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March 20, 2013

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

Re: Officer Involved Shooting on July 21, 2012
Fatal Incident Involving Manuel Angel Diaz
District Attorney Investigations Case # 12-017
Anaheim Police Department DR # 2012-106639
Orange County Crime Laboratory Case # 12-51003

Dear Chief Welter,

Please accept this letter detailing the Orange County District Attorney's (OCDA) Office's investigation and legal conclusion in connection with the above-listed incident involving on-duty Anaheim Police Department (APD) Officer Nicholas Bennallack. Manuel Angel Diaz, 25, of Anaheim, died as a result of his injuries sustained in this incident, which occurred in the City of Anaheim on July 21, 2012.

OVERVIEW

This letter contains a description of the scope of and the legal conclusions resulting from the OCDA's investigation of the July 21, 2012, fatal officer-involved shooting of Diaz. 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 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 July 21, 2012, Investigators from the OCDA Special Assignment Unit (OCDASAU) responded to this incident. OCDASAU Investigators interviewed 49 witnesses and obtained and reviewed the following: APD reports (including summaries of 52 witness interviews conducted by APD), audio recordings and dispatch and radio traffic recordings; Orange County Crime Laboratory (OCCL) reports including toxicology, forensic alcohol examination, DNA, latent print, officer processing and firearms examination reports; crime scene investigation photographs; medical records and photographs related to the injuries sustained by Diaz; criminal history records related to Diaz including prior criminal history records and prior incident reports; the personnel records of Officer Bennallack; and other relevant reports and materials including audio recordings of the conducted witness interviews and neighborhood canvass. Additionally, attorneys from the OCDA subpoenaed and examined three witnesses before the Orange County Grand Jury.

The OCDA conducted an independent and thorough investigation of the facts and circumstances of this incident and has impartially reviewed all evidence and legal standards available. The scope and findings of this review are expressly limited to determining whether any criminal conduct occurred on the part of APD officers or personnel, specifically Officer Bennallack. The OCDA will not be addressing herein issues of policy, training, tactics or civil liability.

INVESTIGATIVE METHODOLOGY

Among other duties, the OCDASAU is responsible for investigating officer-involved shootings within Orange County when someone has been injured as a result of police gunfire. An OCDASAU Investigator is assigned as a case agent and is supported by other OCDASAU Investigators, as well as Investigators from other OCDA units. Six Investigators are assigned to the OCDASAU on a full-time basis. There are additional OCDA Investigators assigned to other units in the Office trained to assist when needed. On average, eight Investigators respond to an incident within an hour of being called. The Investigators assigned to respond to an incident perform a variety of investigative functions that include witness interviews, neighborhood canvass, crime scene processing and evidence collection, vehicle processing, and hospital investigative responsibilities as needed. The OCDASAU audio records all interviews, and the OCCL processes all physical evidence related to the investigation.

When the OCDASAU Investigator has concluded the investigation, the file is turned over to a veteran deputy district attorney for legal review. Deputy district attorneys from the Homicide or Gang Units review fatal, officer-involved shootings and custodial death cases and determine whether criminal charges are appropriate. Prosecutors assigned to the Special Prosecutions Unit review the non-fatal officer-involved shooting cases for possible criminal filings. Throughout the review process, the assigned prosecutor will be in consultation with his or her supervisor, and this Assistant District Attorney will eventually review and approve any legal conclusions and resulting memos. The case may often be reviewed by multiple veteran prosecutors, their supervisors, the Chief of Staff, and the District Attorney. If necessary, the reviewing prosecutor may send the case back for further investigation.

An important part of the investigation of an incident such as this is attempting to obtain a statement from the involved officers. All involved APD personnel voluntarily submitted to interviews by OCDA. Officer Bennallack spoke to OCDA Investigators on July 24, 2012.

FACTS

Introduction

The following synopsis of the incident is based upon our analysis of the evidence, the primary sources of which are:

- statements of the various witnesses to the incident, including the officers;
- the forensic crime scene evidence;
- a short videotape showing the officer's conduct very shortly after the shooting; and
- the medical evidence concerning Diaz's injuries.

The primary witnesses to the incident were Officer Bennallack, his partner Officer Brett Heitmann, and three civilian witnesses from the neighborhood, whom we will refer to as Jane Does 1-3. As often occurs in human affairs, none of these witnesses' perceptions of the incident are identical. Nevertheless, after reviewing their statements and considering the other evidence, we believe that the facts set forth in this synopsis are well established.

Synopsis

On July 21, 2012, at about 4:00 p.m., APD Officers Bennallack and Heitmann were on-duty, in full uniform, working patrol, and driving a gang suppression police car. The officers were in the area of 700 N. Anna Dr. in the City of Anaheim, an area which they knew was claimed as turf by a particular criminal street gang (hereinafter "the gang"), and an area in which the officers knew members of the gang had recently been very active in criminal activity including drug trafficking and gun possession. Officers Bennallack and Heitmann saw several subjects in and around

a car in the alley behind 704 N. Anna Dr. One of the subjects, Diaz, was standing outside the car, leaning into the front passenger window. Diaz's head was shaved, and he wore baggy pants and a baggy, untucked shirt. Officers Bennallack and Heitmann, believing that criminal activity might be taking place, stopped their police car and got out. As they approached the subjects, Diaz looked towards the officers and then immediately turned and ran away. Officers Bennallack and Heitmann chased Diaz, yelling, "Stop, police." Diaz did not comply; he continued to run away from the officers. The officers saw that as Diaz was running from them, both of his hands were in the area of his front waistband as if he was reaching for something or holding something in his waistband area. The officers suspected Diaz might have a weapon in his waistband.

Diaz continued to run from the officers into the south courtyard of 704 N. Anna Dr., and then rounded a corner to enter the fenced west courtyard of the apartment complex. Officers Bennallack and Heitmann continued to pursue Diaz and continued to order him to stop, but Diaz ignored their commands and continued to look back at them over his shoulder as he ran. After crossing the west courtyard, Diaz stopped in front of the north fence. Still facing away from the officers and with his hands in front of him in the area of his waistband, Diaz began to rotate his head and body toward the officers. Simultaneously, he raised his hands. Officer Bennallack saw an object in Diaz's hands. Believing that Diaz was holding a gun and that he was about to shoot at the officers, Officer Bennallack fired his duty weapon at Diaz, hitting him twice and killing him.

Background of the Area

704 N. Anna Dr. is a multi-unit apartment complex. The complex has a grassy courtyard on its south side which wraps around to the west (front) side. The complex is enclosed by a five-foot-high wrought iron fence. An alley with carports runs to the east (rear) side of the complex. From the alley, a gate provides access to the south courtyard. The shooting occurred in the west (front) courtyard area.

The 500-799 blocks of N. Anna Dr., which include the scene of the shooting, comprise the core area claimed as turf by the gang.¹ The gang was particularly active in committing crimes involving weapons and street narcotics during the time of the shooting, and was under investigation by APD, as law enforcement was building its case for a civil injunction against the gang. The outcome of that lengthy investigation included the service of multiple search and arrest warrants on Aug. 10, 2012, which resulted in the arrest of 33 members of the gang and seizure of 40 guns. Further, the Orange County Superior Court granted the injunction against the gang on Jan. 11, 2013. The injunction designates a one-square mile area as a "Safety Zone" within which members of the gang are prohibited from various behaviors, including some that may not be inherently criminal; the Safety Zone includes the scene of the shooting.

Between January 2008 and September 2012, criminal activity in the Safety Zone resulted in the documentation and/or arrest of members of the gang for numerous crimes, including: three murders, four attempted murders, 86 incidents of gun or dangerous weapon possession, 12 participants involved in assaults, 304 drug or paraphernalia violations, 13 incidents of graffiti or vandalism tools, 14 burglaries or possession of burglary tools, 12 robberies, and eight vehicle thefts.

Statement of Officer Heitmann

Officer Heitmann gave a voluntary, consensual statement to the OCDA on July 21, 2012, at 9:00 p.m. (about five hours after the shooting). Officer Heitmann has been a police officer for five years. In the police academy, he received formal training concerning criminal street gangs, and he has received additional on-the-job training from APD gang investigators. Officer Heitmann has been involved in the investigation of several hundred gang-related crimes and has spoken to about 200 known gang members, in both custodial and non-custodial settings, concerning topics related to gang culture including tattoos, graffiti, rival gangs, motivations for committing crimes, possession and use of weapons, and the types of crimes committed by gang members.

¹ When a criminal street gang "claims turf," the members of the gang thereby assert that they have authority and control over that area. Such a claim is necessarily hostile toward the civil authorities and the law-abiding citizens of that area.

On July 21, 2012, Officer Heitmann told OCDA the following:

He and his partner, Officer Bennallack, were assigned to patrol duty on July 21, 2012, and had an approved civilian ride-along with them during their shift. The civilian, John Doe 1, was interested in becoming a police officer. Officers Heitmann and Bennallack were in full police uniform, and were driving a "gang suppression car" – an unmarked police Ford Crown Victoria sedan.

At about 4:00 p.m., they drove south of La Palma Ave. into a north-south alleyway that abuts the rear of 704 N. Anna Dr. and neighboring apartment complexes. He and Officer Bennallack were aware that this was an area claimed as turf by the gang. They knew that the gang had recently been very criminally active, including narcotics trafficking, weapons possession, and graffiti. In the preceding weeks, several members of the gang were arrested in this area for possessing concealed firearms.

Officers Heitmann and Bennallack saw a parked car in the alley with several subjects in and around it; the officers discussed their observations and decided to approach the subjects. As Officer Bennallack drove their car towards the parked car, the subjects around the car looked toward them. The subject who was standing on the passenger side of the car, Diaz, was originally leaning forward, talking through the right front passenger window. However, as the officers approached in the police unit, Diaz stood up, looked northbound in their direction, and then immediately turned and looked southbound. Officer Heitmann said that Diaz then looked back at the officers and appeared nervous. Diaz had a shaved head and wore baggy jeans and a loose, untucked t-shirt. Officer Heitmann recognized Diaz from prior contacts in the area and, based on those contacts and Diaz's appearance, Officer Heitmann believed Diaz to be a member of the gang.

Officer Heitmann could not identify the other subjects associated with the parked car. Officer Bennallack was still bringing their car to a stop in the alley and he had not activated any police lights or siren. Officer Heitmann saw Diaz reach to the front of his waistband, on the exterior of his t-shirt, seemingly adjusting something in the area of his waistband. Based on the way Diaz was using his whole hand to adjust the apparent object and its location, Officer Heitmann believed the object to be a gun, knife, or some sort of weapon. Once the officers got approximately 10 feet north of the parked vehicle, Officer Bennallack stopped their vehicle and Officer Heitmann opened his passenger door to get out. As Officer Heitmann was getting out of his car, Diaz turned away from the officers and ran southbound down the alley. Officer Heitmann began to pursue Diaz on foot, and Officer Bennallack also started to run after Diaz and passed by Officer Heitmann.

Diaz opened the gate leading from the rear alley into the courtyard of the 704 N. Anna Dr. complex and ran westbound, toward the front of the building. Officers Bennallack and Heitmann followed Diaz, yelling at him to stop. Diaz would not stop, and as he continued to run from the officers with his elbows flared out, Officer Heitmann saw Diaz appeared to be holding the object in his front waistband with both hands. Seeing Diaz use both hands to hold the object strengthened Officer Heitmann's belief that Diaz had a weapon because it made Officer Heitmann think the object must be something heavy, unlike a bindle of narcotics. As Diaz ran from the officers, Diaz continually looked back toward the officers as if he were trying to gauge where they were so he could shoot at them. Officers Heitmann and Bennallack continued to yell orders for Diaz to stop, but he did not. As Diaz came to the west end of the courtyard, he rounded the corner of the building and began running north. Officer Heitmann knew that the front (west) courtyard of the complex was enclosed by a wrought iron fence which would be difficult for Diaz to jump over with a gun in his waistband and thus that Diaz – by rounding the corner of the building – had essentially "cornered" himself. Consequently, Officer Heitmann believed that Diaz was either going to pull out the gun and try to throw it and jump over the fence, or he was going to realize he was cornered and they were going to get into a "gunfight." Officer Heitmann feared that he and Officer Bennallack were running right toward Diaz, who was getting ready to shoot at them.

Officer Heitmann had his gun drawn, but Officer Bennallack was between him and Diaz. Officer Heitmann therefore began to move to get clear of Officer Bennallack so that he could get an unobstructed angle to shoot at Diaz. Officer Heitmann saw Officer Bennallack with his gun in his right hand and pointed toward Diaz, crouched down; Officer

Bennallack then leaned to his left as if he was trying to get away from something, and Officer Heitmann heard Officer Bennallack yell something that sounded something like, "Guhh!"² Based on Officer Bennallack's actions, Officer Heitmann believed that Diaz had spun around, had a gun, and was going to shoot them. As Officer Heitmann came around Officer Bennallack's right side, he started to point his gun toward Diaz with his finger on the trigger, getting ready to shoot. Then he heard two to three gunshots in rapid succession and observed Diaz fall to the ground, face first, away from the officers with his head turned facing toward them.

Officers Heitmann and Bennallack approached Diaz to handcuff him. Officer Heitmann said he saw two dark objects: one was a cellphone right underneath the wrought iron fence to the west of Diaz, and one was a dark colored object that appeared to be a glass smoking pipe laying in the grass approximately two to three feet east of Diaz. Officer Heitmann said that Officer Bennallack told him, "Look for the gun, look for the gun; I think he just pitched it." After handcuffing Diaz, Officer Heitmann said he and Officer Bennallack patted Diaz down and then looked for weapons in the area. They found no weapons on or around Diaz. Officer Heitmann then noticed that a large crowd from the neighborhood was beginning to surround he and Officer Bennallack.

Officer Heitmann started to fear for their safety due to the large crowd forming around them, and he started to fear for the safety of their civilian ride-along, whom they had left alone in the alley. Officer Heitmann broadcast over the radio that they had been involved in an officer-involved shooting, they needed paramedics to respond, and they needed officers to respond to the center alley and check on the welfare of their civilian ride-along. Officer Heitmann continued looking for a weapon at the same time as he was trying to put together a bag mask to treat Diaz, and he was keeping an eye on the crowd, which was growing larger and more boisterous. As other APD officers and paramedics arrived at the scene, Officer Heitmann was directed to wait in the rear alley, and after he went to the alley, he was transported back to APD.

Statement of Officer Bennallack

Officer Bennallack gave a voluntary, consensual statement to the OCDA at about 10:00 a.m. on July 24, 2012 (three days after the shooting). Officer Bennallack is a 5 ½-year veteran of APD, assigned to patrol duty. He has received about 26 hours of formal training regarding criminal street gangs. Officer Bennallack has investigated over 100 crimes suspected of being committed by gang members, and has spoken to over 100 gang members concerning topics related to gang culture such as their values and customs, tattoos, clothing, areas of activity, and the type of crimes they commit.

On July 24, 2012, Officer Bennallack told OCDA the following:

He was aware that N. Anna Dr. was the core area of turf claimed by the gang. He believed that the gang was one of the most active criminal street gangs in Anaheim. Approximately two weeks prior, he had personally participated in the arrest of a suspected member of the gang in the alley behind 700 N. Anna Dr. for possession of a handgun. That suspect had a gun holster concealed inside his front waistband.³

On July 21, 2012, he and Officer Heitmann saw a car parked in the same alley with several subjects in and around the car. The subject leaning into the passenger's window was dressed in a manner consistent with the style often worn by gang members. Officer Bennallack decided to contact the subjects, and he drove the police car toward the parked car and began to stop. As he got out of his car, the subject standing by the passenger side of the parked car, Diaz, looked toward the officers, then immediately turned and ran away from them. Officers Bennallack and Heitmann gave chase, following Diaz into the south courtyard of 704 N. Anna Dr., all the while shouting commands to Diaz such

² Officer Heitmann said that he could not make out whether Officer Bennallack was yelling an exclamation, a warning, a command, or something else.

³ The police report concerning that arrest, which occurred on July 1, 2012, shows that APD officers found a loaded .380 semi-auto pistol in a truck bed several feet away from several documented members of the gang, all of whom have been charged with possession of the handgun and active gang participation (People v. Alan Reyes, et al., Orange County Superior Court Case # 12NF2093.) Officer Bennallack handcuffed Reyes. When Reyes was searched, a holster was found in his front waistband. The gun was found to fit within the holster.

as, "Stop," "Get down," and, "Show your hands." However, Diaz would not comply; instead, he continued to run away from the officers with his hands in his front waistband area.

As Diaz reached the front (west) of the apartment complex, he rounded the corner of the building and proceeded north. In doing so, Diaz passed the only gate located to the front of the complex. This caused Officer Bennallack to believe of Diaz, "That he's not attempting to get away from me so much as he is attempt[ing] to get to a point where he can kill me."

Officer Bennallack said that as Diaz rounded the corner, he was "continually looking behind him as I followed." Officer Bennallack continued:

"At that point it appeared as if he had removed the object that I believed to be a firearm, from his waistband. His arms were held in front of him at this point, and he was continuing to run away from me. In my experience, if a suspect is attempting to discard contraband, it would be discarded at the soonest available opportunity. The suspect did not discard the object, but continued running with it, with his hands in front of him."

As Diaz neared the north fence of the courtyard, he slowed. Officer Bennallack described what happened next:

"He [Diaz] began to turn, while still holding the object, which I believed to be a firearm. At this time, I believed the suspect was attempting to turn and – to kill me, to shoot me with his firearm, from close range. At that distance, I believed that the suspect could've killed me by turning and firing without even aiming. The suspect was holding the firearm – the object which I believed to be a firearm – in front of him with two hands, which leads me to believe that the object had weight and mass to it, which leads me to believe that it wasn't a bag of drugs or paraphernalia. As he began to turn, in fear for my life, I drew and fired my weapon two times. I did this to save my life, as well as my partner's life."

As Officer Bennallack fired his gun, he saw Diaz throwing an object into the air. Officer Bennallack described the object as "an unknown object, wrapped in some type of cloth material." He did not recall the color of the cloth material, nor whether it was dark or light colored. The object appeared to Officer Bennallack to be approximately six to eight inches in length and approximately four inches in width. Asked which direction Diaz turned as he threw the object, Officer Bennallack answered, "To the best of my recollection, it was to his left." Officer Bennallack said Diaz threw the object to his left (west), and to the best of his recollection, the object went over the wrought iron fence.

After being shot, Diaz fell face forward. Officer Bennallack then approached Diaz, handcuffed him, and searched him. Officer Bennallack did not find a weapon on or around Diaz. Immediately after the shooting, a large crowd from the neighborhood began to gather around the scene of the shooting. Officer Bennallack told Officer Heitmann that he believed that Diaz had thrown a gun and he asked Officer Heitmann to help him search for the gun. Officer Heitmann briefly looked for a gun on the sidewalk outside the west fence line, but did not locate one. When shown a photo of the cell phone recovered by Crime Scene Investigation (CSI) officers underneath the wrought iron fence close to where Diaz fell, Officer Bennallack said that he did not recall seeing that phone on the day of the shooting.

The gathering of the crowd caused Officer Bennallack to fear that the crowd might retaliate against him and Officer Heitmann or their civilian ride-along, who was still in the alley behind the complex. Officer Heitmann called for back-up, and after back-up officers arrived, Officer Bennallack was removed to the rear alley and then transported to the police station.

Statement of Jane Doe 1

Jane Doe 1 lives in the neighborhood where this incident took place. On Aug. 8, 2012, after being required to testify before the grand jury, she spoke to OCDA at the County courthouse. During this taped statement, Jane Doe 1 said the following:

On the day of the shooting, she saw Diaz, whom she recognized from the neighborhood, running from two police officers in the front yard of 704 N. Anna Dr. As Diaz was running toward the north fence of the yard, he was facing

toward her. Diaz reached into his rear waistband area. She then saw Diaz holding in his hand a black plastic bag. Diaz tossed the bag to his left over the fence, using a soft overhand throwing motion.

As the black bag was in the air, it didn't just float through the air as an empty bag would have, but fell to the ground, leading Jane Doe 1 to believe that the bag contained an object. The bag appeared to be about the size of a softball and it landed possibly in the street underneath a vehicle parked on the east curb.

Just about the same time as the bag went into the air, Jane Doe 1 heard two gunshots and saw Diaz fall face down on the ground. Both police officers had their guns out, but only one officer fired his gun. The shooting officer was about eight feet from Diaz when he fired. He fired two shots in rapid succession. After Diaz was shot, officers handcuffed Diaz and searched him. Then the shooting officer went outside the wrought iron fence and appeared to be searching in the area where Diaz had thrown the bag. She never saw anyone pick the bag up.

Soon after the shooting, other police officers arrived on the scene and put up police tape around the scene. Jane Doe 1 told one of those officers that she had a video of the shooting, and his reply was to ask, "How much do you want for it?" She told the officer that she didn't want anything for the video, and then she asked the officer why police had to use a gun instead of a Taser on Diaz. She did not shoot any video of the incident herself, but someone she knew had taken video just moments after the shooting, which showed Diaz on the ground and officers appearing to search the area. Jane Doe 1 confirmed that the cellphone video posted on YouTube (which OCDA has downloaded) was the video she was referencing, and she knew of no other video concerning the incident.

APD Officer Paul Delgado interviewed Jane Doe 1 on July 21, 2012, (the date of the incident). Officer Delgado reported that during this untaped statement, Jane Doe 1 told him that the first shot was fired into Diaz's back, after which she saw Diaz fall to the ground. Officer Delgado said that Jane Doe 1 told him two different stories about the second shot. First, she reported that, after the first officer shot Diaz in the back, he then shot Diaz in the head. Officer Delgado said that Jane Doe 1 then contradicted herself, saying that while Diaz was lying on the ground after being shot in the back by the first officer, the second officer then walked up to Diaz and shot him in the head.

Officer Delgado reported that throughout the interview, Jane Doe 1 referred to Diaz as "Stomper." She said Diaz was not a gang member, but was friendly with people in the neighborhood. Officer Delgado also reported that Jane Doe 1 told him that the object in Diaz's hand was a dark colored bag or a rag "with something in it." Jane Doe 1 told Officer Delgado that she saw Diaz throw the object over the fence, and that she later saw a lady at the scene pick up the object. According to Officer Delgado, Jane Doe 1 could not, or would not, say whether she personally witnessed the lady pick up the object, and she said that she was not certain whether the lady was a police officer or a civilian. Officer Delgado reported that he believed Jane Doe 1 was being evasive concerning the disposition of the object thrown by Diaz.

In her Aug. 8, 2012, statement to OCDA, Jane Doe 1 denied having seen anyone pick up the object, and denied telling police that she had seen anyone pick up the object.

Statement of Jane Doe 2

On Aug. 8, 2012, after being required to testify before the grand jury, Jane Doe 2 spoke to OCDA at the County courthouse. During this taped statement, Jane Doe 2 reported the following:

She lives in the neighborhood where this incident took place. She was familiar with Diaz, and believed him to be a member of the gang based on his tattoos. On the afternoon of July 21, 2012, she saw Diaz running north in the front yard of 704 N. Anna Dr. As Diaz was running north, he was facing toward Jane Doe 2. Police officers were pursuing Diaz and they yelled, "Get on the ground." At that point, Diaz had stopped running because he had reached the fence bordering the yard to the north.

Diaz then turned his head over his right shoulder toward the officers, as if he wanted to see who was behind him. In so turning his head, Diaz also slightly turned his right shoulder and hip in the same direction.

Just as Diaz was turning his head and body back toward the officers, one of the officers fired his gun twice at Diaz. Diaz fell to the ground and then the officers handcuffed him. She did not observe anything in Diaz's hands during the incident, but her attention had not been focused on Diaz's hands, so she does not know if he in fact had anything in his hands during the incident.

APD Officer Stephen Salicos had conducted an untaped interview of Jane Doe 2 on July 21, 2012 (the day of the shooting). Her report of the incident to Officer Salicos was basically consistent with her statement to OCDA on Aug. 8, 2012. Jane Doe 2's statement to Officer Salicos also included the detail that she saw the first shot strike Diaz in the buttocks, causing him to fall forward. She said that the second shot was fired a second later and struck Diaz in the head.

Statement of Jane Doe 3

On Aug. 8, 2012, after being required to testify before the grand jury, OCDA conducted a taped interview of Jane Doe 3 at the county courthouse. Jane Doe 3 reported the following:

On the afternoon of July 21, 2012, she was out on the street near 704 N. Anna Dr. when she heard a gunshot. Turning in the direction of the sound – south of her – she saw Diaz in the front yard of the 704 complex. She also saw two police officers behind Diaz pointing their guns toward Diaz. She saw Diaz falling face first toward the ground. As Diaz's body fell, his shoulders were not parallel to the ground. Rather, his shoulders and hips were turned at about a 45 degree angle, but she did not remember whether the turn was toward his left or right side.

One of the officers continued to move toward Diaz. As he got to within 12 to 15 feet of Diaz, after a period of time she estimated to be "five seconds" after the first shot, the officer fired a second shot at Diaz. Officers then approached Diaz and handcuffed him. Jane Doe 3 did not see anything in Diaz's hands at the time of the shooting. She recognized Diaz from the neighborhood and knew him as "Stomper." She had seen Diaz about 15 minutes prior to the shooting, and he had been holding a "little black bag"-- a small, black cloth bag similar to an eyeglass pouch. The bag was empty. Jane Doe 3 did not see the bag during or after the shooting, and – although she saw police officers searching the area near where Diaz had been shot – she did not see anyone pick up any objects off the ground.

On July 21, 2012, APD Officer Salicos had conducted an untaped interview of Jane Doe 3. Officer Salicos reported that Jane Doe 3 told him that, after she heard the first shot, she saw Diaz fall to the ground, and then she saw an officer shoot Diaz a second time in the head. Jane Doe 3 told Officer Salicos that Diaz was "a good guy" who helped out "everyone in the neighborhood," and that police were in the wrong for shooting Diaz because Diaz had done nothing wrong and the shooting had endangered the public.

Statement of John Doe 1

John Doe 1 is a civilian who was granted permission by APD to ride along with Officers Bennallack and Heitmann during their shift on July 21, 2012. At 10:00 p.m. on July 21, 2012, John Doe 1 told OCDA the following:

John Doe 1 rode in the back seat of the police car with Officers Bennallack and Heitmann in the front seats. At approximately 4:00 p.m., the officers decided to patrol check the area of N. Anna Dr. As they were headed toward the area, the officers informed John Doe 1 that the area was claimed by the gang and the gang members had been very active in the area recently. As they drove eastbound on La Palma Avenue, they saw a car parked in the alley with several subjects in and around it. The officers had a brief conversation about their observations of the subjects and decided to contact them.

Once they got approximately 10 feet north of the suspect vehicle, Officer Bennallack stopped the police car and the officers started to exit. The subject standing by the passenger's window, Diaz, immediately turned away from the

officers and ran southbound down the center alley. Officer Heitmann jumped out and started to pursue Diaz on foot. Officer Bennallack also started to run after Diaz and passed Officer Heitmann. Diaz ran southbound, then turned westbound and ran toward a black metal pedestrian gate that led into the courtyard of 704 N. Anna Dr. Diaz swung open the gate and entered the courtyard with Officers Bennallack and Heitmann pursuing him. John Doe 1 then lost sight of them.

John Doe 1 did not observe Diaz doing anything with his hands either before he fled or as he fled. John Doe 1 was observing the entire scene during the incident and not looking directly at Diaz. Within seconds of Officer Bennallack, Officer Heitmann, and Diaz running through the pedestrian gate, John Doe 1 heard two to three gunshots in rapid succession. He did not recall hearing any yelling prior to the gunshots. Immediately after the gunshots, John Doe 1 stayed in the vehicle, rolled up his window, and locked his door. He heard either Officer Bennallack or Officer Heitmann broadcast over the radio that shots had been fired and that they needed assistance from other officers.

John Doe 1 was still watching the other subjects in and around the parked car in the alley. He saw the driver of the parked car remove a red cigarette package from possibly one of his pant pockets and then throw it up onto the roof of one of the carports adjacent to the alley. After several follow-up officers arrived, John Doe 1 exited the police vehicle and informed an officer that he had seen the subject throw the cigarette package up onto the roof. An officer who got up on the roof, looked around, then picked up the cigarette package, looked into it and said something similar to, "We've got a whole bunch of dope here."

Statement of Officer Piscopo

APD Officer Salvatore Piscopo heard the radio call of "shots fired" and responded to the scene of the shooting. Within minutes, he arrived to the front courtyard of 704 N. Anna Dr., and he saw Officers Bennallack and Heitmann standing over Diaz, who was on his stomach with his hands cuffed behind his back. Officer Piscopo initially believed that Diaz was dead because his ear was bleeding and he did not see Diaz moving at all. Officer Piscopo said he saw a cellphone cord and a glass narcotics pipe several feet to the southeast of Diaz.

Officer Piscopo approached Officer Bennallack and asked if he was okay. Officer Bennallack said he was okay and then said something similar to, "This guy pitched a gun and we need to find it." Officer Piscopo asked Officer Bennallack where he thought the gun was thrown and Officer Bennallack said he wasn't sure. Officer Piscopo then asked Officer Bennallack to respond to the alley in order to remove Officer Bennallack from the scene of the shooting, and Officer Bennallack did so.

Officer Piscopo began to search the area for a gun. He exited the fenced yard of 704 N. Anna Dr. and looked in the front sidewalk and street, but was not able to locate a gun. Soon after arriving on the scene, he saw that a large crowd was gathering in front of 700 N. Anna Dr. – just south of the shooting scene – and was beginning to yell and swear at the police in a hostile manner. A crowd was also gathering in front of 710 N. Anna Dr. – just north of the shooting scene – and that crowd was also growing hostile.

Officer Piscopo then was informed by Sergeant Steve Pena that Sergeant Pena had found that Diaz was still breathing. Sergeant Pena directed Officer Piscopo to un-cuff Diaz so that he could be treated by paramedics. Moments later, paramedics arrived and began treating Diaz; shortly thereafter, paramedics loaded Diaz into an ambulance and transported him to University of California, Irvine Medical Center. Officer Piscopo rode with Diaz in the ambulance. During the transport, Diaz was unresponsive. After arriving at the hospital, Officer Piscopo remained with Diaz. Diaz was unresponsive to treatment and was pronounced dead at 6:54 p.m. Diaz made no statements after being shot.

Statement of Sergeant Hale

When APD Sergeant Frank Hale responded to the scene of the shooting, he went to the alley to the rear of 704 N. Anna Dr. There, Sergeant Hale met with Officers Bennallack and Heitmann. Sergeant Hale transported both officers and their civilian ride-along (John Doe 1) to APD. Sergeant Hale instructed Officer Bennallack, Officer Heitmann, and

John Doe 1 not to discuss the incident with each other, and he did not observe them discussing the incident with each other.

Neighborhood Canvass Interviews

OCDA responded to the scene of the shooting on July 21, 2012, at approximately 5:30 p.m. APD officers and OCDA Investigators canvassed the neighborhood in order to locate witnesses to the incident. Besides Jane Does 1-3 (discussed above), only two other witnesses were located on the day of the shooting who claimed to have seen the shooting or the events immediately preceding the shooting – Jane Does 4 and 5 (discussed below). However, canvassing efforts on the day of the incident were hampered by the size and hostility of the crowd that gathered as the afternoon progressed. Ultimately, for officer safety, canvassing efforts were discontinued during the evening of July 21, 2012. Over subsequent days, extensive additional canvassing efforts were made, as were public appeals for information. However, only one additional person was located who claimed to have witnessed the shooting – John Doe 2 (discussed below).

Jane Doe 4 lives in the neighborhood where the shooting occurred. On the day of the shooting, she told OCDA Investigators that she had seen a man running from the alley behind the apartment complexes. She saw two police officers running after him. The three of them ran to the front of the building and the man tried to climb the fence. At some point while the officers were in front of the building with the man, she heard two gunshots. Due to the vehicles that were parked on the street, from her vantage point on the west side of N. Anna Dr. (across the street from 704 N. Anna Dr.), she did not actually see the shooting, but heard the shots and then saw the man down on the ground. She did not hear the officers or the other subject say anything.

Jane Doe 5 lives in the neighborhood where the shooting occurred. On the day of the shooting, she told OCDA Investigators that when the shooting happened, she was across the street from 704 N. Anna Dr. when she saw two police officers chasing after a male subject on foot. The officers and the subject ran from the rear of 704 N. Anna Dr. toward the front courtyard. She did not hear the officers yelling anything. She saw the subject (Diaz) running toward the fence. She did not see anything in his hands. Then she heard two gunshots, but her view was obscured by parked cars, so she didn't actually see the shooting. She does not know Diaz, but had seen him in the area "drugged up" before.

John Doe 2 also lives in the neighborhood where the shooting occurred. On Dec. 6, 2012, while in custody at the Orange County Jail, he told OCDA Investigators the following:

On July 21, 2012, he was standing on the west side of N. Anna Dr. when he observed his friend, Diaz, bent down inside the gated portion of an apartment complex, washing his hands at a water hose or faucet. Suddenly, two uniformed Anaheim police officers came into the apartment courtyard from the east alley. Diaz looked at the police officers and immediately turned northbound and ran away. Diaz reached the fence and put both hands on the fence to pull himself up to jump over it. At that moment, Diaz was shot once in the left leg. Diaz then fell to the ground on his knees and was shot a second time in the head. Diaz was handcuffed and his pockets were searched by the two police officers. One of the police officers located a large marijuana pipe in Diaz's pocket and threw it away. After they searched Diaz, the police officers went looking around the area for something. John Doe 2 believed Diaz was still breathing and heard a sound as if Diaz was drowning, but the police officers did not provide medical aid. Other Anaheim police officers arrived and took custody of the guns and badges of the shooting officer and his partner, who were then quickly taken from the scene.

John Doe 2 crossed the street immediately after the shooting incident and began recording the incident with his cellular telephone. A uniformed Anaheim police officer approached him and other residents and offered to purchase their cell phone. John Doe 2 declined, believing it was wrong for the police officer to ask for the cell phone. He did not record that interaction with the police officer, nor was he able to obtain a name or badge number of the officer. He did provide two videos he took of the incident to the news media. He had not seen a foot pursuit leading from the alley to the apartment

courtyard and did not hear any commands from the police officers. John Doe 2 said he did not see any object in Diaz's hands, did not see Diaz reach into his waistband, nor did he see Diaz throw any item away.

EVIDENCE COLLECTION

Officers and CSI searched and processed the scene of the shooting. Of note, they found the following:

- Two .45 caliber cartridge casings, located in the front yard of 704 N. Anna Dr., just west of the front wall of the complex, approximately at the middle of the structure.
- A cellular telephone under the wrought iron fence running across the front (west) borderline of the property at 704 N. Anna Dr., several feet west of where Diaz fell after being shot.
- A glass narcotics pipe and a cell phone charging cord, several feet to the southeast of where Diaz fell.

On the roof of the carport to the rear of 704 N. Anna Dr., adjacent to the parked car that had first attracted the attention of Officers Bennallack and Heitmann, officers found a red cigarette package containing a bindle holding 18 grams of heroin.

Officer Bennallack's duty belt contained the following items:

- Radio
- Two handcuff cases on rear belt with one set of handcuffs
- Taser in holster affixed to the left side belt containing one cartridge
- Two handgun magazines in pouch on left front side belt
- Glock handgun in holster on right side belt with flashlight mount
- Flashlight in holster on rear left side of belt
- Digital audio recorder (DAR) carried on right front side of belt in holster

Officer Bennallack also carried a backup .380 Ruger semi-auto handgun in his back pocket.

EVIDENCE ANALYSIS

Autopsy

On July 23, 2012, Dr. Young-Son Kim of the Orange County Coroner's Office conducted the autopsy of Diaz's body. Dr. Kim found that Diaz had been shot twice – once in the head and once in the buttocks. Dr. Kim concluded that Diaz's death was caused by the gunshot wounds.

Dr. Kim found that the gunshot wound to the head was through-and-through. The wound showed that the bullet entered at the upper right rear scalp, then traveled downward, right to left, slightly back to front, fracturing the skull, causing fatal contusions and exiting near the left ear canal. Dr. Kim found that gunshot wound to the buttocks showed that the bullet entered the upper right buttocks, then proceeded downward, back to front, right to left and lodged in the left pelvic area.

The angle and trajectory of the gunshot wound to Diaz's head were consistent with what would be expected if his head were facing at roughly a 90-degree angle to the gun, but tilted slightly toward the gun. The angle and trajectory of the gunshot wound to Diaz's buttocks were consistent with what would be expected if his feet were planted facing away from the gun, but his hips were rotated slightly to the right.

A toxicological examination of Diaz's postmortem blood was included with the autopsy. The toxicological examination detected the presence of Methamphetamine, Amphetamine, THC, and Levetiracetam (a prescription medication used to prevent seizures).

Ballistics

The two fired cartridge cases recovered from the incident scene are Winchester brand, .45 auto caliber. The two cartridge cases were microscopically compared to cartridge cases test-fired from Officer Bennallack's Glock handgun, and were determined to have been fired from Officer Bennallack's Glock handgun.

The bullet retrieved from Diaz's pelvic area during the autopsy was a Winchester .45 auto caliber. It contained class characteristics similar to Officer Bennallack's gun, however, there was insufficient detail present to positively identify the bullet as having been fired from the gun. Thus, the results of the comparison were inconclusive.

Officer Heitmann's Glock 9 mm semi-auto handgun was inspected on the day of the shooting. No evidence was found to indicate that it had been fired during the incident.

Diaz's clothing was examined for the presence of gunpowder particles. None were found, which indicated that Officer Bennallack was more than six feet away from Diaz when he shot him.

Cell Phone

A cell phone was collected at the crime scene from under the wrought iron fence several feet to the west of where Diaz's body fell. Subscriber records obtained from Metro PCS pursuant to a search warrant show that phone account was opened in Diaz's name on Nov. 8, 2011.

The cell phone was taken to the Orange County Regional Computer Forensics Laboratory (OCRCFL) for examination. A forensic examiner at OCRCFL found that the phone contained hundreds of pictures of Diaz. In about 15 of these photos, dated between Dec. 7, 2011, and July 19, 2012,⁴ Diaz is depicted flashing gang signs and/or displaying his gang tattoos. In 20 of the photos, Diaz is holding a handgun. Four different handguns are depicted in the photos.⁵ In a series of three photos dated July 19, 2012 – two days before the shooting – Diaz is posing for the camera. With one hand, he is flashing a gang sign; with the other hand, he is brandishing a handgun. The gun Diaz is holding appears to be a 6" barrel revolver of .22 or .38 caliber.

The cell phone was tested for DNA by the OCCL. DNA from several sources were found, but due to the low quantity and the multiple sources, results were inconclusive. In other words, no identification could be made to any particular individual, and it could not be determined whether or not Diaz was the source of the DNA deposited on the phone.

DAR

Officer Bennallack carried a DAR on his belt. A review of the recorder shows that it was not activated during Officer Bennallack's interaction with Diaz. Officer Bennallack did activate the DAR for a period of about 40 seconds soon after firing his weapon.

As the recording begins, Officer Bennallack is heard breathing heavily. Officer Heitmann then yells for residents to get back inside their apartments. Officer Bennallack utters a swear word, then says, "Hey look for it dude, look for it." Officer Heitmann broadcasts to dispatch: "Officers code four for now...got a lot of people, a lot of people." Officer Bennallack yells to the gathering crowds, "Get back, get out of here, go back, get back." The audio then concludes.

Officer Heitmann did not turn on his DAR during his interactions with Diaz or after the shooting.

4 Diaz's cell phone was a Samsung smartphone which stores "metadata" in connection with each photograph it takes. From this metadata, a forensic examiner from OCRCFL was able to retrieve the date of creation of the photograph files.

5 Two of the handguns photographed by Diaz are visually indistinguishable from handguns later purchased from members of the gang by police during a sting operation. The first, a Taurus PT .40 caliber semi-auto, was photographed by Diaz on Jan. 10, 2012. On Feb. 9, 2012, gang member Jonathan Maciel sold a visually indistinguishable gun of the exact same make and model to an informant working for the police for \$420. The second gun, a small caliber Glock Generation III semi-auto pistol, was photographed by Diaz on Jan. 3, 2012, and Jan. 10, 2012. A visually indistinguishable gun, a Glock 26, 9mm semi-automatic pistol, was sold for \$600 by gang member Freddy Galeana on May 18, 2012, to an informant working for the police. Ballistics testing showed that the Glock 26 had been used in a gang-related murder committed on May 15, 2012. Gang members Richard Madriles and Gabriel Calderon have been charged with that murder in OC Superior Court case #s 12NF1705 and 12NF2345.

YouTube Video

The civilian cell phone video mentioned by witnesses Jane Doe 1 and John Doe 2 was posted to YouTube, from which it was downloaded by OCDA Investigators. This is the only known video shot during the time period right after the shooting; no videos were located which captured the shooting or the events immediately preceding it.

The YouTube video starts with Diaz lying face down on the grass courtyard of 704 N. Anna Dr. with his hands cuffed behind his back. Officers Heitmann and Bennallack are both searching the courtyard. Officer Heitmann appears to use his lapel microphone to broadcast on his police radio. Crowds of citizens are gathering south, north, and west of the officers. The crowds can be heard yelling at the officers.

During their search of the area, Officer Bennallack is seen exiting the courtyard and searching briefly along the east sidewalk of 704 N. Anna Dr. Officer Bennallack can be seen briefly kneeling down to look under a white pick-up truck parked along the east curb, just south of a gray sedan. Officer Bennallack then returns to the front courtyard as numerous other APD officers arrive and start to move the crowds out of the area, securing the perimeter of the shooting scene. As the crowd is moved out of the perimeter, they become more uncooperative and vocal toward the officers. Officers attempt to render medical aid to Diaz as more officers arrive. The video then concludes.

Diaz's Criminal History

The relevant parts of Diaz's criminal history include a conviction for possessing a gun on school grounds for the benefit of a street gang – a conviction for which he served time in state prison. Diaz also suffered several convictions for narcotics possession. Several times, Diaz was found to be in violation of his conditions of probation and parole – usually for continuing to associate with known gang members, which he was prohibited from doing. As a well-documented, self-admitted member of the gang, he would likely have been subject to the Orange County Superior Court's January 2013 injunction against the gang.

In February 2012, Diaz was on probation for a narcotics charge. On Feb. 2, 2012, the court terminated Diaz's probation and sentenced him to two years incarceration for a new conviction based on his possession of narcotics while in the Anaheim city jail. Prior to California's 2011 "Public Safety Realignment," Diaz's two-year sentence would have been served in state prison; however, due to realignment, Diaz served his time in the Orange County Jail. On May 3, 2012, Diaz was released from custody and was thereafter subject to neither parole nor probation supervision.

Members of Diaz's family told OCDA that, after he was released from jail in May 2012, his family asked him to come live with them in Santa Ana. However, Diaz declined. According to his family, Diaz "just didn't want to be at home where he knew, um, like rules." Instead, his family said that Diaz chose to live on the streets in the Anaheim area where his gang friends lived.

Officer Bennallack's Job History

OCDA Investigators reviewed Officer Bennallack's personnel file, and due consideration has been made of its contents. Special consideration has been given to a prior shooting incident on Jan. 7, 2012. The OCDA's report, dated Dec. 21, 2012, and available at www.orangecountyda.com under Media Center by selecting Investigation Letters, details the conclusion that Officer Bennallack was justified in shooting during that prior incident.

STANDARD LEGAL PRINCIPLES IN OFFICER-INVOLVED SHOOTING CASES

In order to convict an officer of any charges in an on-duty shooting like this, it would be necessary to prove beyond a reasonable doubt that no legal justifications existed for the officer's actions. *People v. Banks* (1977) 67 Cal. App. 3d 379, 383-84. The most salient justification which may apply to the present case is self-defense as set forth in Penal Code Section 197.

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. The relevant Criminal Jury Instruction, written by the Judicial Council of California

and called "CALCRIM 505" provides that a person who reasonably believes that he/she is in imminent danger of being killed or suffering great bodily injury is permitted to defend himself/herself from attack, if, as a reasonable person, he/she had ground for believing and does believe that death or great bodily injury is about to be inflicted upon him/her or upon another person. In doing so, such person may 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 prevent the death or injury which appears to be imminent. The law as detailed in CALCRIM 505 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 is about to suffer death or great bodily injury, to act in self-defense or defense of others. 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.

In the seminal case of *Graham v. Conner* (1989) 490 U.S. 386, the United States Supreme Court held that an officer's right to use his weapon is to be analyzed under the Fourth Amendment's "objective reasonableness" standard. The High Court further opined that the "calculus of reasonableness 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." The United States Supreme Court has 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." *Tennessee v. Garner* (1985) 471 U.S. 1, 3. However, in a subsequent case, the Court held 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." *Graham v. Conner* (1989) 490 U.S. 386, 397. Thus, the Court cautioned that "[t]he reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 396.

As the California Courts of Appeal held in a recent case:

"Unlike private citizens, police officers act under color of law to protect the public interest. They are charged with acting affirmatively and using force as part of their duties, because the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. Police officers are, in short, not similarly situated to the ordinary battery defendant and need not be treated the same. In these cases, then, the defendant 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.... "The test is highly deferential to the police officer's need to protect himself and others. . . .

"The question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. In calculating whether the amount of force was excessive, a trier of fact must recognize that peace officers are often forced to make split-second judgments, in tense circumstances, concerning the amount of force required....

"We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes 'reasonable' action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure."

Brown v. Ransweiler (2009) 171 Cal.App.4th 516, 527-528.

LEGAL ANALYSIS

The courts' analysis and teachings in *Graham* and *Brown*, *supra*, are very much applicable to the circumstances surrounding the interactions of Officer Bennallack with Diaz. In order for Officer Bennallack to be justly charged and convicted for his shooting of Diaz, the prosecution would have to be able to prove beyond a reasonable doubt that Officer Bennallack's actions were not committed in justifiable self-defense – and the judgment of the reasonableness of Officer Bennallack's actions must give due deference to the rapidly evolving, oft-dangerous environment confronting police officers on the street.

As applicable to the facts in this case, the justification of self-defense has several legal elements:

- 1) Officer Bennallack actually believed himself to be in imminent danger of being killed by Diaz;
- 2) Officer Bennallack reasonably believed that the immediate use of force was necessary to defend himself against Diaz;
- 3) Officer Bennallack used no more force than was reasonably necessary to defend himself against the danger posed by Diaz.

We will analyze these elements in turn.

1) Actual Belief in Necessity of Self-Defense

The question here concerns Officer Bennallack's state of mind – did he *actually* believe that Diaz posed a danger to officers? Certainly, Officer Bennallack claimed to have so believed: in his statement to Investigators three days after the shooting, Officer Bennallack said that he shot Diaz because he believed Diaz had a gun and was about to shoot at Officers Bennallack and Heitmann. Of course, a person's statement about their own actions – especially after there has been time to reflect – could be the product of self-serving motives. Therefore, it is important to consider other sources of evidence to see whether they are consistent with the claims of Officer Bennallack. Here, we find the following evidence corroborates Officer Bennallack's claim of self-defense:

- Officer Heitmann said that just a moment before shooting Diaz, Officer Bennallack yelled something like, "Guhh!" – which may have been the beginnings of the word "gun," a common warning shouted by police when a suspect pulls a gun.
- Officer Heitmann said that just after the shooting, Officer Bennallack told him, "Look for the gun, look for the gun; I think he just pitched it."
- Officer Piscopo said that after he arrived on the scene, Officer Bennallack told him, "This guy pitched a gun and we need to find it."
- Jane Doe 1, Jane Doe 3, and John Doe 2 all said that they saw officers searching the scene of the shooting as if they were looking for something particular.
- The YouTube video shows officers searching intently around the scene, as if searching for a particular item.

Because Jane Doe 1 and John Doe 2 made reports suggesting that officers tried to suppress evidence of the shooting,⁶ we have considered the possibility that fellow APD officers could have fabricated evidence to corroborate Officer Bennallack's report. Thus, for instance, it is possible that Officers Heitmann and Piscopo falsely said that Officer Bennallack told them that he had seen Diaz pitch a gun. And it is possible that Sergeant Hale was dishonest when reporting that Officer Bennallack, Officer Heitmann, and John Doe 1 did not talk amongst themselves after the shooting (or they may have done so outside his presence). But we have no actual evidence to that effect.

The YouTube video, depicting events prior to the removal of Officers Bennallack and Heitmann to Sergeant Hale's patrol car in the rear alley, shows plainly that officers appeared to be searching intently for a particular item. The most likely explanation was that they were told by Officer Bennallack that Diaz had pitched a gun. Of course, Officer Bennallack could have lied when he told the other officers that Diaz had a gun, but he would have had to concoct the lie in a very short period of time after the shooting. Further, he was given a chance to corroborate his story that Diaz pitched a metallic item when, during his interview with OCDA, he was shown a picture of the cell phone lying close to the area where Diaz fell. Were Officer Bennallack inclined to invent a story supporting self-defense, pointing to the cell phone as the item which Diaz pitched would have been an easy route for him.⁷ That Officer Bennallack did not

⁶ These witnesses reported that an APD officer at the scene made an offer to buy the cell phone video, which could be interpreted as an attempt to suppress evidence. We have been unable to corroborate that accusation. APD Officer Delgado said that at the end of his interview with Jane Doe 1, she reported for the first time that she had a video of the shooting. He said that he doubted her veracity, and in order to test it, he asked her whether she intended to sell the video. John Doe 2 was not present during that interview. It is difficult to reconcile the accounts of Jane Doe 1, John Doe 2, and Officer Delgado. However, even if –hypothetically--the accusation that one officer attempted to suppress evidence were well-founded, we believe it would be an unwarranted leap to consequently discredit the statements of *all* of the APD officers.

⁷ In the commotion of a foot pursuit, it is plausible that a cell phone could be mistaken for a handgun when removed from the waistband of a criminal suspect.

take that route points toward the sincerity of his claim that he really believed he saw Diaz holding a gun.

Because Diaz was shot in the buttocks and the right rear scalp, it may be argued that Officer Bennallack did not actually believe that Diaz posed a threat to him. The logic of this argument is that shooting a person "in the back" is not consistent with a motive of self-defense. However, such an argument warrants several responses:

- First, a person with a drawn, loaded gun is potentially dangerous regardless of which direction they are facing. Simple experimentation demonstrates that a person can turn and fire at a target 180 degrees behind him in only a fraction of a second. Thus, it is not inherently unreasonable for one standing behind a gunman to feel he is in imminent danger of being shot.
- Second, at the time of the shooting, officers were close enough to Diaz that it would not be very difficult for Diaz to acquire them as targets, were he intending to turn and shoot at them. As Officer Bennallack stated, "At that distance, I believed that the suspect could've killed me by turning and firing without even aiming."
- Such a scenario gives rise to a do-or-die dilemma in which, if the one standing behind the gunman were to wait for the gunman to turn before defending himself against the gunman, it could be too late. Thus, if one believes himself to be in such a scenario, he has only a split second to decide how to proceed – and he might choose to shoot in self-defense at the gunman before the gunman turns, thereby shooting the gunman in the back.
- In this light, it is important to note the autopsy findings that the angle and trajectory of the bullet wounds were consistent with what would be expected if Diaz's head were facing at roughly a 90-degree angle to the gun, but tilted slightly toward the gun, and his feet were planted facing away from the gun, but his hips were rotated slightly to the right. Further, it is significant that – consistent with the autopsy findings – both Officer Bennallack and Jane Doe 2 described Diaz as beginning to turn toward the officers just before Officer Bennallack shot him.

Consequently, we do not find the fact that the shots entered the back half of Diaz's body, by itself, disproves Officer Bennallack's claim that he shot at Diaz in self-defense.

If accurate, witnesses' statements that the second shot to Diaz came after he was already down on the ground might disprove Officer Bennallack's claim of self-defense. Those statements include the following:

- Jane Doe 1, at one point in her July 21, 2012, statement to APD, reported that the second officer shot Diaz in the head after Diaz had fallen to the ground.
- Jane Doe 3, in her Aug. 8, 2012, interview with OCDA, reported that there was an interval of about "five seconds" between the first and second shot.
- John Doe 2 reported in his Dec. 6, 2012, interview that Diaz had fallen to his knees before he was shot a second time.

The statements that Diaz was shot while already down on the ground do not square well with the ballistics evidence indicating a lack of gunpowder particles on Diaz's clothing and the autopsy evidence concerning the trajectory of his bullet wounds. Further, Jane Doe 1's July 21, 2012, statement that Diaz was shot by a second officer is contradicted by the ballistics evidence that shows Officer Bennallack was the sole shooter. Also, Jane Doe 1's allegation that Diaz was shot while he was down was inconsistent with her report to OCDA on Aug. 8, 2012, that the two shots were fired in rapid succession.

The reports by Jane Doe 3 and John Doe 2 are also inconsistent with the statements of Jane Doe 1 (in her Aug. 8, 2012, interview), John Doe 1, and several neighborhood canvass witnesses who heard, but did not see, the shooting – as well as the statements of Officers Bennallack and Heitmann – all of whom reported that the gunshots were fired in rapid succession.

One final consideration which supports the credibility of Officer Bennallack's claim of self-defense is this: the simple fact that Diaz may have been holding a gun. If he was, then one could conclude that Officer Bennallack did, in fact,

see the gun because of his close proximity to Diaz. We are unable to reach a firm conclusion from the evidence whether Diaz did or did not have a gun, but we do take note of the following:

- Diaz has a prior felony conviction for possessing a gun for the benefit of the gang.
- On Aug. 10, 2012 – several weeks after the shooting of Diaz – law enforcement officers serving search and arrest warrants on members of the gang seized 40 guns that were found in the possession of members of the gang. Gang members are known to commonly share possession of guns with one another.
- The cell phone found close to where Diaz fell contained numerous photos of Diaz posing with a handgun, including several photos taken on July 19, 2012 – two days before the shooting.⁸

In summary, we find the statements and actions of Officer Bennallack at and around the time of the shooting to be consistent with his statement to Investigators that he actually believed that Diaz had a gun. Further, we find Officer Bennallack's claim of self-defense to be plausible and internally consistent. We do not find anything in his background to cause us to be suspicious of his credibility. In contrast, we do not find the evidence which contradicts Officer Bennallack's claim of self-defense to be as substantial as the corroborating evidence. Accordingly, we conclude that the evidence favors a finding that Officer Bennallack did actually believe that Diaz posed an imminent danger to officers.

2) Reasonableness of Belief that Diaz Posed Imminent Danger

The second requirement for establishing the justification of self-defense is proof that Officer Bennallack's belief that Diaz posed an imminent danger was reasonable under the circumstances. The following evidence supports the reasonableness of Officer Bennallack's belief:

- The area of N. Anna Dr. was known to Officer Bennallack to be turf claimed by the gang.
- Members of the gang in N. Anna Drive were known to Officer Bennallack to be very actively involved in criminal activity, including possession of weapons.
- Officer Bennallack had recently arrested a member of the gang for possession of a gun, in the same alley to the rear of 704 N. Anna Dr., and that suspect had a gun holster located in his front waistband.
- Diaz, who dressed in a manner consistent with that of gang members, ran from the police upon seeing them approach.⁹
- As he ran, Diaz held his hands around the area of his front waistband rather than pumping his arms at his sides.
- As Diaz ran, he looked back at the officer in a manner consistent with wanting to gauge where the officers were so that he might target them.
- Police yelled at Diaz to stop and get on the ground (as reported by Jane Doe 2 and Officers Bennallack and Heitmann), but Diaz did not comply.
- Diaz did not exit the 704 N. Anna Dr. courtyard by the west gate, but instead turned north into the front courtyard, where he would be fenced in.
- Diaz then turned toward the officers (as indicated by Jane Doe 2 and Officer Bennallack, and as suggested by the autopsy findings).
- Diaz's hands came up from his waistband holding an object about the size of a softball (as indicated by Jane Doe 1 and Officer Bennallack).
- Simultaneous to the shooting, Diaz threw the object to his left, over the fence on the west borderline of the front courtyard (as indicated by Jane Doe 1 and Officer Bennallack. Of special import, note the specific detail

⁸ In *People v. Rinegold* (1970) 13 Cal.App.3d 711, 721, the Courts of Appeal held that "the law is established in California that when a defendant denies that he possessed ... a firearm, evidence is admissible to show that such [a firearm] was in fact possessed by the defendant at other times."

⁹ The United States Supreme Court held, in *Illinois v. Wardlow* (2000) 528 U.S. 119, that a defendant's presence in a high-crime area and his flight upon seeing police officers approaching him constituted reasonable suspicion to believe that he was involved in criminal activity, such that police could lawfully detain him to investigate.

in Jane Doe 1's description of the object: a black plastic bag; it was the size of a softball; it didn't just float like an empty bag would, but flew in an arc and landed on the ground, leading her to believe it contained an object).

- Immediately after the shooting, Officer Bennallack and other officers were seen looking for something, as if they believed that Diaz had thrown something.
- Officer Heitmann, who was similarly situated to Officer Bennallack, also believed that Diaz had a gun and that a "gunfight" was imminent after Diaz turned the corner of the courtyard. Officer Heitmann said he would have shot at Diaz himself in self-defense except that Officer Bennallack was in Officer Heitmann's line of fire.

The above evidence constitutes substantial evidence which would support a finding of the reasonableness of Officer Bennallack's belief that Diaz posed an imminent danger.

Next, we decide whether there is any credible evidence which might indicate that Officer Bennallack's belief was unreasonable. A few witnesses say that they did not see anything in Diaz's hands before the shooting. Some of those witnesses explained that they were not focusing on Diaz's hands, but two – Jane Doe 5 and John Doe 2 – say affirmatively that they saw nothing in his hands.

We find John Doe 2's report to be suspect. His report diverges from the body of evidence in the case in several material ways; for instance, he said the incident began with Diaz drinking from a hose in the yard when officers came upon him. Additionally, John Doe 2 is a member of the gang who considered Diaz a friend; as such, he has a bias in the case. John Doe 2's criminal history further undermines his credibility.¹⁰

As for Jane Doe 5, her vantage point from across the street was not as good as the other witnesses who reported seeing the incident. Moreover, conflict between eyewitnesses to the same event is not uncommon. As explained in CALCRIM 105, "People sometimes honestly forget things or make mistakes about what they remember. Also, two people may witness the same event yet see or hear it differently." We conclude that the statements of witnesses who reported seeing nothing in Diaz's hands are outweighed by the specific, detailed statements of Jane Doe 1 and Officer Bennallack, wherein they describe seeing an object in Diaz's hands.

Importantly, we are struck by two points regarding Jane Doe 1's account. First, the specificity of her observations. While one or more of her detailed descriptions about the object might diverge in some respect from the true state of affairs (for example, color or size), we would not expect such a witness to be altogether mistaken about the existence of such an object. Thus, if Diaz had, in fact, never held such an object, the only reasonable explanation for Jane Doe 1's purported observations would be that she was fabricating the story (or else was hallucinating). Which brings us to the second point about Jane Doe 1: we find her to be a competent, reliable witness. Jane Doe 1 is a decent, law-abiding citizen. She has her wits about her, has no trouble with her eyesight, and has no trouble expressing herself. Furthermore, Jane Doe 1 is not hostile toward Diaz. If anything, we found her to be sympathetic toward Diaz and unsympathetic toward the police – at least insofar as this incident is concerned. Given these circumstances, we give great weight to Jane Doe 1's report that just before the shooting she saw Diaz reach into his waistband and then she saw him holding a black bag with an object in it about the size of a softball.

Of course, it remains a fact that officers did not locate a gun at the scene. A narcotics pipe and a cell phone cord were recovered several feet southeast of where Diaz fell. Diaz's cell phone was located several feet west of Diaz. The positioning of the phone directly underneath the lower horizontal bar of the fence and its undamaged screen tend to suggest that the phone was placed there, as opposed to landing there after being tossed – but either scenario is possible. Neither Officer Bennallack nor Officer Heitmann remembered taking either the phone or the pipe out of Diaz's pockets. Officer Heitmann described seeing the cell phone and pipe on the ground as he approached Diaz

¹⁰ John Doe 2 was convicted of a felony for conspiring to sell and transfer a shotgun without a license. John Doe 2 committed the offense with four other members of the gang on July 19, 2011. The offense occurred in the alley behind 704 N. Anna Dr. Manuel Diaz was also present in the alley when the offense occurred, but he was not charged.

after he had been shot. However, Officer Bennallack did not remember seeing the cell phone at the scene, and John Doe 2 reported seeing officers remove the pipe from Diaz's pockets when they searched him. Thus, the evidence is in conflict, and we find it difficult to conclude with any certainty whether the phone and pipe had been thrown by Diaz or if they were removed from Diaz's pockets when officers searched him.

Still, Jane Doe 1 was specific in her observation that Diaz threw a black bag containing an object over the fence, and Jane Doe 3 reported having seen Diaz holding a black bag or pouch about 15 minutes prior to the shooting. Officer Bennallack said that as he fired his gun, he saw Diaz throwing "an unknown object, wrapped in some type of cloth material." Although police did not locate a black bag or pouch or cloth in the area, it is possible that Diaz threw a bag that contained contraband such as a gun and/or narcotics (and/or perhaps his cell phone). It is further possible that someone in the crowd that gathered, which was hostile toward the police, picked up the bag and left with it. Officer Delgado reported that Jane Doe 1 told him on the day of the shooting that she had seen a lady pick up from under a car the object thrown by Diaz. However, Jane Doe 1 denied to OCDA that she had ever seen that happen, and she further denied having made that statement to Officer Delgado. We therefore cannot reach certainty about what, if anything, Diaz held in his hands at the moment Officer Bennallack shot his gun.

Nonetheless, in light of all the circumstances, we conclude that the evidence favors a finding that Diaz did bring an object out of his waistband and raised it up just as he was turning toward the officers. The exact identity of that object is unclear, although the evidence suggests that its size and mass were not inconsistent with a handgun. However, even if the object was not a gun, making allowance for the "split-second judgments in tense circumstances" required of Officer Bennallack – as the courts say we must – we find that at the moment he pulled the trigger, Officer Bennallack was reasonable in believing that Diaz posed an imminent danger.

3) Reasonable Force

The third element required to establish the justification of self-defense is that the force used is no greater than necessary to deal with the apparent danger. Here, the danger reasonably apparent to Officer Bennallack was that Diaz had pulled an object resembling a gun out of his waistband and he was turning to shoot at Officer Bennallack. Under these circumstances, it was not disproportional force for Officer Bennallack to respond with deadly force. The presence of a non-lethal weapon on Officer Bennallack's gun belt – his Taser – does not negate this element. Officer Bennallack was faced with an apparently deadly threat, and he responded with proportional force. As the Court of Appeal held: "The test is highly deferential to the police officer's need to protect himself and others. . . . In calculating whether the amount of force was excessive, a trier of fact must recognize that peace officers are often forced to make split-second judgments, in tense circumstances, concerning the amount of force required." *Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 527.

CONCLUSION


In order to justly charge and convict Officer Bennallack of a crime, it would be the prosecution's burden to prove beyond a reasonable doubt that he did not act in self-defense or defense of others when he shot at Diaz. In accordance with the foregoing discussion, the prosecution would be unable to carry the burden in this case. A jury analyzing these facts would likely find that it was reasonable for Officer Bennallack to use the force that he did in this circumstance.

This incident encompassed only a few seconds from start to finish, and evolved into a dangerous predicament for the officers. As Diaz approached the north fence and brought his hands up from his waistband, Officer Bennallack did not have a long, clear view of the object in Diaz's hands. This reasonably put Officer Bennallack on the horns of a do-or-die dilemma. If he were to wait to see exactly what Diaz was holding and exactly what Diaz intended to do with the object, Officer Bennallack would be risking his life by leaving himself unguarded. Alternatively, prompted by the evidence indicating that Diaz had a gun and was going to shoot at the officers, Officer Bennallack could shoot at Diaz. Under these circumstances, a jury would find by a preponderance of the evidence that Officer Bennallack acted in justifiable self-defense. At a bare minimum, it is very unlikely that the prosecution could prove beyond a reasonable

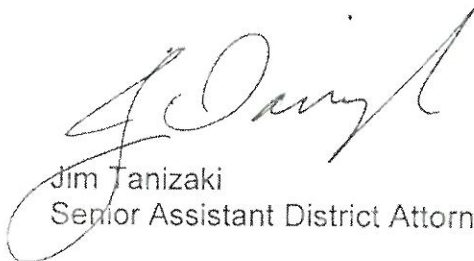
doubt that Officer Bennallack did not act in self-defense.

Therefore, based upon a review of all of the evidence provided to and obtained by the OCDA, and pursuant to the applicable legal principles, it is our legal opinion that the evidence does not support a finding of criminal culpability on the part of Officer Bennallack, and that there is significant evidence that the officer's actions were reasonable and justified under the circumstances when he shot Diaz on July 21, 2012.

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


DAN WAGNER
Assistant District Attorney
Head of Homicide Unit

Read and Approved, by:


Jim Tanizaki
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