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May 13, 2016

Chief Robert Sharpnack
Costa Mesa Police Department
99 Fair Drive
Costa Mesa, CA 92626

Re: Officer-Involved Shooting on July 5, 2012
Non-Fatal Incident involving Vincent Joseph Leon
District Attorney Investigations Case # S.A. 12-016
Costa Mesa Police Department Case # 12-7998
Crime Laboratory Case FR # 12-50060

Dear Chief Sharpnack,

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 Costa Mesa Police Department (CMPD) Officer Dana Potts. Vincent Joseph Leon, 30, survived his injuries. The incident occurred in the City of Costa Mesa on July 5, 2012.

OVERVIEW

This letter contains a description of the scope of and the legal conclusions resulting from the OCDA's investigation of the July 5, 2012, non-fatal, officer-involved shooting of Leon. 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 CMPD 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 5, 2012, Investigators from the OCDA Special Assignment Unit (OCDASAU) responded to this incident. During the course of this investigation, five interviews were conducted, and 36 additional witnesses were contacted during the supplemental canvass interviews. OCDASAU Investigators also obtained and reviewed the following: CMPD reports, audio and video recordings; dispatch and radio traffic recordings; Orange County Sheriff Crime Lab (OCCL) reports, including DNA, latent print, officer processing and firearms examination reports; crime scene investigation photographs; photographs related to the injuries sustained by Leon; criminal history records related to Leon, including prior incident reports; 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 CMPD officers or personnel, specifically Officer Potts. The OCDA will not be addressing issues of policy, training, tactics, or civil liability.

In a case where there is an officer-involved shooting incident and the OCDA files criminal charges against the individual shot by the police, it is the OCDA's policy not to release the final report regarding the officer involved shooting incident until after the issue of guilt is decided in the underlying filed criminal case. This policy is in place to ensure that OCDA is not releasing any information that may be viewed as prejudicing the right of a defendant to receive a fair trial while his or her case is still pending.

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, Gang, and Special Prosecution 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 of an incident such as this is attempting to obtain a statement from the involved officers. Officer Potts provided a voluntary statement on July 5, 2012.

FACTS

Vincent Joseph Leon has a history of drug abuse. At the time of the incident, Leon was on parole for narcotics possession and sales. He frequented motels in the cities of Santa Ana and Costa Mesa. At approximately 6:00 a.m. on July 5, 2012, John Doe was sleeping in room #109 of the New Harbor Inn when Leon arrived and knocked on John Doe's door. Leon told John Doe he had \$100 to spend, and Leon wanted John Doe to take him to Santa Ana so he could purchase heroin.

John Doe agreed and followed Leon to a black 2001 Nissan Frontier ("Frontier") truck. John Doe entered the passenger seat of the truck and Leon entered the driver's seat. The Frontier had been reported stolen from Diamond Bar between July 4, 2012, at 11:00 p.m. and July 5, 2012, at 4:30 a.m.

At 6:12 a.m., Costa Mesa Police Department (CMPD) Officer Dana Potts was working patrol in a marked black and white police vehicle equipped with a LoJack monitor. Officer Potts' LoJack monitor activated, indicating that a stolen vehicle was near his location. The LoJack activation was for the same Frontier. Officer Potts followed the signal for the vehicle and arrived at the New Harbor Inn at 6:24 a.m.

Officer Potts saw the Frontier in the parking lot, and he positioned his vehicle just north of the Frontier's rear bumper. Officer Potts observed Leon sitting in the driver's seat and John Doe in the passenger seat. After exiting his vehicle, Officer Potts drew his firearm, pointed it at the Frontier, and ordered the occupants to raise their hands. John Doe saw Officer Potts and heard the commands. When that occurred, John Doe described the look in Leon's eyes as, "I ain't listening to him, I ain't stopping," and having "that mad dog look," like "he was on a mission to get out of there."

At that moment, Leon put his hands up and took his foot off the brake. The Frontier began to move in reverse, past the front of Officer Potts' vehicle. While it was moving in reverse, the Frontier struck the front push bumper and front right bumper of Officer Potts' police vehicle. John Doe saw Leon "slap" the truck into drive. John Doe jumped out of the vehicle and remained in the parking lot. Leon drove the Frontier into the front right quarter panel of Officer Potts' vehicle, moving it toward Officer Potts and forcing him backwards toward the parked cars to the east. Leon then placed the Frontier into reverse again and backed up so the Frontier was again southwest of Officer Potts' vehicle. Officer Potts moved in front of his driver's side door toward the left front quarter panel and continued shouting commands for Leon to stop the vehicle.

Leon then placed the vehicle in drive. Leon looked directly at Officer Potts, making eye contact, and accelerated. John Doe said Leon, "gunned it" to go around the police vehicle or move it out of the way. Leon drove the Frontier into Officer Potts' patrol vehicle, striking it a second time. Officer Potts, fearing for his life, and afraid he would be pinned between the driver's side of his vehicle and the parked cars to the east, fired his pistol at Leon. The bullets struck the front hood and windshield of the Frontier. Officer Potts then retreated into an open parking space, away from his vehicle and the other parked vehicles, as he continued to fire his pistol at Leon. Officer Potts fired a total of six times.

Leon exited the Frontier and ran out of the New Harbor Inn parking lot, turning onto Harbor Boulevard. Leon ran to 2191 Harbor Boulevard into the Trade Winds Mobile Home Park. A surveillance camera showed Leon, in a dark hoodie and black hat, run through the parking lot and try to jump over the northwest concrete wall of the front parking lot. Leon wasn't able to climb the wall, so he ran and hid under a white 1996 GMC Jimmy in the same parking lot. Blood drops were located next to the vehicle. When Leon saw residents looking at him, he ran from the Trade Winds parking lot, onto Harbor Boulevard, and through the parking lot at 2177 Harbor Boulevard.

Leon jumped over the fence and into the yard of 2172 Charle Street, Unit B. Leon entered that residence through the back kitchen door. When the owner of the residence, Jane Doe, confronted Leon, Leon walked into the backyard, discarding his sweatshirt and hat on the ground. Leon then took Jane Doe's daughter's bicycle and fled southbound on Charle Street.

John Doe's opinion was that Officer Potts had the potential of being injured each time Leon crashed the Frontier into the police vehicle. Tire marks from the Frontier indicate two rapid accelerations. There was damage to the police vehicle's fender, door, and wheel. Scuff marks from the police vehicle indicated it moved a substantial distance.

Civilian witnesses were interviewed. They confirmed hearing the police officer's commands, a crash, and then shots being fired. Another civilian witness saw the truck crash into the police unit and the driver flee. Leon's girlfriend was also interviewed, and said she overheard Leon tell his father, "I took a car and did something stupid."

CMPD patrol vehicles are equipped with Mobile Audio Video Systems (MAVS) recording devices. The MAVS are activated when the patrol vehicle's lights and sirens are turned on. However, since Officer Potts did not turn on his lights and sirens prior to or at any time during his contact with Leon, his MAVS did not activate.

Leon's Voluntary and Consensual Statement

On July 13, 2012, Leon was arrested by the CMPD. Leon was read his Miranda rights and agreed to speak to police officers. Leon stated he was not at the New Harbor Inn and was not involved in the officer involved shooting incident on July 5, 2012. A one-inch pink abrasion was observed on the left side of Leon's forehead. Leon claimed the injury was a result of a fight with a man named, "Roadkill." Leon also claimed he had alibi witnesses, but refused to give their names.

EVIDENCE COLLECTED

The following evidence was collected by Orange County Crime Laboratory personnel:

Officer Potts

- One Heckler & Koch USP .40 caliber, semi-automatic pistol;
- One Winchester .40 caliber cartridge, located in the chamber of the gun;
- Seven Winchester .40 caliber cartridges, located in the magazine of the gun; and
- Two full magazines, located on Officer Pott's duty belt.

Scene #1 – New Harbor Inn parking lot

- Black Nissan Frontier truck;
- Six .40 caliber cartridge casings, head stamped "WINCHESTER 40 S&W";
- Two bullets and a projectile fragment from the Nissan Frontier;
- A piece of paper with writing on it; and
- A hypodermic syringe.

Scene #2 – Trade Winds Mobile Park Home

One blood swab collected from the Trade Winds Mobile Park home parking lot.

Scene #3 – 2172 Charle Drive

- One black baseball cap;
- One gray and black long-sleeve hooded sweatshirt;
- One white plastic shopping bag; and
- One green "Baja Fresh" card (located in the right front sweatshirt pocket).

EVIDENCE ANALYSIS

Firearm, Cartridge and Projectile Examination

An OCCL forensic specialist examined the firearms and projectiles collected in this case. Officer Potts' Heckler & Koch USP .40 caliber, semi-automatic pistol was test-fired using ammunition from the submitted magazines. The pistol operated without malfunction. The six fired cartridges were determined to have been fired in Officer' Pott's pistol. It could not be determined if any of the bullets were fired from Officer Pott's firearm.

Deoxyribonucleic Acid (DNA)

An OCCL forensic specialist collected swabs from the blood stains recovered in the three different crime scenes: next to the white GMC Jimmy at the Trade Winds Mobile Home Park; the gray and black hooded sweatshirt, black hat, and plastic bag recovered from 2172 Charle Drive; and the driver's side area of the Frontier. A DNA sample was obtained from Leon and DNA tests were conducted to compare Leon's DNA to the evidence collected. The same DNA profile was obtained from the blood from the Trade Winds Trailer Park, the sweatshirt, the hat, and the oral swab standard from Leon. DNA consistent with Leon was detected in the samples taken from the Frontier.

Fingerprints

A latent fingerprint taken from the Frontier was identified to Leon.

Leon's Prior Criminal History

Leon's criminal history was reviewed and considered. It consists of the following: possession of narcotics for sale, residential burglary, grand theft, vehicle theft, commercial burglary, possession of narcotics, obstructing a police officer, petty theft, speed contest, driving under the influence, possession of narcotics paraphernalia, driving with a suspended license, failure to appear, and violations of parole.

Leon's Post-Incident Conviction

On July 22, 2013, the OCDA filed an Information, charging Leon in Orange County Superior Court case 12HF2003 with one count of violating California Penal Code section 245(c), aggravated assault on a peace officer; one count of violating California Penal and Vehicle Code sections 665.5(a)-10851(a), vehicle taking with a prior conviction; and one count of violating California Penal Code section 666(a)-484(a)-488, theft with three prior convictions. The OCDA further alleged that Leon was previously convicted of a prior serious felony and served prior prison terms. On May 11, 2016, Leon plead guilty to all the charges and was sentenced to 9 years in state prison.

STANDARD LEGAL PRINCIPLES IN OFFICER-INVOLVED SHOOTING CASES

Possible criminal charges against an officer involved in a non-fatal shooting include 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. 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 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, 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.

The United States Supreme Court's analysis and teachings in *Graham, supra*, apply to the circumstances surrounding the interaction between Officer Potts with Leon.

LEGAL ANALYSIS

Officer Potts first encountered Leon in the parking lot of the New Harbor Inn seated in the driver's seat of a stolen vehicle. After exiting his police vehicle, Officer Potts drew his firearm, pointed it at the Leon's vehicle, and ordered the occupants to raise their hands. Passenger John Doe saw Officer Potts and heard the commands, and described the look in Leon's eyes as, "I ain't listening to him, I ain't stopping," and having "that mad dog look," like "he was on a mission to get out of there."

When Leon raised his hands, he took his foot off the brake, and his vehicle began to move in reverse. Leon's vehicle struck the front push bumper and front right bumper of Officer Potts' vehicle. Leon then "slap[ped]" his vehicle into drive and John Doe jumped out of the Frontier. Leon drove into the front right quarter panel of Officer Potts' vehicle, moving it toward Officer Potts and forcing him backwards toward the parked cars to the east. Leon then shifted into reverse and backed up so that his vehicle was again southwest of Officer Potts' vehicle. Officer Potts moved in front of his driver's side door toward the left front quarter panel and continued to give commands for Leon to stop. Leon did not comply; instead, he placed the vehicle in drive, while looking directly at Officer Potts, and accelerated hard. Leon drove into Officer Potts' vehicle, striking it a second time. According to John Doe, Officer Potts had the potential of being injured each time Leon crashed into the police vehicle. Officer Potts, fearing for his life, and thinking that he would be pinned between the driver's side of his vehicle and the parked cars to the east, fired his pistol six times at Leon.

In order for Officer Potts to be justly and lawfully charged and convicted with a crime in this incident, it is the OCDA's burden to prove beyond a reasonable doubt that Officer Potts did not act in reasonable and justifiable self-defense or defense of another when he shot at Leon. As should be apparent from the above-described 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 Potts to believe that his life was in danger. Therefore, he was justified when he shot at Leon.

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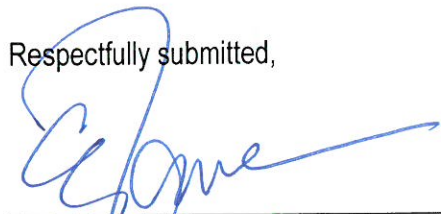
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CONCLUSION

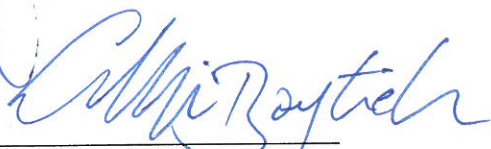
Based upon a review of all of the evidence provided to and obtained by the OCDA, and based on the entirety of the facts contained in all the available reports and interviews reviewed, and pursuant to the applicable legal principles, it is our legal opinion that there is no evidence of criminal culpability on the part of Officer Potts, and there is substantial evidence that his actions were reasonable and justified under the circumstances in the shooting of Leon on July 5, 2012.

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

Respectfully submitted,



Erin Rowe
Deputy District Attorney
Special Prosecutions Unit



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