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ORANGE COUNTY, CALIFORNIA

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BUREAU OF INVESTIGATION

LISA BOHAN - JOHNSTON

DIRECTOR
ADMINISTRATIVE SERVICES

SUSAN KANG SCHROEDER

CHIEF OF STAFF

July 15, 2013

Interim Chief Raul Quezada
Anaheim Police Department
425 S. Harbor Blvd.
Anaheim Blvd., CA 92805

Re: Officer Involved Shooting on July 22, 2012
Fatal Incident involving Joel Acevedo
District Attorney Investigations Case #12-018
Anaheim Police Department DR # 12-107297
Orange County Crime Laboratory Case #12-51015

Dear Chief Quezada,

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 Anaheim Police Department (APD) Officer Kelly Phillips. Joel Acevedo, 22, of Anaheim, died as a result of his injuries. The incident occurred in the city of Anaheim on July 22, 2012.

OVERVIEW

This letter contains a description of the scope of and the legal conclusions resulting from the OCDA's investigation of the July 22, 2012, fatal officer-involved shooting of Acevedo. 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 APD officer 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 July 22, 2012, Investigators from the OCDA Special Assignment Unit (OCDASAU) responded to this incident. OCDASAU Investigators interviewed 64 witnesses and obtained and reviewed the following: APD 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; autopsy photographs, the forensic pathology report related to Acevedo; criminal history records related to Acevedo including prior criminal history records and prior incident reports; the personnel records of Officer Phillips; 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 APD officers, specifically Officer Phillips. The OCDA will not be addressing herein issues of policy, training, tactics or civil liability.

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 92663
(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

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. All of the APD officers involved in this incident voluntarily spoke with OCDA.

When any party involved in an officer-involved shooting is prosecuted by OCDA for crimes arising out of the incident, while the criminal case is pending, rules of professional responsibility promulgated by the American Bar Association and the California State Bar typically constrain OCDA from releasing, outside of the courtroom setting, extensive details concerning the incident. Thus, OCDA often waits until the conclusion of the criminal case before releasing its findings, which is what happened in this instance. As will be discussed more fully below, OCDA prosecuted Vanessa Janine Duran, an associate of Acevedo, for crimes she committed which precipitated this shooting; OCDA awaited the conclusion of Duran's case before issuing our findings and conclusions in this letter.

LOCATION OF OFFICER INVOLVED SHOOTING

The officer-involved shooting of Joel Acevedo took place in a flat residential parking lot between two, two storied apartment buildings on Guinida Lane in Anaheim. The parking lot contains only one row of angled parking slots. The area is in a residential neighborhood and is dimly illuminated by street lamps on Guinida Lane and a motion sensor light affixed to the wall of one of the apartment buildings.

OCDASAU Investigators conducted extensive canvass interviews of residents of Guinida Lane. None of the witnesses observed anyone firing a gun in this case. Many of the witnesses heard numerous consecutive gunshots. Two of the witnesses believed that the gunshots sounded as if they came from two different types of firearms; however they could not be certain.

FACTS

On July 22, 2012, at approximately 11:20 p.m., Anaheim Police officers Kelly Phillips, Trang Pham and Daniel Lambaren were assigned to a three-man gang suppression unit. Officer Phillips was the driver of the vehicle, which was a marked APD patrol unit. The patrol unit was a "slicktop," meaning it did not have an emergency light bar mounted to its roof; however, the vehicle was equipped with emergency lights in the visor and affixed to the vehicle's front push bar.

The three officers were patrolling in the 100 block of West Guinida Lane, in the City of Anaheim, traveling westbound, when a silver Lexus sport utility vehicle (SUV) traveling eastbound passed their vehicle. As the vehicle passed, Officer Phillips recognized the driver of the vehicle as being Vanessa Janine Duran, a subject he had prior contact with and who he knew to have an affiliation with a local criminal street gang.

Officer Phillips noticed the vehicle's license plate lamp was not illuminated, a violation of California Vehicle Code section 24601. Officer Phillips initiated a u-turn and began to follow the SUV. As the SUV drove eastbound on Guinida Lane, it failed to come to a complete stop at the stop sign located at the intersection of Guinida Lane and Iris Street; this being a violation of California Vehicle Code section 22450(a). The SUV rolled through the stop sign, turned left, and continued northbound on Iris Street from Guinida Lane. The SUV appeared to accelerate as it continued northbound on Iris Street. Officer Phillips turned on his emergency lights in order to stop the SUV. Officer Phillips continued following the SUV in a high speed pursuit. Officer Lambaren notified APD dispatch of their location and the nature of the pursuit.

As the SUV traveled southbound on Palm Street, Officer Phillips advised Officer Lambaren that he believed the SUV was headed back towards Guinida Lane. According to Officer Phillips, Guinida Lane is considered "the main street" for Duran's gang. As the SUV reached Guinida Lane, it attempted to turn eastbound onto Guinida Lane; however, the SUV was unable to negotiate the turn and skidded across the intersection in a southeasterly direction. It collided with the curb and continued traveling eastbound into a vacant lot that was located on that corner of the intersection. As a result of hitting the curb, the SUV's tires were blown.

PURSUIT OF OCCUPANTS OF SILVER SUV

As the SUV came to rest, a male subject, who was wearing a light colored sweatshirt, exited the rear driver's side door of the SUV. The subject was later identified as Jose Gaudencio Hernandez. As Hernandez jumped from the vehicle, he dropped an item that appeared to be heavy. The item appeared to be inside the left pocket of Hernandez's sweatshirt and dropped towards the ground. Hernandez caught the item as it fell and then continued to run eastbound on Guinida Lane, away from the SUV. Officer Phillips immediately became concerned that the item in Hernandez's pocket might be a firearm.

At approximately the same time, two additional subjects fled from the SUV. A male subject who was wearing a dark sweatshirt, later identified as Acevedo, exited the front passenger's door of the SUV and began running southbound. Duran, the driver of the SUV, exited the driver's door of the SUV and began running eastbound on Guinida Lane.

Officer Phillips parked the patrol unit and Officer Lambaren and Officer Pham pursued the subjects. Officer Lambaren chased Acevedo southbound across the vacant lot towards the rear of the first apartment building located east of Palm Street on the south side of Guinida Lane. Officer Pham chased Duran and Hernandez, eastbound on Guinida Lane. Officer Phillips exited the patrol vehicle and assisted Officer Pham by pursuing Duran and Hernandez. Duran proceeded in a different direction from Hernandez and was able to escape; however, at a later date, she was arrested and subsequently charged (see below).

STATEMENT OF OFFICER KELLY PHILLIPS

Officer Phillips gave a voluntary statement to OCDA on July 30, 2012 – eight days after the incident. He said that he saw Duran flee from the SUV; however, he decided to follow his fellow officers in their pursuit of the unknown males from the SUV. Officer Phillips said he did this because he feared one or both of these individuals might have possessed a weapon. He also believed that, because he knew Duran from his previous contact with her, she would not be difficult to locate.

Officer Phillips observed Officer Pham chase Hernandez into a southbound parking on Guinida Lane. Fearing Hernandez may be armed, Officer Phillips followed Officer Pham and Hernandez into the parking lot. Officer Phillips entered the parking lot behind Officer Pham and observed "a flash of dark" travel eastbound across the south end of the parking lot. Officer Phillips believed the "flash of dark" was the dark colored sweatshirt worn by Acevedo.

Officer Phillips saw the dark object move northbound behind the parked vehicles, along the east side of the parking lot. Officer Phillips believed the "flash of dark" was Acevedo making his way to the north end of the parking lot so that he could flee from the area. Officer Phillips looked southbound into the parking lot and observed Officer Pham walk eastbound between the parked vehicles. Officer Phillips turned to walk northbound in the direction he had seen the dark silhouette. As he did so, Officer Phillips observed the dark silhouette move southbound behind a parked vehicle. Officer Phillips believed Acevedo was going to attempt to hide in the parking lot. Officer Phillips drew his firearm at that time and approached the parked vehicles.

As Officer Phillips walked northbound, he approached the rear of a white Honda SUV. Officer Phillips was located just south of the SUV, even with the space that separated the SUV from the vehicle that was parked south of the SUV. Officer Phillips observed a shadow that "popped up" in front of the SUV and then disappeared from view. As the shadow disappeared, Officer Phillips heard a gunshot. Officer Phillips believed the shadow was Acevedo and that Acevedo had fired a handgun at him in an attempt to kill him.

Officer Phillips immediately moved north and took a position of cover to the rear of the SUV. From behind the SUV, Officer Phillips peered through the rear window toward the front of the SUV. As he did so, Officer Phillips observed a shadow pop up from the front of the SUV once more. Once again, as the shadow disappeared from view, Officer Phillips heard a gunshot. After hearing the initial gunshot, Officer Phillips thought to himself, *"This went from gangster running and hiding to gangster trying to kill me."* Officer Phillips later added, *"So at that point, I, I went from, it was pure survival like he's gonna kill me or I'm gonna kill him and I'm not, I don't want to die today."*

Officer Phillips evaluated the situation and believed that Acevedo's next move might be to go around the north side of the SUV and assault Officer Phillips. Officer Phillips explained, *"So I move left and I knew that I needed, I needed to shoot him before he shot me."* Officer Phillips was not sure of how he advanced towards Acevedo, but recalled a vacant parking stall immediately north of the SUV. Officer Phillips saw a dark shadow to the front of the SUV and, upon hearing the second gunshot, immediately fired four rounds from his handgun toward the dark shadow.

Officer Phillips explained, *"You know what, I'm not even positive if I stepped out or if I just pried [sic] around the back of the car. Um... I, you know I just reacted. I can't tell you where I was standing. I was standing somewhere at the left rear corner of the SUV, whether it was still at the corner or out in that empty space, I'm not positive, but I moved that way and as soon as I saw, again I wasn't even... I didn't even have a, a silhouette, as soon as, well, I had a silhouette, I just had a dark shadow moving. As soon as I got the dark shadow, I shot."*

Officer Phillips was then able to see Acevedo standing at the front of the SUV. Acevedo appeared to freeze and then he fell to his right side. Officer Phillips could see that Acevedo was holding a handgun in his right hand as he fell. Officer Phillips approached Acevedo as he lay on the ground and noticed that Acevedo was still moving. Officer Phillips described Acevedo's movements on the ground as more of a "twitch" or "twitching." Acevedo was still holding the handgun in his right hand. By this time, Officer Pham had approached his location. Officer Phillips kicked the handgun from Acevedo's hand. Once the handgun was kicked from Acevedo's grasp, it came to rest between Acevedo's legs. Officer Phillips and Officer Pham rolled Acevedo onto his left side, handcuffed him and then rolled Acevedo onto his back. Officer Phillips broadcast over the radio that he had been involved in an officer-involved shooting.

Once the area was secured, Anaheim firefighters/paramedics were allowed to enter the location where Acevedo was located, and they immediately pronounced Acevedo dead.

STATEMENT OF OFFICER PHAM

Officer Pham voluntarily spoke with OCDA on July 23, 2012, the day after the shooting. He said that, as the SUV came to rest and Hernandez fled on foot, he followed Hernandez with Officer Phillips following behind. Hernandez ran toward the parking lot in between the two apartment buildings on Guinida Lane. As Officer Pham chased Hernandez southbound through the parking lot, he observed Acevedo running northbound toward him. Upon making eye contact with Acevedo, Officer Pham

observed him duck behind several of the cars which were parked in the diagonal spaces. A moment later, Officer Pham observed Officer Lambaren come around the southeast corner of the apartment building. Officer Lambaren was chasing Acevedo as he exited the SUV. As Officer Lambaren rounded the corner, Hernandez practically ran into him. Officer Lambaren detained Hernandez and had him lay on the ground.

Officer Pham began to walk between the parked vehicles in order to locate Acevedo. He observed Officer Phillips toward the north end of the parking lot and he believed that he had Acevedo trapped somewhere between the parked vehicles. Officer Pham heard Officer Phillips yell something, but could not make out what was said. Officer Pham heard three to four gunshots, which sounded like they were from the same gun. He did not see who actually fired the gun. Officer Pham came out from behind the cars and observed Officer Phillips pointing his gun in a southeast direction.

Officer Pham walked toward Officer Phillips and observed Acevedo lying partially on his right side with his hand on or near the gun. Officer Pham heard Officer Phillips say, "*He shot at me.*" Both officers approached Acevedo and Officer Phillips kicked the gun away from his hands. Both Officers rolled Acevedo onto his stomach and handcuffed him.

STATEMENT OF OFFICER LAMBAREN

Officer Lambaren voluntarily spoke with OCDA on July 23, 2012. He said that he, upon the SUV stopping, followed the front passenger, later identified as Acevedo. Acevedo ran toward the south side of the western-most apartment complex on the south side of Guinida Lane, which abutted the open field. As Officer Lambaren approached the southwest corner of the building, he saw Acevedo turn the corner and run north. Officer Lambaren lost sight of Acevedo at this point.

Officer Lambaren reached the east end of the building where the parking lot was located between the two apartment buildings. He looked north and observed a subject running towards him. This subject was later identified as Hernandez (rear passenger of the SUV). Hernandez collapsed within approximately five feet of Officer Lambaren. Officer Lambaren ordered Hernandez to show his hands; however, Hernandez did not comply. Officer Lambaren used his foot and then a knee to hold Hernandez down as he pulled his arm out from underneath him.

Upon looking north, Officer Lambaren observed Officer Phillips fire his pistol, approximately three to four times in an easterly direction. He was not sure what Officer Phillips was firing at; however, in his periphery he thought he saw a male subject in the area of the west wall of the apartment building on Guinida Lane.

Officer Lambaren handcuffed Hernandez and broadcast over the police radio that an officer-involved shooting had occurred.

EVIDENCE COLLECTION

From the foot of Acevedo's body, Crime Scene Investigators (CSI) collected a chrome Smith & Wesson .40 caliber, semi-automatic pistol, with a magazine seated in the magazine well.

Officer Phillips's .45 caliber Glock Pistol, Model 21 was also collected.

Three cartridge cases with Federal .40 S&W head stamps were located near Acevedo's body. One cartridge case was located within two feet of Acevedo's body in the dirt/weed area adjacent to the apartment building on Guinida Lane, a second was found approximately three feet from Acevedo's head near the building's water meters, and a final cartridge case was located approximately 10 feet from Acevedo's body near a dumpster that was adjacent to the building.

Four cartridge cases with Winchester .45 auto head stamps were located to the rear of the white Honda SUV. These four casings were within a close proximity to where Officer Phillips fired his Glock Pistol, Model 21, .45 caliber.

EVIDENCE ANALYSIS:

Ballistics:

Two bullet projectiles were recovered from the scene and booked as evidence. One of the bullet projectiles (evidence marker #10) was located in the parking lot behind the location of where Officer Phillips was located when he fired his weapon. It appeared that this bullet struck the apartment building behind where Officer Phillips was when he fired his gun, after which the bullet came to rest in the parking lot. The other projectile located (evidence marker #8) was located near Acevedo's body.

An OCCL forensic scientist, Tom Matsudaira, completed the firearm and projectiles examination on this case. Officer Phillips' service weapon was a Glock Pistol, Model 21, .45 caliber. The Glock pistol was test-fired and operated without malfunction. Four cartridge cases recovered from the scene were analyzed and were determined to have been fired from Officer Phillips' handgun.

Acevedo's handgun, Smith & Wesson model SW40VE pistol, .40 caliber; serial #PBU9895 was test-fired and operated without malfunction. Three cartridge cases recovered from the scene were analyzed and determined to have been fired from Acevedo's handgun.

The bullet marked as evidence marker #8 was analyzed. The bullet recovered shared class characteristics with Officer Phillips' Glock pistol; however, the bullet could not be conclusively identified as being fired from Phillips' pistol. The result of the microscopic comparison was inconclusive.

The bullet marked as evidence marker #10 was also analyzed. This bullet was examined and was determined to have been fired from the Smith & Wesson pistol that was possessed by Acevedo.

OCCL also conducted DNA testing on the Smith & Wesson pistol, serial #PBU9895. Swabs were taken from the slide of this pistol and analyzed by another forensic scientist. Using accepted DNA testing procedures and analysis, Acevedo's DNA was found to be present on this pistol.

Autopsy:

On July 24, 2012, at approximately 9:00 a.m., the post-mortem examination of Acevedo was conducted by Orange County Coroner's Forensic Pathologist Yong-Son Kim, M.D. Dr. Kim found that Acevedo suffered three gunshot wounds.

The first wound entered the right side of the head – front to rear and in a right to left direction causing significant internal damage. This gunshot wound was a through-and-through wound. Dr. Kim noted that this injury is considered to be a fatal wound.

The second gunshot wound was a through-and-through wound to the right elbow, which fractured the lower portion of the humerus. This bullet entered the outside portion of the right arm and exited the inside portion of the right arm. The bullet then reentered the body and came to rest in the right hip. This bullet was removed. This injury would not have been considered life-threatening.

A third gunshot wound was described as entering the lower portion of Acevedo's neck and entering the anterior chest cavity. Dr. Kim noted that this bullet caused significant damage. The bullet entered and exited the pericardial sac, severed the aorta, disrupted heart structures, penetrated the right lung, the diaphragm, the liver, the right kidney and embedded itself in the lumbar spine, causing significant hemorrhaging. Dr. Kim removed this bullet from Acevedo's lumbar region. Dr. Kim noted that this gunshot is considered fatal.

Toxicology:

A toxicology exam was conducted on Acevedo's post-mortem blood. The following narcotics were detected: Amphetamine (.097mg/L); Methamphetamine (0.55 mg/L) and Tetrahydrocannabinol Carboxy-Acid.

STATEMENT OF DURAN

Although Duran escaped the scene of the incident, she was subsequently arrested. She was charged with vehicle theft, evading a police officer, and active gang participation in O.C. Superior Court Case Number 12NF2871. The deputy district attorney (DDA) assigned to Duran's case had no contact with the DDA assigned to review the shooting of Acevedo. A third DDA interacted with Duran's defense attorney in order to obtain a statement from her about the shooting incident. The investigative file of the officer-involved shooting, including Duran's statement, was made available to the DDA prosecuting Duran, and copies of those materials were turned over to Duran's lawyer.

On December 4, 2012, Duran submitted to an interview with OCDA under an agreement that prohibited any use of her statements against her in her criminal case. In this interview with OCDA, Duran said that two days before the officer-involved shooting, she saw Acevedo in the area of Guinida Lane being chased by APD officers. Duran claimed that the APD officers began shooting at Acevedo as he fled, but OCDA and APD were unable to find any reports or any other witnesses or evidence indicating that any APD officer fired his weapon near this location on July 20, 2012.

Duran further stated that, on the evening of July 22, 2012, Duran and Acevedo were together at Duran's apartment on Guinida Lane. As Duran and Acevedo were leaving the apartment, Acevedo handed Duran the keys to a Lexus SUV and asked her to drive him to an unknown location. As they walked toward the Lexus SUV, they saw Hernandez walking in the street. Hernandez asked for a ride; Duran and Acevedo obliged. Duran entered the driver's seat, Acevedo the front passenger's seat, and Hernandez got into the rear passenger seat of the SUV.

As Duran drove the SUV eastbound on Guinida Lane, she made eye contact with Officer Phillips (a police officer with whom she had previous contacts), who was driving a patrol vehicle westbound past Duran. As she was driving, Acevedo took control of the steering wheel and placed his foot on the gas pedal to speed away from the APD officers.

The SUV lost control with a few tires "blowing out" and came to rest near Guinida Lane. She observed Acevedo and Hernandez run southbound. Duran decided to run eastbound on Guinida Lane. As Duran ran past the entrance of a parking lot on Guinida Lane, she observed Acevedo running northbound toward her through the parking lot. According to Duran, she observed Acevedo trip as he exited this parking lot and APD officers dragged him further into the parking lot. Duran returned to the parking lot to observe their actions.

She claimed that she hid at the entrance of the parking lot and was approximately 20 feet away from Acevedo when she observed two APD officers hold him down while Officer Phillips "executed" him. Duran claimed that, after seeing this, she bumped into an unknown object, which made a noise. The noise drew the attention of one of the APD officers, and she said she was then chased by the officer. Duran said the officer was shooting at her as he chased her but he did not hit her and he was unable to catch her. She claimed she was able to hide for a couple of hours and then was later able to leave the area.

We find that Duran's account of the incident is not credible for several reasons. First and foremost, it is contradicted by the physical evidence located at the scene. The assertion that Acevedo was "executed" after being dragged to the location by the officers is completely contradicted by the Smith & Wesson .40 caliber gun found in Acevedo's hands along with the three expended cartridge cases around his body. Additionally, the bullet recovered from the area behind where Officer Phillips fired his weapon (evidence marker #10), was found to have been fired from Acevedo's gun. This evidence strongly indicates that Acevedo fired his gun at Officer Phillips. The neighborhood witnesses who heard the gunshots consistently described the volley of shots to have been fired in rapid succession. It is not possible to reasonably reconcile these established facts with Duran's account of an "execution" of Acevedo, nor does the physical evidence support Duran's claim that officers shot at her, as no projectiles or casings, nor any other evidence, was found to corroborate that claim.

Second, the context in which Duran made her statement does not build confidence that her statement was truthful. That she had to be granted immunity in order to obtain her version of the incident alerts one that her statement should be critically considered. She stood to lose nothing if she were to tell a lie. Additionally, her situation as an associate of Acevedo and an

associate of the criminal street gang indicates she is likely biased in favor of Acevedo and against APD.

Finally, Duran's statement itself stretches credulity. In an apparent attempt to negate any criminal wrongdoing doing on her part for the vehicle theft and evading the police, she said that it was not her plan to evade the police; rather, Acevedo was responsible for pushing on the accelerator. We find this assertion to be self-serving and physically unlikely. Moreover, her statement is ultimately undermined by her admission of guilt. On June 24, 2013, Duran pleaded guilty to violations of Vehicle Code §10851 (unlawful taking of a vehicle) with an enhancement under Penal Code § 186.22(b) (criminal street gang activity), Vehicle Code §2800.2 (evading police while driving recklessly), and Penal Code § 186.22(a) (participation in a criminal street gang). In support of her guilty plea, she made the following factual admissions to the court:

"On July 22, 2012, I did unlawfully drive and take a 2003 Lexus that was not mine without the consent of the owner and with the intent to permanently deprive the owner of title and possession of the vehicle. I also drove the vehicle with willful and wanton disregard for the safety of persons and property with the intent to flee and elude a distinctly marked pursuing peace officer's motor vehicle.... I also actively participated in [a] criminal street gang, knowing its members have engaged in an ongoing pattern of criminal activity, and did willfully and unlawfully promote, further and assist in felony criminal conduct by members of that gang with the specific intent to do so. I committed the above offenses for the benefit of and in association with [a]criminal street gang."

Duran was sentenced to one year in jail.

Were she ever to testify as a witness concerning the officer-involved shooting incident, a jury would learn of her conviction for the above-mentioned crimes, which impeach Duran's denial of wrongdoing and also more generally impeaches her as a felon who has engaged in dishonest conduct.

Consequently, we find Duran's statement under grant of immunity concerning the officer-involved shooting is wholly uncorroborated and untrustworthy.

THE LAW

In order to convict an officer for a shooting, it is 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; prominent in this case is the justification provided in Penal Code Section 197.

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. The relevant Criminal Jury Instruction as written by the Judicial Council of California and set forth in CALCRIM 505 permits a person being assaulted to defend himself from attack if, as a reasonable person, he had grounds for believing and did believe that great 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 505 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. The law does not require a person under attack to retreat; a person is permitted to stand his/her ground and utilize self-defense. *People v. Hughes* (1951) 107 Cal.App.2d 487, 494.

In the seminal case of *Graham v. Conner* (1989) 490 U.S. 386, the U.S. Supreme Court explained that an officer's right to use force 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.

As the California Courts of Appeal held in a recent case:

"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 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.... "The test is highly deferential to the police officer's need to protect himself and others. . . .

"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....

"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, 527-528.

LEGAL ANALYSIS

The issue is whether Officer Phillips's actions were justifiable as lawful self-defense. Based upon the investigation in this case, the physical evidence collected and the evidence supplied by Officer Phillips, it is the conclusion of the OCDA that the evidence supports a finding that Officer Phillips's actions were legally justified.

This conclusion is based upon the following evidence:

- Officer Phillips knew the individuals involved attempted to flee from police even before the police had attempted to stop them, that they had engaged in a high speed chase, that the driver was affiliated with a criminal street gang, that they were in the main area of the gang's criminal activity, and that one of the fleeing passengers of this car dropped and then picked up a heavy object that was consistent with a weapon;
- Officers Phillips, Pham and Lambaren were dressed as police officers and engaged in a foot pursuit of these three individuals;
- Officer Phillips saw Acevedo in close proximity to his location and then heard gunfire from Acevedo's direction;
- When Officer Phillips heard the gunshots, Acevedo was in a position of advantage – i.e., Acevedo was concealed in the darkness behind a car while Officer Phillips was standing vulnerable in the parking lot;
- Officer Phillips then saw Acevedo moving behind a car and he believed that he was in a "kill or be killed" scenario when he shot Acevedo;
- After shooting Acevedo, Officer Phillips saw a gun in Acevedo's hands;
- Acevedo's DNA was found on a gun located by CSI investigator's by Acevedo's feet;
- 3 expended cartridges were found near Acevedo that were found to have been fired from Acevedo's firearm;
- A bullet fired from Acevedo's gun was located in the parking lot behind the area where Officer Phillips had stood prior to shooting at Acevedo.

Officer Phillips said he shot Acevedo because he feared that Acevedo was a threat to his life. We find that Officer Phillips' claim of self-defense is credible and is strongly corroborated by physical evidence at the scene and other witness's statements.

The only evidence contradicting Officer Phillips' claim of self-defense is Duran's immunized account of the event. In all relevant

aspects, Duran's account is far less credible than Officer Phillips'. Duran's statement contradicts the physical evidence. It contradicts the accounts given by the neighborhood witnesses and Officers Pham and Lambaren. Her account is even contradicted, ultimately, by her own subsequent guilty plea. Further, she would not make a strong witness, given that she would be impeached with her felony conviction for crimes evincing moral turpitude.

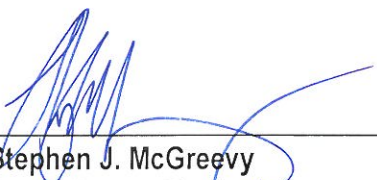
Accordingly, our analysis of the evidence and the law leads us to conclude that a jury would be highly likely to find that Officer Phillips was justified when he shot Acevedo. This is a far greater showing of justification than that required for Officer Phillips to earn an acquittal if he were to be charged with a crime based upon the officer-involved shooting.

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 Phillips and that there is substantial evidence that the officer's actions were justified under the circumstances when he shot Acevedo on July 22, 2012.

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

Respectfully submitted,


Stephen J. McGreevy
Senior Deputy District Attorney
Homicide Unit

Read and Approved,


Dan Wagner
Assistant District Attorney
Head of Homicide Unit