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January 7, 2013

Chief John Welter  
Anaheim Police Department  
425 South Harbor Boulevard  
Anaheim, CA 92805

Re: Officer Involved Shooting on March 6, 2012  
Fatal Incident involving Decedent Martin Angel Hernandez  
District Attorney Investigations Case # S.A. 12-007  
Anaheim Police Department Case DR # 2012-32895  
Orange County Crime Laboratory Case FR #12- 43616

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 Dan Hurtado. Martin Angel Hernandez, 21, Anaheim, died as a result of his injuries. The incident occurred in the City of Anaheim on March 6, 2012, at approximately 10:00 p.m.

## OVERVIEW

This letter contains a description of the scope of and the legal conclusions resulting from the OCDA's investigation of the March 6, 2012, fatal officer-involved shooting of Hernandez. 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 March 6, 2012, Investigators from the OCDA Special Assignment Unit (OCDASAU) responded to this incident. OCDASAU Investigators interviewed nearly 60 witnesses and obtained and reviewed the following: APD reports, audio recordings and dispatch and radio traffic recordings; Garden Grove Police Department incident reports; Orange County Sheriff 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 Hernandez; criminal history records related to Hernandez including prior criminal history records and prior incident reports; the personnel records of Officer Hurtado 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 Hurtado. 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 investigations of cases such as these is attempting to interview the officers involved in the shooting. All of the APD officers involved in this incident gave voluntary, consensual statements to the OCDA.

### **FACTS**

#### **The 911 Call**

On March 6, 2012, at approximately 9:48 p.m., APD Dispatch received a 911 call reporting five to six males standing outside a white car in the alley of an apartment complex on East Wakefield Street in the City of Anaheim. The caller indicated that he observed one of the males put a handgun behind the driver's seat of the white car and a second male place a handgun in his waistband. He further indicated that the males were yelling out their gang name.

The caller described the two gunmen as darkly-dressed Hispanic males in their early 20s, and that one of them was wearing black "Dickies" pants and a light blue or gray polo shirt. As the dispatcher attempted to obtain further information, the call was disconnected. An audio recording of this 911 call was provided to OCDASAU personnel. In the recording, one can hear at least one male voice in the background yelling the name of a criminal street gang multiple times.

#### **Anaheim Police Officers Arrive**

Uniformed Anaheim Police Officers Hurtado, Ray Drabek and Mike Brannigan were informed of the details of the 911 call and, in response thereto, drove their marked patrol vehicles to the East Wakefield Street. Upon arrival, they coordinated their approach toward apprehending the armed subjects in the alley. The officers agreed that they would approach on foot lest their marked patrol vehicles prematurely alert the armed gunmen. They agreed that Officer Hurtado would position himself at the west end of the alley and Officers Drabek and Brannigan would approach from the east end of the alleyway.

The officers were previously aware that the location is frequented by members of a specific criminal street gang. They were also aware that this same criminal street gang is a violent criminal street gang and was enjoined by a court order from its members congregating in that area while engaging in specified activities, including disturbing the peace

and weapons violations. Based on their aforementioned knowledge, the officers armed themselves prior to their approach. Officer Hurtado, who was slated to position himself alone at the west end of the alley, selected his department-issued Bushmaster AR 15 Semi-automatic rifle.

#### Events Immediately Preceding the Shooting

Witness #1 was in the alleyway leaning into the passenger side of a vehicle, which was parked in the west end of the alleyway, when Witness #1 noticed a single uniformed police officer armed with a rifle approaching on foot slowly and silently. Witness #1 then looked in the direction that the officer was looking and briefly observed two Hispanic male running toward her and the officer. Witness #1 later described the two males as "typical cholos" with shaved heads and baggy pants. Prior to the officer's arrival, Witness #1 had noticed a white vehicle parked in the alleyway. Witness #1 described to OCDA Investigators that she was scared of the males running toward her for fear of being taken as a hostage. Witness #1 did not notice anything in the hands of the two running males, but was only able to catch a "glimpse" of them while they were running. As the officer moved forward, Witness #1 moved backward, attempting to hide behind a parked vehicle. Pursuant to the statement by Witness #1 to OCDA Investigators, the primary of focus of Witness #1 was to move from harm's way.

#### The Shooting

From Witness #1's position of hiding, Witness #1 heard the officer yell, "'Stop or I'll shoot' or something very similar." Witness #1 indicated that the officer was "loud and clear" and yelled the command repeatedly. Witness #1 then heard two or three gunshots. Witness #1 looked up and saw one male on the ground in the alley and heard the officer on his radio reporting that a person was "down." Witness #1 then ran inside an apartment to check on family members. When Witness #1 later returned outside to move the family's vehicle, Witness #1 saw other police officers around the male on the ground.

When asked if the officer's warnings and the shots were simultaneous, Witness #1 responded, "No, he totally gave them a chance; he yelled and then he stopped and shot."

Witness #2 was in an apartment and heard two gunshots. Witness #2 went out into the alley and saw a male lying on the ground in the alleyway. The male was bleeding from the head and there was a shotgun next to him. Witness #2 indicated having seen the male before and believed him to be a gang member based on the large gang tattoo on the back of his head. Witness #2 used a cell phone to video record the male on the ground. The cell phone recording depicts Hernandez lying on the ground near a block wall, bleeding from the head and with a pistol gripped shotgun resting within a few feet of his right side.

#### Voluntary, Consensual Statement of Officer Hurtado

Officer Hurtado gave a voluntary and consensual statement to the OCDASAU on March 8, 2012. Officer Hurtado indicated that at approximately 9:49 p.m., he was working patrol and was dispatched to the alley behind an apartment complex on East Wakefield Avenue in the City of Anaheim. Anaheim Police Officers Brannigan and Drabek were dispatched to assist. Officer Hurtado was informed that five or six male gang members were standing in the north alley near a white vehicle, and that one of the male subjects was seen putting an unknown type firearm behind one of the seats of the vehicle.

Officer Hurtado was familiar with the area and was aware that the Wakefield Avenue address was an area frequented by a specific criminal street gang and that there was a court ordered gang injunction against that particular gang prohibiting its members from assembling within the defined safety zone, which included the apartment complex and the alley behind it. As Officer Hurtado continued to travel to the location, dispatch transmitted additional information over the police radio indicating that the involved subjects were Hispanic males with shaved heads and an additional male was observed placing a firearm in his waistband area.

Officer Hurtado's experience as a patrol officer, as well as a safe school officer, had required him to come in close contact with members of the gang that frequented this particular location. He previously worked in conjunction with the APD Gang Detail and assisted in serving the gang injunction against members of this particular gang. Officer Hurtado was aware of the gang's criminal history, their associated graffiti, as well as shootings where members were either victims or suspects. In the last week or two prior to this incident, Officer Hurtado arrested two juveniles that had tagged the gang's graffiti, and believed the gang's activity was starting to "pick up in the area."

Officers Hurtado, Brannigan and Drabek coordinated their approach. Officers Brannigan and Drabek were to approach from the east side while Officer Hurtado would approach from the west side. The officers were aware that gang members in the area would usually have a "look out." Therefore, they parked in an area out of sight in order to have a better probability of finding the subjects in the alley. Officer Hurtado communicated to the other officers that he would hold his position on the northwest corner and not enter the alley for fear of a cross fire situation. Officer Hurtado exited his patrol vehicle and removed his department-issued Bushmaster AR 15 Semi-automatic rifle. Based on the call and the information provided to him, including multiple and possibly armed gang members in the alley, he indicated that he believed his department-issued AR 15 was a "better weapon to enter this encounter."

As Officer Hurtado took his position, his attention was immediately drawn to a vehicle parked north of the wrought iron gate because he noticed a lone female, later identified as Witness #1, standing inside the right front passenger door. It appeared to Officer Hurtado that Witness #1 was folding a blanket or clothing. Officer Hurtado then observed a subject riding a BMX type bicycle westbound in the alley toward himself and Witness #1. Officer Hurtado also noticed a second subject with a shaved head, wearing a gray hooded sweatshirt and dark colored pants, running north of the subject on the bicycle, between the bicycle and the alley's north cinder block wall.

The subject running, later identified as Hernandez, was almost parallel to the subject on the bicycle, and running westbound at a "very fast speed." Immediately thereafter, Officer Hurtado observed that Hernandez was carrying a "shotgun" in his right hand. Hernandez was holding the shotgun with his right hand behind the barrel, near the chamber. The shotgun was parallel to the ground, but as Hernandez was running, the barrel swung in an upward and downward manner. Officer Hurtado described the shotgun as having a pistol grip. Officer Hurtado estimated Hernandez to be 25 to 35 yards away from him, but was quickly approaching. Officer Hurtado believed the bicyclist and Hernandez were two of the five to six subjects referenced in the original call, and had either seen or heard the police and were fleeing. Officer Hurtado's immediate concern was now for Witness #1, who was standing north of the parked vehicle and therefore closest to harm's way.

After having previously communicated with the other officers that he would not enter the alley in fear of a crossfire situation, Officer Hurtado now believed he needed to enter the alley to prevent Witness #1 from being harmed if Hernandez decided to engage Officer Hurtado in gunfire. It was Officer Hurtado's belief that Hernandez was running from the police and was desperate because he was in possession of a firearm. Since Hernandez was running directly toward Officer Hurtado and Witness #1, Officer Hurtado feared that Hernandez could carjack Witness #1 and/or take Witness #1 as a hostage. It was at that time Officer Hurtado decided he must leave his position of cover and enter the alley to confront the approaching gunman.

Officer Hurtado pointed his rifle at Hernandez. He then identified himself, yelling something to the effect of, "Police, stop," or "Stop, police." Officer Hurtado yelled the command at least once, possibly twice. He saw Hernandez stop and change direction as he came within 10 yards of the officer. Officer Hurtado observed the subject on the bicycle continue westbound toward him. However, since he could see both of the bicyclist's hands on the handle bars of the bicycle, he kept his focus on Hernandez and the shotgun. Hernandez now ran eastbound in the alley, away from Officer Hurtado. Officer Hurtado observed Hernandez turn toward a blue dumpster positioned along the north cinder block wall. Initially, Officer Hurtado believed Hernandez was going to use the dumpster in an attempt to scale over the cinder block wall topped with barbed wire and escape into the Satellite Mobile Home Park.



However, as Hernandez approached the dumpster, he flipped the shotgun around the front of his body and started to raise the shotgun so the barrel of the shotgun was now pointed toward the officer. As Officer Hurtado observed the barrel of the shotgun coming up at him, he noted that the opening of the barrel appeared quite large. Since he was now in the open alley with no cover and believed he was about to be shot, Officer Hurtado discharged his department-issued rifle. He discharged what he believed to be two rounds, but later discovered he had fired three rounds in very rapid succession, at which time Hernandez immediately collapsed to the ground. Once Officer Hurtado was able to observe Officers Brannigan and Drabek in the alley, he approached Hernandez. He saw Hernandez was not moving and had labored breathing. Hernandez's shotgun was lying approximately four to five feet west of his body.

Post-Shooting, Voluntary Interviews with Civilian Witnesses in the Neighborhood

Of the numerous residents interviewed, the overwhelming majority indicated that they heard gunshots, but did not immediately look outside. Some indicated they heard shouting prior to hearing gunshots, others indicated they did not hear shouting prior to hearing gunshots. Witness #1 was the sole witness who admitted being out in the alley during the shooting.

**EVIDENCE COLLECTED AT THE SCENE**

The following items of evidence were collected at the scene by OCCL personnel:

- Three .223 cartridge cases
- One Bushmaster XM15-E2S rifle
- One Mossberg 12 gage shotgun, modified with a pistol grip and loaded with two live 12 gauge shotgun shells
- Hernandez's clothing
- DNA swabs and fingerprints were collected from a Motorola cellular telephone, the cellular telephone battery, the cellular telephone back plate, the men's single speed bicycle, and the wrist watch

The following items were collected at the scene by APD personnel:

- One Motorola cellular telephone
- One Motorola cellular telephone battery
- One Motorola cellular telephone back plate
- One men's single speed bicycle
- One plastic grocery style bag containing a child's toy, miscellaneous small package items, and a watch.

Both OCCL personnel and APD personnel documented numerous instances of gang graffiti throughout the alley.

**EVIDENCE ANALYSIS**

Toxicology

Hernandez's post-mortem blood samples were analyzed for prescription drugs and common drugs of abuse. The following results were obtained:

Methamphetamine	1.3 mg/L
Amphetamine	0.092 mg/L
Tetrahydrocannabinol	Detected
THC Acid metabolite	Detected

Firearms Examination

Bushmaster, Model XM15-E2S semiautomatic rifle (Officer Hurtado's rifle) was examined, test fired and found to operate without malfunction.

The Mossberg, Model 500A, 12-Gauge pump shotgun, (Hernandez's shotgun) was examined, test fired and found to operate without malfunction.

### Cartridge Case Examination

The three expended cartridge cases from the scene were Winchester brand 5.56x45mm caliber. The three cartridge cases were microscopically examined and were determined to have been fired from Officer Hurtado's Bushmaster rifle.

### Shotgun and Shotgun Shells Processed for DNA

Swabs were collected for the purpose of DNA testing from the Mossberg 12 Gauge pump shotgun found at the scene next to Hernandez, the shells which were loaded in the shotgun, and the tape found on the stock of the shotgun. DNA analysis was performed on the swabs.

The same DNA profile was obtained from the blood detected on the swabs of the trigger of the Mossberg shotgun and the left side of the Mossberg shotgun. This DNA profile matched the DNA profile of Hernandez. In addition, DNA collected from one of the shotgun shells taken out of the Mossberg shotgun, DNA collected from the front end of the Mossberg shotgun, and DNA collected from the non-sticky side of the tape from the stock of the Mossberg shotgun all matched Hernandez's DNA.

In other words, DNA analysis shows that Hernandez's DNA was found on (1) the trigger and the left side the Mossberg shotgun, (2) the shotgun shell loaded inside the Mossberg shotgun, (3) the front end of the Mossberg shotgun, and (4) the tape from the stock of the Mossberg shotgun.

### **HERNANDEZ'S PHYSICAL / MEDICAL CONDITION**

The autopsy was conducted by Dr. Aruna Singhania of the Orange County Coroner's Office on March 7, 2012, at approximately 9:15 a.m. Dr. Singhania noted that Hernandez had multiple tattoos on his body, including on the top, back, and left side of his head (a review of the photos of the autopsy reveal many of the tattoos are gang specific). Dr. Singhania concluded that Hernandez's cause of death was avulsion of the brain due to a through-and-through gunshot wound to the head.

### **DECEDENT'S PRIOR CRIMINAL HISTORY**

Hernandez's criminal history and documented membership in an enjoined gang was reviewed and considered.

### **STANDARD LEGAL PRINCIPLES IN OFFICER-INVOLVED SHOOTING CASES**

Possible criminal charges against an officer involved in a fatal shooting include murder [Penal Code Section 187]; manslaughter [Penal Code Section 192]; assault with a deadly weapon [Penal Code Section 245]; and assault by a police officer [Penal Code Section 149]. In order to lawfully convict an officer of any of these charges, 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 the 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 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.

The Criminal Jury Instructions as written by the Judicial Council of California are referred to as CALCRIM instructions. The relevant Jury Instruction 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*, as well as well settled California law are very much applicable to the circumstances surrounding the interactions of Officer Hurtado with Hernandez.

## **LEGAL ANALYSIS**

While discharging his duty as a police officer and in response to a citizen’s call for police assistance, Officer Hurtado entered an alley at night with a known gang presence realizing that he would likely encounter armed gang members. Officer Hurtado then observed Hernandez, a well-documented member of a criminal street gang, armed with a shotgun, which was ultimately pointed at the officer. At the time the shotgun was pointed at the officer, the officer was in an open alley with no cover and believed, reasonably based on all the available evidence, that he was about to be shot. In addition, Officer Hurtado knew that an innocent civilian was standing in the immediate vicinity and in harm’s way. In order to neutralize the perceived threat, the officer fired his department-issued rifle. As discussed below and based on well-established law and all the known facts, it would be unreasonable and unfair to conclude that Officer Hurtado did

not have justification to use his weapon in self-defense.

The evidence establishes that, before Officer Hurtado fired his gun, he found himself face to face with an armed subject who ignored the officer's commands to stop and who pointed a shotgun at the officer. Officer Hurtado's account regarding the actions of Hernandez is corroborated by the statements of civilian Witnesses #1 and #2, as well as by forensic evidence showing that Hernandez's DNA was on the shell inside the shotgun as well as on the shotgun. Furthermore, the statement of the 911 caller and the video recording made by Witness #2 provide more corroborating evidence indicating that Hernandez was armed. 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 [...] police officer is in the exercise of the privilege of protecting the public peace and order [and] he is entitled to the even greater use of force than might be in the same circumstances required for self-defense." *Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 527.

In analyzing the conduct in this case, one of the questions to be asked is similar to what the Supreme Court observed in *Brown*: "The question is whether a peace officer's actions were objectively reasonable based on the facts and circumstances confronting the peace officer. The test is highly deferential to the police officer's need to protect himself and others." *Id.* at p. 527. Furthermore, the Supreme Court held that "the '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. The question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. In calculating whether the amount of force was excessive, a trier of fact must recognize that peace officers are often forced to make split-second judgments, in tense circumstances, concerning the amount of force required." *Id.* at pp. 527-528. Therefore, it is well settled that in evaluating Officer Hurtado's conduct, "we must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes 'reasonable' action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure." *Brown v. Ransweiler* (2009) 171 Cal. App. 4th 516, 528. The reality that Officer Hurtado was facing included the need on his part to make a split-second decision when confronted with an armed gang member who was refusing lawful commands and pointed his shotgun at the officer. Simply stated, the law allows a police officer to use deadly force when he reasonably believes that someone is trying to shoot at him.

The 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 bodily injury, to act in self-defense or defense of others upon such appearances, and from such fear and honest convictions. Where potential danger, emergency conditions, or other exigent circumstances exist, as was the situation when Officer Hurtado was confronted by an armed subject pointing a shotgun at him, 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." *Brown v. Ransweiler* (2009) 171 Cal. App. 4th 516, 528. This language from the Court's decision in *Brown* describes exactly what Officer Hurtado was facing.

In order for Officer Hurtado to be justly and lawfully charged and convicted of a crime in this incident, it would be the prosecution's burden to prove beyond a reasonable doubt that Officer Hurtado did not act in reasonable and justifiable self defense or defense of another when he shot at Hernandez. Therefore, our above-described legal analysis and our legal conclusion listed below are equally applicable to a potential filing for murder, voluntary manslaughter, or any of the



other possible charges listed above.

**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 and conclusion that there is no evidence of criminal culpability on the part of Officer Hurtado and there is substantial evidence the officer acted reasonably under the circumstances when he shot and killed Hernandez on March, 6, 2012.

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

A handwritten signature in black ink, appearing to read "Troy Pino", written over a horizontal line.

**Troy Pino**

Senior Deputy District Attorney  
Homicide Unit

Read and Approved,

A handwritten signature in blue ink, appearing to read "Dan Wagner", written over a horizontal line.

**Dan Wagner**

Assistant District Attorney  
Head of Homicide Unit