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January 15, 2013

Chief Scott Jordan
Tustin Police Department
300 Centennial Way
Tustin, CA 92780

Re: Officer Involved Shooting on December 17, 2011
Fatal Incident involving Benny Herrera
District Attorney Investigations Case # S. A. 11-028
Tustin Police Department DR # 11-6747
Orange County Crime Laboratory Case # 11-56721

Dear Chief Jordan,

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 Tustin Police Department (TPD) Officer Osvaldo Villarreal, in which Benny Herrera, 31, died as a result of his injuries. The incident occurred in the City of Tustin on Dec. 17, 2011.

OVERVIEW

This letter contains a description of the scope of and the legal conclusions resulting from the OCDA's investigation of the Dec. 17, 2011, fatal officer-involved shooting of Herrera. 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 Tustin 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. 17 2011, Investigators from the OCDA Special Assignment Unit (OCDASAU) responded to this incident. OCDASAU Investigators interviewed 31 witnesses and obtained and reviewed the following: Tustin police reports, Orange County Fire Authority (OCFA) reports, audio recordings, dispatch and radio traffic recordings; Orange County Sheriff Coroner reports; 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 Herrera; criminal history records related to Herrera; the personnel records of Officer Villarreal; 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 TPD officers or personnel, specifically Officer Villarreal. 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 aspect of investigating these types of cases is attempting to interview the officer involved in the shooting. Officer Villarreal provided a voluntary statement to OCDA Investigators on Dec. 21, 2011.

FACTS

Synopsis

On Dec. 17, 2011, at approximately 3:03 p.m., Tustin Officer Villarreal was assigned to a single-man patrol car. Officer Villarreal was driving his marked patrol unit in the City of Tustin when a 911 call was received by TPD from Jane Doe, Herrera's girlfriend. According to Jane Doe, Herrera had arrived for a visit at her apartment in Tustin. He went out at approximately 2:00 p.m. and returned approximately 15 minutes later. Jane Doe reported that, upon his return, his demeanor had changed. Specifically, she observed his eyes were glossy, he was pacing, and he appeared paranoid. Jane Doe told police that Herrera appeared to be under the influence of methamphetamine based on her experience with the use of the drug. Jane Doe stated to police dispatch that she argued with Herrera and Herrera punched her and took her cell phone. Jane Doe gave a detailed description of Herrera, his clothing and the direction of travel he had taken on foot. Jane Doe first denied to police dispatch that she had been physically harmed, then disclosed that Herrera had taken her cell phone and stated that Herrera had just punched her in the head with a closed fist.

At approximately 3:04 p.m. Officers Villarreal and Brian Miali, who was also working patrol in a marked patrol police vehicle, were dispatched to a domestic violence disturbance at Jane Doe's residence. Dispatch provided a description of Herrera. As the officers responded to the residence, dispatch updated them with the following information: Herrera may have an outstanding arrest warrant out of Los Angeles County and he was currently on parole for drug possession.

En route to the location, Officer Miali encountered Herrera walking on foot on the road. An attempt to stop him resulted in Herrera walking in the middle of the street. Herrera then advanced toward Officer Miali's vehicle while concealing his hands in his sweatshirt down by his waistband. Officer Miali made a radio call for help. Officer Villarreal then bypassed Officer Miali's vehicle, driving his car close to Herrera. As he did so, Herrera began to advance toward Officer Villarreal's vehicle. Officer Villarreal ordered Herrera to show his hands, but Herrera did not comply. At this point, Officer Villarreal drew his weapon and fired twice at Herrera, shooting him in the chest. It was later determined that Herrera did not have a weapon on his person.

Voluntary, Consensual Statement of Officer Miali

Officer Miali voluntarily submitted to an interview with OCDA Investigators on Dec. 18, 2011. According to Officer Miali, after being dispatched to the domestic violence disturbance, the following occurred: At approximately 3:11 p.m., as Officer Miali was driving eastbound on El Camino Real toward the call location, Officer Miali observed Herrera, dressed in clothing matching the suspect description given by dispatch, walking westbound towards Officer Miali on the south side of El Camino Real, west of Tustin East Drive. There is no sidewalk in this area, rather an emergency lane that borders the retaining wall separating the road from the Interstate -5 Freeway.

According to Officer Miali, he drove and approached Herrera and Herrera looked at him. Herrera then turned away from Officer Miali and put his right hand into the front pocket of the sweatshirt he was wearing and began to walk northbound in front of Officer Miali's vehicle toward the north side of the street. Officer Miali, who was still in his vehicle, angled the vehicle toward the north of Herrera. Herrera then responded by changing his direction from northbound to eastbound. At this point, Herrera was now in the middle of the roadway, which was a two-way left turn lane between the eastbound and westbound lanes. While facing westbound, Herrera "jogged" backwards while still holding his right hand in his pocket.

At this point, Officer Miali believed Herrera to appear to be under the influence of narcotics. He described Herrera as "making motions with his face, eyes and hands, almost as if he had something in his pocket." Officer Miali continued driving toward Herrera while issuing commands to Herrera to "get down." None of these commands were obeyed by Herrera. Officer Miali then drew his pistol and pointed it at Herrera while preparing to shoot Herrera through the windshield of his vehicle if Herrera produced a weapon. Officer Miali called a "code 3" (officer needs assistance) over his police radio. After making the call, Officer Miali observed Officer Villarreal bypass his vehicle, thereby getting closer to Herrera than Officer Miali. Officer Miali never saw Herrera take his right hand out of his pocket and he believed that Herrera had a gun. At the time the Officer Miali heard the gunshot, he could not tell for sure if Herrera or Officer Villarreal had fired.

Voluntary, Consensual Statement of Officer Villarreal

Officer Villarreal gave a voluntary statement to OCDA Investigators on Dec. 21, 2011. According to Officer Villarreal, he was driving eastbound behind Officer Miali on El Camino Real when he first observed Herrera. Officer Villarreal heard Officer Miali say over the police radio that he intended to get out of the car to approach the subject, who was possibly the man from the dispatch call. Officer Villarreal then heard Officer Miali issuing commands and calling a "code 3." Officer Villarreal observed both of Herrera's hands go toward his sweatshirt pocket/hip area. This led Officer Villarreal to believe that Herrera could be armed. Officer Villarreal then overtook Officer Miali's vehicle, passing on Officer Miali's left, and angled his vehicle toward the retaining wall in an attempt to keep Herrera from moving toward the north side of the street, where there was a large apartment complex. Based on the nature of the call, the background information on the suspect, and the belief that Herrera could be armed, Officer Villarreal was concerned that Herrera would be able to get to the large apartment complex on the other side of the street.

At this point, Officer Villarreal observed Herrera begin to turn forward/east, but then quickly turn back around and run west toward the passenger side of Officer Villarreal's vehicle. This seemed highly unusual to Officer Villarreal, as he expected the suspect to either comply or try to get away; instead, Herrera charged toward the police officers. Officer Villarreal then observed Herrera's hands begin to come out of his right pocket area. Believing that Herrera "had the drop on me," he commanded Herrera to take his hands out of his pockets. Herrera did not comply and Officer Villarreal continued to see both of Herrera's hands in his hip area, as if Herrera was armed underneath his sweatshirt.

Herrera continued to advance toward Officer Villarreal's vehicle's passenger side. Officer Villarreal observed Herrera at his passenger side window, with Herrera's hands at waist level, concealed underneath his sweatshirt. Believing he was about to be shot by Herrera, Officer Villarreal drew his pistol and shot at Herrera twice in rapid succession through his open front passenger window. Herrera then dropped to the ground. Herrera immediately was searched for

weapons. He was found to be unarmed and no weapons were found in the area surrounding him. Herrera was then administered cardiopulmonary resuscitation by Tustin police officers.

Post-shooting Events

At 3:18 p.m., OCFA personnel began life-saving measures on Herrera. At 3:30 p.m., Herrera was transported to Western Medical Center. At approximately 3:36 p.m. OCFA relinquished care to Western Medical Center emergency room personnel. At 3:45 p.m., Herrera was pronounced dead by hospital medical staff.

Civilian Witnesses

After the shooting, Herrera's girlfriend, Jane Doe, gave a voluntary interview to Investigators. According to Jane Doe, Herrera had recently been making suicidal comments. Upon TPD officers advising Jane Doe that Herrera had been killed by police, she stated, "He always said he wanted to go out like that."

No civilian (i.e., non-law enforcement) witnesses were found who observed the shooting. John Doe, a civilian motorist, saw the events immediately preceding the shooting. He described seeing Herrera walking in the street with police cars close to Herrera. John Doe said Herrera was moving both hands in a "circular motion, around the stomach area." John Doe said he looked away from the confrontation between Herrera and the police in order to retrieve his cell phone. While looking away, John Doe said he heard a gunshot, then a pause, then two more gunshots. He looked back up and saw a police officer standing with his gun in his hand and Herrera on the ground.

Autopsy

On Dec. 19, 2011, the post-mortem examination was performed by Dr. Aruna Singhania of the Orange County Coroner's Office. Dr. Singhania identified two gunshot entry wounds, both found on Herrera's left chest. Dr. Singhania determined that the two gunshots to the chest caused damage to major organs including the lungs, liver, heart and diaphragm, which caused Herrera's death.

EVIDENCE COLLECTED AT THE SCENE

1. Two expended 45 automatic caliber Winchester cartridge casings located on the floorboard behind the passenger seat and on the ledge of the plexiglass separator, behind the driver's seat of Officer Villarreal's vehicle.
2. One copper jacket bullet located on the ground near where Herrera fell.

No weapon was found on the person of or near the vicinity of Herrera.

EVIDENCE COLLECTED FROM OFFICER VILLARREAL

1. Duty weapon: Glock, Model 21, 45 mm caliber pistol. A cartridge was in the chamber and the magazine contained an additional 11 cartridges. The magazine had a 13-cartridge capacity.
2. Two additional magazines containing 13 cartridges (full capacity).

EVIDENCE ANALYSIS

Toxicology Examination

Methamphetamine, amphetamine, diazepam, nordiazepam and temazepam were detected in Herrera's post-mortem blood.

Weapons Examination

Officer Villarreal's Duty Weapon: Glock Model 21 Pistol, 45 mm. The semi-automatic Glock pistol was test-fired and malfunctioned once during the test (the cause of which was not determined).

Cartridge Casing Examination

The two 45 mm Winchester cartridge cases from the scene were determined to have been fired from Officer

Villarreal's Glock duty weapon.

Projectile Examination

It could not be determined if the bullet that was recovered from the scene was fired from Officer Villarreal's handgun. The microscopic comparison was inconclusive. The bullet did share class characteristics with Officer Villarreal's handgun.

HERRERA'S PRIOR CRIMINAL HISTORY

Herrera California Criminal History was reviewed and considered. Herrera was a previously convicted felon who had served time in state prison. His convictions included possession of a controlled substance for sale, battery upon a spouse/cohabitant, felon in possession of a firearm and violation of parole. He was on parole at the time of his death.

STANDARD LEGAL PRINCIPLES IN OFFICER-INVOLVED SHOOTING CASES

Possible criminal charges against an officer involved in a shooting include murder (Penal Code Section 187); assault with a deadly weapon (Penal Code Section 245); and assault by a police officer (Penal Code Section 149). In order to convict an officer of any of these charges, however, it would be necessary to prove beyond a reasonable doubt that no legal justifications existed for the officer's actions. *People v. Banks* (1977) 67 Cal. App. 3d 379, 383-84. Several such justifications may apply in any given case and they are set forth in Penal Code Sections 196, 197 and 835a.

California Penal Code Section 196 provides that use of deadly force by a public officer is justifiable when necessarily used in arresting persons who are "charged with a felony" and who are fleeing from justice or resisting such arrest. Section 196 applies both where the suspect in question is "charged with a felony" and where the officer has "reasonable cause" to believe that the person has committed a felony. *People v. Kilvington* (1894) 104 Cal. 86, 89. The felony must involve violence or the threat of violence. *Kortum v. Alkire* (1977) 69 Cal. App. 3d 325, 333.

California Penal Code Section 197 provides that the use of deadly force by any person is justifiable when used in self-defense or in defense of others.

California Penal Code Section 835a allows any police officer who has reasonable cause to believe that a person to be arrested has committed a felony [public offense] to use reasonable force to affect the arrest, to prevent escape, or to overcome resistance. The section further provides that a police officer "who makes or attempts to make an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance." As with Penal Code Section 196, Section 835a only allows use of deadly force by the police officer when the suspect's felony involves violence or the threat of violence. *Kortum v. Alkire* (1977) 69 Cal. App. 3d 325, 333. The court in *Kortum* further held that deadly force against a fleeing felony suspect is justifiable only when the felony "is of the violent variety, i.e., a forcible and atrocious one which threatens death or serious bodily harm, or there are **other circumstances which reasonably create a fear of death or serious bodily harm to the officer or to another.**" *Kortum v. Alkire, supra*, 69 Cal. App. 3d at 333. In addition, Penal Code section 834a requires that if a person has knowledge, or by the exercise of reasonable care, should have knowledge, that he is being arrested by a peace officer, that person must refrain from using force or any weapon to resist such arrest.

Similarly, the relevant Criminal Jury Instruction as written by the Judicial Council of California and set forth in CALCRIM 3470 permits a person being assaulted to defend himself from attack if, as a reasonable person, he had grounds for believing and did believe that bodily injury was about to be inflicted upon him or upon another person. In doing so, such person may immediately use all force and means which he believes to be reasonably necessary and which would appear to a reasonable person, in the same or similar circumstances, to be necessary to defend against that danger and to prevent the injury which appears to be imminent.

The law as detailed in CALCRIM 3470 and in well-settled case law therefore permits a person, if confronted by the **appearance of danger** which arouses in his mind, as a reasonable person, an honest fear and conviction that he or another person is about to suffer bodily injury, to act in self-defense or defense of others upon such appearances, and from such fear and honest convictions. The person's right of self-defense is the same **whether the danger is real or merely apparent**. *People v. Jackson* (1965) 233 Cal.App.2d 639, 641-642.

Nevertheless, the above justifications must be interpreted in light of United States Supreme Court precedent that limits the right of a police officer to use deadly force. *People v. Martin* (1985) 168 Cal. App. 3d 1111, 1124. Thus, in *Tennessee v. Garner* (1985) 471 U.S. 1, 3, the United States Supreme Court ruled that a police officer is entitled to use deadly force only when "the officer has probable cause to believe that the suspect poses a significant threat of death or serious bodily injury to the officer or others."

This limitation was, however, subsequently clarified by the United States Supreme Court in the seminal case of *Graham v. Conner* (1989) 490 U.S. 386, wherein the Supreme Court explained that an officer's right to use force [i.e., his weapon] is to be analyzed under the Fourth Amendment's "objective reasonableness" standard. The Supreme Court further stated that the determination of the reasonableness of an officer's use of force "must embody allowance for the fact that police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain and evolving." *Id.* at 397. Thus, the Court cautioned that "[t]he reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 396.

The United States Supreme Court's analysis and teachings in *Graham, supra*, are very much applicable to the circumstances surrounding the interactions of Officer Villarreal with Herrera.

LEGAL ANALYSIS

The central issue to be addressed is whether Officer Villarreal's act of shooting Herrera was legally justified under a theory of self-defense. In order to justly charge and convict Officer Villarreal for this shooting, it would be the prosecution's burden to prove beyond a reasonable doubt that Officer Villarreal did not act in lawful self-defense. We conclude that we cannot meet that burden because there is significant evidence to support all three elements of the justification, as we will now explain.

The first element of the legal justification of self-defense is that force is used under the actual belief of the necessity to defend oneself. Here, Officer Villarreal told OCDA Investigators that he shot Herrera because he was fearful that Herrera was about to shoot him. Officer Villarreal's claim that he was fearful that Herrera would shoot is corroborated by Officer Miali, who had the same belief and fear and who himself had drawn his weapon based on his own observations and interactions with Herrera just prior to Officer Villarreal's encounter. No evidence was found which disproves Officer Villarreal's claim that he acted solely out of the perceived need to defend himself. Consequently, we conclude it could not be proven that Officer Villarreal did not honestly believe he needed to shoot Herrera in order to defend himself.

The second requirement for the legal justification of self-defense is that the belief in the necessity to defend oneself is reasonable. We conclude that we could not disprove that Officer Villarreal's belief that he needed to defend himself was reasonable because of the following evidence:

- The nature of the call, a domestic violence disturbance, reported the suspect had already been violent just prior to the encounter, had a criminal history, and was possibly under the influence of drugs.
- The location where this encounter took place was not an area of pedestrian traffic and Herrera's actions appeared deliberate and confrontational.
- As Officer Miali got closer to Herrera and gave commands, Herrera disobeyed commands, concealed his hands, and continued to be confrontational. Officer Villarreal witnessed this.
- Officer Villarreal heard Officer's Miali's "code 3" call for assistance over the radio. Officer Villarreal

responded by bypassing Miali's vehicle and moving closer to Herrera to deal with the danger.

- Herrera did not run away, but rather continued to charge toward the officers. Specifically, Herrera continued to advance toward Officer Villarreal's vehicle and did not appear to want to flee or get away.
- As Herrera advanced, he put his right hand in his sweatshirt pocket/hip area, as if he was getting ready to draw a weapon.
- As Officer Villarreal gave Herrera commands to get his hands out of his pockets, Herrera continued to advance toward the passenger side of Officer Villarreal's vehicle in an aggressive manner, and ignored the officer's command to show his hands, instead keeping his hands concealed near his waistband, a location where a weapon might be concealed.
- Officer Villarreal's statement that Herrera was concealing his hands near his waistband just prior to the shooting is corroborated by the observations of civilian witness John Doe.
- Jane Doe said that Herrera had "always wanted to go like that," meaning being shot by police officers. This gives rise to an inference that Herrera, who was unarmed, may have been attempting to lead police to believe that he did have a weapon in order to cause the police to shoot him.

Consequently, we find that significant evidence supports the conclusion that Officer Villarreal reasonably believed that Herrera posed an imminent threat to his safety.

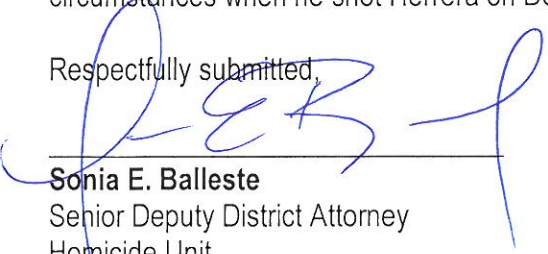
The third element required for the legal justification of self-defense is that the force used be no greater than that which is required under the circumstances as they reasonably appear to the threatened person. Here, the apparent threat as it reasonably appeared to Officer Villarreal was that Herrera was about to shoot him. Under these circumstances, it was reasonable for Officer Villarreal to respond with lethal force; lesser force would have been ineffective and retreat was not a reasonably safe alternative. Moreover, the law does not require a person under apparent attack to retreat; he is permitted to stand his ground and utilize self-defense. (*People v. Hughes* (1951) 107 Cal.App.2d 487, 494.)

To sum up, in order for Officer Villarreal to be convicted of a crime for this shooting, it would be the prosecution's burden to prove beyond a reasonable doubt to a unanimous jury that Officer Villarreal did not act in self-defense when he shot Herrera. As discussed above, we conclude that the prosecution would be unable to carry this burden.

CONCLUSION

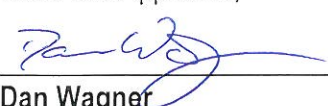
Based upon a review of all of the evidence provided to and obtained by the OCDA, and based on the entirety of the facts contained in all the available reports and interviews we reviewed, and pursuant to the applicable legal principles, it is our legal opinion that the evidence does not support a finding of criminal culpability on the part of Officer Villarreal, and there is significant evidence that the officer's actions were reasonable and justified under the circumstances when he shot Herrera on Dec. 17, 2011. Accordingly, the OCDA is closing its inquiry into this incident.

Respectfully submitted,



Sonia E. Balleste
Senior Deputy District Attorney
Homicide Unit

Read and Approved,



Dan Wagner
Assistant District Attorney
Head of Homicide Unit