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November 9, 2018

Chief Laura Farinella
Laguna Beach Police Department
505 Forest Ave
Laguna Beach, CA 92651

Re: Officer-Involved Shooting on February 11, 2018
Non-Fatal Incident involving Valerie Ann Giocondo
District Attorney Investigations Case # 18-007
Laguna Beach Police Department Case # 18-00482
Orange County Crime Laboratory Case # 18-42468

Dear Chief Farinella,

Please accept this letter detailing the Orange County District Attorney's Office's (OCDA) investigation and legal conclusion in connection with the above-listed incident involving on-duty Laguna Beach Police Department Officers (LBPd) Thomas McGuire and James Michaud. Valerie Giocondo survived her injuries. The incident occurred in the City of Laguna Beach on Feb. 11, 2018.

OVERVIEW

This letter contains a description of the scope and the legal conclusions resulting from the OCDA's investigation of the Feb. 11, 2018, non-fatal, officer-involved shooting of Valerie Giocondo. 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 LBPd 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 Feb. 11, 2018, Investigators from the OCDA Special Assignment Unit (OCDASAU) responded to this incident. During the course of this investigation, 10 interviews were conducted and 12 additional witnesses were contacted during the supplemental canvass interviews. OCDASAU Investigators also obtained and reviewed the following: LBPd reports, in-car videos, audio dispatch and radio traffic recordings; Orange County Crime Laboratory (OCCL) reports, including officer processing and firearms examination reports; crime scene investigation photographs; medical records and photographs related to the injuries sustained by Giocondo; criminal history records related to Giocondo including prior incident reports; 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 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 LBPd personnel, specifically Officers McGuire and Michaud. The OCDA will not be addressing any possible issues relating to policy, training, tactics, or civil liability.

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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 canvasses, 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, TARGET/Gangs, and Special Prosecutions Units review fatal and non-fatal officer-involved shootings and custodial death cases, and determine whether criminal charges are appropriate. Throughout the review process, the assigned prosecutor will be in consultation with the Senior Assistant District Attorney supervising the Felony Operations II Division of the OCDA, who 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 officers. Officers McGuire and Michaud declined to provide voluntary statements to the OCDA. However, both officers wrote police reports that were reviewed as part of this investigation.

DISCLOSURE OF OFFICER-INVOLVED SHOOTING VIDEO & AUDIO EVIDENCE

The OCDA recognizes releasing video and audio evidence of officer-involved shooting and custodial death incidents can assist the public in understanding how and why these incidents occur, increase accountability, and build public trust in law enforcement. Consistent with the OCDA's written policy in connection with the release of video and audio evidence relating to officer-involved shooting and custodial death incidents where it is legally appropriate to do so, the OCDA is releasing to the public video/audio evidence in connection with this case. The relevant video/audio evidence is available on the OCDA webpage <http://orangecountyda.org/reports/videoandaudio/default.asp>.

FACTUAL SUMMARY

On Sunday, Feb. 11, 2018, at approximately 12:00 p.m., Giocondo was involved in an argument with Jane Doe 1 in Huntington Beach. During the argument, Giocondo told Jane Doe 1 she was never going to see her again. Giocondo threw objects during the argument and left in her Lexus SUV. After Giocondo left, Jane Doe 1 discovered a BB gun was missing.

Giocondo has a borderline personality disorder and a history of depression, and was prescribed medication for her condition. Giocondo later told OCDASAU investigators she had run out of her normal medication and had taken a combination of Effexor and Venlafaxine on the day of the incident. Jane Doe 1 also described Giocondo's demeanor that day as being crazy and sad. Giocondo had posted statements on Facebook which sounded like she was saying goodbye. Jane Doe 1 was concerned Giocondo would waive the BB gun around and have the police kill her.

At approximately 2:36 p.m., Jane Doe 2 telephoned the LCPD and reported Giocondo was extremely depressed, having a panic attack, and wanted to commit suicide. Jane Doe 2 reported Giocondo was driving a grey Lexus SUV, and that she may have a BB gun with her. Jane Doe 2, along with other family and friends, received text messages and Facebook posts from Giocondo which indicated she was depressed, lacked the will to go on living, and implied her desire to commit suicide. One text received from Giocondo read, "I have a gun and I'm going to use it." Another text read, "Please let the police officer know that really I was a good person and that I didn't mean to ruin his life."

At approximately 2:34 p.m., LBPD Officer McGuire's Vehicle License Plate Reader (LPR) recorded Giocondo's license plate and vehicle stopped near South Coast Highway, in Laguna Beach. At approximately 2:44 p.m., Officer McGuire was dispatched to the 700 block of South Coast Highway to look for Giocondo. LBPD Dispatch broadcasted that Giocondo had made suicidal threats. LBPD Dispatch broadcasted "the female possibly does have a BB gun inside of the vehicle."

At approximately 2:53 p.m., Jane Doe 3, John Doe 1, and Jane Doe 4 were returning to their vehicle from the beach at the west end of Saint Ann's Drive. When they reached the top of the stairs they walked past Giocondo who was seated in the driver seat of the Lexus. As they passed, Giocondo asked them to call the police. Giocondo displayed a black handgun in her hand and said she was not going to hurt them but was going to kill herself. Jane Doe 3 and Jane Doe 4 described the handgun as a "matte black handgun" and Jane Doe 4 believed the handgun was real. John Doe 1 was concerned Giocondo would go down to the beach and do "bad stuff." Jane Doe 4 telephoned LBPD but became frightened and gave the telephone to Jane Doe 3 to relay the information. A security camera recorded video of the encounter.

Officer McGuire was then dispatched to Saint Ann's Drive and Gaviota Drive to locate Giocondo. LBPD Dispatch broadcasted, "We have another RP (Reporting Party) calling advising they have the vehicle in view, Saint Ann's and Gaviota parked on Saint Ann's. The female made a comment to the RP that she wanted to kill herself. Information only, per the parents, she does have a BB gun in the vehicle." Dispatch also broadcasted, "RP did see the weapon. It is in her hands at this time."

At approximately 2:57 p.m., McGuire arrived at the scene and his police vehicle was equipped with a patrol vehicle video recording system. Officer McGuire wore a remote microphone which recorded audio from the incident. The video camera was facing north on Coast Highway and did not capture the incident. McGuire spoke briefly with someone believed to be Jane Doe 3 who told him Giocondo had displayed a "firearm" to her and said she was going to kill herself. Officer McGuire then approached Giocondo alone on foot. Giocondo was standing at the front of her vehicle holding a wine bottle. As she looked in Officer McGuire's direction, she immediately placed the bottle of wine in her left hand and put her right hand in the large front pocket of her hooded sweatshirt.

Officer McGuire engaged Giocondo in conversation and offered to help her. He continuously ordered her to put down the bottle and to remove her hand from her pocket. Giocondo did not comply but continuously responded "no." Giocondo also repeatedly yelled about how police officers are jerks. Officer McGuire drew his pistol from the holster and pointed it toward Giocondo with a two handed grip. Officer McGuire requested the next officer bring a 40mm less than lethal launcher.

Officer McGuire described in his police report his contact with Giocondo and her refusal to remove her hand from her pocket which, "... based on the size of the pocket, I knew it was capable of concealing the previously mentioned gun." Officer McGuire also wrote, "Based on the report of Giocondo being armed with a gun, her being suicidal, and her furtive movement of placing her hand in her pocket, I immediately feared for my safety which caused me to draw my department issued handgun and point it at Giocondo."

At approximately 2:59 p.m., Officer Michaud arrived and retrieved a 40mm launcher from his vehicle. Officer Michaud's patrol video camera captured video and audio of the incident. As Officer Michaud approached the scene, he positioned himself on the passenger's side of Giocondo's vehicle and attempted to get Giocondo to listen to Officer McGuire's commands with no success.

At approximately 3:00 p.m., Giocondo suddenly withdrew the BB pistol from her pocket with her right hand and pointed it at Officer McGuire. Officer Michaud fired a 40mm less lethal round through the open windows at her center torso. After being struck by the 40mm less lethal round, Giocondo flinched forward slightly then raised the BB gun and pointed through the driver side window toward Officer Michaud. Officer McGuire wrote, "When I looked towards Giocondo, I immediately pointed my firearm at her and saw what I believed was a black, semiautomatic handgun." Officer McGuire, positioned near the right front of the vehicle, fired eight gunshots from his pistol toward Giocondo, striking her multiple times.

Giocondo dropped the bottle and the BB gun, turned her back to her vehicle and leaned against it. Officer Michaud dropped the 40mm launcher and drew his handgun. Shortly thereafter, additional officers arrived, Giocondo was handcuffed, and first aid was rendered.

Giocondo told the officers she was sorry and it was "not your fault" several times as they rendered aid. While LBPD Sergeant William Downing was holding pressure dressings to Giocondo, she said, "It's not your fault", "I'm sorry", "I'm sorry, it's not your fault", "I don't want to live", "Tell him I'm sorry", "I hate my life", "He's a good guy. I just want to die."

Laguna Beach Fire Department (LBFD) arrived and took over treatment. Giocondo was transported to Mission Hospital where she was treated by a doctor for a wound to the right side of the neck, two wounds to the right shoulder, one wound to the chest above the clavicle, and one wound to the right side of the face.

EVIDENCE COLLECTED

The following items of evidence were collected and examined:

- Two bullet jackets
- One bullet lead core and one bullet jacket fragment
- One DTFL 40 mm launcher and one 40 mm less than lethal blue and grey cartridge
- One bullet
- One iPhone
- BB gun
- One 40mm less than lethal cartridge case
- One 40 mm less than lethal blue cartridge
- Six cartridge cases

EVIDENCE ANALYSIS

Firearms Examination

Officer McGuire's Glock pistol was test fired at the Orange County Crime Lab and fired without malfunction. The pistol was received unloaded and with the magazine removed. The pistol was identified as having fired the six cartridge cases recovered from the scene.

GIOCONDO'S PRIOR CRIMINAL HISTORY

Valerie Giocondo's criminal history was reviewed and considered. Giocondo had a California Criminal History that dates back to 2001. She has previously been arrested for the following charges:

- Possession of over an ounce of marijuana
- Driving Under the Influence of Alcohol
- Inflict Corporal Injury, Spouse / Cohabitant

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 lawfully 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.

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.)

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.

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 p. 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/she 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/herself from attack if, as a reasonable person, he/she had grounds for believing and did believe that bodily injury was about to be inflicted upon him/her or upon another person. In doing so, such person may immediately use all force and means which he/she believes to be reasonably necessary and which would appear to a reasonable person, in the same or similar circumstances, to be necessary to 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/her mind, as a reasonable person, an honest fear and conviction that he/she or another person is about to suffer bodily injury, to act in self-defense or defense of others upon such appearances, and from such fear and honest convictions. The person’s right of self-defense is the same whether the danger is real or merely apparent. (*People v. Jackson* (1965) 233 Cal.App.2d 639, 641-642.)

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 physical injury to the officer or others.”

This limitation was, however, clarified subsequently 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/her 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.)

The United States Supreme Court’s analysis and teachings in *Graham* are applicable to the circumstances surrounding the interactions of Laguna Beach Police Department Officers McGuire and Michaud with Giocondo.

LEGAL ANALYSIS

The facts in this case are determined by considering both Officers McGuire and Michaud’s police reports, as well as Giocondo’s account of the incident, which were supplemented by other relevant material, video recording, and witnesses present at the incident.

The issue is whether the conduct of Officers McGuire and Michaud was criminally culpable and without justification. As stated above, in order to charge Officers McGuire and Michaud with a criminal violation, it is required that the prosecution be able to prove beyond a reasonable doubt that no legal justification existed for the police officers' conduct. Therefore, in order to lawfully charge Officers McGuire and Michaud with a crime, the prosecution must prove beyond a reasonable doubt that they did not act in lawful self-defense. If the actions that day of Feb. 11, 2018, were justifiable as lawful self-defense or defense of others, then criminal charges will not be warranted.

As the Court of Appeal held in a somewhat 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 effectuate 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.)

Where potential dangerous, emergency conditions or other exigent circumstances exist, the California Courts of Appeal have noted that the United States Supreme Court's definition of reasonableness is comparatively generous to the police. The court in *Brown* noted that 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, supra*, 171 Cal.App.4th at p. 528.)

Based on the totality of all the facts in this incident, Officers McGuire and Michaud were justified in believing that Giocondo posed a significant threat of death or serious physical injury to themselves and others. This conclusion is based on the totality of the circumstances but mainly based on the conduct of Giocondo in the moments leading up to the shooting. When Officer McGuire first arrived on scene, Giocondo immediately put her right hand in the large front pocket of her hooded sweatshirt. McGuire was unable to see if Giocondo had anything in her pocket, however, based on the size of the pocket, it was reasonable for McGuire to assume that it was capable of concealing a gun. Based on the report of Giocondo being armed with a gun (possibly a BB gun), her being suicidal, and her furtive movement of placing her hand in her pocket, Officer McGuire feared for his safety which caused him to draw his handgun and point it at Giocondo.

Moreover, Officer McGuire attempted to speak with Giocondo and repeatedly ordered her to take her hand out of her pocket. Giocondo not only refused to take her hand out of her pocket but she continuously told him "no." Since Giocondo was responding to orders, it is reasonable to infer that Giocondo heard the commands, but willfully and intentionally refused to follow them. Giocondo yelled that the officer did not want to help her and that there was no help. Giocondo continued to yell about how police officers are "jerks" which would reasonably make an officer believe that Giocondo disliked police officers.

Upon Officer Michaud's arrival, Giocondo also told Officer McGuire she wanted him to go home to his family tonight but she was sorry. That particular comment, coupled with her statement about police officers being "jerks", the reports of her being armed with a gun, and her lack of cooperation, could reasonably cause Officers McGuire and Michaud to believe that Giocondo intended to harm them. Moreover, there was concern that the area was populated by pedestrians who could walk into the incident and potentially become injured.

Finally, when Giocondo quickly and spontaneously pulled an unknown dark object from her sweatshirt pocket which the officers believed could be a firearm, the officers reacted rationally and reasonably by firing at Giocondo. While there were reports that Giocondo possessed a BB Gun, neither officer had confirmation of such a device and could have reasonably assumed it was a lethal firearm.

It should also be noted that, in order for Officers McGuire and Michaud 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 the officers did not act in reasonable and justifiable self-defense or defense of another when they shot at Giocondo. 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 justly conclude that it was reasonable for Officers McGuire and Michaud to believe their life and the lives of others in the area were in danger. Therefore, the evidence in this case does not show that the officers acted unlawfully.

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 there is no evidence of criminal culpability on the part of Officers Thomas McGuire and James Michaud, and there is substantial evidence that Officers McGuire and Michaud were reasonable and justified under the circumstances when they shot Valerie Giocondo on Feb. 11, 2018.

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



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