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July 11, 2012

Roger Merchant  
Resident Agent in Charge  
Los Angeles Resident Office  
Department of Homeland Security  
Office of Inspector General  
222 North Sepulveda Boulevard, Suite 1640  
El Segundo, CA 90245

Re: Non-fatal Shooting on Dec. 1, 2011  
Incident involving Daniel Noriega and Immigration and Customs Enforcement Agent Justin Wiessner  
District Attorney Investigations Case # 12 SA 015  
Anaheim Police Department DR # 11-179969

Dear Agent Merchant,

Please accept this letter detailing the Orange County District Attorney's (OCD A) Office's legal review in connection with the above-listed incident involving Daniel Noriega, 28, Anaheim, and on-duty Immigration and Customs Enforcement (ICE) Agent Justin Wiessner. The incident occurred in the City of Anaheim on Dec. 1, 2011.

## OVERVIEW

This letter contains a description of the scope of and the legal conclusions resulting from the OCD A's investigation of the Dec. 1, 2011, non-fatal shooting involving Daniel Noriega and Immigration and Customs Enforcement Agent Justin Wiessner. This letter includes an overview of the OCD A's investigation, methodology and overview of the procedures employed, evidence examined, witnesses interviewed, factual findings, legal analysis, and legal conclusion determining whether there was criminal culpability by the agent involved in the shooting. The format of this document was developed by the OCD A, at the request of many Orange County police agencies, to foster greater accountability and transparency in law enforcement.

On Dec. 1, 2011, Investigators from the Anaheim Police Department (APD) responded to the scene of an officer-involved shooting involving Daniel Noriega (Noriega) and ICE Agent Justin Wiessner (Agent Wiessner) of the Department of Homeland Security (DHS). During the course of this investigation, the OCD A obtained and reviewed reports prepared by APD and the Buena Park Police Department (BPPD), photographic evidence, surveillance videos, tape recorded interviews of the agents involved and of Noriega, the 911 calls, and the dispatch calls of the BPPD and APD. All agents involved gave voluntary statements.

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The OCDA has impartially reviewed all available evidence and legal standards. The scope of the review and findings are expressly limited to a determination of whether or not any criminal conduct occurred by Agent Wiessner. The OCDA will not be addressing policy, training, tactics or civil liability.

### **INVESTIGATIVE METHODOLOGY**

Among other duties, the OCDA Special Assignments Unit (SAU) is responsible for investigating officer-involved shootings within Orange County when someone has been injured as a result of police gunfire. When no one has been injured as a result of the police gunfire, however, the police agency with jurisdiction over the area where the shooting occurred typically is responsible for investigating the shooting. In this case, that agency is APD. Subsequent review by the OCDA in cases where no one has been injured is discretionary.

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 and the District Attorney. If necessary, the reviewing prosecutor may send the case back for further investigation.

### **FACTUAL SUMMARY**

On Dec. 1, 2011, ICE agents were attempting to apprehend a wanted narcotics trafficking fugitive named Juan Carlos Alcala. Alcala's last known address was the current address of Noriega, who is dating Alcala's ex-girlfriend. ICE agents watched Noriega's residence and saw Noriega leave with a child. Agents could not verify if Noriega was Alcala because Noriega was wearing a baseball cap and sunglasses. Noriega left the residence driving his girlfriend's vehicle, a GMC Yukon sport utility vehicle. Agents followed Noriega to the Walmart parking lot located in the back of the store at Euclid Street and Loara Street. The child who had been with Noriega walked across the street to a nearby school and shortly thereafter agents decided to stop the vehicle driven by Noriega to determine if he was Alcala.

Agent Wiessner, who was driving an unmarked Chevy Impala, pulled in front of the vehicle driven by Noriega at an angle and attempted to get out of his vehicle. Agent Wiessner was in plain clothes but wearing a bullet-proof vest with a patch that said "POLICE" across the front and a badge hanging from his neck. Agent Wiessner's vehicle was equipped with emergency lights along the windshield. The lights are manual and the switches are in the center console. Agent Wiessner turned his lights on at some point. As Agent Wiessner was exiting his car, he discharged his gun through the windshield of his vehicle, apparently in the direction of Noriega. Neither Noriega nor his vehicle were struck by the bullet.

Noriega fled the area and drove to a Chevron gas station located at 6392 Beach Boulevard in the City of Buena Park, where he called 911 at approximately 8:52 a.m. and reported that he had been shot at by "detectives" in unmarked cars for an unknown reason. Noriega surmised that the officers may have mistaken him for someone else, and told dispatch that he fled after being shot at. Noriega did not have a cell phone with him at the time and borrowed a cell phone from an individual at the gas station to call 911. Officers from BPPD responded to the gas station and also notified APD because the shooting took place in the City of Anaheim. Officers from APD responded shortly thereafter.

Immediately after shooting, Agent Wiessner remained at the location of the shooting and did not pursue Noriega. Other agents did pursue Noriega but lost sight of him. When APD responded to the scene of the shooting, Agent Wiessner had moved his car into a marked parking stall. Agent Wiessner stated to Anaheim PD investigators who arrived at the scene of the shooting that he shot in response to Noriega intentionally trying to ram his car into Agent Wiessner's car.

Agent Wiessner further indicated that he did not have time to get out of his car, and he fired the shot through his car's windshield in response to Noriega's actions.

An assisting ICE Agent was behind Noriega's vehicle at the time of the shooting. This assisting Agent was in the process of exiting his car when the shooting occurred. The assisting Agent stated that he did not see the shooting and his only potential view of the front of Noriega's vehicle and Agent Weissner's vehicle was through his peripheral vision. Immediately after the shooting, the assisting Agent said he saw a hole in Agent Wiessner's vehicle and saw Noriega take off at a high rate of speed. The assisting Agent saw Agent Wiessner's arm extended with the weapon out. The assisting Agent indicated that he did not see Noriega's vehicle make any kind of movement to ram Agent Wiessner's vehicle, although he only had a peripheral view of the incident.

Other agents were interviewed but were not close enough to Noriega and Agent Wiessner's vehicles at the time of the shooting to give any factual information regarding the shooting. In addition, several civilian witnesses were interviewed in the area but they did not see the shooting or Noriega flee.

### **EVIDENCE ANALYSIS**

Photographs were taken of Agent Wiessner's and Noriega's vehicles. Video surveillance was recovered from local businesses, but none of the video covers the location where the shooting took place. Agent Wiessner's duty weapon he used at the time of the shooting was examined by APD. They noted the weapon was a .40 caliber Sig Saur semi-automatic handgun with one live round in the chamber and one live round in the magazine. The magazine can carry 12 rounds with one in the chamber for a total of 13 rounds. A spent casing was located on the driver's floorboard. The bullet hole was just beneath the rear view mirror. The bullet that Agent Wiessner shot was never located.

### **STANDARD LEGAL PRINCIPLES IN OFFICER-INVOLVED SHOOTING CASES**

Possible criminal charges against an officer involved in a shooting include murder [Penal Code Section 187]; attempted murder [Penal Code Section 664/187]; assault with a deadly weapon [Penal Code Section 245]; 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 [public offense] 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.

## **CONCLUSION**

According to Agent Wiessner, he shot at Noriega in response to Noriega trying to intentionally ram his car into Agent Wiessner’s car. Agent Wiessner further stated that he did not have time to get out of his car, and therefore fired the shot through his car’s windshield in response to Noriega’s actions. According to Noriega, he believed he had not committed any crime and did not try to ram his car into Agent Wiessner’s car. When Noriega perceived that he was being shot at by Agent Wiessner without justification, in fear for his life and safety, he drove away, fleeing the scene of the shooting.

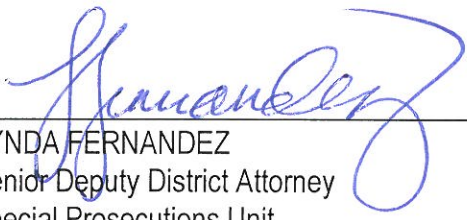


In order for Agent Wiessner to be justly and lawfully convicted of a crime in this incident, it is the prosecution's burden to prove beyond a reasonable doubt that Agent Wiessner intentionally shot at Noriega and did not act in reasonable and justifiable self-defense or defense of others when he shot. The prosecution would be unable to meet the burden in this case for the following reasons: there are no independent witnesses to the moment of the shooting; there is insufficient corroborative evidence to substantiate Noriega's account of what occurred; and, there is insufficient corroborative evidence to substantiate Agent Wiessner's account of what occurred.

It is to be noted that based on the entirety of evidence, there is insufficient evidence to prove any criminal conduct on the part of Noriega and the OCDA will be taking no action against Noriega, nor does the OCDA consider him a suspect.

Accordingly, the OCDA is referring review of this incident back to DHS for any internal investigation that they deem necessary and/or appropriate.

Very truly yours,

  
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LYNDA FERNANDEZ  
Senior Deputy District Attorney  
Special Prosecutions Unit  
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Read and Approved by JAIME COULTER  
Assistant District Attorney, Special Prosecutions Unit