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December 21, 2012

John Welter, Chief of Police
Anaheim Police Department
425 S. Harbor Blvd.
Anaheim, CA 92805

Re: Officer Involved Shooting on January 7, 2012
Fatal Incident involving Bernie Villegas
District Attorney Investigations Case # SA 12-002
Anaheim Police Department DR # 12-03635
Orange County Crime Laboratory Case FR # 12-40450

Dear Chief Welter,

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 Anaheim Police Department (APD) Officer Nick Bennallack. Bernie Villegas, 36, Anaheim, died as a result of his injuries. The incident occurred in the City of Anaheim on Jan. 7, 2012.

OVERVIEW

This letter contains a description of the scope of and the legal conclusions resulting from the OCDA's investigation of the Jan. 7, 2012, fatal officer-involved shooting of Villegas. 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 APD 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 Jan. 7, 2012, Investigators from the OCDA Special Assignment Unit (OCDASAU) responded to this incident. OCDASAU Investigators interviewed 48 witnesses and obtained and reviewed the following: APD reports, audio recordings and dispatch and radio traffic recordings; Anaheim Fire Department incident 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 Villegas; criminal history records related to Villegas including prior criminal history records and prior incident reports; the personnel records of Officer Bennallack; 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 APD officers or personnel, specifically Officer Bennallack. The OCDA will not be addressing herein issues of policy, training, tactics or civil liability.

INVESTIGATIVE METHODOLOGY/LEGAL REVIEW

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 investigations of cases such as these is attempting to interview the officers involved in the shooting. All four of the APD officers involved gave voluntary, consensual statements to the OCDA on Jan. 8 and 9, 2012.

FACTS

The decedent, Villegas, lived with several family members at an apartment complex located on West Ball Road in the City of Anaheim. Villegas was a Filipino male who had lived in the United States for approximately 10 years. Though Tagalog was his primary language, Villegas spoke and understood English.

On Jan. 7, 2012, at approximately 10:30 p.m., Witness #1 and Witness #2 visited Villegas at his apartment complex. Witness #1 was Villegas' friend and Witness #2 was Witness #1's girlfriend. Witness #2 assumed that they went to the apartment complex so that her boyfriend, Witness #1, could buy drugs from Villegas. They arrived at the apartment complex and made contact with Villegas in the visitor parking area, located at the rear of the apartment complex. When Witness #1 first arrived at the apartment complex, he noticed that Villegas had what appeared to be a real firearm. It was only after seeing the firearm up close and speaking with Villegas that Witness #1 learned that it was a BB rifle and not a real firearm. While Witness #2 slept in a nearby parked car, Villegas and Witness #1 remained in the visitor parking area, talking, hanging out and shooting an empty Pine Sol bottle with Villegas' BB rifle.

At approximately 10:49 p.m., APD received a 911 call about a man with a shotgun at an apartment complex located on West Ball Road in the City of Anaheim. The Reporting Party (RP) stated that less than five minutes prior she saw a Filipino man in the visitor parking area of the apartment complex with a shotgun. She reported that it appeared the man was trying to hide the weapon from view. The RP said that she knew the man as a tenant, that he had been contacted and arrested previously by police, and that she believed the man sold drugs.

APD dispatched four officers to the scene, specifically Officers Bennallack, Brett Heitmann, Matt Ellis and Kevin Voorhis. These four officers were assigned to patrol and were wearing full police uniforms with a badge above the left breast shirt pocket and Anaheim police patches on both shoulders. All the officers were wearing their standard police issued duty belt. Information about the call -- including that a man who had previous police contacts and sold drugs was armed with a shotgun -- was relayed from dispatch to the responding officers via radio and/or computer. The officers arrived on scene at approximately 10:52 p.m.

The officers parked their cars on Ball Road and walked north along the carports toward the visitor parking area at the north end of the apartment complex. Officers Bennallack and Ellis were armed with their duty handguns. Officers Heitmann and Voorhis were carrying Colt AR15 rifles, as well as their holstered duty handguns. When the officers reached the visitor parking area they observed Villegas holding what turned out to be his BB gun. The rifle stock was resting on the ground while Villegas was holding the end of the barrel with his hands. The visitor parking area was illuminated by two overhead lights. The officers identified themselves as police officers and yelled commands at Villegas and Witness #1, including "Show me your hands," "Put your hands up," and "Drop the gun."

Witness #1, who stated that he immediately saw and heard the officers and realized they were police, complied and raised his hands. Villegas began to raise the gun up, at which time Officer Bennallack fired a total of five rounds from his handgun at Villegas. The other three officers were positioned to Bennallack's left and they did not have a clear line of sight to fire due to an obstruction from a staircase and handrail. No other officers fired their weapons.

Witness #1 stated that he heard a gunshot and looked over at Villegas, who was still standing and leaning against a staircase railing, holding the barrel of the air gun in his right hand. Villegas fell to the ground under a nearby staircase. Villegas was struck in the right cheek, right bicep, right chest, right hip, and he had a graze wound on his head. The officers moved Villegas' body from under the stairwell, began first aid and attempted life saving measures. The officers immediately reported the shooting over their police radios and requested paramedics. Paramedics responded and attempted life saving measures, but ultimately pronounced Villegas deceased at the scene. A "Daisy Red Ryder" BB rifle was located near Villegas' body. The BB gun had the general appearance of a real firearm and did not, for instance, have a bright orange safety tip.

Voluntary Statement of Officers

All four of the APD officers involved gave voluntary, consensual statements to the OCDA on Jan. 8 and 9, 2012.

Officer Bennallack

Officer Bennallack has been a police officer with APD for a little over five years and is assigned to patrol division. He voluntarily spoke with OCDA investigators on Jan. 9, 2012 -- two days after the shooting.

He said that after being dispatched in response to the 911 call, he along with Officers Heitmann, Voorhis and Ellis walked up the driveway/alley and were clearing the carport area of the apartment complex. He heard voices and then observed Villegas, who matched the description of the suspect given in the call, standing near a stairway, leaning against a retaining cinder block wall and facing the officers. Officer Bennallack observed what he believed to be a shotgun directly next to Villegas' left side, leaning against the cinder block wall. Officer Bennallack described the shotgun, later determined to be the Red Ryder Daisy BB Rifle, as having a wood stock and a dark or metallic type barrel.

According to Officer Bennallack, officers made repeated commands to Villegas, shouting directions such as "Show me your hands," "Drop the gun," "Let go of the gun," or something similar. Officer Bennallack observed Villegas make a quick movement and grab the barrel of the rifle and lift the rifle off of the ground. Villegas was not obeying any of the officers' commands.

Officer Bennallack stated he both in fear for his safety and his life and for the lives of his fellow officers and the public. His training and experience told him that a single shot from a shotgun was capable of hitting multiple targets and causing multiple casualties. Due to the formation they were in, Officer Bennallack believed Villegas would be able to hit multiple targets. Officer Bennallack believed Villegas was going to use the shotgun against the officers. Villegas had been described as a known drug dealer, and in Officer Bennallack's training and experience, drug dealers often carry weapons and have the potential to use them against law enforcement officers.

Officer Bennallack fired five rounds from his department issued handgun at Villegas. Villegas dropped to the ground, on his back, with his upper body partially underneath the staircase. The rifle dropped at Villegas' feet, north of where

his body laid on the ground. The officers approached Villegas and kicked Villegas' rifle northbound, away from Villegas' body. Officer Bennalack began to administer chest compressions to Villegas, until he was relieved by Officer Heitmann.

Officer Heitmann

Officer Heitmann has been employed as a police officer for APD for the past four years. Officer Heitmann is currently assigned to patrol. He was partnered with Officer Bennalack in a two man unit when they received a call for service about a man with a shotgun. Officer Heitmann said that as he was listening to the updated information from dispatch, his awareness intensified. A shotgun in the male subject's hand along with information that the subject was involved in drug sales, led Officer Heitmann to believe this call was a potentially dangerous situation. In Officer Heitmann's experience, people who were involved with drug sales frequently carried weapons and they were more likely to react violently toward the police.

When he approached the carport/visitor parking area, Officer Heitmann observed a male subject leaning up against the staircase. That subject was later identified as Villegas. Officer Heitmann began to give commands, either, "Show me your hands," or "Put your hands up." He repeated the commands at least three times. Officer Bennalack was also giving similar commands. Officer Heitmann observed Villegas holding what appeared to be a "lever action" rifle or long gun, with brown wood stocks and blue or black metal. Officer Heitmann did not observe any markings or signs of it being a toy or fake gun. The rifle appeared to be in front of Villegas and he had both hands on the fore-end, wrapped around the barrel.

Officer Heitmann changed his commands from, "Show me your hands," to "Drop the gun," "Let go of the gun," or something similar. Villegas looked in their direction. Out of the corner of his eye, Officer Heitmann saw that Witness #1 had completely put his hands up in the air. Heitmann observed Villegas start to slightly raise the rifle up from the ground. Villegas' facial expression was not panicked, but calm. The butt of the stock was on the ground or close to it, and as he moved his arms the rifle was moving with him, in an upward manner. Villegas was not obeying any of the officers' commands.

As Villegas raised the rifle from the ground, Officer Heitmann felt there was an immediate threat and he and his fellow officers were in grave danger of being shot or killed. It was at that moment that Officer Bennalack came to a complete stop and fired four to six rounds, in succession, from his duty weapon. Officer Heitmann observed Villegas fall to the ground, on his back, his upper body partially under the staircase. The rifle had fallen forward, lying in the area of Villegas' feet.

Officer Voorhis

For the past eight and one half years, Officer Voorhis has been employed as a police officer; the past three and one half years for APD and the five years prior to that for the Long Beach Police Department. Officer Voorhis is currently assigned to APD's patrol division.

After receiving the call for service, Officer Voorhis said he met with Officers Ellis, Bennalack, and Heitmann two to three complexes east of the apartment complex. Officer Voorhis retrieved his rifle from the trunk of his unit and observed Officer Heitmann retrieving his rifle as well. The four officers approached the complex on foot. As the group moved northbound, Officers Heitmann and Bennalack maintained visual observation northerly as Officers Voorhis and Ellis cleared the carports on the west side of the alley. Officers Voorhis and Heitmann had their rifles drawn and Officers Bennalack and Ellis had their pistols drawn.

As the group came within approximately 30-40 feet south of the northern-most carport's wall, Officer Voorhis heard voices from the open parking area north of the carports. Officer Voorhis observed Witness #1 standing near a parked car, north of the staircase. South of Witness #1, Officer Voorhis observed the barrel of a gun pointing upward, toward the sky; the gun was not close enough to Witness #1 for him to have been holding it. As the four officers continued

their approach, Officer Voorhis observed a second male subject, later identified as Villegas, standing behind the staircase.

Officer Voorhis did not observe Villegas holding the gun; however, he believed Villegas to have been holding it based upon the manner in which the gun's barrel was pointed skyward; it did not appear the gun was leaning against an object. Officer Voorhis announced "police" and heard an unknown officer say, "Drop the gun. Drop the gun." Officer Voorhis observed the barrel of the gun move either upward, or backward, not toward the ground. Officer Voorhis feared whoever held the gun was not complying with commands and may use the gun against officers. Officer Voorhis looked down his rifle's sights to obtain a sight picture; however, due to Villegas's position behind the staircase, Officer Voorhis was unable to obtain a clear sight picture. At approximately that moment, Officer Voorhis heard approximately three gunshots emanating from his right side. Officer Voorhis heard Officer Heitmann radio dispatch and advised an officer involved shooting occurred, and at some point, heard an unknown officer request paramedics respond.

Officer Ellis

Officer Ellis has been employed by APD for approximately three and a half years and is currently assigned to the uniform patrol division. After receiving the call for service, Officer Ellis said all four officers entered the east alley and proceeded north searching the carports for a suspect. Officers Heitmann and Bennalack were at the front of the search team, as Officer Ellis and Voorhis were to the rear. The officers searched and cleared each carport proceeding toward the north uncovered parking area.

As Officers Ellis and Voorhis searched, Officer Ellis heard either Officer Heitmann or Officer Bennalack yell something to the effect of, "Put it down," "Drop it," or "Get on the ground." Within a second of hearing the last order, Officer Ellis heard five gunshots. Officer Ellis observed Officer Bennalack pointing his weapon at Villegas, who was lying on the ground behind the stairway on the west side of the parking lot. He observed a long thin object that appeared to be the barrel of a gun protruding from beneath Villegas' body.

Officer Heitmann was giving commands to another male subject, later identified as Witness #1, who was standing behind a parked vehicle in the northwest part of the parking lot. Witness #1 walked toward the officers as ordered and was detained. Officer Ellis did not observe the actual shooting because he was focused on clearing the vehicles in the southwest part of the lot when it occurred.

Statement of Witness #1

Witness #1 said that on Jan. 7, 2012, sometime after 10:00 p.m., he and his girlfriend, Witness #2, arrived at the apartment complex on East Ball Road. He drove into the complex and parked in a visitor's parking space at the far north end of the apartment complex.

Once Witness #2 parked, Witness #1 observed his friend, Villegas, standing on the second level, ready to climb the staircase that led to the second-level apartments. Witness #1 observed Villegas carrying a "gun." When Witness #1 first observed Villegas carrying the firearm, he believed it to be a real firearm. As Villegas approached Witness #1, he realized the firearm might not be real. Witness #1 then asked Villegas if the firearm was real and Villegas told him it was an air gun. In the visitor parking area, they both shot the BB rifle, using a plastic Pine Sol bottle as a target.

Witness #1 and Villegas then began talking and laughing. After several minutes of talking with Villegas, Witness #1 heard commands and observed four to five police officers, in uniform, standing nearby. Witness #1 heard them identify themselves as police officers and then heard them say something to the effect of, "Raise up your hands," and "Don't move." Witness #1 was scared and feared for his safety and raised his hands and arms up, yelling, "No, no, no."

Witness #1 was looking directly at the police officers, and observed them to have their weapons drawn and pointed in his and Villegas' direction. Witness #1 described some of the police officer's weapons as assault rifles. Witness #1 heard a gunshot and looked over at Villegas, who was still standing and leaning against the north staircase railing,

holding the barrel of the air gun in his right hand. Witness #1 heard several more gunshots and was afraid he was going to get shot, so he dropped to his knees, continuing to hold his hands and arms up. Witness #1 heard a total of four or five gunshots. After the gunshots, Witness #1 glanced over and observed Villegas lying on the ground.

Evidence Collected at the Scene

OCCL personnel arrived on scene to collect evidence, map the scene and take photographs. Five Winchester .45 auto cartridge cases and a "Daisy Red Ryder" BB rifle were collected from the scene, among other items. The BB rifle had no safety markings such as a bright orange tip.

Evidence Analysis

An examination of Officer Bennallack's duty handgun revealed that five rounds (out of a total capacity of 14 rounds) were missing. Examination of the five expended cartridges recovered from the scene determined that they had been fired from Officer Bennallack's firearm. An inspection of the firearms and ammunition that Officers Heitmann, Ellis and Voorhis carried indicated that no rounds were missing, implying that their firearms had not been recently fired.

Swabs were collected from the stock, trigger, fore stock and lever of the Red Ryder Daisy BB Rifle for purposes of deoxyribonucleic acid (DNA) analysis. DNA typing was performed on the extracts from the trigger and lever. A mixture of DNA from two or more individuals was obtained from the extracts of the trigger and lever of the Red Ryder Daisy BB Rifle. However, due to the low level of DNA and the presence of DNA from multiple individuals, the results from these samples were not suitable for database entry or comparison to the known DNA profile of Villegas.

Autopsy

On January 10, 2012 Dr. Lawrence Nguyen, Forensic Pathologist for the Orange County Coroner, performed an autopsy on Villegas. Dr. Nguyen determined that the cause of death was multiple gunshot wounds. Villegas' post-mortem blood samples were analyzed for prescription drugs and common drugs of abuse. The following results were obtained:

DRUG	MATRIX	RESULTS
Amphetamine	Postmortem blood	0.14 mg/L
Methamphetamine	Postmortem blood	2.3 mg/L
Amphetamine	Brain	0.26 mg/kg
Methamphetamine	Brain	4.4 mg/kg

STANDARD LEGAL PRINCIPLES IN OFFICER-INVOLVED SHOOTING CASES

Possible criminal charges against the officer involved in the shooting include murder (PC 187) and assault by a police officer (PC 149). However, in order to convict any officer of any of these charges, it would be necessary to prove beyond a reasonable doubt that no legal justifications apply for the officers' actions. People v. Banks (1977) 67 Cal.App.3d 379, 383-84. Several justifications may apply; they are provided by Penal Code sections 196, 197, and 835a.

California Penal Code section 196 states 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 835a allows any police officer who has reasonable cause to believe that a person to be arrested has committed a felony 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.

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

The above justifications must be interpreted in light of U.S. 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. The U.S. 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.” Tennessee v. Garner (1985) 471 U.S. 1, 3.

However, any determination about the reasonableness of force used by an officer “must embody allowance for the fact that police officers are often forced to make split second judgments—in circumstances that are tense, uncertain, and rapidly evolving.” Thus, “[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.” Graham v. Connor (1989) 490 U.S. 386, 396.

LEGAL ANALYSIS

In analyzing Officer Bennalack’s actions, the critical issue is the law on self-defense and defense of others. If Officer Bennalack was confronted by the appearance of danger which reasonably aroused in his mind an honest fear and conviction that he or another person was about to suffer death or great bodily injury, then he was justified in acting in self defense or defense of others by shooting Villegas. Further, as the United States Supreme Court has stated, the reasonableness of Officer Bennalack’s use of force must be judged from the perspective of a reasonable officer on the scene, rather than with 20/20 hindsight. In order to justly charge and convict Officer Bennalack for committing any crime, it would be the burden of the prosecution to prove beyond a reasonable doubt that no justification existed for the shooting.

In his voluntary interview with OCDA Investigators, Officer Bennalack stated that he had received information from police dispatch that a drug dealer had a shotgun. In Officer Bennalack’s training and experience, drug dealers often carry weapons and have the potential to use them against law enforcement officers. When he arrived on scene, Officer Bennalack observed what he believed to be a shotgun directly next to Villegas’ left side. After viewing the BB rifle, which contains no distinctive safety markings, we conclude that Officer Bennalack reasonably believed that it was a real shotgun. Villegas did not obey any of the officers’ commands to drop the gun and then Officer Bennalack saw Villegas make a quick movement and lift the rifle off of the ground. Officer Bennalack stated he was not only in fear for his safety and his life, but in fear for the lives of his fellow officers and the public. His training and experience told him that a single shot from a shotgun was capable of hitting multiple targets and causing multiple casualties. Due to the formation they were in, Officer Bennalack believed Villegas would be able to hit multiple targets. Officer Bennalack believed Villegas was about to use the shotgun against the officers.

Officer Bennalack’s statements are generally consistent with the other witnesses interviewed -- both law enforcement and civilian -- as well as the other evidence analyzed and reviewed as part of this investigation. Therefore, we find credible Officer Bennalack’s statement that he shot Villegas because he feared for his own safety and the safety of others in the area. Further, under the circumstances, we find there is insufficient evidence to disprove beyond a reasonable doubt that his fear was reasonable. Put another way, we believe that we could not prove beyond a reasonable doubt that the justifications of self-defense and defense of others do not apply. In fact, although the gun turned out to be a BB rifle and not an actual shotgun, we believe that a jury hearing this case would be likely to find

that Officer Bennalack reasonably feared for his safety and the safety of others. As mentioned earlier, the justifications of self-defense and defense of others apply whether the danger is real or merely apparent, provided that the fear aroused is reasonable.

CONCLUSION

Based upon a review of all of the evidence provided to and obtained by the OCDA, it is our legal opinion that the evidence does not support a finding of criminal culpability on the part of Officer Bennalack when he shot Villegas on Jan. 7, 2012, and there is significant evidence the officer's actions were justified under the circumstances.

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

Respectfully submitted,



Robert Mestman
Senior Deputy District Attorney

Read and Approved,



Dan Wagner
Assistant District Attorney
Head of Homicide Unit