



OFFICE OF THE

# DISTRICT ATTORNEY

ORANGE COUNTY, CALIFORNIA

**TONY RACKAUCKAS, DISTRICT ATTORNEY**

September 11, 2017

Acting Chief David Valentin  
Santa Ana Police Department  
60 Civic Center Plaza  
Santa Ana, CA 92701

Re: Officer-Involved Shooting on August 1, 2016  
Fatal Incident involving Richard Gene Swihart  
District Attorney Investigations Case # SA 16-027  
Santa Ana Police Department # 16-20142  
Orange County Crime Laboratory Case # 16-52644

Dear Acting Chief Valentin,

Please accept this letter detailing the Orange County District Attorney's Office (OCDA) investigation and legal conclusion in connection with the above-listed incident involving on-duty Santa Ana Police Department (SAPD) Officer Matthew Chitjian. Richard Gene Swihart, 32, died as a result of his injuries. The incident occurred in the City of Santa Ana on Aug. 1, 2016.

## OVERVIEW

This letter contains a description of the scope and the legal conclusions resulting from the OCDA's investigation of the Aug. 1, 2016, fatal, officer-involved shooting of Richard Gene Swihart (Swihart). 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 SAPD 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 Aug. 1, 2016, Investigators from the OCDA Special Assignment Unit (OCDASAU) responded to this incident. During the course of this investigation, 15 interviews were conducted, and 15 additional witnesses were contacted during the supplemental canvass interviews. OCDASAU Investigators also obtained and reviewed the following: SAPD reports, audio dispatch and radio traffic recordings; Orange County Crime Laboratory (OCCL) reports, including toxicology, DNA, latent print, officer processing and firearms examination reports; Orange County Sheriff-Coroner's Office (OCCO) reports; Orange County Fire Authority (OCFA) reports; crime scene investigation and subject photographs; video surveillance; civilian video footage; criminal history records relating to Swihart; 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 reviewed all evidence and legal standards impartially. The scope and findings of this review are expressly limited to determining whether any criminal conduct occurred on the part of SAPD officers or personnel, specifically Officer Chitjian. The OCDA will not be addressing any possible issues relating to policy, training, tactics, or civil liability.

REPLY TO: ORANGE COUNTY DISTRICT ATTORNEY'S OFFICE

WEB PAGE: [www.OrangeCountyDA.com](http://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 13<sup>TH</sup> 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) 835-7624

☐ ☐ CENTRAL OFFICE  
401 CIVIC CENTER DR. W  
P.O. BOX 808  
SANTA ANA, CA 92701  
(714) 834-3952

**JIM TANIZAKI**  
CHIEF ASSISTANT D.A.

**JOSEPH D'AGOSTINO**  
SENIOR ASSISTANT D.A.  
GENERAL FELONIES/  
ECONOMIC CRIMES

**MICHAEL LUBINSKI**  
SENIOR ASSISTANT D.A.  
SPECIAL PROJECTS

**JAIME COULTER**  
SENIOR ASSISTANT D.A.  
BRANCH COURT OPERATIONS

**SCOTT ZIDBECK**  
SENIOR ASSISTANT D.A.  
VERTICAL PROSECUTIONS/  
VIOLENT CRIMES

**JENNY QIAN**  
DIRECTOR  
ADMINISTRATIVE SERVICES

**SUSAN KANG SCHROEDER**  
CHIEF OF STAFF

## **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, TARGET/Gangs, and Special Prosecutions Units review fatal, as well as non-fatal, officer-involved shootings and custodial death cases and determine whether criminal charges are appropriate. Throughout the review process, the assigned prosecutor will be in consultation with the Assistant District Attorney supervising the Special Prosecutions Unit, who 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 is to attempt to obtain a statement from the involved officers. Officer David Enriquez gave a voluntary statement to OCDA Investigators on Aug. 1, 2016. Officer Matthew Chitjian declined to give a voluntary statement to the OCDA.

## **FACTUAL SUMMARY**

On Aug. 1, 2016, at approximately 9:20 a.m., SAPD Officers Chitjian and Enriquez were assigned to patrol the homeless encampments located at the Civic Center Plaza in Santa Ana. Officer Enriquez drove a marked, black and white SAPD police vehicle with Officer Chitjian in the passenger seat. Both officers wore SAPD uniform polo shirts with "SANTA ANA POLICE" written in large white letters on the back, embroidered SAPD badges on the left chest area, SAPD patches on each shoulder, dark blue jeans, and a black nylon duty belt holding police equipment. Each officer carried a duty firearm in a holster. The incident was captured on various government building surveillance video cameras.

Officer Enriquez drove westbound with Officer Chitjian on the walkway north of the Plaza of the Flags and south of the Central Justice Center courthouse. They observed a male subject, approximately 5 feet 10 inches and 180 pounds, later identified as Richard Gene Swihart, riding a bicycle on the handicapped ramp in the Plaza of the Flags. The Civic Center area has a substantial homeless population and is also a busy pedestrian thoroughfare for county employees, jurors, and civilians accessing surrounding county buildings. Riding a bicycle within the Civic Center area is a violation of Santa Ana Municipal Code (SAMC) section 36-41(11).

Swihart rode his bicycle toward the officers' patrol vehicle and stopped. Officer Enriquez parked the patrol vehicle and both officers got out, intending to issue Swihart a citation for the SAMC violation. Officer Enriquez told Swihart, "Stop. I need to talk to you about your riding your bike in the Civic Center," and asked for identification. Officer Enriquez said Swihart became hostile, stating he did not have identification and asked why the officer was giving him a hard time. Officer Enriquez responded, "Sir, we're just going to give you a citation for riding your bike," and asked Swihart to put the kickstand down on his bicycle. Swihart continued to be uncooperative and asked why the officers were bothering him. Officer Enriquez did not see any signs of intoxication and believed Swihart was coherent and knew he was speaking to the police. Swihart was wearing cargo shorts with numerous pockets, and also had a container attached to his bicycle containing numerous personal items.

Because Swihart refused to comply, the officers moved towards Swihart to detain and place handcuffs on him. Officer Enriquez intended to search Swihart for officer safety and proceed with issuance of the citation. Officer Enriquez told Swihart not to move because they were going to cuff him. Swihart pushed his bicycle to the ground. When the officers tried to handcuff him, Swihart tensed up, became rigid and tried to pull away. Officer Enriquez tried to gain control over Swihart by placing his left arm over Swihart's shoulder and chest area, so Officer Enriquez could spin Swihart to the ground. Officer Enriquez's goal was to get Swihart into a position to safely handcuff him, but Swihart was strong and resisted going to the ground.

Officer Enriquez lost his footing and both he and Swihart fell to the ground, side by side. Officer Enriquez did not know where Swihart's hands were, which Officer Enriquez believed was a safety concern because Swihart had not been searched for weapons. When Officer Enriquez and Swihart were on the ground, Officer Enriquez felt a tugging sensation on the gun holster of his utility belt and saw Swihart trying to take the gun from its holster. Officer Enriquez believed that if Swihart was able to obtain his gun that there was an imminent threat of danger to himself, Officer Chitjian, and the surrounding civilians. Officer Enriquez was unable to re-gain control over his gun, so he shouted, "He's going for my gun! He's going for my gun!" to alert Officer Chitjian. Immediately after, Officer Enriquez heard two shots and Swihart's grip on the gun loosened, allowing the officers to detain him.

Officer Enriquez announced the shooting over the radio at approximately 9:24 a.m. Both officers proceeded to administer first aid to Swihart at the scene. Additional police officers arrived to assist with crowd control and secure the scene. The OCFA transported Swihart to Orange County Global Medical, where he was treated for gunshot wounds until he was pronounced deceased on Aug. 14, 2016.

Numerous civilians witnessed the entire incident and stated that Swihart was combative with the officers and tried to take Officer Enriquez's gun. One witness stated, "The officers had no choice, they are fighting for their lives." Another witness said, "That cop did nothing wrong, I saw that dude [Swihart] try to take the officer's gun," and numerous witnesses believed the officers were protecting themselves. The entire incident unfolded in less than two minutes.

### **EVIDENCE COLLECTED**

The following items of evidence were collected and examined:

- Two cartridge cases head stamped "WINCHESTER 45 AUTO"
- Bullet collected from the hospital

### **EVIDENCE ANALYSIS**

#### **Firearms Examination**

Officer Chitjian's Glock Model 21 pistol was test fired at the OCCL by a forensic scientist and it fired without malfunction. The analysis of the evidence in this case scientifically confirmed that the two cartridge cases from the scene were fired from Officer Chitjian's Glock pistol.

#### **Toxicological Examination**

A sample of Swihart's blood was collected and examined by a forensic scientist at the OCCL. Amphetamine, Methamphetamine, THC and Carboxy-THC were detected in Swihart's blood.

#### **Fingerprints**

Officer Chitjian's weapon, and Officer Enriquez's weapon and holster, were processed for latent fingerprints. The evidence obtained was of insufficient quality for scientific comparison with Swihart's fingerprints.

#### **DNA**

DNA evidence was collected but it was of insufficient quantity for scientific analysis.

#### **AUTOPSY**

On Aug. 15, 2016, a Forensic Pathologist from the Orange County Sheriff-Coroner's Office conducted an autopsy on

the body of Swihart. The cause of Swihart's death was determined to be from complications from two gunshot wounds to the torso, and pulmonary thromboemboli.

### **CRIMINAL HISTORY**

Swihart's criminal history consists of arrests for the following crimes:

- Transportation of a Controlled Substance
- Robbery
- Attempted Extortion and Extortion
- Possession of a Controlled Substance
- Possession of a Controlled Substance Paraphernalia
- False Identification to a Peace Officer
- Possession of Marijuana
- Inflicting Corporal Injury to a Spouse or Cohabitant
- Petty Theft
- Driving While License Suspended
- Obstructing a Public Officer
- Trespassing
- Probation Violation
- Possession of a Switchblade Knife
- Evading a Police Officer
- Failure to Report for a Work Release Program
- Under the Influence of a Controlled Substance

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

Possible criminal charges against an officer involved in an on-duty shooting incident include murder [Penal Code Section 187]; manslaughter [Penal Code Section 192]; 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. Adrian* (1982) 135 Cal.App.3d 335, 340-342.) 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 the 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. (*Kortum v. Alkire* (1977) 69 Cal.App.3d 325, 332.) The felony must involve violence or the threat of violence. (*Id.* at 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." The Court of Appeal 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 p. 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/her mind, as a reasonable person, an honest fear and conviction that he/she 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 physical injury to the officer or others."

This limitation was, however, clarified subsequently by the United States Supreme Court in the seminal case of *Graham v. Connor* (1989) 490 U.S. 386, wherein the Supreme Court explained that an officer's right to use force [i.e., his/her 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 rapidly evolving—about the amount of force that is necessary in a particular situation" (*Id.* at 396-397.)

The United States Supreme Court's analysis and teachings in *Graham* are very much applicable to the circumstances surrounding the interactions of SAPD Officer Chitjian with Swihart.

## **LEGAL ANALYSIS**

The issue in this case is whether the conduct of Officer Chitjian on Aug. 1, 2016, was criminally culpable and without justification. As stated above, in order to charge Officer Chitjian with a criminal violation, it is required that the prosecution have the good faith belief in the ability to prove, beyond a reasonable doubt, that no legal justification existed for the police officer's conduct. If Officer Chitjian's actions were justifiable as lawful self-defense or defense of others, criminal charges will not be warranted.

Based on the totality of all the available evidence, it is clear that Officer Chitjian was justified in believing Swihart posed a significant threat of death or serious physical injury to himself, his partner, and the surrounding civilians. Swihart was illegally riding a bicycle in a heavily populated pedestrian area. Swihart was approached by Officers Enriquez and Chitjian, who were in police uniform and coming from a clearly marked, black and white Santa Ana Police Department vehicle. When contacted about riding his bicycle and asked to provide identification, Swihart refused and became hostile and argumentative. Officer Enriquez made numerous unsuccessful attempts to obtain compliance. When Swihart refused to cooperate, the officers attempted to handcuff him to safely issue a citation.

When Officers Chitjian and Enriquez attempted to place Swihart's hands behind his back, Swihart resisted and tried to pull away. Officer Enriquez tried to gain control by taking Swihart to the ground. While on the ground, Swihart continued to struggle. Officer Enriquez felt his holster move and saw Swihart's hand on his holster, pulling on his handgun. Officer

Enriquez was justifiably and reasonably afraid Swihart would get his gun and shoot him, his partner or any one of the numerous civilians in the area, so he yelled to Officer Chitjian, "He's going for my gun! He's going for my gun." Officer Chitjian then fired two gunshots. Civilians witnesses who observed the incident shared Officer Enriquez's concerns and stated that the officers, "had no choice," and, "were protecting themselves." While Officer Chitjian did not give the OCDA a statement, it is reasonable that a jury may infer that he heard Officer Enriquez's statements and believed he needed to use deadly force to protect himself, his partner, and the public.

Certainly, it would have been preferable if the OCDA were able to obtain a voluntary statement from Officer Chitjian regarding his state of mind at the time of the shooting. However, Officer Chitjian's decision to decline to give the OCDA a voluntary statement may not legally and ethically be used to draw negative evidentiary inferences regarding the conduct and the state of mind of Officer Chitjian.

In order for Officer Chitjian to be justly and lawfully charged and convicted with a crime, it is the OCDA's burden to prove beyond a reasonable doubt that Officer Chitjian did not act in reasonable and justifiable self-defense or defense of another when he shot Swihart. As should be apparent from the above-described facts and analysis, the prosecution would be unable to carry this burden in this case. A jury analyzing these facts would justly conclude that it was reasonable for Officer Chitjian to believe his life and the lives of others were in danger. It is clear from the evidence in this case that Officer Chitjian did not commit a crime, and that he was justified when he shot Swihart and carried out his duties as a peace officer in a reasonable and justifiable manner.

#### **CONCLUSION**

Based upon a review of all of the evidence provided to and obtained by the OCDA, and based on the entirety of the facts contained in all the available reports and interviews reviewed, and pursuant to the applicable legal principles, it is our legal opinion that there is no evidence of criminal culpability on the part of Officer Chitjian, and there is substantial evidence that his actions were reasonable and justified under the circumstances when he shot and killed Swihart on Aug. 1, 2016.

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



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**Erin Rowe**  
Deputy District Attorney  
Special Prosecutions Unit



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Read and approved by **Ebrahim Baytieh**  
Assistant District Attorney  
Supervising Head of Court – Special Prosecutions Unit