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October 30, 2013

Interim Chief Carlos Rojas
Santa Ana Police Department
60 Civic Center Plaza
Santa Ana, CA 92701

Re: Officer Involved Shooting on December 10, 2010
Fatal Incident involving Andres Ramirez
District Attorney Investigations Case # S.A. 10-023
Santa Ana Police Department DR # 10-40060
Orange County Crime Laboratory Case FR # 10-55469

Dear Chief Rojas,

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 Santa Ana Police Department (SAPD) Officer Frank Gutierrez. Andres Ramirez, 21, of Santa Ana, died as a result of his injuries. The incident occurred in the City of Santa Ana on Dec. 10, 2010.

OVERVIEW

This letter contains a description of the scope of and the legal conclusions resulting from the OCDA's investigation of the Dec. 10, 2010, fatal officer-involved shooting of Ramirez. 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 Dec. 10, 2010, Investigators from the OCDA Special Assignment Unit (OCDASAU) responded to this incident. OCDASAU Investigators interviewed 152 witnesses and obtained and reviewed the following: Santa Ana Police and Fire Department 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; medical records and photographs related to the injuries sustained by Ramirez; criminal history records related to Ramirez including prior criminal history records and prior incident reports; the personnel records of Officer Gutierrez; 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 SAPD officers or personnel,

specifically Officer Gutierrez. The OCDA will not be addressing herein issues of policy, training, tactics or civil liability.

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 an incident such as this is attempting to obtain a statement from the involved officers. No other officers besides Officer Gutierrez were present to witness the shooting. Officer Mike Heitmann was the nearest officer to the scene of the shooting, and he voluntarily spoke to OCDA on July 11, 2010 (the day after the shooting). After denying numerous interview requests by OCDA, Officer Gutierrez granted an interview to OCDA on Sept. 25, 2012.

FACTS

In late 2010, Ramirez moved to California from North Carolina. On Dec. 8, 2010, Ramirez moved from his cousin's house in Santa Ana to his aunt's' house on South Ross Street in Santa Ana.

In the early afternoon of Dec. 10, 2010, SAPD received two citizen reports of "gangsters" and "gang members" loitering in the area of apartment buildings on South Poplar Street. This area in Santa Ana is claimed as turf by a local criminal street gang. Officers were dispatched to the area but did not make any record of contacting any subjects in response to the calls.

At 6:00 p.m. on Dec. 10, 2010, Officer Gutierrez began his patrol shift.

At about 6:10 p.m., SAPD received a citizen report that 10 to 12 gang members were drinking alcohol to the rear of an apartment building on South Poplar Street; the caller reported that it was an ongoing problem. SAPD Officer Gutierrez was dispatched to the location. According to the call history, no report was taken.

At approximately 9:00 p.m. Officer Gutierrez contacted Officer Heitmann via his police radio and asked Heitmann to meet with him to conduct a patrol check in the 1100 and 1200 blocks of South Pacific Avenue and South Poplar Street. Officer Gutierrez mentioned that he was in the area earlier on a call and known gang members had run from him.

According to Officer Heitmann, it was well-known to SAPD officers that gang members were often located in front of the apartment complexes in the 1100 and 1200 blocks of South Pacific Avenue, and when police vehicles were spotted, the gang members would typically run east through the apartment complex and into an east alley that was

often used to aid in their escape from police contact.

Driving their two separate black and white marked police vehicles, Officer Heitmann followed Officer Gutierrez north on South Pacific Avenue toward West Dahl Lane while communicating on their police radios. According to Officer Heitmann, they were communicating on a non-recorded channel identified as white "talk-around."

Just before Officer Gutierrez arrived at West Dahl Lane, he advised over the police radio that he saw several of "them" running. Officer Heitmann understood "them" as being gang members and they were running east toward the rear alley.

Officer Gutierrez turned east onto West Dahl Lane and then north into the alley directly behind the apartment complexes on South Pacific Avenue. Officer Heitmann continued north and stopped his vehicle in front of the apartments on South Pacific Avenue in case the gang members doubled back toward the street when they saw Officer Gutierrez driving north in the alley.

With his windows down, Officer Heitmann heard some sort of loud noise that sounded as if it came from the east alley and believed that Officer Gutierrez might have been involved in some sort of traffic collision. Officer Heitmann continued north on South Pacific Avenue, east on West Langan Lane, and then south into the north/south alley.

As Officer Heitmann turned south into the alley, he saw Officer Gutierrez's vehicle further south in the alley, facing north with the driver's door open. Officer Heitmann could not recall if Officer Gutierrez's vehicle had the headlights on or any emergency lights activated. Officer Heitmann continued south and noted that Officer Gutierrez was standing just west of his vehicle near a west carport. Officer Heitmann parked just north and east of Officer Gutierrez's vehicle.

Officer Heitmann got out of his vehicle, still believing that Officer Gutierrez was involved in a traffic collision, and started looking for collision damage to Officer Gutierrez's vehicle. Officer Heitmann did not immediately see any damage and then looked toward Officer Gutierrez.

Officer Heitmann saw Officer Gutierrez facing in a northwest direction with his firearm drawn. Officer Heitmann then saw the legs of someone on the ground. Officer Heitmann believed that Officer Gutierrez had one of the gang members laying face down, preparing to arrest him.

Officer Heitmann approached the subject, later identified as Ramirez, thinking he was going to be placing handcuffs on Ramirez, and asked Officer Gutierrez what had occurred. Officer Gutierrez looked at Officer Heitmann and said something about the "guy" being down and that he had a knife, pointing toward a knife that was on the ground west of Ramirez.

Officer Heitmann saw that Ramirez had a wound to the back of his head and was lying face down with his head against the front passenger tire of a car that was backed into the northeast corner parking stall of the apartment carport. Officer Heitmann realized that Officer Gutierrez was involved in a shooting, so he told Officer Gutierrez to back away.

According to John Doe #1, a resident of an apartment close to the scene of the shooting, he heard several subjects at the front of the apartment complex yelling the name of a criminal street gang at passing cars shortly before the shooting.

According to John Doe #2, a resident of the apartments, he was walking north in the alley when a police vehicle entered from the south behind him. John Doe #2 heard someone say, "Stop," and then heard an apparent gunshot. John Doe #2 did not see the shooting incident and believed he was approximately 15 yards away from where the shooting occurred.

According to John Doe #3, a resident of an apartment close to the scene of the shooting, he was in his bedroom when he heard a "pop." A couple of minutes later, John Doe #3 looked out of his second-story bedroom window and saw the flashing emergency lights from a police vehicle. John Doe #3 said he heard a uniformed police officer yelling, "Why were you running, buddy?" or something similar to that with the word "Buddy." The officer was standing by himself between a vehicle and a truck with his flashlight.

According to Jane Doe #1, a resident of an apartment close to the scene of the shooting, she was in her bedroom and heard the sound of a vehicle at a high rate of speed, then an apparent gunshot. Jane Doe #1 looked out of her bedroom window and saw four to five individuals, two females and two or three males, running east on West Dahl Lane toward South Poplar Street. Jane Doe #1 did not recognize the males but did recognize one of the females, whom she believed had ties to a local street gang. Jane Doe #1 heard the female scream and then yell, "Run." Several residents from the apartment buildings on South Pacific Avenue reported hearing a subject yelling in Spanish, "Juda," or "La Juda," and then subjects running. "La Juda" or "Juda" is a Spanish slang term for police.

At approximately 9:37 p.m., Officer Gutierrez advised over the primary police radio channel that an officer-involved shooting had occurred.

At approximately 9:38 p.m., SAPD Sergeant Chuck Flynn arrived on scene. Sgt. Flynn directed Officer Heitmann to handcuff and render first aid to Ramirez until paramedics arrived. Officer Heitmann moved Ramirez away from the vehicle he had fallen next to in order to provide him with medical attention. Officer Heitmann did not see any additional injuries to Ramirez besides the gunshot wound to the rear of his head, and Officer Heitmann noted that Ramirez was breathing and had a faint pulse.

Officer Heitmann did not recognize Ramirez from any prior contacts but did note gang-type tattoos on his body.

At approximately 9:44 p.m., Santa Ana Fire Department personnel arrived at the location, performed a visual assessment, and noted that Ramirez was unconscious but still breathing and had a heartbeat.

Ramirez was considered a critical trauma patient, so once an airway was established and he was placed on a backboard, Ramirez was placed into the back of paramedic unit #3 and transported to Western Medical Center – Santa Ana (WMCSA).

At approximately 10:00 p.m., Ramirez arrived at WMCSA, where medical treatment was relinquished to the emergency room personnel. Ramirez was given medications to assist with breathing and was intubated by the treating physician. Ramirez was not able to sustain life on his own and advanced life saving efforts were initiated. On Dec. 11, 2010, at approximately 12:01 a.m., Ramirez sustained a cardiac arrest and was in immediate need of resuscitation. Medical personnel responded to Ramirez's room to provide advanced life saving efforts, including cardiopulmonary resuscitation and chest compressions. Ramirez received numerous cardiac medications, including atropine and epinephrine; however, the medications and advanced life saving efforts did not restore a cardiac rhythm or pulse.

At 12:16 a.m., doctors determined that Ramirez had no cardiac movement, was not breathing, and would not recover from the gunshot injury. He was pronounced dead.

VOLUNTARY STATEMENT OF OFFICER GUTIERREZ

An important part of the investigation of an incident such as this is attempting to obtain a statement from the involved officers. OCDA made numerous requests of Officer Gutierrez, through his attorney, for an interview regarding this incident. Through his attorney, Officer Gutierrez consistently declined to speak with OCDA regarding the incident.

On June 18, 2012, Officer Gutierrez voluntarily provided to OCDA an oral swab DNA reference sample, which OCCL used to compare to a male DNA profile obtained from the knife found near Ramirez at the scene of the shooting.

In September, 2012, after Officer Gutierrez had obtained a new attorney, he decided to voluntarily provide a statement to OCDA. OCDA interviewed Officer Gutierrez on Sept. 25, 2012.

Officer Gutierrez stated that, when he went on duty at 6:00 p.m. on Dec. 10, 2010, he checked the dispatch log to see if there had been many calls to SAPD earlier in the day because he wanted to "see what kind of calls are pending, see how busy the district was." Officer Gutierrez noted the call regarding 10 to 12 gang members drinking alcohol to the rear of an apartment on South Poplar Street. Officer Gutierrez said that as he drove by that area that evening, he saw a large group of gang members. Officer Gutierrez recognized a few individuals, including a known gang member on parole. Officer Gutierrez activated his air horn, causing the gang members to run in all directions. Due to the fact that Officer Gutierrez was by himself, he did not give chase.

At approximately 9:00 p.m., Officer Gutierrez asked Officer Heitmann via police radio to meet with him in a parking lot in the area of South Bristol Street and West Edinger Avenue. Officer Gutierrez wanted to conduct a patrol check in the 1100 and 1200 block of South Pacific Avenue and South Poplar Street. Officer Gutierrez told Officer Heitmann about the above-incident where the gang members had run from him.

When Officer Gutierrez entered the alley, he activated his overhead emergency lights and removed his handgun from his holster and placed it on his lap. This was a tactic that Officer Gutierrez was taught by a Field Training Officer when entering alleys in gang areas. With the vehicle windows down, Officer Gutierrez entered the alley at approximately five miles per hour and used his spotlight to illuminate the people that he saw running from west to east. Officer Gutierrez used the spotlight to see if the subjects that were running were discarding any narcotics, guns or other weapons.

As he approached the carports, he used his spotlight from west to east to illuminate the area. While doing this, Officer Gutierrez saw an individual in one of the carports between two vehicles who looked as if he was preparing to run, and then the subject stopped.

According to Officer Gutierrez, the subject was facing east and he could only see half of the subject. The subject, later identified as Ramirez, turned away from Officer Gutierrez, holding his hands in front of him and out of Officer Gutierrez's view. Ramirez now had his back to Officer Gutierrez.

This action made Officer Gutierrez feel scared and "uneasy" because he believed that this individual was familiar with the escape routes and everyone else was running but him. Officer Gutierrez was only able to get a quick look at the individual's face and did not recognize him. From the rear, Officer Gutierrez noted that Ramirez had some sort of tattoo on his shaved head, but that was all he could make out.

While seated in his patrol car, Officer Gutierrez started giving commands to Ramirez, stating, "Let me see your hands," and "Put your hands in the air." Ramirez slowly raised only his left hand and Officer Gutierrez could clearly see that Ramirez was holding a knife. Ramirez kept his right hand in front of his body near his waist and out of Officer Gutierrez's view.

While this was going on, Officer Gutierrez heard people whistle and saw shadows from people to the north of him. The area was dark and Officer Gutierrez did not know Officer Heitmann's location. Officer Gutierrez was concerned about other gang members approaching him from behind or shooting at him because he was there by himself.

Officer Gutierrez continued to give Ramirez commands such as, "Put both hands in the air," and "Drop the knife." While giving these commands, Officer Gutierrez noted that Ramirez's head was going from left to right as if he was trying to determine Officer Gutierrez's location. Ramirez was "creeping backward" towards Officer Gutierrez, closing to within seven to 10 feet from Officer Gutierrez.

Officer Gutierrez said he continued commanding Ramirez to drop the knife and show his hands; meanwhile, Officer Gutierrez positioned his firearm outside the opened driver's door window and opened the driver's door with his left hand. As Officer Gutierrez started to step out of his vehicle with his left foot on the ground and in the doorway of the vehicle, he saw that Ramirez lowered his stance and his right leg started to pivot toward Officer Gutierrez.

Officer Gutierrez told OCDA Investigators, "As I start stepping out of the vehicle, I see his, I can see him already try to lower his stance and his leg start pivoting. At that time, I felt, I was scared that he was just gonna launch at me and just 'cause I know the distance, how fast they can close with the knife, and me being pinned in that position that I was in, seated in my vehicle. He had the advantage if he turned and just got on me. So as soon I saw his leg pivoting to turn, that's when I, I took that shot."

Officer Gutierrez said he was aiming at the center of Ramirez' body, but believed when he moved up to get out of the seat, he inadvertently changed the position of his weapon.

Ramirez dropped to the ground and Officer Gutierrez took a position of cover in case Ramirez advanced toward him. Officer Gutierrez did not see any movement coming from Ramirez, so he approached and, using his left hand, grabbed the knife out of Ramirez's left hand. Officer Gutierrez began to clear the immediate area within the carport. Once Officer Gutierrez finished clearing the area, he realized that he had made a mistake by picking up the knife when in fact it may have been better to kick the knife from Ramirez's hand. Officer Gutierrez then tossed the knife to the ground.

EVIDENCE ANALYSIS

Findings at Autopsy

On Dec. 13, 2010, at 9:24 a.m., an autopsy was conducted by Dr. Aruna Singhania, a forensic pathologist for the Orange County Sheriff-Coroner. Dr. Singhania located a wound at the back of Ramirez's head. The wound was consistent with a bullet hole that traveled from back to front with a right to left trajectory. Dr. Singhania located and removed numerous lead bullet and copper jacketing fragments from the entrance wound at the back of Ramirez's head and skull cavity. No exit wound was located.

The autopsy was concluded at 11:15 a.m. Dr. Singhania determined Ramirez's cause of death to be massive head trauma due to a gunshot wound to Ramirez's head.

Toxicology

A toxicology exam was conducted on Ramirez's post-mortem blood. Tetrahydrocannabinol (THC) and Tetrahydrocannabinol Carboxy-Acid were detected.

Weapons Examination

Officer Gutierrez's service weapon is a Glock Pistol, Model 22, 40 caliber. The pistol was test fired without malfunction.

Cartridge Case Examination

The single cartridge case recovered from the scene was compared to the test-fired cartridges from Officer Gutierrez's weapon and determined to have been fired from that weapon.

Projectile Examination

The fragments collected at autopsy were consistent with being from the type of ammunition used by Officer Gutierrez; however, there was insufficient detail to make an exact identification.

Gun Shot Distance Estimation

No sooting, stippling, or muzzle imprint was present around the entry gunshot wound. This finding indicates that the shot was fired from a distance greater than six feet.

DNA Analysis

The OCCL conducted DNA examination on the knife found near Ramirez at the scene of the shooting. Analysis conducted in February, 2011 indicated that Ramirez was a contributor of DNA found on the handle of the knife, and that DNA from two unknown individuals was also present on the handle. In June, 2012, Officer Gutierrez voluntarily provided a sample of his DNA for comparison purposes. Subsequent analysis indicated that Officer Gutierrez's DNA was also present on the knife handle. The third contributor is unknown.

CRIMINAL BACKGROUND OF RAMIREZ

Ramirez had no California criminal history. He did have criminal history from North Carolina and South Carolina, including two separate misdemeanor convictions for resisting a police officer and felony convictions for vehicle theft and eluding arrest. Tattoos on his body were consistent with affiliation with a Santa Ana criminal street gang.

CIVIL LAW SUIT

Survivors of Ramirez filed a wrongful death lawsuit against the City of Santa Ana. In April 2012, the City of Santa Ana settled the case for approximately \$1 million. Officer Heitmann was deposed during the course of pre-trial discovery. The OCDA has reviewed Officer Heitmann's deposition testimony and found it to be consistent with his July 11, 2010, statement to the OCDA. Officer Gutierrez was not deposed, nor did he make any other statements in connection with the civil case. No relevant evidence not previously discovered by the OCDA surfaced as a result of the civil law suit.

STANDARD LEGAL PRINCIPLES IN OFFICER-INVOLVED SHOOTING CASES

In order to justly charge and convict an officer of any charges in an on-duty shooting like this, 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. The most salient justifications which may apply to the present case are set forth in Penal Code Sections 196 and 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, written by the Judicial Council of California and called "CALCRIM 505" provides that a person who reasonably believes that he/she is in imminent danger of being killed or suffering great bodily injury is permitted to defend himself/herself from attack, if, as a reasonable person, he/she had ground for believing and does believe that death or great bodily injury is about to be inflicted upon him/her or upon another person. In doing so, such person may use all force and means which he/she believes to be reasonably necessary and which would appear to a reasonable person, in the same or similar circumstances, to be necessary to prevent the death or injury which appears to be imminent. The law as detailed in CALCRIM 505 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 is about to suffer death or great bodily injury, to act in self-defense or defense of others. 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.

In the case of *Graham v. Conner* (1989) 490 U.S. 386, the United States Supreme Court held that an officer's right to use his weapon is to be analyzed under the Fourth Amendment's "objective reasonableness" standard. The High Court further opined that the "calculus of reasonableness 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." The United States Supreme Court has 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." *Tennessee v. Garner* (1985) 471 U.S. 1, 3. However, in *Graham*, the Court held 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." *Graham v. Conner* (1989) 490 U.S. 386, 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.

Further, Penal Code Section 196, defined by CALCRIM 507, provides that a police officer can justifiably kill another when he is attempting to arrest another person who is fleeing from justice and the officer had probable cause to believe that the person posed a threat of serious physical harm, either to himself or others.

LEGAL ANALYSIS

The only eye-witness to this shooting is Officer Gutierrez. While he did not give a statement until nearly two years after the shooting, his statement stakes a claim to the justification of self-defense. In order to justly charge and convict Officer Gutierrez with a crime for this shooting, the prosecution would have to prove beyond a reasonable doubt that the claimed justification did not apply.

We conclude that, if believed, Officer Gutierrez's version of events provide justification for the shooting. Even though Officer Gutierrez was armed with a gun and was initially seated in his patrol car, according to his statement he was exiting his car to confront an apparent gang member armed with a knife. This apparent gang member refused to drop the knife as ordered and was further disobeying orders to stop moving toward the officer. Instead, according to Officer Gutierrez, Ramirez moved to within about 10 feet of the officer and began to pivot to face him. These circumstances, if believed, would likely be found by a jury to constitute a reasonable basis for believing that Ramirez posed an imminent deadly threat to Officer Gutierrez. Consequently, when we analyze the situation described by Officer Gutierrez by the applicable legal standard of "reasonableness" which is "highly deferential" to the tense, rapidly-evolving circumstances confronting police officers in the streets, we believe that we would be unable to prove beyond a reasonable doubt that Officer Gutierrez's belief that he was in imminent peril was unreasonable.

In order to be able to justly charge and convict Officer Gutierrez with a crime, the prosecution would thus have to be able to prove beyond a reasonable doubt that his statement concerning the shooting was untruthful. We conclude that we would be unable to meet this burden because credible evidence corroborates Officer Gutierrez's statement.

It is well-established that the scene of the shooting was located within an area claimed as turf by a criminal street gang and was a high-crime area. Several times on the day of the shooting, law-abiding citizens of the area reported that gang members had been loitering in the area. Consistent with Officer Gutierrez's claim, neighborhood witnesses indicated that, when the police arrived to investigate, the gang members scattered and ran in all directions. Consistent with Officer Gutierrez's statement, a neighborhood resident heard someone yell "stop" before the shot was fired.

The bullet wound trajectory – back to front and right to left – is consistent with Officer Gutierrez's claim that Ramirez

was pivoting on his right leg as he was backing and turning to face Officer Gutierrez.

A knife was located near Ramirez with Ramirez's DNA on the handle, consistent with Officer Gutierrez's claim that Ramirez was brandishing the knife.

Additionally, Officer Heitmann corroborated Officer Gutierrez's version of events leading up to the shooting. Further, Officer Heitmann's statement about what Officer Gutierrez told him when Officer Heitmann arrived at the scene – that Ramirez had a knife – is consistent with Officer Gutierrez's statement to OCDA.

In contrast to this significant corroborating evidence, there is scant evidence to disprove Officer Gutierrez's statement. That Officer Gutierrez waited 20 months to make a statement to the OCDA may seem troubling, and it could give rise to an inference that his statement was tailored to conform to the known extrinsic evidence. But otherwise his silence does not constitute evidence against him; the Fifth Amendment guarantees that a person's exercise of his right to remain silent cannot be used as evidence to incriminate him. Further, we do not find any evidence of prior dishonesty in Officer Gutierrez's background.

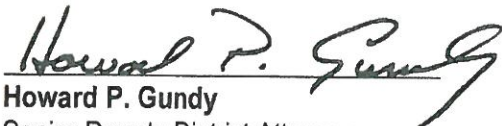
Thus, the only substantial evidence that might be seen as tending to disprove Officer Gutierrez's statement is the laboratory finding that Officer Gutierrez's DNA is on the knife handle. However, this evidence is equally consistent with the innocent explanation, provided by Officer Gutierrez, that Officer Gutierrez removed the knife from Ramirez's grip immediately after the shooting. When faced with two reasonable interpretations of evidence, one of which points to guilt and one which points to innocence, the constitutional presumption of innocence requires us to adopt the innocent interpretation.

Thus, in analyzing the totality of evidence, we find the evidence to be reasonably reconcilable with Officer Gutierrez's version of events, which establishes a plausible justification for the shooting. This means that we would be unable to prove a case against Officer Gutierrez beyond a reasonable doubt.

CONCLUSION

Based upon a review of all of the evidence provided to and obtained by the OCDA, 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 Gutierrez, and that there is credible evidence corroborating his claim that he shot Ramirez in self-defense.

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


Howard P. Gundy
Senior Deputy District Attorney


Read and Approved by **Dan Wagner**
Assistant District Attorney
Head of Homicide Unit