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April 18, 2012

Chief Robert H. Gustafson
Orange Police Department
1107 N. Batavia Street
Orange, CA 92867

Re: Officer Involved Shooting on July 13, 2010
Non-Fatal Incident involving Michael Rodriguez
District Attorney Investigations Case # S.A. 10-017
Orange Police Department DR # 10-07-058
Orange County Crime Laboratory Case # FR 10-48437
Orange County Coroner Case # CR 10-04439-HO

Dear Chief Gustafson,

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 Orange Police Department (OPD) Corporal Clark Smith. Michael Rodriguez, 56, Orange, survived his injuries. The incident occurred in the City of Orange on July 13, 2010.

OVERVIEW

This letter contains a description of the scope of and the legal conclusions resulting from the OCDA's investigation of the July 13, 2010, non-fatal officer-involved shooting of Rodriguez. 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 OPD officers 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 13, 2010, Investigators from the OCDA Special Assignment Unit (OCDASAU) responded to this incident. OCDASAU Investigators interviewed more than 102 witnesses and obtained and reviewed the following: OPD reports; audio recordings; surveillance video; Orange County Sheriff's Department (OCSD) incident reports; Orange County Sheriff Crime Lab (OCCL) reports including toxicology, officer processing and firearms examination reports; crime scene investigation photographs; and photographs related to the injuries sustained by Rodriguez.

The OCDA conducted an independent and thorough investigation of the facts and circumstances of this incident and has

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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 OPD officers or personnel, specifically Corporal Smith. 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 and the District Attorney. If necessary, the reviewing prosecutor may send the case back for further investigation.

FACTS

Rodriguez moved into the residence in May 2007 located at the 2500 block of North Bourbon Street in the City of Orange with his girlfriend of three years, Jane Doe, her two children, and Jane Doe's brother-in-law.

According to Jane Doe, her two children, and brother-in-law, Rodriguez suffered from chronic neck pain due to injuries sustained in an auto accident. At the time of the incident he was taking prescription Methadone (up to 16 pills a day) and Narcos, a combination of prescription Hydrocodone (Vicodin) and Acetaminophen (Tylenol), for his neck pain. Hydrocodone is a central nervous system depressant. He was also an alcoholic.

According to Jane Doe and her two children, the medications changed Rodriguez's personality. Rodriguez had been angry and suffered from hallucinations at the time of this incident. Rodriguez's erratic behavior caused problems in his relationship with Jane Doe. Jane Doe's daughter and brother-in-law were aware that Rodriguez had physically abused Jane Doe in the past, as recently as the day prior to the incident, and had heard Rodriguez threaten to hurt her in the past.

According to Jane Doe, on the morning of July 13, 2010, Rodriguez was unusually quiet when he woke up. At approximately 9:30 a.m., Jane Doe left to clean the home of a friend. Later that morning, Rodriguez arrived at the friend's home and told Jane Doe that he was leaving her because he loved her and did not want to hurt her anymore.

Between noon and 1:00 p.m., both Jane Doe and Rodriguez arrived home. Rodriguez repeated that he was leaving Jane Doe and would not bother her anymore. Rodriguez retreated into their bedroom and Jane Doe followed. Rodriguez rummaged through the closet, and located a paper bag in a box containing a handgun, and placed the bag in his back pocket. Jane Doe grabbed the bag out of Rodriguez's pocket and ran out of the bedroom holding the silver handgun with Rodriguez following her.

Jane Doe ran out of the house through the rear glass sliding door holding the handgun in the paper bag. As she ran out, she yelled at her daughter, son, and brother-in-law to call 911 because Rodriguez "had a gun and was going to shoot himself."

According to Jane Doe's daughter, she asked Rodriguez what he was doing, to which he responded for her to "butt out" and then pushed her out of the way when she tried stopping him in the hallway.

Jane Doe ran away from the residence to the rear alley, where she proceeded to throw the bag containing the handgun over a fence into the patio area of the 2500 block of North Canal Street on the opposite side of the alley. According to Jane Doe, Rodriguez saw her throw the bag into that residence belonging to Witness #2. Witness #1, who lives at another home on the 2500 block of North Canal Street, was driving his truck in that alley when he saw Jane Doe throw the brown bag into Witness #2's yard. According to Witness #1, Rodriguez went to the rear gate and entered into the yard of Home #1.

Witness #2 was in her backyard with her 2-year-old daughter when she noticed a brown bag fly through the air from the alley into her backyard. When the bag landed, she noticed the barrel of a gun protruding from the opening of the bag but couldn't make out its color. According to Witness #2, Rodriguez aggressively "stormed" into her yard from the alley and retrieved the bag and gun within seconds of it landing on the ground. Rodriguez told Witness #2 he had to "grab" his gun when asked why he was in her backyard and "stormed out," slamming the gate on his way out. Witness #2 saw Rodriguez walk into a house with a brown fence, which she believed to be where he resided.

Witness #1 observed Rodriguez emerge from Witness #2's backyard and place the bag containing the handgun in his left rear pants pocket. Witness #1 described Rodriguez's demeanor as "pissed off and freaky," and added that Rodriguez gave him a dirty look as he walked back toward his residence, but did not say anything. Witness #1 noticed Witness #2 walk out of her backyard and yell at Rodriguez, at which time Witness #1 told Witness #2 to be quiet, as Rodriguez had a gun.

According to Jane Doe, after throwing the bag containing the firearm into Witness #2's backyard, she went back inside the home and again asked her family to call 911. Rodriguez entered the residence and walked into the bedroom. He emerged holding a small box, which Jane Doe believed contained bullets. Unbeknownst to Jane Doe, Rodriguez had retrieved the gun from the residence across the alley. Rodriguez then left the residence, walked south on Bourbon Street, and turned west on Heim Avenue.

Jane Doe's brother-in-law exited the residence and approached Witness #2 and asked if the gun was still in her backyard, who told him that the gun was no longer in her backyard. The brother-in-law told Witness #1 and Witness #2 that Rodriguez and Jane Doe had been verbally fighting for the past few weeks and now Rodriguez was in possession of a handgun. The brother-in-law said he was afraid for his safety and did not want to go back into the residence because Rodriguez was in possession of the firearm.

At 12:28 p.m., OPD dispatch received a 911 call from Jane Doe's daughter from their home. She told the OPD dispatcher that Rodriguez had a gun and wanted to kill himself. She described Rodriguez as a 56-year-old male Hispanic, wearing black pants and a black tank top shirt. She advised dispatch that Rodriguez had just left the residence.

In addition, Witness #1 called the business telephone line for OPD and told the police dispatch that a male subject had a handgun in a sack in the alley and Witness #1 wanted Orange police to investigate. Witness #1 told dispatch that the subject carrying the sack with the handgun was on the west side of North Bourbon Street, two homes north of East Heim Avenue. This information was subsequently broadcast to the officers responding to the incident.

At 12:29 p.m., OPD Officers David Holtz, John Mancini, and Ignacio Maciel were dispatched to a home on the 2500 block of North Bourbon Street regarding a male subject screaming that he was going to kill himself. Dispatch was further advised that the man was armed with a firearm. Officers Holtz, Mancini, Maciel, David McMillen, and Corporal Smith each acknowledged the call and advised they would be enroute. Corporal Smith advised he would be responding from The Village at Orange.

Officers Holtz, Mancini, Maciel, McMillen, Adams, and Corporal Smith all gave voluntary statements.

At 12:30 p.m., Corporal Smith advised OPD dispatch that he had arrived in the area and was observing Rodriguez in the area of Canal Street and Heim Avenue. Corporal Smith arrived in his marked OPD vehicle wearing a distinctive OPD uniform with a badge and department-issued firearm. Corporal Smith advised OPD dispatch that it did not appear that Rodriguez had anything in his hands at that time.

At 12:31 p.m., Corporal Smith advised OPD dispatch that Rodriguez had heard a responding police unit's siren and started to run north on Bortz Street. Corporal Smith also advised that Rodriguez was carrying a brown paper bag and had an unknown object in his right hand.

According to Corporal Smith, Rodriguez had both arms in front of him and he was fiddling with something in his right hand. Rodriguez then put the brown paper bag in his left front pant pocket and dropped his right arm down to his side. Corporal Smith noticed a chrome or silver object in Rodriguez's right hand and initially thought the object was possibly a cell phone, but could not be sure at that time.

Corporal Smith knew other OPD officers were responding to the area, so he decided to hold off making contact with Rodriguez until his backup officers arrived to assist. Corporal Smith followed approximately 30 feet behind Rodriguez in his police unit. Rodriguez did not appear to know Corporal Smith was following him because he did not look back at him at that time.

As Rodriguez continued northbound on the east sidewalk of Bortz Street, Corporal Smith became concerned for the public's safety due to the information that Rodriguez was armed with a firearm and suicidal. Corporal Smith feared Rodriguez was irrational and unpredictable. Corporal Smith realized he needed to make contact with Rodriguez prior to him hurting someone, as the area is densely populated with single-family residences.

Corporal Smith turned his police unit northbound on Bortz Street and sounded the police unit's fog horn once or twice in order to get Rodriguez's attention. Corporal Smith stopped and exited his police unit, stood behind his driver's door, pointed his duty weapon at Rodriguez, and ordered Rodriguez to show his hands and get on the ground. Rodriguez stopped on the east sidewalk of Bortz Street, just north of 2505 North Bortz Street, which is the residence located on the northeast corner of Heim Avenue and Bortz Street. This location is approximately two blocks away from Jane Doe's residence. Instead of getting on the ground as ordered, Rodriguez immediately turned around and pointed a small handgun at Corporal Smith's head from approximately 30 feet away.

Corporal Smith hesitated for a moment because he wanted to make sure it was a gun. When he saw that it was in fact a gun, Corporal Smith fired his duty weapon at Rodriguez twice, fearing for his life and thinking that Rodriguez was going to shoot him in the face. Corporal Smith noticed Rodriguez's body shake as if he were hit with the rounds. Rodriguez dropped his right arm to his side, slowly turned around, and started walking northbound on the east sidewalk of Bortz Street away from Corporal Smith. Corporal Smith continued to point his duty weapon at Rodriguez, but did not fire anymore rounds because he felt the immediate threat had stopped.

Corporal Smith attempted to broadcast over the radio, "shots fired, 997 (officer needs assistance), 998 (officer involved in a gun battle)." Officer Mancini was just arriving as backup at the scene as Corporal Smith made his broadcast. Corporal Smith didn't know if his rounds had actually hit Rodriguez because Rodriguez continued walking northbound on the east sidewalk of Bortz Street. According to Corporal Smith, when Officer Mancini arrived, he parked in front of Corporal Smith's vehicle on Bortz Street and exited his vehicle. Corporal Smith told Officer Mancini that Rodriguez had pointed the handgun at him, he had fired shots at Rodriguez, and that Officer Mancini should get cover because he was exposed as he exited his vehicle. Officer Mancini ran toward the residences on the east side of the street, however, he was unable to locate a place for concealment. Corporal Smith was yelling at Rodriguez, "Drop the gun, drop the gun."

According to Officer Mancini, he responded with his emergency lights and siren activated and arrived at the North Bourbon Street location where an unknown citizen advised him that Corporal Smith had gone west of their location. Officer Mancini

looked west and observed the overhead emergency amber lights activated on Corporal Smith's patrol unit, which was near the northeast corner of Bortz Street and Heim Avenue. Officer Mancini drove west on Heim Avenue toward Corporal Smith's patrol unit.

As Officer Mancini was turning north on Bortz Street and driving west of Corporal Smith's patrol unit, he observed Corporal Smith standing at the driver's side of the patrol unit, facing north. Corporal Smith's right arm was extended out toward the front of his body, and Officer Mancini heard two rapid-fired gunshots. He observed Rodriguez approximately 40 to 50 feet north of his location walking northbound on the east sidewalk. Rodriguez was holding what appeared to be a silver revolver in his left hand.

Officer Mancini then observed Corporal Smith slowly driving a patrol unit north on Bortz Street following Rodriguez. Officer Mancini took cover on the unit's passenger side, opened the front passenger door, and also followed Rodriguez. He observed that Rodriguez was bleeding from the left forearm. Both Corporal Smith and Officer Mancini yelled at Rodriguez several times to drop the gun and get on the ground, but Rodriguez refused to comply and continued to walk away from them while still holding the gun.

Corporal Smith advised over the radio that Rodriguez was not complying with their commands and still had the gun in his hands. Rodriguez continued walking and turned westbound on Darby Street, then northbound again on Bortz Street.

At approximately 12:28 p.m., Witness #3, who lives at a home on the 2500 block of North Bortz Street, was seated in the living room of his residence. Witness #3 faced west and could see out of his living room window from where he was seated. The window was closed but his blinds were open. Witness #3 saw Rodriguez walking quickly westbound on Heim Avenue on the north side of the street. Rodriguez had a brown package in his hands with which he "fumbled." Rodriguez attempted to place the package in his left front or left rear pants pocket.

Rodriguez turned northbound onto Bortz Street, at which time Witness #3 got up out of his chair and stood by the living room window, where he watched Rodriguez walk in front of his house. Rodriguez was at the edge of Witness #3's driveway when Witness #3 saw a marked black and white OPD vehicle drive northbound on Bortz Street and stop about six to eight feet from the curb in front of his house.

A police officer got out of the driver's door and stood outside the car between the open door and the driver's compartment. Witness #3 said that the police officer was very easy to identify because he was wearing a dark blue police uniform with City of Orange patches on his shoulders. The police officer removed his handgun from his holster and pointed it in the direction of Rodriguez. Witness #3 heard the police officer yell several commands at Rodriguez. Witness #3 could not recall exactly what the commands were but thought the commands were something similar to "stop" or "show me your hands."

Rodriguez walked to the north end of Witness #3's driveway and stopped. Witness #3 had to look through the glass windows of his truck that was parked in his driveway in order to see Rodriguez, and he could only see Rodriguez's upper torso. Rodriguez shrugged his shoulders and the officer continued to yell commands at him. Rodriguez raised his right arm parallel to the ground at approximately shoulder height. Witness #3 saw a small handgun in Rodriguez's right hand and it was pointed in the direction of the police officer. Witness #3 heard a gunshot and saw Rodriguez turn to his right. Witness #3 heard a second gunshot and decided at that time to lay on the floor for cover.

When Witness #3 heard the two gunshots, he was focused on Rodriguez and did not see if the police officer was the one who fired. Witness #3 described the gunshots as being about one to two seconds apart.

Witness #4 lives at a home on the 2500 block of North Bortz Street, which is directly across the street from Witness #3's residence. Witness #4 had a "Q-See" nine-channel video recorder connected to nine cameras monitoring the outside of his residence. The date and time on the recording was malfunctioning and frozen at "2010/02/13 20:10:05." The hard drive on his

video surveillance system captured video images for approximately one week and then records over itself.

Camera #5 is positioned on the east side eave, closest to the north side of the garage, monitoring the driveway and the street on the east side of the residence. Camera #6 is positioned on the east side eave, closest to the south side of the garage, monitoring the driveway and the street on the east side of the residence.

Witness #4 disconnected the surveillance system and gave an OCDA Investigator his consent to take the system to the OCDA's Office Technical Services Unit to burn the video images to a disc. An OCDA technician extracted the video of the incident.

The surveillance footage from camera #5 shows Rodriguez walking northbound on the east sidewalk of Bortz Street. Corporal Smith's police unit arrived and stopped facing northbound in front of the 2500 block of North Bortz Street. Rodriguez stopped momentarily just north of the driveway, turned around facing south, then turned back around and started walking northbound on Bortz Street again. Officer Mancini arrived in his police unit. Officer Mancini exited his vehicle and hurriedly began to follow Rodriguez on foot. Corporal Smith then hurriedly approached Officer Mancini's patrol vehicle on the driver's side and began to drive it forward. Officer Mancini got behind the passenger side door, and both started following Rodriguez.

Camera #6 does not depict the incident any clearer than camera #5. Camera #6 does show Corporal Smith arriving in his vehicle, stopping in front of 2505 North Bortz Street, exiting his vehicle, and standing behind his driver's door as Rodriguez stopped momentarily and turned around facing south. Due to the camera locations and distance of the cameras from Rodriguez, the video footage does not depict what was in his hands. The footage also does not depict Corporal Smith firing his duty weapon.

At approximately 12:28 p.m., Witness #5, who lives nearby at a home on the 2500 block of North Bortz Street, was inside her house in the living room watching television when she heard two gunshots. She opened her front door and walked outside to see what happened. She didn't immediately see anything but heard police officers on what she thought was a public address system telling someone to drop a gun. She went back inside her house.

Seconds later, Witness #5 became curious again and slightly opened the front door about four or five inches. She looked outside and saw Rodriguez walking northbound on Bortz Street on the east sidewalk. She saw that Rodriguez had a silver handgun in his right hand, which was along his right pant leg, and he was looking down toward the ground. She again heard the police tell Rodriguez to put the gun down, but he did not comply. She saw a black and white marked police vehicle approximately 25 to 30 feet behind Rodriguez. She could not recall where the police officers were in relationship to the police vehicle. Rodriguez and the police vehicle continued northbound on Bortz Street and eventually went out of her sight.

At approximately 12:28 p.m., Witness #6, who lives on the 1200 block of East Darby Street, was inside his house when he heard two gunshots. He came out onto his front door and saw Rodriguez on the east sidewalk walking northbound on Bortz Street. He saw a marked black and white OPD vehicle on northbound Bortz Street behind Rodriguez. The police vehicle was moving slowly northbound, and one OPD officer walked along the passenger side of the vehicle. He heard the police over the police vehicle public address system yell numerous commands for Rodriguez to stop and put the gun down.

According to Witness #6, Rodriguez had a chrome handgun in his hands in front of his torso, blood dripping from his arms, and he walked with his head down. Rodriguez staggered as he walked northbound and it appeared to Witness #6 that Rodriguez was putting bullets in the gun. The police officers behind Rodriguez continued to give him numerous commands to "stop" and "put the gun down," both with and without the vehicle public address system; however, Rodriguez did not comply. Rodriguez continued to walk northbound on Bortz Street as officers slowly followed behind.

Rodriguez walked past Witness #6's house when Witness #6 heard a clicking noise from the gun. Witness #6 believed the noise was Rodriguez closing the gun after it was loaded with bullets. Rodriguez continued northbound with the police officers

following behind him and eventually went out of Witness #6's view.

Witness #7, who lives on the 1200 block of East Darby Street, was working in his garage when he heard someone yell, "Drop the gun" three times. He then heard two popping sounds. He looked down the street and saw Rodriguez walking on the sidewalk in front of 1235 East Darby Street. Witness #7 observed a police vehicle driving slowly northbound on Darby Street with a police officer walking behind the open passenger door. The police officers were constantly yelling for the subject to stop and drop the gun. Rodriguez continued walking on the sidewalk, ignoring the officer's commands. John Doe #5 closed his garage door as Rodriguez continued toward his residence. Witness #7 looked over his east side-yard gate and could see from a distance of 40 feet that Rodriguez had a small silver handgun in his hand.

Witness #7 went inside his residence fearing for his safety. Rodriguez continued walking past Witness #7's house then north on Bortz Street. Witness #7 continued to watch from his back yard and saw Rodriguez stop at the intersection of Bortz Street and St. James Avenue. Rodriguez raised the gun to his head and then Witness #7 heard a pop sound and saw a small puff of smoke, as if Rodriguez had shot himself. Rodriguez then dropped to the ground.

At approximately 12:30 p.m., Witness #8, who lives on the 2600 block of North Bortz Street, was preparing to leave for a class. She exited her residence and her attention was drawn toward the street in front of her residence and south of her driveway. She observed several police officers outside of a police vehicle with their guns un-holstered. She heard conversations between the officers, but could not decipher what the officers were saying.

Witness #8 went back inside her residence and to the northeast bedroom to look out of the north-facing, partially-opened bedroom window. Through the open window, she heard further communications, but again couldn't decipher what those communications were about.

Witness #8 observed Rodriguez walking along a brick wall on the east sidewalk of Bortz Street in a northerly direction toward St. James Avenue. It appeared to Witness #8 that Rodriguez was holding a cell phone in his left hand and held it close to his left ear. She observed Rodriguez approach the northeast corner of Bortz Street and St. James Avenue and step off the curb. Rodriguez took three to five steps away from the curb into the intersection of Bortz Street and St. James Avenue when she heard a "pop" sound. The next thing she saw was Rodriguez lying on his back the ground, facing upwards.

Witness #8 observed several police officers with their guns unholstered approach Rodriguez on the ground, roll him over onto his stomach, and handcuff him.

According to Corporal Smith, Rodriguez continued northbound on the east sidewalk of Bortz Street, passing Ensign Circle, where he started to manipulate the gun again. Rodriguez put the gun up to his right temple with his right hand, but the gun didn't fire. Rodriguez then looked at the gun and continued walking northbound on the east sidewalk of Bortz Street. Rodriguez put the gun up to his right temple with his right hand a second time, but the gun didn't fire.

As Rodriguez approached St. James Avenue, he put the gun up to his head a third time with his right hand and he shot himself in the right temple. He fell to the ground on Bortz Street at St. James Avenue. Corporal Smith advised dispatch that Rodriguez had shot himself and requested paramedics.

According to Officer Mancini, as he and Corporal Smith followed Rodriguez onto northbound Bortz Street, taking cover behind the patrol vehicle, he noticed Rodriguez messing with his gun while walking on the east sidewalk on Bortz Street. Rodriguez did not point it at the officers at that time. Officer Mancini and Corporal Smith yelled at Rodriguez to drop the gun several times. Officer Mancini also observed Rodriguez reaching into his pants pocket, but Rodriguez was having trouble because he was bleeding from his hand.

At some point prior to Rodriguez reaching the corner of Bortz Street and St. James Avenue, Rodriguez hit his gun against the

east cinder block wall. Officer Mancini and Corporal Smith were still yelling at Rodriguez to drop the gun. Officer Mancini then saw Rodriguez put the gun to his head using his right hand. Officer Mancini heard the gun click, but it did not go off. Rodriguez reached St. James Avenue with the gun still pointed to his head and pulled the trigger, causing the gun to go off. Rodriguez fell to the ground.

Officer Maciel arrived in the area and drove northbound on Franki Street, which was one street west of Bortz Street, and parked south of St. James Avenue. He observed OPD Officers McMillen and Holtz also parked on Franki Street. He retrieved his assigned AR-15 rifle from his patrol unit and these officers proceeded toward St. James Avenue.

As Officer Maciel was walking north approaching St. James Avenue he heard a single gunshot. He turned east on St. James Avenue and observed Rodriguez lying on the street in the area of St. James Avenue and Bortz Street. Rodriguez was lying on his back with blood pooling around his head. A small silver handgun was also by his head. Officers Mancini and Ken Adams approached Rodriguez and handcuffed him.

At approximately 12:37 p.m., Orange Fire Department Engine #3 was dispatched to St. James Avenue and North Bortz Street. At approximately 12:43 p.m., Engine #3 arrived in the staging area at Heim Avenue and Canal Street. Once the scene was secured, paramedics were led into the scene by Officer Adams.

At approximately 12:50 p.m., paramedics made patient contact and observed Rodriguez lying face-down in the street on his stomach with his hands handcuffed at his back. They observed obvious signs of death including a gunshot wound to the head and brain matter on the pavement. Paramedics checked Rodriguez's pulse and found he was pulse-less and apneic.

At 12:50 p.m., paramedics determined Rodriguez was dead on arrival. No other trauma was noted. During their assessment, paramedics observed loose ammunition to one side of Rodriguez's body and a small derringer-type handgun on the opposite side of the body.

EVIDENCE ANALYSIS

Autopsy:

At 9:05 a.m. on July 14, 2010, a post-mortem examination of Rodriguez was conducted at the Orange County Sheriff-Coroner Forensic Science Center. The autopsy was conducted by Orange County Chief Forensic Pathologist Dr. Anthony Juguilon. Dr. Juguilon observed the following gunshot wounds on Rodriguez: one gunshot entry wound to the top of Rodriguez's left forearm, two gunshot exit wounds to the bottom of his left forearm, and one gunshot entry wound to the right side of the head above the ear. Dr. Juguilon opined that the injury to Rodriguez's left forearm was a serious orthopedic injury, but not fatal. Dr. Juguilon observed that the gunshot wound to the right side of Rodriguez's head was consistent with a contact wound, as he found gunpowder projectiles near the entry wound. The gunshot wound to the head fractured the orbital plate and left side of the skull and was consistent with a self-inflicted gunshot wound. Dr. Juguilon recovered an impact-damaged lead bullet in the left side of Rodriguez's brain. Dr. Juguilon concluded that the cause of death was a self-inflicted gunshot wound to the head.

Toxicology:

The OCCL conducted a toxicological examination on Rodriguez's post-mortem blood sample. The results were:

| DRUG | MATRIX | RESULT |
|-----------------------------|------------------|---------------|
| ETHANOL | POSTMORTEM BLOOD | DETECTED |
| METHADONE | POSTMORTEM BLOOD | DETECTED |
| ALPRAZOLAM | POSTMORTEM BLOOD | DETECTED |
| METHAMPHETAMINE/AMPHETAMINE | POSTMORTEM BLOOD | NEGATIVE |
| COCAINE | POSTMORTEM BLOOD | NEGATIVE |

Weapons/Firearm Examination

The firearms examination was conducted by OCSD Crime Lab Forensic Scientist Tara Christian, who examined the following items of evidence:

1. Glock Model .22 pistol, .40 automatic caliber, semi-automatic pistol, magazines and cartridges (Corporal Smith)
2. Two cartridge cases and projectiles from the officer involved shooting scene
3. Derringer Model F.I.E. pistol, .38 special caliber (Rodriguez)
4. Bullet fragments from Rodriguez's left forearm
5. Bullet, impact damaged copper lead bullet from Rodriguez's left side of the brain

Glock Model .22 pistol (Corporal Smith)

The two Winchester cartridge cases from the scene were determined to have been fired from Corporal Smith's Glock Model 22 pistol. The bullet fragments recovered from the scene were determined to be Winchester jacketed hollow point bullet, but unsuitable for classification or comparison.

Corporal Smith's Glock was test-fired using four cartridges. Christian concluded that Corporal Smith's Glock pistol functioned normally. The barrel of the Glock had six-sided polygonal rifling with a right twist.

Derringer Model F.I.E. 38 Special (Rodriguez)

The Derringer was received with the barrels open and a fired Winchester brand .38 S&W caliber cartridge in the bottom barrel, which was determined to be a mis-chamber for this firearm. The cartridge was forcibly removed from the Derringer.

The Derringer was test-fired with .38 S&W and .38 special caliber ammunition from the laboratory reference collection and determined to function normally. The Derringer produced test-fire bullets with firing characteristics that were unique to this firearm, different than those of the Glock.

Bullet Fragments from Rodriguez's left arm and head

The two bullet fragments recovered from Rodriguez's forearm lack marks suitable for classification or comparison.

The impact-damaged bullet fragment recovered from the left side of Rodriguez's brain has similar firing-related class characteristic marks as the Derringer, but due to damage, could not be identified or eliminated as having been fired from the Derringer. The results of the comparison were inconclusive. Corporal Smith's Glock pistol was eliminated as having fired the bullet recovered from Rodriguez's brain.

STANDARD LEGAL PRINCIPLES IN OFFICER-INVOLVED SHOOTING CASES

Possible criminal charges against an officer involved in a shooting include murder [Penal Code Section 187]; 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. 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 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.” 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.

LEGAL ANALYSIS

California Penal Code Section 835a states that any peace officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable force to effect the arrest, to prevent escape, or to overcome

resistance. In addition, Penal Code Section 834a requires that if a person has either actual or constructive knowledge that he is being arrested by a peace officer, that person must refrain from using force or any weapon to resist such arrest.

CALCRIM 3470 permits a person being assaulted to defend himself/herself from attack if, as a reasonable person, he/she had grounds for believing and does believe that 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 injury which appears to be imminent.

The law as detailed in CALJIC 5.51 and CALCRIM 3470 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.*] 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 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.

As the California Supreme court held in a recent case, it is well-settled that "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 that might be in the same circumstances required for self-defense...'” *Brown v. Ransweiler (2009) 171 Cal.App.4th 516, 527*.

Where potential danger, emergency conditions, or other exigent circumstances exist, the Supreme Court's definition of reasonableness is comparatively generous to the police. "In effect, the Supreme Court intends to surround the police who make these on-the-spot choices in dangerous situations with a fairly wide zone of protection in close cases...." A police officer's use of deadly force is reasonable if "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." "...Thus, "an officer may reasonably use deadly force when he or she confronts an armed suspect in close proximity whose actions indicate an intent to attack."” *Id.* at 528.

Applying these principles to the instant set of circumstances, Corporal Smith had received information from Orange Police dispatch that Rodriguez had made suicidal statements and was now in possession of a firearm wandering the streets of Orange in the middle of the day.

Upon Corporal Smith's arrival at the intersection of Bortz Street and Heim Avenue, an area surrounded by single family homes, he observed Rodriguez. Corporal Smith, aware of Rodriguez's suicidal mental state, initially did not see the gun described by the 911 callers but observed Rodriguez holding a brown paper bag and an unknown object. Corporal Smith then observed Rodriguez manipulating an object in his hand and then observed that it was a chrome object, but was still unsure it was in fact a gun. As Corporal Smith waited for backup to arrive, he noticed Rodriguez walking deeper into the residential neighborhood and made a reasonable judgment call to contact Rodriguez, as he posed a danger of shooting and/or killing civilians given his irrational behavior.

When Corporal Smith made contact with Rodriguez by blowing his fog horn, Rodriguez stopped and turned toward Corporal Smith, at which time Corporal Smith ordered Rodriguez to stop and put his hands up and get on the ground. Instead, Rodriguez raised the silver or chrome object he now recognized as a small handgun up toward Corporal Smith's face from a distance of approximately 30 feet. There corroboration by witness statements and physical evidence that Corporal Smith was faced with a life or death decision. Faced with an irrational, suicidal, armed person, Corporal Smith was in fear for his life and

felt that it was necessary to employ deadly force to stop the threat to himself and civilians that may have been in the immediate vicinity.

Corporal Smith fired two rounds that struck Rodriguez in the left forearm. His belief that he would be killed had he not employed deadly force was real, objective and reasonable, and therefore justified. There is also abundant evidence that the two rounds that struck Rodriguez were non-fatal. Several civilian witnesses corroborated the fact that Rodriguez continued walking away and disobeying commands from Orange police officers at the scene even after he was wounded.

Several civilian witnesses, Orange police officers, and Corporal Smith indicated that Rodriguez self-inflicted a gunshot wound to his right temple. A .38 special caliber Derringer and several ammunition rounds were recovered a very short distance from Rodriguez's body. OCCL's forensic analysis of the copper projectile recovered from Rodriguez's brain concluded that the projectile had not been fired from Corporal Smith's Glock, but rather had markings similar to those produced from the Derringer.

CONCLUSION


Based on all the evidence available to us, and on the entirety of the facts contained in the reports and interviews I reviewed, and pursuant to the applicable legal principles, it is my legal opinion that there is no evidence of any criminal culpability on behalf of Corporal Smith. His actions were reasonable in light of the situation confronting him.

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

Very truly yours,



ISRAEL CLAUSTRO
Deputy District Attorney
Target-Gang Unit



Read and Approved by JAIME COULTER
Assistant District Attorney