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ORANGE COUNTY, CALIFORNIA

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DIRECTOR
ADMINISTRATIVE SERVICES

SUSAN KANG SCHROEDER
CHIEF OF STAFF

December 19, 2012

Chief Kevin Raney
Garden Grove Police Department
11301 Acacia Parkway
Garden Grove, CA 92840

Re: Officer Involved Shooting on November 19, 2011
Fatal Incident involving Jason Nunez
District Attorney Investigations Case #11-023
Garden Grove Police Department DR # 11-15646
Orange County Crime Laboratory Case # 11-555333

Dear Chief Raney,

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 Garden Grove Police Department (GGPD) Officer Omar Perez. Jason Nunez, 31, of Garden Grove, died as a result of his injuries. The incident occurred in the City of Garden Grove on Nov. 19, 2011.

OVERVIEW

This letter contains a description of the scope of and the legal conclusions resulting from the OCDA's investigation of the Nov. 19, 2011, fatal officer-involved shooting of Nunez. 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 GGPD 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 Nov. 19, 2011, Investigators from the OCDA Special Assignment Unit (OCDASAU) responded to this incident. OCDASAU Investigators interviewed more than 75 witnesses and obtained and reviewed the following: GGPD reports, audio recordings and dispatch and radio traffic recordings; Orange County Crime Laboratory (OCCL) reports including toxicology, forensic alcohol examination, latent print, officer processing and firearms examination reports; crime scene investigation photographs; medical records and photographs related to the injuries sustained by Nunez; criminal history records related to Nunez including prior criminal history records and prior incident reports; the personnel records of Officer Perez; and other relevant reports and materials including audio recordings of the conducted neighborhood canvass.

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 GGPD officers or personnel, specifically Officer Perez.

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

☐ 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 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.

An important part of the investigation of officer-involved-shooting cases such as this is to obtain a statement from the shooting officer. Officer Perez voluntarily spoke to OCDA investigators at 11:00 p.m. on Nov. 19, 2011, about four hours after the shooting.

FACTS

On Nov. 19, 2011, Nunez was at his sister's residence in Garden Grove. Also present was Nunez's sister's boyfriend, John Doe. According to his sister, Nunez had "mental issues" and had never been the same since his wife left him two years ago. On Nov. 19, 2011, Nunez's sister observed Nunez start a fire in the backyard of her residence. Her boyfriend went into the backyard and told Nunez to put the fire out before someone called the fire department. John Doe then extinguished the fire. Nunez became enraged and began breaking several windows in the backyard of the residence. He then picked up rocks and threw them at his sister and her boyfriend. Nunez then entered the residence, grabbed two large knives and began to chase his sister and her boyfriend down the street.

Nunez's sister and her boyfriend ran from their residence and telephoned GGPD at approximately 6:45 p.m. During the 911 call from Nunez's sister, she told the police dispatcher, "My brother is going crazy right now, he has a knife." As the call continued, she sounded frantic, winded, and said, "He's chasing me, he's running toward us."

While one dispatcher was speaking with Nunez's sister, a second dispatcher dispatched GGPD Officers Perez and Christopher Earle to Nunez's sister's residence regarding a fight involving weapons. The initial information provided to those officers was that the caller's brother was chasing her on Glen Street with a knife. Several other Garden Grove police officers heard the dispatched call and responded as well.

As officers were responding, dispatchers continued speaking with Nunez's sister, who reported her brother, Nunez, had broken windows with a shovel and thrown a rock at her. She told dispatchers, "He already has mental problems, but this is definitely out of the ordinary. He has major depression. All I know is that it's gonna be hard for him to get in the cop car. I already know he'll fight them, he, he's sick."

Dispatchers continued to broadcast updated information to officers as they were en route to the call. One update gave officers a detailed physical description of Nunez. Another update advised officers that Nunez suffers from depression and would fight with officers. A third update advised officers that Nunez was still following the 911 caller eastbound on Dorada Avenue from Glen Street, and he had thrown a rock at her and used a shovel to break windows.

Within an approximate 30 second time period, three Garden Grove Police units arrived on scene from three different directions. Officer Eduardo Barajas arrived from the east, driving westbound on Dorada Avenue. Officers Veronica Nelson and Brian Dalton, who were working a two-officer car driven by Dalton, arrived from the north, driving southbound on Woodland Lane, and then westbound on Dorada Avenue. Officer Perez arrived from the west, driving eastbound on Dorada Avenue.

Officer Perez was in uniform, driving a marked patrol car. On his belt, he carried a handgun and a taser. In the passenger compartment of the car, he carried a baton and a shotgun, and in the trunk he had a less-than-lethal beanbag shotgun.

As Officer Perez approached the intersection of Dorada Avenue and Strathmore Drive, he observed Nunez, who was wearing a blue shirt matching the description given by dispatchers, walking westbound on Dorada Avenue. Officer Perez stopped his marked patrol car in the intersection of Dorada Avenue and Strathmore Drive, angling it northwest facing in Nunez's direction, and illuminated Nunez with the headlights and driver's side spotlight of his police vehicle. As Nunez continued walking westbound toward Officer Perez, Officer Perez observed Nunez holding a knife in his right hand.

Officer Perez exited his patrol vehicle, stood behind his opened driver's door, pointed his handgun at Nunez, and ordered him to drop the knife. Officer Perez estimated Nunez to be approximately 20 feet from him at that point. In reaction to Officer Perez's order to drop the knife, Nunez raised the knife and changed direction from westbound to southwest, walking directly toward Officer Perez. Officer Perez and Nunez made eye contact with one another; however, Nunez did not verbalize anything.

Officer Perez issued a second command to drop the knife as Nunez continued walking toward him; however, Nunez did not comply. As Nunez was within approximately 15 feet of his location with a knife still in his hand, Officer Perez fired one shot from his pistol to stop Nunez. Nunez immediately fell to the ground and dropped the knife as he fell. Officer Perez approached Nunez and handcuffed him.

Additional witnesses heard Officer Perez issue numerous commands to Nunez. Both Officers Dalton and Barajas heard Officer Perez order Nunez to "Drop the knife;" however, only Barajas observed Nunez holding a knife. A civilian witness heard the police officer yell, "Stop, stop," and, "Drop the knife" prior to firing his weapon.

When Officers Dalton and Barajas reached Nunez, they both observed a knife on the ground near Nunez. The knife was a stainless steel two-edged carving knife, with an approximate 8-inch blade and black handle. Officer Dalton assisted Officer Perez with handcuffing Nunez, and later performed cardiopulmonary resuscitation on Nunez.

An additional knife was located just north of the first knife, near the north gutter. This second knife had an approximate 8-inch blade and black handle.

Garden Grove Fire Department personnel later arrived and subsequently pronounced Nunez deceased.

Patrol Car Video

Officer Perez's car was equipped with a dash-mounted video camera, which captured the shooting on tape. The video reveals the following:

- Nunez comes into view, walking toward Officer Perez's car, just as Officer Perez's car comes to a stop.
- Approximately six seconds elapsed from the time Officer Perez's vehicle came to a stop to the time when he fired his pistol.

- During the six seconds that Nunez is visible on-camera prior to being shot, he covered approximately 33 feet while advancing toward Officer Perez.
- Shortly after Nunez appears on-camera, he raises his right arm out to his side, revealing a large knife in his hand.
- Nunez continued walking quickly toward Officer Perez with the knife raised until he was within about 15 feet of Officer Perez. At that point, Nunez is shot and falls forward onto the ground.

Statement of Officer Perez

About four hours after the shooting, Officer Perez voluntarily spoke to OCDA Investigators about the incident. Officer Perez described the information he had received from police dispatchers about an armed suspect, and said that when he spotted Nunez walking on the street, he noticed that Nunez was holding a knife. Officer Perez said that he pointed his gun at Nunez and twice commanded Nunez to drop the knife, but Nunez failed to comply. Instead, Nunez looked directly at Officer Perez and began walking directly toward him with the knife raised. "He was walking fairly quickly," reported Perez. "He was still coming at me with a knife raised, blade pointed at me. I was in fear for my life, at which point I fired one round."

AUTOPSY

On Nov. 21, 2011, Doctor Aruna Singhania, a forensic pathologist, conducted a post-mortem examination on Nunez's body at the Orange County Sheriff-Coroner Forensic Science Center. Following an extensive external and internal examination, Dr. Singhania concluded that the single gunshot wound to Nunez's chest was fatal and that the cause of death was exsanguination due to a transected sub-clavian artery.

One bullet core, one copper jacket, and metal fragments were collected during the autopsy.

EVIDENCE ANALYSIS

Toxicology

A toxicology exam was conducted on Nunez's post-mortem blood. No alcohol or narcotics were found to be present in Nunez's postmortem blood.

Weapon Examination:

OCCL Forensic Scientist Thomas Matsudaira completed the firearm and projectiles examination on this case. Officer Perez's service weapon was a Glock Pistol, Model 21, .45 caliber. The Glock pistol was test-fired and operated without malfunction. The single cartridge case from the scene was compared to the test fires from Officer Perez's pistol and was determined to have been fired from that pistol.

THE LAW

Possible criminal charges against an officer involved in a shooting include murder (Penal Code Section 187) and assault by a police officer (Penal Code Section 149). In order to convict an officer of any of these charges, however, it would be necessary to prove beyond a reasonable doubt that no legal justifications existed for the officer's actions. *People v. Banks* (1977) 67 Cal. App. 3d 379, 383-84. Several such justifications may apply in any given case and they are set forth in Penal Code Sections 196, 197 and 835a.

California Penal Code Section 196 provides that use of deadly force by a public officer is justifiable when necessarily used in arresting persons who are "charged with a felony" and who are fleeing from justice or resisting such arrest. Section 196 applies both where the suspect in question is "charged with a felony" and where the officer has "reasonable cause" to believe that the person has committed a felony. *People v. Kilvington* (1894) 104 Cal. 86, 89. The felony must involve violence or the threat of violence. *Kortum v. Alkire* (1977) 69 Cal. App. 3d 325, 333.

California Penal Code Section 197 provides that the use of deadly force by any person is justifiable when used in self-defense or in defense of others.

California Penal Code Section 835a allows any police officer who has reasonable cause to believe that a person to be arrested has committed a felony to use reasonable force to effect the arrest, to prevent escape, or to overcome resistance. The section further provides that a police officer “who makes or attempts to make an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance.” As with Penal Code Section 196, Section 835a only allows use of deadly force by the police officer when the suspect’s felony involves violence or the threat of violence. *Kortum v. Alkire* (1977) 69 Cal. App. 3d 325, 333. The court in *Kortum* further held that deadly force against a fleeing felony suspect is justifiable only when the felony “is of the violent variety, i.e., a forcible and atrocious one which threatens death or serious bodily harm, or there are **other circumstances which reasonably create a fear of death or serious bodily harm to the officer or to another.**” *Kortum v. Alkire*, *supra*, 69 Cal. App. 3d at 333.

In addition, Penal Code section 834a requires that if a person has knowledge, or by the exercise of reasonable care, should have knowledge, that he is being arrested by a peace officer, that person must refrain from using force or any weapon to resist such arrest.

Similarly, the relevant Criminal Jury Instruction as written by the Judicial Council of California and set forth in CALCRIM 3470 permits a person being assaulted to defend himself from attack if, as a reasonable person, he had grounds for believing and did believe that bodily injury was about to be inflicted upon him or upon another person. In doing so, such person may immediately use all force and means which he believes to be reasonably necessary and which would appear to a reasonable person, in the same or similar circumstances, to be necessary to defend against that danger and to prevent the injury which appears to be imminent.

The law as detailed in CALCRIM 3470 and in well-settled case law therefore permits a person, if confronted by the **appearance of danger** which arouses in his mind, as a reasonable person, an honest fear and conviction that he or another person is about to suffer bodily injury, to act in self-defense or defense of others upon such appearances, and from such fear and honest convictions. The person’s right of self-defense is the same **whether the danger is real or merely apparent.** *People v. Jackson* (1965) 233 Cal.App.2d 639, 641-642.

Nevertheless, the above justifications must be interpreted in light of United States Supreme Court precedent that limits the right of a police officer to use deadly force. *People v. Martin* (1985) 168 Cal. App. 3d 1111, 1124. Thus, in *Tennessee v. Garner* (1985) 471 U.S. 1, 3, the United States Supreme Court ruled that a police officer is entitled to use deadly force only when “the officer has probable cause to believe that the suspect poses a significant threat of death or serious bodily injury to the officer or others.”

This limitation was, however, subsequently clarified by the United States Supreme Court in the seminal case of *Graham v. Conner* (1989) 490 U.S. 386, wherein the Supreme Court explained that an officer’s right to use force [i.e., his weapon] is to be analyzed under the Fourth Amendment’s “objective reasonableness” standard. The Supreme Court further stated that the determination of the reasonableness of an officer’s use of force “must embody allowance for the fact that police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain and evolving.” *Id.* at 397. Thus, the Court cautioned that “[t]he reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” *Id.* at 396.

LEGAL ANALYSIS

The issue is whether Officer Perez may be charged with a crime. If his actions were justifiable as lawful self-defense, then the shooting was not unlawful. Based upon the investigation in this case and the uncontroverted, corroborated evidence supplied by Officer Perez, it is the conclusion of the OCDA that the evidence does not support a finding of criminal culpability on the part of Officer Perez.

This conclusion is based upon the following evidence:

- Officer Perez had received information that Nunez was armed with a knife and had attacked the 911 caller at her residence and was chasing her.
- Officer Perez stopped his patrol car when he spotted Nunez holding a knife while walking on the street in the area of the reported crime.
- Officer Perez pointed his gun at Nunez and commanded Nunez to stop and drop the knife, but Nunez would not.
- Instead, Nunez looked directly at Officer Perez, raised the knife, and walked quickly directly toward Officer Perez.
- When Nunez was about 15 feet from Officer Perez and still advancing with the knife raised, Officer Perez shot Nunez.

Soon thereafter, Officer Perez said he shot Nunez because he feared that Nunez was a threat to Perez's life. We find that Officer Perez's claim of self-defense is credible, is not contradicted by other evidence, and is corroborated by evidence at the scene, the video tape from his patrol vehicle, and other witness's statements. Having established that there is proof that Officer Perez acted in the belief that he needed to shoot Nunez in order to defend himself, what remains to be analyzed is whether his belief was reasonable, whether the danger was imminent, and whether the force used was proportional to the threat. These issues will now be discussed in turn.

In order for Officer Perez's actions to be justifiable self-defense, his fear must be reasonable, and must be of *imminent* harm; any future harm would not suffice. It is a demonstrable fact that an armed attacker who is within twenty-one feet of his intended victim can reach that person in less than two seconds. Accordingly, when faced with an individual within twenty-one feet armed with a knife charging at them, officers are trained that, absent other methods of defense, they must attempt to move out of the plane of attack, draw their weapon and fire.¹ Here, when Officer Perez exited his patrol vehicle, Nunez was about forty-five feet away, holding a knife. Then, within five seconds, Nunez advanced about thirty feet toward Officer Perez and raised the knife, to the point where Nunez was within fifteen feet of Officer Perez and still advancing toward him with the knife raised. Based on the evidence that Nunez was wielding a knife, was at close range, and was advancing toward Officer Perez, we conclude that Officer Perez reasonably believed that he was in imminent danger of being killed or suffering great bodily injury.

With respect to the issues of the need to use deadly force in response to the threat, and using no more force than necessary, the key fact to consider is the apparent imminence of Nunez's deadly attack. Officer Perez was responding to a call of an armed individual who had chased the reporting party with the knife in an apparent attempt to commit an aggravated assault. When Officer Perez spotted Nunez walking on the street holding a knife, he properly drew his gun and ordered Nunez to stop. However, Nunez would not comply and instead began to advance toward Officer Perez with the apparent motive of attacking him. Officer Perez had to make a split-second decision. Calling for help was not an effective option. Re-entering his car to secure himself against an attack would perhaps have provided protection for Officer Perez, but it would not have protected the community from Nunez. Moreover, the law does not require a person under attack to retreat; he/she is permitted to stand his/her ground and utilize self-defense. (*People v. Hughes* (1951) 107 Cal.App.2d 487, 494.) Having already reasonably drawn his handgun, under the circumstances it would not be reasonable to require Officer Perez to re-holster that weapon and draw his taser, as time may not have permitted him to do so. Moreover, being confronted with the threat of imminent deadly force--Nunez's upraised knife-- Officer Perez is not required by state criminal law to respond with less-than-lethal force. In sum, viewing the circumstances of the apparent imminent deadly attack by Nunez as a reasonable officer on the scene would, instead of through the calm of 20/20 hindsight – as the Supreme Court counsels we must – we find that a jury would likely find that it was reasonable self-defense for Officer Perez to shoot Nunez.

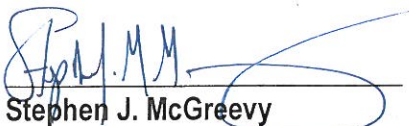
¹ For more than twenty years, a concept called the "21-Foot Rule" has been a core component in training officers to defend themselves against knife attacks. At its core, the "rule," derived from extensive experimentation and study, states that in the time it takes the average officer to recognize a threat, draw his gun and fire two rounds at an approaching assailant, an average subject charging at the officer with a knife can cover a distance of 21 feet.

CONCLUSION

Based on all evidence provided to the OCDA, the entirety of the facts contained in the reports 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 Perez and there is substantial evidence that the officer's actions were justified under the circumstances when he shot Nunez on Nov. 19, 2011.

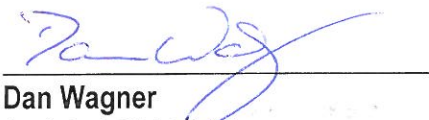
Accordingly, the OCDA is closing its inquiry into this incident.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "S. J. McGreevy", written over a horizontal line.

Stephen J. McGreevy
Senior Deputy District Attorney
Homicide Unit

Read and Approved,

A handwritten signature in blue ink, appearing to read "Dan Wagner", written over a horizontal line.

Dan Wagner
Assistant District Attorney
Head of Homicide Unit