



OFFICE OF THE  
**DISTRICT ATTORNEY**  
ORANGE COUNTY, CALIFORNIA  

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TODD SPITZER

March 24, 2020

Chief Jorge Cisneros  
Anaheim Police Department  
425 South Harbor  
Anaheim, CA 92805

Re: Officer-Involved Shooting on March 27, 2018  
Non-Fatal Incident involving Kenneth John Yamashita-Magarro  
District Attorney Investigations Case # SA 18-013  
Anaheim Police Department Case # GO 2018-46250  
Orange County Crime Laboratory Case # FR 18-44391

Dear Chief Cisneros,

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 Anaheim Police Department (APD) Detectives Paul Delgado and Peter Picone. Kenneth John Yamashita-Magarro, 25, survived his injuries. The incident occurred in the City of Irvine on March 27, 2018.

**OVERVIEW**

This letter contains a description of the scope and the legal conclusions resulting from the OCDA's investigation of the March 27, 2018, non-fatal, officer-involved shooting of Yamashita-Magarro. 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 28, 2018, Investigators from the OCDA Special Assignment Unit (OCDASAU) responded to this incident. During the course of this investigation, 11 interviews were conducted. OCDASAU Investigators also obtained and reviewed the following: APD, Fountain Valley Police Department (FVPD), Irvine Police Department (IPD), Tustin Police Department (TPD), and California Highway Patrol (CHP) reports, audio dispatch and radio traffic recordings; video footage from Body Worn Cameras (BWC); Orange County Fire Authority (OCFA) reports; 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 Yamashita-Magarro; criminal history records related to Yamashita-Magarro including prior incident reports; and other relevant reports and materials.

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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 APD officers or personnel, specifically Detectives Delgado and Picone. 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 after the issue of guilt is decided in the underlying filed criminal case. This policy is in place to ensure that OCDA is not releasing any information that may be viewed as prejudicing the right of a defendant to receive a fair trial while his or her case is still 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 to attempt to obtain a statement from the involved officers. Detectives Delgado and Picone gave voluntary statements to OCDA Investigators on April 4, 2018.

### **DISCLOSURE OF OFFICER-INVOLVED SHOOTING VIDEO & AUDIO EVIDENCE**

The OCDA recognizes that 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 March 27, 2018 at approximately 3 p.m., APD Detective Mark Brydges began conducting surveillance of a residence on the 9000 block of Cloverdale Avenue in the City of Westminster. Detective Brydges, a member of the APD Special Investigations Unit (SIU), was conducting surveillance of John Doe. Detective Brydges was attempting to arrest John Doe after learning from John Doe's probation officer that he was in violation of his post release community supervision (PRCS). In addition to the PRCS violation, John Doe had a \$40,000 warrant for auto theft, possession of a firearm by a felon, and petty theft. John Doe was a known member of a local criminal street gang, and had prior arrests for weapons possession, assault with a deadly weapon, evading the police, narcotics, and court order violations. APD detectives had arrested John Doe twice previously, deploying a Vehicle Containment Technique, a maneuver to prevent dangerous suspects from fleeing in a vehicle or on foot and creating a danger to the public.

At approximately 6:00 p.m. on March 27, 2018, Detective Brydges saw John Doe arrive at the residence and requested additional detectives for surveillance, and detectives from multiple APD units responded. Between approximately 7 p.m. and 7:30 p.m., detectives saw a ride sharing service car arrive at the residence. Three people entered the vehicle. Due to the darkness, detectives were unable to identify the individuals or determine if any of them were John Doe. Several detectives followed the vehicle but lost sight of it in the Huntington Beach area.

At approximately 9:45 p.m., APD Detective Ryan Killeen, who was surveilling the residence, observed two or three individuals appear in the driveway. Poor lighting and trees obscured his view, and he was unable to determine if any of the individuals were John Doe. Detective Killeen observed one male and one female subject, with a potential third subject obscured by foliage. The subjects were standing around a dark sedan covered by a beige car cover. The female stood at the front of the car, engaged in a phone conversation, while the male subject removed the car cover and opened the driver's side door of the vehicle several times, appearing to be loading or unloading items into the vehicle. After approximately fifteen minutes, the male entered the vehicle, a black Nissan Altima, and quickly reversed out of the driveway. The female did not enter the vehicle. Detective Killeen was unable to determine if there were any additional subjects in the vehicle.

APD Sergeant Curt Ledesma and Detective Pete Picone responded to Detective Brydges' request for support and were parked in a strip mall parking lot in the area of Margo Lane and Brookhurst Street. They observed the suspect vehicle make a northbound turn onto Brookhurst Street from Margo Lane and, along with other APD plain-clothes detectives, began surveilling the vehicle. APD Detectives were unable to identify who was in the vehicle or the number of occupants, due to the dark window tint of the vehicle. The vehicle then made an eastbound turn on McFadden Avenue and accelerated at a high rate of speed. At approximately 10 p.m., the surveilling officers requested support from "Angel," the APD police helicopter, to assist in surveilling the vehicle. Before Angel arrived, the detectives observed the driver of the vehicle using counter surveillance techniques, such as driving at high rates of speed, making quick U-turns, stopping on residential streets, and driving down cul-de-sacs. The use of these techniques was consistent with John Doe's prior conduct and criminal history, and increased the detectives' suspicion that John Doe was in the vehicle.

Angel followed the vehicle and observed it reach speeds of more than 100 miles per hour (mph) on residential streets, make U-turns, and drive recklessly. Angel then broadcast a request for assistance in stopping the vehicle over red channel, the countywide radio channel for emergency communication. Angel advised that they were following a reckless driver, northbound on the I-405 freeway, and Detective Brydges broadcast on red channel that the driver was possibly a PRCS

violator. Three FVPD officers began driving northbound on I-405 to try and catch the vehicle when the vehicle exited the freeway at Bolsa Avenue and re-entered the I-405 freeway heading southbound. As the FVPD officers followed the vehicle southbound, the vehicle again made evasive maneuvers. Angel continued to broadcast the direction and speed of the vehicle, which reached speeds of more than 120 mph. East of MacArthur Boulevard, the vehicle attempted to make a lane change and the driver lost control. The vehicle struck the center divider of the freeway and came to rest facing west across the southbound I-405 freeway. Detective Brydges then broadcast again over red channel that John Doe was a PRCS violator and known to carry weapons, but that the identity of the driver had not yet been confirmed.

FVPD Officer Bryan Nguyen arrived at the crash scene. He found the driver's door open and the vehicle abandoned. A witness told Officer Nguyen that a male fled westbound on foot. Officer Nguyen spotted a male subject, later identified as Yamashita-Magarro, limping in the area of the 24-Hour Fitness located at 18007 Von Karman Avenue, in the city of Irvine. Around this time, Detective Picone arrived at the crash scene in his unmarked vehicle, identified himself as an officer with APD to other officers on scene, and began searching the area to see if the driver was ejected from the vehicle. APD Officer James Elliot, Tactical Flight Officer on board Angel, spotted Yamashita-Magarro and broadcast this information over red channel. Detective Picone stood on top of a wall and spotted Yamashita-Magarro from the freeway. Detective Picone shined his flashlight at him, identified himself as a police officer, and instructed Yamashita-Magarro to stop. Yamashita-Magarro then began walking faster, and Detective Picone entered his vehicle and followed a marked police unit southbound on I-405.

Around this time, IPD Officer Joshua Brewer responded to the area and saw Yamashita-Magarro cross Von Karman Avenue from the 24-Hour Fitness towards the parking lot of the Marriott Hotel. Officer Brewer illuminated Yamashita-Magarro with his vehicle's spotlight and parked his vehicle approximately 25 yards from him. Officer Brewer heard the broadcast that the subject was known to carry weapons. He exited his vehicle and told Yamashita-Magarro to stop. Yamashita-Magarro turned and looked at Officer Brewer, placed his right hand down the front of his waistband, covered his right hand and waistband with his t-shirt, and continued walking. Officer Brewer continued to follow Yamashita-Magarro, drawing his handgun and giving orders to stop. Yamashita-Magarro continued walking, jerking his arm as if he was going to pull something out of his waistband. Officer Brewer followed Yamashita-Magarro towards the Marriott Hotel and was afraid he would enter the hotel lobby. Officer Brewer positioned himself in front of Yamashita-Magarro and gave him commands to stop and show his hands. Yamashita-Magarro ignored these commands, changed direction, and kept his hand in his waistband.

As Officer Brewer tried to stop Yamashita-Magarro from approaching the Marriott, APD Detective Delgado arrived in his unmarked pickup truck. Detective Delgado drove slightly past Yamashita-Magarro, donned his tactical vest, and exited the truck. As Detective Delgado exited the truck, the seatbelt latch pushed against the magazine release button on his belt-mounted handgun, disengaging the magazine from the catch. Detective Delgado did not realize the magazine fell out of the magazine well and onto the driver seat of the truck. Detective Delgado then illuminated Yamashita-Magarro with his gun-mounted flashlight, identified himself as a police officer, and gave commands to Yamashita-Magarro to stop and show his hands. Yamashita-Magarro began walking in a southeastern direction away from the Marriott. Detective Delgado observed Yamashita-Magarro's right hand in his pocket or front waistband area, out of sight. Detective Delgado instructed Yamashita-Magarro to show his right hand and not to move, but Yamashita-Magarro ignored these commands. Yamashita-Magarro shook his head in a "no" manner, and mumbled something to the effect of "huh-uh, huh-uh, huh-uh."

Yamashita-Magarro continued walking, and Officer Brewer and Detective Delgado followed him from a distance of approximately thirty feet. During this period, Detective Delgado repeatedly gave commands to stop and show his hands, but Yamashita-Magarro kept his right hand concealed in his waistband area and would abruptly turn towards the officers. Yamashita-Magarro flinched his right arm several times as if he were going to pull out a weapon, and Detective Delgado believed Yamashita-Magarro was purposely making a point to show his left arm freely swinging, but not his right. At this time, there were numerous marked police units present, with overhead lights and sirens activated.

At 10:21:55 p.m., APD Sergeant Ledesma and Detective Picone both arrived on scene. Detective Picone exited his vehicle and began giving commands for Yamashita-Magarro to show his hands. At this time, Sergeant Ledesma described Yamashita-Magarro as digging in his waistband in a manner that was consistent with pulling a weapon. According to Sergeant Ledesma, this digging, combined with Yamashita-Magarro's walking and looking back at the officers, made the hair on the back of Sergeant Ledesma's neck stand up. Yamashita-Magarro then turned towards Detective Delgado in a manner Detective Delgado described as "a quick, furtive, full upper body movement," which led him to believe that Yamashita-Magarro was going to pull a weapon on him. Detective Delgado fired a single round at Yamashita-Magarro. Detective Delgado observed Yamashita-Magarro change his posture, like he was startled, but Detective Delgado was unsure if he had hit Yamashita-Magarro with the shot. Detective Picone heard the shot fired as he exited his car, but he was unsure if the shot was fired by Yamashita-Magarro or another officer.

Detective Delgado then realized his handgun was empty due to the magazine having fallen out in his truck. Detective Delgado then reloaded his handgun with a fully loaded magazine, and his handgun malfunctioned by double feeding two cartridges. Detective Delgado took approximately five seconds to clear the malfunction, and then he observed Yamashita-Magarro walking towards Sergeant Ledesma and Detective Picone.

FVPD Sergeant Antonius Spangler arrived at the scene and observed officers beginning to surround Yamashita-Magarro. Sergeant Spangler saw Yamashita-Magarro's right hand in his waistband in a fist, and believed Yamashita-Magarro was holding a handgun or other weapon. At this point, several officers recognized a crossfire situation, and called out a warning. Yamashita-Magarro continued walking towards Von Karman Avenue, and Sergeant Ledesma feared Yamashita-Magarro was trying to draw the officers in to ambush them. Realizing that Yamashita-Magarro was a threat, Sergeant Spangler, positioned behind Yamashita-Magarro, fired his Taser from a range of approximately 25 feet, however the Taser failed to strike Yamashita-Magarro from this distance.

Sergeant Spangler observed Detective Picone walking towards Yamashita-Magarro. The accounts of Sergeant Spangler, Sergeant Ledesma, and Detective Picone, in addition to footage from body-worn cameras (BWC) worn by Detective Picone and Sergeant Ledesma, show Detective Picone walking towards Yamashita-Magarro's left side, and both he and other officers giving commands to Yamashita-Magarro to show his hands by yelling, "Hands! Hands! Hands!" Yamashita-Magarro did not respond, but continued walking and looking at Detective Picone.

Sergeant Spangler, Sergeant Ledesma, and Detective Picone all observed Yamashita-Magarro *blade* his body, or turn his upper torso to his left towards Detective Picone. Sergeant Ledesma described this movement, based on his training and experience, as consistent with someone about to engage Detective Picone with a weapon. Detective Picone observed Yamashita-Magarro make this furtive movement toward him, and Yamashita-Magarro's right hand began to come out of his

waistband. Based on Yamashita-Magarro's demeanor and failures to comply with officer commands, Detective Picone believed Yamashita-Magarro was pulling a weapon on him, and instinctively reacted by firing his handgun at 10:22:12 p.m. BWC footage from Sergeant Ledesma and Detective Picone shows Detective Picone firing eight rounds at Yamashita-Magarro and Yamashita-Magarro falling to the ground with his arms extended out to his side.

Officers then approached Yamashita-Magarro and asked for the location of his gun. Sergeant Ledesma first searched Yamashita-Magarro's waistband, but did not find a weapon. Officers immediately administered first aid. While cutting away his clothing, officers located an Oakland Raiders money clip containing a credit card and \$1,130 in cash inside the crotch area of Yamashita-Magarro's underwear. At this point, Sergeant Ledesma noticed that the subject was not John Doe, and IPD officers identified the subject as Yamashita-Magarro. OCFA personnel arrived shortly after and transported Yamashita-Magarro to Orange County Global Medical Center, in the city of Santa Ana. Yamashita-Magarro was treated for gunshot wounds to the chest, left leg, and lower back, and underwent surgery where a bullet was recovered. Yamashita-Magarro survived his injuries but is paralyzed from the waist down.

OCDA Investigators attempted to speak with Yamashita-Magarro regarding the officer-involved shooting, but he declined to be interviewed regarding the incident.

### **EVIDENCE COLLECTED**

The following items of evidence were collected and examined:

- Eight 9mm cartridge cases headstamped WIN 9mm Luger
- One 9mm cartridge headstamped WIN 9mm Luger
- One Taser wire with probe
- One green Taser door
- One Taser cartridge (deployed)
- Taser wire
- Detective Delgado's Glock 17 pistol
- Detective Picone's Glock 17 pistol
- 7 body worn camera videos from officers at the scene (not all depict the incident)
- Patrol Video from Irvine Police Vehicles (none of which depict the incident)
- Dispatch Audio Recordings

### **EVIDENCE ANALYSIS**

#### **Firearms Examination**

Detective Delgado's Glock pistol was test fired at the OCCL and fired without malfunction. Detective Picone's Glock pistol was test fired at the OCCL and fired without malfunction. The eight cartridge cases recovered from the scene were determined to have been fired by Detective Picone's pistol. The bullet recovered from Yamashita-Magarro shares the same class characteristics as the test fires from Detective Picone's pistol.

#### **Projectile Examinations:**

Sergeant Spangler's Taser malfunctioned during testing at the OCCL. The Taser did not activate when the trigger was pulled, the safety lever malfunctioned, and the Taser failed to download its data to the computer.

### **YAMASHITA-MAGARRO'S PRIOR CRIMINAL HISTORY**

Yamashita-Magarro's criminal history was reviewed and considered. As an adult, Yamashita-Magarro has a California Criminal History that dates back to 2012, which includes arrests for the

following charges:

- Disorderly conduct: under the influence of drugs
- Petty theft
- Grand theft
- Possession of a switchblade in a vehicle
- Conspiracy to falsely indict another
- Conspiracy to commit a crime
- Taking a vehicle without owner's consent
- Possession of a controlled substance
- Possession or purchase for sale of a controlled substance
- Transportation or sale of a controlled substance
- Possession of a controlled substance for sale
- Transportation of a controlled substance
- Adult selling a controlled substance to a minor
- Contribute to the delinquency of a minor
- Inflict corporal injury on spouse/cohabitant

### **YAMASHITA-MAGARRO'S POST-INCIDENT CONVICTION**

On December 4, 2018, the OCDA filed criminal charges against Yamashita-Magarro in Orange County Superior Court case number 18CF3377, consisting of one felony count of Transportation for Sale of a Controlled Substance, a violation of California Health and Safety Code section 11352(a); one felony count of Possession for Sale of a Controlled Substance, in violation of California Health and Safety Code section 11351; one felony count of Possession of Metal Knuckles, in violation of California Penal Code section 21810; one felony count of Having a False Compartment for Purposes of Transporting Controlled Substance, in violation of California Health and Safety Code section 11366.8(a); three felony counts and one misdemeanor count of Receiving Stolen Property, in violation of California Penal Code section 496(a); one misdemeanor count of Resisting and Obstructing an Officer, in violation of California Penal Code section 148(a)(1); one misdemeanor count of Hit and Run with Property Damage, in violation of California Penal Code section 20002(a); one misdemeanor count of Reckless Driving, in violation of California Vehicle Code section 23103(a); and one misdemeanor count of Possession of Controlled Substance Paraphernalia, in violation of California Health and Safety Code section 11364(a).

On March 11, 2020, Yamashita-Magarro entered a guilty plea to violating Health and Safety Code section 11351, and Penal Code sections 21810, 496 (a), and 148 (a)(1), in addition to Vehicle Code section 20002 (a). Yamashita-Magarro was sentenced to 1 year in the Orange County Jail and 5 years of formal probation.

### **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 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 very much applicable to the circumstances surrounding the interactions of APD Detectives Delgado and Picone with Yamashita-Magarro.

### **LEGAL ANALYSIS**

The facts in this case are determined by considering both Detectives Delgado’s and Picone’s statements to the OCDA investigators, as well as other police officers’ accounts of the incident, which were supplemented by other relevant material and witnesses present at the incident, as well as the video captured on the BWC footage.

The issue in this case is whether the conduct of Detectives Delgado and Picone on March 27, 2018 was criminally culpable and without justification. As stated above, in order to charge Detectives Delgado and Picone with a criminal violation, it is required that the prosecution have a good faith belief in the ability to prove, beyond a reasonable doubt, that no legal justification existed for the police officers’ conduct and they did not act in lawful self-defense. If the actions of Detectives Delgado and Picone 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 relatively 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 circumstances, it is reasonable to conclude that Detectives Delgado and Picone were justified in believing that Yamashita-Magarro posed a significant threat of death or serious physical injury to himself and others. Based on the reckless driving and counter surveillance techniques used by Yamashita-Magarro, the officers in pursuit believed John Doe to be in the car. John Doe was known to be armed, and known to be a gang member. Additionally, officers believed the individual whom they contacted on foot to be John Doe. Although it was later determined that Yamashita-Magarro was unarmed, all of the officers on scene, including Detectives Delgado and

Picone, reasonably believed that Yamashita-Magarro was clutching a firearm in his waistband. This belief was supplemented by their training and experience with armed suspects.

Sergeant Ledesma, with more than 24 years of law enforcement experience, stated that he has seen hundreds of people stuff drugs in their pants, and that Yamashita-Magarro was not doing that, and that he would "bet his life" that Yamashita-Magarro was digging for a gun. Detective Delgado, with over 22 years of experience in law enforcement, believed, based on Yamashita-Magarro's right hand being concealed and his quick upper body turn towards him, that Yamashita-Magarro was pulling a weapon on him. Detective Delgado feared for his life. Detective Picone heard a gunshot as he arrived, and believed it was possible that Yamashita-Magarro discharged a weapon. This uncertainty, combined with Yamashita-Magarro's right hand tucked in his waistband, led Detective Picone to believe that Yamashita-Magarro was armed and turning to pull a weapon on him when he *bladed* his body towards Detective Picone. Additionally, throughout the incident, Yamashita-Magarro ignored the officers' commands, and continued to walk toward officers with his hand clenched in his waistband.

Based on their training and experience, Detectives Delgado and Picone indicated that they believed Yamashita-Magarro was digging for a gun in his waistband. Those observations, along with his reckless driving, failure to obey the officers' commands, and quick body movements toward the officers, led Detectives Delgado and Picone to reasonably believe that Yamashita-Magarro posed a significant threat to their own lives and that of their fellow officers. Yamashita-Magarro drove at speeds in excess of 100 mph on residential streets, performed counter surveillance techniques, and avoided police on the I-405 freeway at speeds over 120 mph. From the time he was first contacted by Officer Brewer until he was shot by Detective Picone, Yamashita-Magarro failed to comply with the commands to stop and show his hands by several officers who had identified themselves as police. The identities of the police officers was clear, from their commands to the presence of numerous marked police units with overhead lights and sirens activated. As each officer arrived and gave commands, Yamashita-Magarro ignored them and continued walking with his right hand in his front waistband and his left arm swinging freely. Yamashita-Magarro gave no indication that he intended to comply with police commands, and led several experienced police officers to believe he intended to engage them with a firearm. Detectives Delgado and Picone did what they believed necessary to stop a threat to themselves, their fellow officers, and the public. As such, the officers' conduct was reasonable based on the totality of the circumstances.

To be charged and convicted with a crime in this incident, it is the OCDA's burden to prove beyond a reasonable doubt that Detectives Delgado and Picone did not act in reasonable and justifiable self-defense or defense of another when they shot at Yamashita-Magarro. 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 Detectives Delgado and Picone to believe that their lives and the lives of others were in danger.

**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 Detectives Delgado and Picone, and there is substantial evidence that their actions were reasonable and justified under the circumstances when they shot Yamashita-Magarro on March 27, 2018.

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



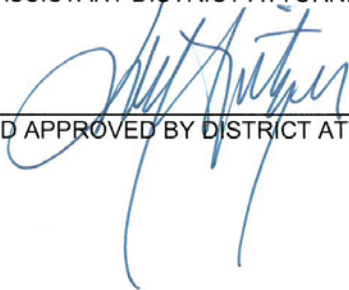
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**ERIN ROWE**  
SENIOR DEPUTY DISTRICT ATTORNEY  
SPECIAL PROSECUTIONS UNIT



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



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READ AND APPROVED BY DISTRICT ATTORNEY **TODD SPITZER**