't be an accident.

Islas ran into the area of a strip mall located at 2732-2738 North Bristol Street. As Islas ran, witnesses stated that he held his waistband and attempted to enter his pockets. Officer Vergara stated that he believed Islas was reaching for a gun. Islas had the appearance of a gang member, with baggy dark clothing, and a shaved head. According to Officer Vergara, he has arrested many people in the past who have hid guns in their waistband.

Islas did not comply with numerous officer commands to "stop." Officer Vergara stated that Islas had a blank stare. Officer Vergara thought Islas may be under the influence of a drug given his bizarre and aggressive behavior, and his blank look. At one point, Officer Vergara came within a few feet of Islas who had briefly stopped in a parking lot in the strip mall. Officer Vergara had his hand on his gun which was unsnapped in its holster. Officer Vergara saw that Islas had nothing in his hands, and yelled for him to "Get down on the ground!" When Islas did not comply, Officer Vergara struck him with his baton along his left shoulder area. Officer Vergara stated the baton had no effect on Islas who turned and continued running in an easterly direction.

Islas again ran across traffic lanes on Bristol. Again, Islas appeared to be reaching for his waistband. Officer Vergara stated he heard Officer Alvarez yell out that Islas was "messing around with his waistband!" Officer Vergara tried to clear traffic not knowing if Islas was going to pull out a gun and shoot someone in a car, or shoot Officer Alvarez, or himself.

While Officer Vergara was trying to clear traffic, and continue to pursue Islas, he heard a single shot. At the time, he was not sure if it was a firearm and if so, who was doing the shooting as he could not see in front of Islas, and Officer Alvarez was behind him. Islas was still reaching for his waistband when Officer Vergara heard a second "pop" which he recognized to be a gun shot. Officer Vergara then realized Officer Alvarez had fired as the gun shot was off to Officer Vergara's left side in the area of Officer Alvarez. Officer Vergara then heard, "hey get down on the ground," or "stop," and then the sound of a Taser gun.

Officer Vergara, who was directing three lanes of traffic coming at him, turned and looked and saw Officer Alvarez attempting to grab Islas hand. Islas was now down on the ground. Officer Vergara asked the CHP officer who was driving by, Officer Chavez, to block traffic. Officer Vergara then assisted Officer Alvarez in handcuffing Islas who was still resisting. CHP Officer Olivera also assisted in handcuffing Islas. It was later discovered that Islas did not have any weapons on his person. Officer Vergara confirmed with Officer Alvarez that he was involved in a "998" or officer involved shooting. Islas was treated by Santa Ana Fire Department paramedics for a gunshot wound to his right shoulder and then transported to UCI Medical Center. He was later transported to Western Medical Center in Anaheim.

EVIDENCE ANALYSIS

OCCL Forensic Scientist, Thomas Matsudaira, completed a firearms examination related to this case. He evaluated Officer Alvarez's .40 caliber Glock pistol and determined that two cartridges were missing consistent with Officer Alvarez firing his gun two times. A cartridge casing was recovered at the scene on Bristol in the west concrete gutter. The Glock was test fired, and the cartridge casing recovered from the scene was determined to have been fired from Officer Alvarez's Glock. Officer Alvarez's Taser gun was also examined. It had a single 5 second activation recorded at 1:54 a.m.

SAPD Officer Jorge Arroyo went to UCI Medical Center to evaluate Islas for drug use, and to request a blood sample from him. Officer Arroyo noted that Islas had many objective symptoms consistent with drug use: rapid speech, red watery eyes, sweating profusely, dry lips with a white coat on them, an elevated pulse, dilated pupils in a controlled environment, rigid muscles, a clenched jaw, and fidgeting. A nurse from California Forensic Phlebotomy came to the hospital and drew a sample of Islas's blood. However, the results of the toxicology screening were negative in all categories. It does not appear his blood was tested for blood alcohol content.

Islas was uncooperative with the hospital staff when he initially arrived. He refused to give a statement to police.

DISPOSITION OF CRIMINAL CASE AGAINST ISLAS

On June 2, 2010, the OCDA charged Islas with seven counts of various criminal offenses in Orange County Case # 10CF1393. Islas was charged with the following: two counts of Penal Code (PC) §245(a)(1), assault with a deadly weapon other than a firearm, PC §459-460(a), residential burglary, PC §664/459-460(a), attempted residential burglary, PC §594(a)/(b)(2)(A), vandalism less than \$400, and PC §594(a)/(b)(1), vandalism more than \$400. He pleaded guilty to

the court to all of the charges on Aug. 24, 2010, and was sentenced to six years in state prison. Islas signed under penalty of perjury the following factual basis for his plea:

In Orange County, California, on 5/30/10, I did willfully and unlawfully commit an assault upon the person of A. Lopez by means of force likely to produce great bodily injury. In OC, California, on 5/30/10, I did willfully and unlawfully commit an assault upon the person of A. Lopez with a deadly weapon (a beer bottle), and did willfully and unlawfully commit an assault upon the person of R. Rolon with a deadly weapon (a piece of glass). In Orange County, California, on 5/30/10, I did willfully and unlawfully attempt to enter and inhabited dwelling house inhabited by R. Martinez with the intent to commit aggravated assault, a felony, while R. Martinez, a non-accomplice, was present in the residence. I also maliciously and unlawfully damaged the metal door and floor that was the real and personal property of R. Martinez in an amount under \$400 as well as maliciously and unlawfully damaged the metal door, windows, and blinds which were the real and personal property of R. Rolon in an amount over \$400. I also did unlawfully enter the inhabited dwelling house of R. Rolon with the intent to commit aggravated assault (a felony) while R. Rolon, a non-accomplice, was present at the house.

In addition, Islas' relevant criminal record dating back to 1998, which would likely have been admissible as evidence in a trial that charged a police officer with a crime was considered, including: Tampering with a Vehicle, Under the Influence of a Controlled Substance, Vandalism, Disorderly Conduct, Assault with a Deadly Weapon (not a Firearm), Battery on a Spouse, Obstructing a Public Officer, Possession of a Controlled Substance, Trespass, Threatening a Crime with the Intent to Terrorize, Assault, Probation Violation, Maliciously Defacing with Paint, Illegal Entry, Vandalism, and Burglary. Islas' prior contacts with law enforcement demonstrate his violent character and give credibility to the version of events as stated by Officer Vergara.

LEGAL PRINCIPLES AND ANALYSIS

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.]

The California Supreme Court held in a recent case, *Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 527, that police officers are not similarly situated to the average battery defendant. The Court stated:

"[U]nlike private citizens, police officers act under the color of law to protect the public interest. They are charged with acting affirmatively and using force as a 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 effect 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 framed the issue as follows: "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:

"the 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer at the scene, rather than with the 20/20 vision of hindsight. The question is whether the officer's 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 this case, it is well settled that in evaluating Officer Alvarez'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." (*Ibid.* at p. 528.) Officer Alvarez was trying to take into custody a suspect who had already demonstrated himself to be violent by the prior contacts with various residents at the 2801 North Bristol Street apartment complex. Islas fled when the officers tried to contact him, heightening the suspicion that Islas had something to hide. Islas was non-compliant and irrational. He appeared to be under the influence of a controlled substance which would have heightened the officers' awareness that Islas could not be reasoned with and was dangerous.

In spite of numerous commands to stop, Islas ran into traffic on Bristol, a street with three lanes going in each direction. Islas' actions endangered the lives of those driving as well as the officers pursuing him. Islas was wearing baggy clothing capable of concealing a firearm and was grabbing at his waistband and pockets on several occasions as if he had a weapon. Officer Vergara indicated that based on Islas' actions, and clothing, he thought Islas possibly had a firearm. Though no weapons were recovered on Islas' person, Officer Alvarez was not legally required to wait until Islas produced a gun from his waistband before acting based on the totality of the circumstances and his observation of Islas' actions.

Where potential danger, emergency conditions, or other exigent circumstances exist, the Supreme Court's definition of "reasonableness" is generous to the police. 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 officers or others. Accordingly, Officer Alvarez acted reasonably under the circumstances. While Officer Alvarez did not give a voluntary

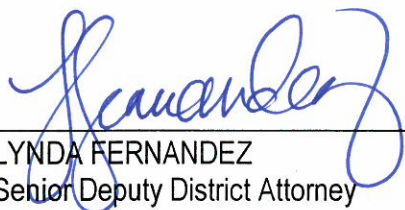
statement, Officer Vergara's account given in his voluntary statement of what he witnessed was considered in determining the reasonableness of Officer Alvarez's actions under the circumstances. This determination is also made with the allowance that Officer Alvarez acted in a "tense, uncertain, and rapidly evolving situation." (See *Graham, supra.*) Based on a review of all available evidence, the conduct of the involved officer does not support a finding of criminal culpability.

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 criminal culpability on behalf of Officer Alvarez on May 30, 2010, when he shot Islas.

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

Very truly yours,



LYNDA FERNANDEZ
Senior Deputy District Attorney
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Read and Approved by Michael Lubinski
Senior Assistant District Attorney
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