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July 16, 2014

Sheriff Sandra Hutchens
Orange County Sheriff's Department
320 N. Flower Street, Suite 108,
Santa Ana, CA 92703

Re: Custodial Death on April 12, 2012
Death of Fetus M.
District Attorney Investigations Case #SA 12-011
Orange County Sheriff's Department Case #12-061396
Orange County Crime Laboratory Case #12-45667

Dear Sheriff Hutchens,

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 the April 12, 2012, custodial death of inmate Lauren M.'s fetus.

OVERVIEW

This letter contains a description of the scope and the legal conclusions resulting from the OCDA's investigation of the custodial death of inmate Lauren M.'s fetus. In this letter, the OCDA describes the investigative methodology employed, evidence examined, witnesses interviewed, facts discovered and the legal principles applied to determine whether criminal culpability exists on the part of any Orange County Sheriff's Department (OCSD) deputy or any other person under the supervision of OCSD.

On April 12, 2012, OCDA Special Assignment Unit (OCDASAU) Investigators responded to the OCSD Women's Main Jail facility after the demise of Inmate Lauren M.'s fetus (hereinafter "Fetus M.") while inmate Lauren M. was being monitored in the infirmary after she began a 3-step elective abortion procedure. The OCDA conducted an independent and thorough investigation of the facts and circumstances of this event and impartially reviewed all evidence and legal standards. The scope and findings of this review are expressly limited to determining whether any criminal conduct occurred on the part of OCSD deputies or personnel. The OCDA will not be addressing policy, training, tactics, or civil liability.

INVESTIGATIVE METHODOLOGY

Among other duties, the OCDASAU is responsible for investigating custodial deaths within Orange County when an individual dies while in custody. 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, scene processing,

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evidence collection, and hospital investigative responsibilities as needed. The OCDASAU audio records all interviews, and the Orange County Crime Laboratory 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.

FACTS

An OCDA Investigator interviewed inmate Lauren M. (hereinafter "Lauren") and obtained the following facts during this investigation. As of November 2011, Lauren had been involved in a monogamous sexual relationship with her boyfriend, which resulted in her becoming pregnant. Her last menstrual period was Nov. 26, 2011. In February 2012, during her relationship with her boyfriend, Lauren learned of her pregnancy through a home pregnancy test kit. Both Lauren and her boyfriend agreed that she would have an abortion and later ended their relationship.

Lauren had made multiple attempts to abort her pregnancy. According to Lauren, she had visited a medical clinic off La Cienega Boulevard in Los Angeles, but the clinic only performed first trimester abortions. According to Lauren, she also had an appointment with a family planning clinic in San Bernardino, but her ride to that clinic fell through and she eventually re-scheduled her appointment.

The Huntington Beach Police Department arrested Lauren on March 13, 2012, for Health & Safety Code section 11377, possession of a controlled substance; therefore she did not make her re-scheduled appointment at the San Bernardino clinic. Subsequently, a parole hold was issued for Lauren, causing her to remain incarcerated.

On March 15, 2012, Lauren was transported and booked at the OCSD Women's Main Jail. According to the OCSD Medical Intake Screen & Triage questionnaire, Lauren indicated that she was approximately 16 weeks pregnant and denied any complications with her pregnancy. OCSD Medical Intake declared Lauren suitable to undergo the booking process and she was housed at the Orange County Jail.

Beginning March 16, 2012, and on subsequent dates through April 3, 2012, Lauren filled out, signed and submitted Inmate Health Message Slips indicating she was pregnant and needed an abortion. The OCSD authorized a medical consultation with Family Planning Associates (FPA) Medical Group in Long Beach.

On April 4, 2012, Lauren was transported to FPA, where she signed paperwork consenting to an elective abortion performed by dilation and extraction with separate consents for insertion of the osmotic dilators and a digoxin injection. Lauren underwent an ultrasound, which determined her to be approximately 20 weeks pregnant. Due to the gestational length of Lauren's pregnancy, the abortion process would be done over a three day period of time.

On April 10, 2012, Lauren returned to FPA to begin the 3-step abortion process. Three dilators were inserted into Lauren's cervix. Lauren returned to the OCSD Women's Jail, but was housed in the Infirmary for observation.

On April 11, 2012, Lauren returned to FPA and had the previous three dilators removed and six more dilators inserted into her cervix. She was given a digoxin injection in the abdomen, which Lauren understood would cause the fetus' heart to stop and softened the tissues. Lauren returned to OCSD Women's Jail Infirmary with an appointment to return to FPA the following day for the third step in the abortion process. At approximately 8:00 p.m., Lauren received her pre-natal vitamins and antibiotic medication during the jail's medical call. She fell asleep and woke at approximately midnight suffering from cramps. Lauren said it felt like she was having contractions. Lauren told the jail nursing staff that she was cramping.

On April 12, 2012, at approximately 1:00 a.m., a Correctional Medical Services (CMS) registered nurse (RN) examined Lauren for vaginal bleeding, but found no signs of bleeding. The RN medicated Lauren with Tylenol, however, according to Lauren, her cramping continued for a couple of hours. Lauren sat on the toilet in an attempt to relieve the cramping and thought she might have to use the bathroom. While sitting on the toilet, Lauren "pushed" and expelled the fetus in the toilet water. According to Lauren, the fetus was not moving and was still attached to her via the umbilical cord. Lauren remained on the toilet and yelled "medical emergency" to get medical attention from staff.

After sitting on the toilet for a couple of minutes, OCSD Deputy Belinda Lee, who was conducting a sector check of the infirmary at approximately 2:50 a.m., was advised by Lauren that she had just miscarried and the fetus was outside of her vagina, but still attached to the placenta. Deputy Lee immediately summoned another RN, a licensed vocational nurse (LVN), and OCSD Deputy April Swain, who all then entered to render medical aid.

Lauren remained on the toilet and showed Deputy Lee that the fetus was still attached to her uterus via the umbilical cord. Deputy Lee requested that Deputy Swain contact paramedics. Deputy Lee did not observe the fetus to have any signs of life. Deputy Lee wrapped the fetus in a towel and carefully positioned Lauren onto a mattress and had her lie down. The responding RN and LVN checked Lauren's vital signs, which were normal. Deputies summoned the original RN, who responded to the infirmary and found Lauren lying on the floor on top of a mattress. The RN observed the fetus lying between Lauren's legs at her vaginal entrance, attached to the umbilical cord. The RN immediately checked the fetus to see if it was "viable," however, she found the fetus to be "non-viable." The RN also checked the toilet, but did not see anything of evidentiary value.

Deputy Swain also observed Lauren sitting on the toilet when she entered the infirmary to render medical aid. After Deputy Lee requested that Deputy Swain contact paramedics, Deputy Swain immediately directed staff to contact the fire department, which they promptly did. Deputy Swain also advised OCSD Sergeant James Bau of the incident. Deputy Swain changed out of her uniform to accompany Lauren to the hospital as they awaited the arrival of paramedics. The Santa Ana Fire Department (SAFD) Engine 1 and Medic 1 arrived on scene at approximately 3:03 a.m. and found Lauren having child birth issues.

At approximately 3:17 a.m., SAFD Medic 1 transported Lauren and the "stillborn" fetus to St. Joseph Hospital. Deputy Swain accompanied Lauren in the rear of the ambulance to take care and custody of the fetus while awaiting the arrival of the Orange County Sheriff's Coroner. Lauren's vital signs were monitored and remained stable. At approximately 3:24 a.m., Lauren was transferred into the care of St. Joseph Hospital Emergency Department personnel. Deputy Swain informed St. Joseph Hospital staff that no one was to remove the fetus from her care until the Coroner arrived. Lauren was eventually transferred to Labor & Delivery Room (LDR) # 19.

DR. B.K. EXAMINATION AND DIAGNOSIS AT ST. JOSEPH HOSPITAL

Upon arrival at the hospital, Lauren was transferred to the second floor Labor & Delivery. Doctor B.K. examined Lauren at approximately 3:45 a.m. Dr. B.K.'s preoperative diagnosis was that she had suffered an incomplete abortion at 19 weeks with the fetus hanging from the cord attached to the placenta, as well as partial retention of the placenta. Dr. B.K. did not see any sign of trauma to Fetus M. and there was no sign of life. According to Dr. B.K., Fetus M. would not have survived outside the womb, as its lungs had not fully developed. Dr. B.K. severed the umbilical cord at approximately 3:48 a.m.

After Dr. B.K. severed the umbilical cord, Fetus M. was placed in a white plastic container inside a red plastic biohazard bag that remained in LDR #19 and was retained for examination by the Orange County Sheriff Coroner.

According to St. Joseph Hospital medical records, Fetus M. was male; the gestational age was approximately 20 weeks; length was 8.5 inches and weight was 270 grams, and the Apgar score was zero in all five categories.

The Apgar score quickly evaluates a newborn's physical condition and well being, and is usually given twice; once at one minute after birth, and again at five minutes after birth. The following five factors are used to evaluate the newborn's condition and each factor is scored on a scale from zero to two, with a score of two being the best score:

- Heart rate
- Respiration effort
- Muscle tone
- Reflex
- Skin coloration

According to St. Joseph Hospital's delivery summary, the Apgar score for Fetus M. was zero at one minute, and zero at five minutes. At both one and five minutes, Fetus M. presented an absent heart rate, an absent respiratory effort, flaccid muscle tone, and no response to reflex and was blue in color.

At approximately 6:30 a.m., Dr. B.K. performed a Dilatation & Curettage (D&C) on Lauren. During the D&C, the placenta was delivered, and six laminarias (dilators) were removed. Lauren tolerated the procedure well and suffered no complications.

ORANGE COUNTY CORONER INVESTIGATION AND ANALYSIS

FETUS M. EXAMINATION

At approximately 5:29 a.m. on April 12, 2012, an Orange County Coroner Investigator arrived at St. Joseph Hospital LDR #19. A second Orange County Coroner Investigator arrived shortly thereafter. At approximately 5:52 a.m., Deputy Swain relinquished care and custody of Fetus M. to the two coroner investigators when Lauren was transferred to the Operating Room for the D&C procedure.

At approximately 6:05 a.m., the two Orange County Coroner Investigators performed a preliminary examination of Fetus M. and made the following observations:

- Fetus M. was inside a white plastic container and wrapped in a white towel.
- Fetus M.'s face and head were partially covered by the amniotic sac.
- A beige plastic clamp was affixed to Fetus M.'s umbilical cord.
- The placenta was photographed while inside a hospital container, but not retained.

At 6:25 a.m., the two coroner investigators sealed Fetus M.'s body inside a body bag and transported it to the Orange County Sheriff-Coroner Forensic Science Center in the City of Santa Ana.

At approximately 6:45 a.m., the Orange County Coroner's Office consulted Doctor Joseph Cohen, a Forensic Pathologist with United Forensic Services and the prior Chief Forensic Pathologist for the County of Riverside, to determine whether an autopsy would be appropriate. After reviewing documentation from CMS, FPA, St. Joseph Hospital, as well as photographs and X-rays; Dr. Cohen provided the following opinion:

Medical records clearly showed it was an "incomplete abortion." Incomplete abortion means that a portion (most of it in this case) of the placenta remained in the uterus following delivery of the fetus. The umbilical cord was still attached to the fetus, although the majority of the placenta remained in the uterus. Therefore, physicians performed a dilatation and curettage under spinal anesthesia to remove the retained placental tissue.

The abortive procedure was planned and consented to by Lauren and everything before and after the delivery was well documented.

The Apgar scores of the fetus were reported to be zero and zero, which meant that it was a “stillbirth.” This was no surprise, as the multiple-step abortion procedure was planned in advance, was in process, and Lauren precipitously delivered the fetus earlier than the planned extraction of the fetus.

Fetus M. was stillborn at most likely 19 to 20 weeks gestation, but unlikely was of gestational age greater than 20 to 21 weeks. The medical records show the physician of record deemed it a “stillbirth” at approximately 20 weeks gestation.

Based on all the available evidence and medical documents, Dr. Cohen concluded that an autopsy was not appropriate.

On April 18, 2012, Lauren signed an Authorization for Disposition of Fetus M., and also signed and dated the OCDA document indicating she authorized the Orange County Coroner’s Office to dispose of Fetus M. as biological waste.

BACKGROUND INFORMATION:

Lauren’s California Criminal History dates back to 2010. She had been previously arrested for the following charges:

- Possession of Controlled Substance
- Possession of Hypodermic needle/syringe
- Possession of Paraphernalia
- Burglary
- 1st Degree Robbery
- Probation violation
- Import/Transport Controlled substance
- Failure to appear after written promise
- Parole violation

LEGAL PRINCIPLES AND ANALYSIS

LAW OF HOMICIDE

Homicide is the killing of one human being, or a fetus, by another. Murder, voluntary manslaughter, and involuntary manslaughter are types of homicide. To prove that a person is guilty of murder, it must be proven that:

1. The person committed an act that caused the death of another person or fetus;
2. When the person acted he/she had a state of mind called malice aforethought; and
3. He/she killed without lawful excuse or justification.

Viability of a fetus is not an element of fetal homicide, but the prosecution must demonstrate “that the fetus has progressed beyond the embryonic stage of seven to eight weeks.” Generally this occurs after major structures have been outlined. *People v. Davis* (1994) 7 Cal. 4th 797, 814-815.

In this case, Dr. B.K. estimated Fetus M.’s gestational age at approximately 19 or 20 weeks, which is well beyond the embryonic stage of seven to eight weeks. DR. Cohen corroborated that opinion, but estimated Fetus M.’s gestation age at approximately 19 or 20 weeks.

While Fetus M. had progressed beyond the embryonic stage of seven to eight weeks, Penal Code section 187(b) nevertheless provides an exception to the death of a fetus under certain circumstances.

PENAL CODE SECTION 187(b) (EXCEPTION TO MURDER)

Penal Code Section 187(b) provides that murder charges will not apply to a person who commits an act that results in the death of a fetus if, in relevant part:

- (1) The act was solicited, aided, abetted, or consented to by the mother of the fetus, or

(2) The act complied with the Therapeutic Abortion Act ("TAA").

Murder charges are not appropriate if Lauren, the mother of Fetus M., consented to the abortion or if the abortion complied with the *Reproductive Privacy Act* (Formerly *Therapeutic Abortion Act*).

THE REPRODUCTIVE PRIVACY ACT (FORMERLY THERAPEUTIC ABORTION ACT)

The TAA has been replaced by the *Reproductive Privacy Act* ("RPA"), which mirrors federal law, and provides that every woman has a fundamental right to an abortion and the State shall not deny or interfere with a woman's fundamental right to choose to bear a child or obtain an abortion prior to the "viability of the fetus" or, when necessary, to save the life or health of the mother.

Under federal law, a woman has a constitutional right to choose to terminate her pregnancy before the fetus is viable without undue interference by the state. See *Planned Parenthood v. Casey* (1992) 505 U.S. 833, at 846. "Adult women have a Fourteenth Amendment right to terminate a pre-viability pregnancy." *Id.* at 871.

"Viability of the fetus" in this context refers to the point at which the State may prohibit an abortion as the state has a "compelling interest in the life or health of the fetus." See *Colautti v. Franklin* (1979) 439 U.S. 379, at 388-389. States may not fix viability at a specific point in a woman's pregnancy because viability varies from pregnancy to pregnancy. While viability is a "flexible" point, see *Planned Parenthood of Cent. Mo. v. Danforth* (1976) 428 U.S. 52, at 64, it is medically determinable. *Id.* at 64-65. Precisely because viability varies from pregnancy to pregnancy, the Supreme Court has held repeatedly that "the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician." *Colautti, supra*, 439 U.S. at 396 (citing *Danforth, supra*, 428 U.S. at 64).

The State must further comply with *Penal Code* sections 3405 and 4028 when dealing with female detainees and prisoners.

Penal Code § 3405

Penal Code section 3405 provides that a prisoner who is pregnant and desires an abortion, if eligible under the law as cited above, is entitled to obtain the abortion. Therefore, despite the fact that Lauren is an inmate, she retains the fundamental right as a pregnant woman to seek and obtain an abortion, and thus is protected by the RPA.

Penal Code §4028

Penal Code section 4028 provides that the State shall place no conditions or restrictions upon the obtaining of an abortion by a female detained in any local detention facility, pursuant to the TAA (now the RPA). Females found to be pregnant and desiring abortions shall be permitted to determine their eligibility for the right, and if determined to be eligible, shall be permitted to obtain one.

LAUREN'S REQUEST FOR AN ABORTION

Lauren, mother of Fetus M., requested and solicited a therapeutic abortion between March 16, 2012 and April 3, 2012, when she voluntarily submitted an Inmate Health Message Slip requesting an abortion procedure while in the custody of OCSD. She indicated she was about 16 weeks pregnant. Upon receipt of the Inmate Health Message Slip, the OCSD authorized a medical consultation with FPA.

On April 4, 2012, OCSD transported Lauren to FPA, where it was determined she was 20 weeks pregnant. Lauren voluntarily signed paperwork consenting to an elective abortion, and began the three-step abortion process six days later. FPA determined Lauren to be eligible for an abortion and she was transported by OCSD to FPA two more times to complete the elective abortion procedure.

During the early morning of April 12, 2012, after Lauren complained of cramps, an RN checked Lauren for signs of vaginal bleeding. The RN did not observe any such signs and appropriately provided Lauren with medication to relieve her symptoms. Lauren's symptoms did not subside.

While sitting on the toilet, Lauren “pushed” and expelled the fetus in the toilet water. The fetus was not moving and was still attached to her via the umbilical cord. Lauren remained on the toilet and yelled “medical emergency” to get medical attention from staff.

Deputy Lee observed and heard Lauren’s medical emergency and sought and received assistance from Deputy Swain and two other nurses, who immediately rendered medical assistance to Lauren and Fetus M. The RN, after being notified of Lauren’s medical emergency, treated Lauren while paramedics responded, but found Fetus M. to not be viable.

The OCSD complied with the *RPA*, *Penal Code* section 3405 and 4028, and did not deny or impede Lauren’s right to an abortion. Nor did the OCSD place any conditions or restrictions on Lauren in order to impede her right to an abortion. To the contrary, the OCSD actually provided necessary medical care to carry out her legally protected desire to receive a therapeutic abortion.

LAUREN’S ABORTION COMPLIED WITH THE REPRODUCTIVE PRIVACY ACT

FPA determined that Lauren was eligible for an abortion because she was in the early stages of her pregnancy and her unborn fetus was not viable at the time FPA began the three-step abortion process. As indicated above, Dr. B.K. opined that Lauren had suffered an “incomplete abortion” and deemed Fetus M. a “stillbirth.” Fetus M. was beyond the embryonic stage, as major structures had been outlined. Dr. B.K. estimated Fetus M.’s gestational age at approximately 19 or 20 weeks. Dr. Cohen corroborated that opinion, but estimated Fetus M.’s gestation age at approximately 19 or 20 weeks. Nevertheless, Fetus M. was not viable because according to Dr. B.K., Fetus M.’s lungs had not fully developed and would not have survived birth.

Therefore, the two doctors’ opinions about Fetus M.’s gestational age confirm that the fetus was not “viable” and that the abortive procedure complied with RPA and federal law.

CONCLUSION

Based on all the evidence provided to and reviewed by the OCDA and pursuant to the applicable legal principles, there is no evidence to support a finding of criminal culpability on the part of any OCSD personnel or any individual under the supervision of OCSD. The evidence clearly shows that Fetus M.’s demise was the result of being “stillborn” due to an incomplete abortive procedure, lawfully requested by the fetus’ mother, and that the abortive procedure complied with RPA and federal law and would fall under the exception to murder under Penal Code section 187(b).

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

Respectfully Submitted,



Israel Claustro
Deputy District Attorney
Target-Gang Unit



Read and Approved by **Ebrahim Baytieh**
Acting Assistant District Attorney
Head of Court – Special Prosecution Unit