



OFFICE OF THE
DISTRICT ATTORNEY
ORANGE COUNTY, CALIFORNIA

TODD SPITZER

September 17, 2019

Chief Thomas C. Kisela
Orange Police Department
1107 N. Batavia St.
Orange, CA 92867

Re: Officer-Involved Shooting on May 28, 2015
Non-Fatal Incident involving Edgar Eduardo Martinez
District Attorney Investigations Case #15-011
Orange Police Department Case #15-051054
Orange County Crime Laboratory Case #FR 15-48348

Dear Chief Kisela,

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 Orange Police Department (OPD) Officers Nicholas Silver and Corey Trippley. Edgar Eduardo Martinez, 23, survived his injuries. The incident occurred in the City of Orange on May 28, 2015.

OVERVIEW

This letter contains a description of the scope and legal conclusions resulting from the OCDA's investigation of the May 28, 2015, non-fatal, officer-involved shooting of Martinez. The letter includes an overview of the OCDA's investigative methodology and procedures employed, as well as a description of the relevant evidence examined, witnesses interviewed, factual findings, and legal principles applied in analyzing the incident and determining whether there was criminal culpability on the part of the OPD officers involved in the shooting. The format of this document was developed by the OCDA, at the request of many Orange County police agencies, to foster greater accountability and transparency in law enforcement.

On May 28, 2015, Investigators from the OCDA Special Assignment Unit (OCDASAU) responded to this incident. During the course of this investigation, 20 interviews were conducted, and 29 additional witnesses were contacted during the supplemental canvass interviews. OCDASAU Investigators also obtained and reviewed the following: OPD reports, audio dispatch and radio traffic recordings; Orange County Crime Laboratory (OCCL) reports, including toxicology, forensic alcohol examination, officer processing and firearms examination reports; crime scene investigation photographs; medical records and photographs related to the injuries sustained by Martinez; criminal history records related to Martinez; 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 OPD officers or personnel, specifically Officers Silver and Trippy. The OCDA will not be addressing any possible issues relating to policy, training, tactics, or civil liability.

In a case where there is an officer-involved shooting incident and the OCDA files criminal charges against the individual shot by the police, it is the OCDA's policy not to release the final report regarding the officer involved shooting incident until the issue of guilt is decided in the underlying filed criminal case. This policy is in place to ensure the OCDA does not release information that may be viewed as prejudicial to the defendant's right to receive a fair trial while his or her case is pending.

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, 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 Operations IV 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 and their supervisors. The District Attorney reviews all officer involved shootings and custodial death letters. If necessary, the reviewing prosecutor may send the case back for further investigation.

An important part of the investigation is attempting to obtain a statement from the involved officers. Officers Silver and Trippy gave voluntary statements to OCDA Investigators on June 3, 2015.

FACTUAL SUMMARY

At the time of this incident, Edgar Eduardo Martinez's mother, Jane Doe 1, and Martinez's brother, John Doe 1, lived with family members in an apartment located at 1900 block of East Rose Avenue (Does' residence) in Orange. Jane Doe 1 and John Doe 1 slept in the living room area of the apartment. Martinez lived elsewhere with his girlfriend.

On Thursday, May 28, 2015, at approximately 1:30 a.m., Martinez woke Jane Doe 1 by knocking on the front door of the apartment. When Jane Doe 1 opened the door, Martinez seemed normal and was not acting out of character. Martinez went to sleep in the living room area. Between 3:30 and 4:00 a.m., Jane Doe 1 woke up to prepare breakfast and lunch for John Doe 1 before he went to work. As Jane Doe 1 prepared food in the kitchen, Martinez approached and asked her to drive him to an unknown location. Jane Doe 1 told Martinez it was too early and she would drive him later. Martinez appeared upset and was adamant that he needed a ride. Jane Doe 1 told Martinez she was unable to drive him anywhere, especially at that hour of the morning. Martinez became angry and removed a handgun from his pants pocket. Martinez told Jane Doe 1 the gun was loaded and ready to

shoot. Martinez held the handgun in his right hand, above his waist with his arm bent at a 45-degree angle, with the muzzle of the handgun pointing up.

Jane Doe 1 described Martinez as menacing and was afraid Martinez would use the gun because she refused to give him a ride. She tried to reason with Martinez in an attempt to calm him down and take the handgun from him. Jane Doe 1 told officers she heard Martinez crying the day before and he talked about suicide. John Doe 1, who was awake and getting ready for work, also tried to calm Martinez and take the handgun from him.

At approximately 4:10 a.m., Jane Doe 2, Martinez's cousin who lived at the same residence as Jane Doe 1 and John Doe 1, woke to the sound of arguing coming from the living room area. Jane Doe 2 saw Martinez arguing with his mother while waving a gun in his right hand. Jane Doe 2 knew Martinez used methamphetamine, and based on his aggressive behavior and threatening comments to his mother, Jane Doe 2 believed he was high on drugs. Jane Doe 2 heard Martinez accuse Jane Doe 1 of taking his girlfriend somewhere and replacing her with someone else. Jane Doe 2 also heard Martinez threaten to harm Jane Doe 1 if she did not take him to see his girlfriend. Other members of the household also heard Martinez threaten to kill his mother.

At approximately 4:22 a.m., Jane Doe 2 called 911 and reported Martinez's threats and gun possession inside the residence, stating, "He has a gun and he's pointing it at his mom... he's claiming he's going to kill her." Jane Doe 2 was obviously upset, gave Martinez's name, and said to the dispatcher, "Why is he trying to kill her? He's drugged out." OPD Officers Charles Lange, Aaron Drootin and Silver were dispatched to the apartment. The officers were soon joined by OPD Officer Stephanie Hughes, Sergeant Rafael Ward, Detective Leslie Franco, and Officer Trippey.

Officers Trippey and Drootin entered a neighbor's bedroom directly across the walkway from the Does' residence. They positioned themselves at the bedroom window, which allowed them a direct and unobstructed view to the front door of the Does' residence. Officer Drootin provided a summary of his observations to the assembled officers, via his hand held police radio. Officer Trippey maintained a position of cover with his firearm drawn. Officers Lange, Silver and Hughes maintained a position north of the residence, near Rose Avenue. Officers Silver and Lange positioned themselves behind the engine block of a pick-up truck, which was parked facing east on the south side of Rose Avenue. From their position behind the vehicle, they could observe the front/east side of 1926 East Rose Avenue.

OPD communications identified Martinez as the subject Jane Doe 2 reported to be armed and threatening family members. Martinez's name and physical description were broadcast to the officers on scene. Based on past briefings and conversations with other OPD officers, Officer Silver knew Martinez was an active gang member as soon as he was identified on the radio. When he approached the scene, Officer Silver saw Jane Doe 2 leaning out her window, crying and asking him for help. After removing the air conditioning unit in the bedroom window, Jane Doe 2 exited the residence through the window with her mother, brothers, and two young children. After they were out of the apartment, they were directed to police officers on Rose Avenue, who removed them from the area. Officer Silver then moved further east, taking a position in the northeast corner of the yard of 1934 East Rose Avenue. Shortly thereafter, John Doe 1 exited the residence and was removed from the area for his safety. Officer Drootin then saw an elderly female, Jane Doe 1, exit the front door of her residence and walk toward the officers. She was also removed from the area.

At approximately 4:42 a.m., Officer Drootin saw Martinez exit the residence with his hand in his right pocket. Officers did not know if Martinez had the gun or any other weapons on his person. Officer Silver saw Martinez walk in a diagonal direction from the front door of the Does' residence toward him. Officer Silver illuminated Martinez with his flashlight, which caused Martinez to curse and turn back toward the apartment door. Officer Silver tried to get Martinez's cooperation with several verbal commands, asking multiple times to see Martinez's hands, but Martinez did not comply. When Martinez nearly reached the front door of the Does' residence, Officer Silver yelled, "Hey, Edgar!" Martinez stopped and turned to face Officer Silver.

Martinez stayed in the dark front porch area of the Does' residence. He lit a cigarette while Officer Silver tried to persuade him to come out and talk with the officers. Martinez shook his head and said, "Nah," and "No." Officer Silver continued his efforts to persuade Martinez to come out and talk to them. Martinez told Officer Silver he felt threatened and continued to step back and forth between the door to the apartment and several steps north of the door while continuing to shake his head. Officer Silver intermittently illuminated Martinez with his flashlight to view Martinez's movements and prevent him from seeing Officer Silver's exact position.

At approximately 4:45 a.m., Martinez stood in the alcove in front of the apartment door of the Does' residence. Martinez's back was facing Officer Silver. Martinez suddenly spun his body around, turning in the direction of Rose Avenue. Martinez's arm was raised and pointed directly at Officer Silver. When Martinez's arm was at chest to shoulder level, Officer Silver saw between three and six muzzle flashes and heard snaps, which he believed to be gunfire. Officer Silver thought Martinez was shooting at him and thought he was going to be killed. Officer Silver dropped to one knee and discharged seven rounds from his handgun at Martinez. During the exchange of gunfire, Martinez fell out of Officer Silver's view.

Officer Trippey observed Martinez's actions from his position in the west bedroom window of 1932 East Rose Avenue. The view from the window was unobstructed and within 30 feet of the front door of the Does' residence. Due to the limited lighting in the area, Officer Trippey could only see a silhouette of Martinez in the alcove of the porch. He watched Martinez remove a dark object out of his pants pocket and point it toward the officers on Rose Avenue. Officer Trippey saw Martinez fire two to three shots toward the police officers. Officer Trippey believed Martinez fired the gun with the intent to shoot the officers stationed on Rose Avenue. Based on these observations, Officer Trippey fired his handgun at Martinez approximately eight to nine times. Officer Trippey saw Martinez fall back into the dimly lit porch alcove, facing Officer Trippey. Martinez looked in Officer Trippey's direction and continued to move while lying on the ground. Officer Trippey believed his shots revealed his and Officer Drootin's position. Officer Trippey opened fire at Martinez again because Martinez was still moving, and Officer Trippey believed Martinez was going to fire at him and Officer Drootin.

After the second series of shots fired by Officer Trippey, Officer Drootin illuminated Martinez with his flashlight, revealing a small black revolver lying approximately ten feet from Martinez. When the shooting stopped, Jane Doe 1 ran up to Martinez and held on to him. Officer Hughes, Detective Franco, and Sergeant Ward approached Martinez and Jane Doe 1 and tried to release Martinez from Jane Doe 1's grip. Officer Hughes searched Martinez for weapons and detained him. Officers Hughes and Detective Franco held Martinez by his legs and pulled him away from Jane Doe 1. Martinez was combative and continuously kicked at the officers. Officer Hughes and Detective Franco remained with Martinez until paramedics arrived at the scene.

After Martinez was secured, OPD officers conducted a protective sweep of the Does' residence and observed John Doe 2 lying face down on the living room floor. John Doe 2 told officers he was sleeping when he heard what he believed to be gunshots. John Doe 2 felt pain in his head and right shoulder that prevented him from moving, and noticed he was bleeding. John Doe 2 then heard yelling and police radios and knew the police were at his residence. John Doe 2 did not hear Martinez or the police officers prior to hearing the gunshots. Paramedics were summoned to treat John Doe 2. The Orange Fire Department (OFD) arrived on scene and treated Martinez and John Doe 2.

OFD personnel transported Martinez to Orange County Global Medical Center (OCGMC) in Santa Ana. A doctor evaluated Martinez and determined that he sustained multiple gunshot wounds to his face, torso, and groin. Martinez was sedated and unable to make a statement regarding the incident. Martinez was treated for his injuries and expected to recover.

OFD personnel took John Doe 2 to the University of California, Irvine Medical Center (UCIMC). A doctor evaluated John Doe 2 and determined that he sustained multiple gunshot wounds to his head and shoulder. He was treated for his injuries and expected to recover.

EVIDENCE COLLECTED

The following items of evidence were collected and examined:

- One black revolver, “Rhome” GMBH Model RG7, Serial # 1077471.
- One GLOCK 15-round capacity magazine including eight bullets, case head stamp “WINCHESTER .40 S&W”
- Twenty-one cartridge cases, head stamp “WINCHESTER .40 S&W”
- Six bullets
- Three bullet fragments.
- Four bullet jacket fragments.
- Three core fragments.
- One knife with the blade closed.

EVIDENCE ANALYSIS

Firearms Examination

The six-shot Rhom revolver, found next to Martinez at the scene, was received unloaded. It was packaged with three *fired* Remington brand .22 short caliber cartridge cases, and three Remington brand .22 short caliber cartridges, each with a brass washed lead bullet. The Rhom revolver was test fired at the Orange County Crime Lab and operated without malfunction in both single and double actions.

Officers Silver and Trippy’s Glock pistols were test fired at the OCCL and fired without malfunction.

Seven cartridge cases were determined to have been fired in Officer Silver’s Glock pistol. Fourteen cartridge cases were determined to have been fired Officer Trippy’s Glock pistol.

Toxicological Examination

A sample of Martinez’s blood was collected at OCGMC. An Orange County Sheriff’s Department (OCSD) forensic scientist examined the blood sample. Methamphetamine and amphetamine were detected in Martinez’s blood.

MARTINEZ’S PRIOR CRIMINAL HISTORY

Martinez’s criminal history was reviewed and considered. Martinez’s criminal history includes arrests for robbery, street gang activity, vandalism, driving under the influence, and driving on a suspended license.

MARTINEZ’S POST-INCIDENT CONVICTION

On June 1, 2015, the OCDA filed criminal charges against Martinez in the Orange County Central Judicial District, Orange County Superior Court case #15CF1174, consisting of felony attempted murder of a police officer, a violation of California Penal Code section 664(e) –187(a); felony assault with a semi-automatic firearm, in violation of California Penal Code section 245(b); felony criminal threats, in violation of California Penal Code section 422; and felony possession of a firearm by a felon, in violation of California Penal Code section 29800(a)(1). Martinez was also charged with enhancements for criminal street gang activity, in violation of California Penal Code section 186.22(b)(1), personal discharge of a firearm, in violation of California Penal Code section 12022.53(c), and personal use of a firearm, in violation of California Penal Code section 12022.5(a). It was further alleged that Martinez had previously been convicted of two serious and violent felonies, also known as strikes, in violation of California Penal Code sections 667(d)/(e)(1) and 1170.12(b)/(c)(1).

Martinez was convicted by a jury on July 15, 2019 of attempted murder of a police officer, assault with a semi-automatic firearm, and criminal threats. The jury also found true the enhancements for personal discharge of a firearm and personal use of a firearm.

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 for the prosecution 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." (*People v. Kilvington* (1894) 104 Cal. 86, 89.) The felony must involve violence or the threat of violence. (*Kortum v. Alkire* (1977) 69 Cal. App. 3d 325, 333.)

California Penal Code Section 197 provides that the use of deadly force by any person is justifiable when used in self-defense or in defense of others. California Penal Code Section 835a allows any police officer who has reasonable cause to believe that a person to be arrested has committed a felony [public offense] to use reasonable force to effect the arrest, to prevent escape, or to overcome resistance. The section further provides that a police officer, "who makes or attempts to make an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance." As with Penal Code Section 196, Section 835a only allows use of deadly force by the police officer when the suspect's felony involves violence or the threat of violence. (*Kortum v. Alkire* (1977) 69 Cal. App. 3d 325, 333.) The court in *Kortum* further held that deadly force against a fleeing felony suspect is justifiable only when the felony, "is of the violent variety, i.e., a forcible and atrocious one which threatens death or serious bodily harm, or there are other circumstances which reasonably create a fear of death or serious bodily harm to the officer or to another." (*Kortum v. Alkire, supra*, 69 Cal. App. 3d at 333.)

In addition, Penal Code section 834a requires that if a person has knowledge, or by the exercise of reasonable care, should have knowledge, that he is being arrested by a peace officer, that person must refrain from using force or any weapon to resist such arrest.

Similarly, the relevant Criminal Jury Instruction, as written by the Judicial Council of California and set forth in CALCRIM 3470, permits a person being assaulted to defend himself from attack if, as a reasonable person, he had grounds for believing and did believe that bodily injury was about to be inflicted upon him or upon another person. In doing so, such person may immediately use all force and means which he believes to be reasonably necessary and which would appear to a reasonable person, in the same or similar circumstances, to be necessary to defend against that danger and to prevent the injury which appears to be imminent.

The law, as detailed in CALCRIM 3470 and in well-settled case law, therefore permits a person, if confronted by the appearance of danger which arouses in his mind, as a reasonable person, an honest fear and conviction that he or another person is about to suffer bodily injury, to act in self-defense or defense of others upon such appearances, and from such fear and honest convictions. The person's right of self-defense is the same whether the danger is real or merely apparent. (*People v. Jackson* (1965) 233 Cal.App.2d 639, 641-642.)

Nevertheless, the above justifications must be interpreted in light of United States Supreme Court precedent that limits the right of a police officer to use deadly force. (*People v. Martin* (1985) 168 Cal. App. 3d 1111, 1124.) Thus, in *Tennessee v. Garner* (1985) 471 U.S. 1, 3, the United States Supreme Court ruled that a police

officer is entitled to use deadly force only when “the officer has probable cause to believe that the suspect poses a significant threat of death or serious bodily injury to the officer or others.” This limitation was, however, subsequently clarified by the United States Supreme Court in the seminal case of *Graham v. Conner* (1989) 490 U.S. 386, wherein the Supreme Court explained that an officer’s right to use force [i.e., his weapon] is to be analyzed under the Fourth Amendment’s “objective reasonableness” standard. The Supreme Court further stated that the determination of the reasonableness of an officer’s use of force, “must embody allowance for the fact that police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain and evolving.” (*Id.* at 397.) Thus, the Court cautioned that 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* are very much applicable to the circumstances surrounding the interactions of OPD Officers Silver and Trippley with Martinez.

LEGAL ANALYSIS

The issue in this case is whether the conduct of OPD Officers Silver and Trippley on May 28, 2015, was criminally culpable and without justification. As stated above, to charge Officers Silver and Trippley with a criminal violation, the prosecution must have a good faith belief that there is sufficient evidence to prove beyond a reasonable doubt that no legal justification existed for the officers’ conduct. If the actions of Officers Silver and Trippley were justifiable as lawful self-defense or defense of others, then criminal charges will not be warranted.

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.)

This is not a close case. Officers Silver and Trippley were completely justified in believing that Martinez posed a significant threat of death or serious physical injury to themselves, their fellow officers, and nearby civilians. The officers knew Martinez had previously threatened his mother with a gun. Martinez’s family was in such fear that his cousin called 911 and the family climbed out a bedroom window at 4:30 a.m. to escape a dangerous situation. In addition, Martinez was a known gang member and was believed to be under the influence of drugs. Given the early hour, the officers knew the surrounding residences would be occupied, placing more civilians in danger.

When Martinez walked out of the house, the area where he stood was dimly lit and the officers did not know if Martinez was still armed with the gun he used to threaten his mother. When Martinez was contacted by the officers, he refused their requests to show his hands and speak to them, and specifically told them, “No,” or “Nah,” when they gave him commands. Instead of cooperating with the officers, Martinez suddenly pulled out his gun and shot several times toward the OPD officers stationed on East Rose Avenue.

When Martinez fired in Officer Silver’s direction, Officer Silver believed Martinez was going to kill him. This was clearly reasonable and justified on the part of Officer Silver. Likewise, Officer Trippley reasonably and justly believed Martinez was trying to shoot the officers stationed on Rose Avenue. Only then did the officers fire on Martinez. After firing his handgun, Martinez was still moving when he was on the ground. This led Officer Trippley to believe Martinez still posed a threat to him and Officer Drootin, especially after

Officer Trippey fired at Martinez and gave away their position. Because Martinez still posed a threat to the officers, Officer Trippey fired at Martinez a second time.

In order for Officers Silver and Trippey 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 Martinez. 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 Silver and Trippey to believe their lives, the lives of fellow officers, and residents of the neighborhood were in danger after Martinez fired his gun. Therefore, Officers Silver and Trippey were justified when they shot at Martinez. Officers Silver and Trippey did not commit a crime, but instead carried out their duties as peace officers in a reasonable and justifiable manner.

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 no evidence of criminal culpability on the part of Officers Silver and Trippey, and there is overwhelming evidence that their actions were reasonable and justified under the circumstances when they shot Martinez on May 28, 2015.

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



ERIN ROWE
DEPUTY DISTRICT ATTORNEY



READ AND APPROVED BY **EBRAHIM BAYTIEH**
SENIOR ASSISTANT DISTRICT ATTORNEY – OPERATIONS IV