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November 18, 2014

Chief of Police Kevin Raney
Garden Grove Police Department
11222 Acacia Parkway
Garden Grove, CA 92840

Re: Officer-Involved Shooting on December 13, 2013
Non-Fatal Incident involving Thomas Ray Lehman
District Attorney Investigations Case # S.A. 13-030
Garden Grove Police Department Case # 13-15918
Crime Laboratory Case FR # 13-57247

Dear Chief Raney,

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 Garden Grove Police Department (GGPD) Officer Corey Polopek. Thomas Ray Lehman, 23, survived his injuries. The incident occurred in the City of Garden Grove on Dec. 13, 2013.

OVERVIEW

This letter contains a description of the scope and the legal conclusions resulting from the OCDA's investigation of the Dec. 13, 2013, non-fatal, officer-involved shooting of Lehman. 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 GGPD officer involved in the shooting. The format of this document was developed by the OCDA, at the request of many Orange County police agencies, to foster greater accountability and transparency in law enforcement.

On Dec. 13, 2013, Investigators from the OCDA Special Assignment Unit (OCDASAU) responded to this incident. During the course of this investigation, 12 interviews were conducted, and 23 additional witnesses were contacted during the supplemental canvass interviews. OCDASAU Investigators also obtained and reviewed the following: GGPD reports, audio recordings, dispatch and radio traffic recordings; Orange County Sheriff Crime Lab (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 Lehman; criminal history records related to Lehman including prior incident reports; the personnel records of Officer Polopek; 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 reviewed all evidence and legal standards impartially. The scope and findings of this review are expressly limited to determining whether any criminal conduct occurred on the part of GGPD officers or personnel, specifically Officer Polopek. The OCDA will not be addressing 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. Deputy district attorneys assigned to the Special Prosecutions Unit review the non-fatal officer-involved shooting cases for possible criminal filings. Throughout the review process, the assigned prosecutor will be in consultation with his or her supervisor, and this Assistant District Attorney will eventually review and approve any legal conclusions and resulting memos. The case may often be reviewed by multiple veteran prosecutors, their supervisors, the Chief of Staff, and the District Attorney. If necessary, the reviewing prosecutor may send the case back for further investigation.

An important part of the investigation of an incident such as this is attempting to obtain a statement from the involved officer. Officer Polopek provided a voluntary statement to OCDA Investigators on Dec. 13, 2013.

FACTS

The facts as detailed below are determined largely based on Officer Polopek's voluntary statements to the OCDA Investigators, but also by considering all the evidence available to and uncovered by OCDA Investigators.

At approximately 6:00 a.m. on Dec. 13, 2013, GGPD Officer Polopek read a GGPD bulletin containing information about a male subject identified as 23-year-old Thomas Ray Lehman. According to the bulletin, Lehman had recently been released from prison for second-degree robbery and was transient. Lehman wanted his mother and brother to allow him to stay at their residence and provide him financial assistance. When they refused, Lehman threatened to kill them. He specifically threatened to shoot his brother in the face and "eviscerate him for the fun of it." According to the bulletin, Lehman stated he had access to a handgun and claimed to have gang connections. The bulletin advised that Lehman told his brother he would not hesitate to "shoot it out" with police "if he had to." Lehman's threats to his mother and brother provided probable cause to arrest Lehman. The bulletin described Lehman as a very thin 130 pound white male, 6'0" in height. He was further described as very unstable. The bulletin stated Lehman was familiar with the general area where his family resided.

At approximately 12:09 p.m., Officer Polopek and GGPD Officer Gerald Jordan were dispatched to a possible residential burglary in progress approximately two-tenths of a mile from Lehman's family residence. GGPD Dispatch advised that two subjects were attempting to burglarize a vacant residence on Palmwood Drive between Alderson Avenue and Dewey Drive. One of the burglary suspects was described as a tall, thin white male in his twenties, wearing a black jacket and sunglasses. The other suspect was described as a Hispanic male in his twenties, wearing a grey hooded sweatshirt. Officer Polopek recalled that Lehman's mother and brother resided in the same area where the burglary was occurring.

Officer Jordan arrived at the location first, and informed Officer Polopek that he had not seen anyone, but had heard noises coming from the residence at the 11000 block of Palmwood Drive. Shortly thereafter, GGPD Officers Juan Centano and Ron Reyes arrived on scene, and a plan was formulated for Officers Polopek and Reyes to "clear" the backyard of the residence. Officers Polopek and Reyes scaled the fence and proceeded through the backyard. Officer

Polopek was concerned because he and Officer Reyes were in "the open" in "exposed" positions, with no available cover or means of concealment. Moreover, Officer Polopek recalled that Lehman had indicated he had access to a firearm and would shoot it out with police if the situation presented itself.

As Officer Polopek moved along the fence line, his attention was drawn to a metal storage shed in the northwest portion of the yard. He had seen the shed earlier from a distance, but his focus at the time was on the residence. There were two doors that slid open from the center of the shed. As Officer Polopek approached the shed, he realized the shed doors were not closed, as he had initially thought, but rather were open approximately one inch. Officer Polopek observed that a blue "tie-down," or thin rope, possibly used to secure the doors of the shed, was "dangling." Officer Polopek feared that if the shed contained any suspects, his and Officer Reyes' positions were compromised, and they were in harm's way if an ambush should occur.

When Officer Polopek was approximately three feet from the shed, he believed he was "at the point of no return." If the suspects were inside the shed and wanted to shoot it out with the police, he believed Officer Reyes was in the direct line of fire. Officer Polopek did not know if Officer Reyes saw the shed door because Officer Reyes was covering the house, but Officer Polopek was aware Reyes was in the "kill zone" or "fatal funnel," directly in line with the front opening of the shed. Moreover, Officer Polopek realized as he and Officer Reyes had initially entered the backyard, they had crossed in front of the opening of the shed. In Officer Polopek's mind, if anyone was inside the shed, their positions were already exposed.

Officer Polopek determined he needed to clear the shed quickly. He stood within three feet of the shed, with his handgun drawn in his left hand and quickly used his right hand to open the shed door. He did not give any verbal commands, as he did not want to broadcast his position to any subjects who might be concealed within. As Officer Polopek opened the shed door, he immediately saw Lehman crouched down, just inside the entrance to the shed. Lehman was facing Officer Polopek with his hands clenched together in the front of his waistband. Officer Polopek could not determine if Lehman was armed due to the ambient lighting inside the shed and the placement of Lehman's hands against the dark color of his clothing. Officer Polopek stated that he believed that if Lehman had a dark colored weapon against his dark clothing, Officer Polopek would not have been able to see it.

According to Officer Polopek, he believed that he was about to be shot by Lehman, due to Lehman's crouched stance, the position of his hands clenched at his waist, and his proximity to the entrance of the shed. With his handgun already drawn, Officer Polopek fired one round towards the "center mass" of Lehman. The round struck Lehman and he fell down on his right side. After Lehman fell, Officer Polopek saw Lehman's hands open and saw that he was not armed. No guns were found in Lehman's possession or location.

Officer Polopek entered the shed and saw the second subject, identified as Marcus Jones, hiding in the back corner. Officer Polopek noted that Jones' hands were "frozen" and opened out in front of him at waist level. Upon determining that Jones was unarmed, Officer Polopek instructed him to "get down." Jones complied and lay on his stomach next to Lehman. Officer Polopek yelled to Officer Reyes for assistance, and Officer Reyes came to the shed and handcuffed both suspects. Officer Polopek asked Jones why he and Lehman were hiding inside the shed. Jones said that he was sorry and that he was in there sleeping. Lehman did not make any statements.

At approximately 12:29 p.m., Anaheim Fire Department (AFD) Engine 6 arrived at the scene. AFD Paramedic Mike Moody was directed to Lehman who was lying on his left side in the shed. Lehman's hands were cuffed behind his back and he was in a pool of blood. Lehman did not move when Paramedic Moody initially addressed him, and Paramedic Moody thought he was deceased. After a few seconds, Lehman looked around, but did not respond verbally to Paramedic Moody or his partners. Officer Reyes then assisted AFD paramedics in removing Lehman from the shed. Lehman was moved just outside the opening of the shed where paramedics attended to his injuries. Lehman's vital signs were a pulse rate of 124, respiratory rate of 30, and a blood pressure of 93/60.

Paramedic Moody located an apparent gunshot wound to the left side of Lehman's neck. Paramedic Moody covered the wound with a rubber glove and gauze, and then applied a cervical collar. Lehman appeared to have difficulty breathing so Paramedic Moody attempted to insert an oropharyngeal airway. Lehman did not tolerate the airway due to his gag reflex, so his breathing was assisted via oxygen and a non-rebreather mask. While placing the mask on Lehman, Lehman mouthed to Paramedic Moody that he could not move his legs. Paramedic Moody asked him if he had pain anywhere else, and Lehman mouthed, "No." Lehman was placed on a backboard and prepared for transport.

At approximately 12:40 p.m., Lehman was placed into an ambulance and transported to the University of California, Irvine Medical Center (UCIMC). While en route to the hospital, Paramedic Moody established an intravenous line in Lehman's left arm and administered normal saline.

At approximately 12:49 p.m., Lehman arrived at UCIMC and his care was relinquished to the on-duty trauma staff. Lehman was conscious upon his arrival and assigned to trauma room "A." The assigned Registered Nurse (RN) assessed Lehman's condition utilizing a Glasgow Coma Scale (GCS). The GCS is a scale comprised of testing a patient's ocular, verbal, and motor responses. The GCS utilizes a score range of three to 15. A score of three describes the least responsive patient, and a score of 15 describes a fully-alert patient with mobility and the ability to converse normally. The RN rated Lehman at a "10," as his eyes were open and he had the ability to answer questions. Lehman did not possess the ability to move his body below his shoulders, and he did not respond to painful stimuli. The attending senior trauma resident on duty at UCIMC applied pressure to Lehman's legs and he informed her that he had no sensation.

Prior to administering any muscle relaxing medication, a rectal exam was performed to check for "tone" or muscle response. A lack of any rectal "tone" is an indicator that a patient may be suffering from a degree of paralysis. Lehman showed a lack of "tone" during this examination.

Due to the nature of the injury, trauma staff elected to place an endotracheal (ET) tube in Lehman's airway so that he could be placed on a ventilator. Prior to placing the ET tube, Lehman was administered Etomidate (sedative) and Succinylcholine (paralytic agent) to relax his muscles and make him immobile. Upon successful placement of the ET tube, Lehman was connected to a ventilator to ensure he was oxygenating properly.

After placement of the ET tube, Lehman was taken for a computed tomography (CT) scan to ensure that the ET tube was placed properly and to check for internal injuries. Lehman's CT scan showed blood in his right lung and air outside the lung. The CT scan also revealed damage to his spine. A chest tube was placed in Lehman's right lung in an effort to drain blood from the lung and create a negative pressure environment that would allow the lung to re-inflate. The attending trauma surgeon's initial assessment revealed that Lehman had paralysis of his legs and most of his arms, with limited shoulder movement. The further surgeon opined that Lehman's injuries were consistent with a cervical spine injury. As the bullet traversed from left to right, Lehman suffered injuries to his spinal cord and a fracture at the fifth to sixth cervical spine. While in the Trauma Unit, medical personnel performed an endoscopy in an attempt to identify any injuries to Lehman's throat, specifically his trachea and esophagus, and no injuries were located.

The bullet was left in place in Lehman's upper right chest and no efforts were made to retrieve it during Lehman's stay in the trauma unit. Lehman was deemed to be "hemodynamically" stable, meaning his blood pressure was within range, there was perfusion to all vital organs, and his oxygen levels were good. At 5:41 p.m., Lehman was transferred to the Surgical Intensive Care Unit.

On Feb. 4, 2014, Lehman was transferred from UCIMC to Pacific Haven Subacute and Healthcare Center.

STATEMENT OF MARCUS JONES

On Dec. 13, 2013, approximately five hours after the shooting, OCDASAU Investigators interviewed Marcus Jones. The following is a summary of Jones' statement:

Jones said that he had known Lehman for approximately three days and that they were smoking crystal methamphetamine together at the time of the incident. Jones indicated that they were walking through a residential area when they came upon a house that was for sale and appeared to be vacant. They were tired and wanted some place to rest so they went into the backyard. They saw there was a shed and decided to go inside to smoke methamphetamine.

As they sat inside the shed smoking methamphetamine, Lehman heard something and told Jones about it. Through the one inch opening of the shed, Jones saw an officer walking past the back of the house. Jones said he knew immediately it was a police officer because he was wearing a "blue cop shirt." The officer had his gun drawn and was talking on the phone. Jones and Lehman panicked because they had drugs and were not supposed to be there. Lehman was holding the lighter and the "piece" (meth pipe). Jones whispered to Lehman to "hide the piece."

Jones estimated that within five seconds of Jones initially seeing the officer at the back of the house, two cops opened the sliding doors of the shed and one of them shot Lehman. According to Jones, as the door to the shed was opened by the police officer, Lehman was turned away from the door because he was trying to get rid of the pipe. Jones indicated that he did not believe the officer who shot Lehman knew they were in the shed before the door was opened. Jones also said that he thought they surprised the officer and the officer shot too fast. Jones did not remember hearing any officer giving any commands before opening the door to the shed. Jones told OCDASAU Investigators that he blacked out right after the shooting.

EVIDENCE COLLECTED

The following items were collected from Officer Polopek:

- Glock, Model 21, .45 caliber semi-automatic pistol, serial number CZF065US, with a Surefire flashlight mounted beneath the barrel.
- One .45 caliber cartridge from the chamber of the pistol
- Twelve .45 caliber cartridges from the magazine seated in the pistol (13 round capacity)
- Two magazines from the magazine pouch of Officer Polopek's Sam Brown belt, containing thirteen .45 caliber cartridges from each magazine (13 round capacity).

The following items were collected from the scene:

- Cellular telephone
- Scissors
- Sunglasses
- Plastic bottle containing purple liquid
- Disposable lighter
- White T-shirt and grey tank top
- Black jacket
- One .45 cartridge case, head stamp WINCHESTER 45 +P

EVIDENCE ANALYSIS

Firearms Examination

An OCCL forensic specialist examined the relevant firearm and projectile involved in this case. Officer Polopek's Glock pistol was determined to have fired the cartridge case collected from the scene.

Lehman's Criminal History

Lehman had a State of California Criminal History Record dating back to 2004, including but not limited to arrests for robbery, obstructing an officer, and assault and battery. This would be relevant to this case should Officer Polopek be charged with a crime.

STANDARD LEGAL PRINCIPLES IN OFFICER-INVOLVED SHOOTING CASES

Possible criminal charges against an officer involved in a non-fatal shooting include 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. Adrian* (1982) 135 Cal.App.3d 335, 340-342. 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. *Kortum v. Alkire* (1977) 69 Cal.App.3d 325, 332. The felony must involve violence or the threat of violence. *Id.* at 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." The Court of Appeal 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 held 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 physical 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. Connor* (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 rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396-397. Thus, the United States Supreme Court cautioned 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." *Id.* at 396.

The United States Supreme Court's analysis and teachings in *Graham, supra*, are very much applicable to the circumstances surrounding Officer Polopek's shooting of Lehman.

LEGAL ANALYSIS

The facts in this case are determined largely by considering Officer Polopek's statements to the OCDA Investigators, which were supplemented by other relevant material and witnesses present at the scene of the incident.

On the morning of the shooting incident, Officer Polopek read a GGPD bulletin stating that Lehman had threatened to kill his mother and brother. Lehman also told his brother that he had a gun and would "shoot it out" with police "if he had to." Several hours after reading the bulletin, Officer Polopek was dispatched to a possible residential burglary in progress in the same area where Lehman's family resided. A plan was formulated for Officer Polopek and a fellow GGPD officer to search the backyard of a vacant residence from which the officers heard noises. As Officer Polopek walked through the backyard, he saw a metal shed with its doors open slightly. Fearing that it would be unsafe to announce his presence, Officer Polopek opened the shed door with his gun drawn. Lehman was crouched down, just inside the door, with his hands clenched together in the front of his waistband. Officer Polopek indicated that he could not determine if Lehman was armed due to the ambient lighting inside the shed and the placement of Lehman's hands against the dark color of his clothing. Believing that he was about to be shot, Officer Polopek fired one round towards the "center mass" of Lehman. Based on the entirety of the available evidence, the prosecution will not be able to prove beyond a reasonable doubt that at the time of the shooting Officer Polopek was not reasonably justified in fearing for his life and the life of Officer Reyes based on the totality of circumstances, including the statement by Jones which in part supports Officer Polopek's statements regarding the incident.

Where potential dangerous, 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." *Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 528.

As stated above, the prosecution would not be able to prove beyond a reasonable doubt that Officer Polopek was not justified in believing Lehman posed a significant threat of death or serious physical injury to himself and the other officer present. This conclusion is based on the totality of the circumstances and based on the information that was available to Officer Polopek prior to the shooting. In addition, the conduct of Lehman at the time of the shooting was considered in reaching this conclusion.

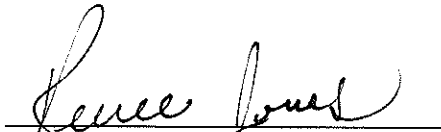
It should also be noted that in order for Officer Polopek to be justly and lawfully charged and convicted with a crime in this incident, it is the OCDA's burden to prove beyond a reasonable doubt that Officer Polopek did not act in reasonable and justifiable self-defense or defense of another when he shot at Lehman. As should be apparent from the above-described analysis, the prosecution would be unable to carry this burden in this case. A jury analyzing these facts would most likely conclude that at the time of the shooting it was reasonable for Officer Polopek to believe that his life was in danger. Therefore, the filing of criminal charges against Officer Polopek in this incident is not warranted.

CONCLUSION

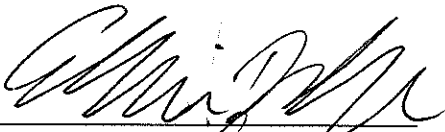
Based upon a review of all of the evidence provided to and obtained by the OCDA, and based on the entirety of the facts contained in all the available reports and interviews reviewed, and pursuant to the applicable legal principles, it is our legal opinion that there is a lack of sufficient evidence to warrant the filing of criminal charges against GGPD Officer Polopek in connection with the shooting of Thomas Ray Lehman on Dec. 13, 2013.

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

Respectfully submitted,



Renee Jones
Deputy District Attorney
Special Prosecutions Unit



Read and Approved by **Ebrahim Baytieh**
Acting Assistant District Attorney
Head of Court – Special Prosecutions Unit