



OFFICE OF  
**THE DISTRICT ATTORNEY**  
COUNTY OF SAN DIEGO

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April 19, 2013

Chief William Lansdowne  
San Diego Police Department  
1401 Broadway  
San Diego, CA 92101

**Re: Fatal shooting of Mr. Victor David Ortega on June 4, 2012, by San Diego Police Officer Jonathan McCarthy. SDPD Case No. 12-022062; DA Special Operations Case No. 12-054PS; Deputy District Attorney assigned: Paul Azevedo**

Dear Chief Lansdowne:

The District Attorney's Office has reviewed the reports and other materials compiled by your department concerning the fatal shooting of Mr. Victor David Ortega by San Diego Police Officer Jonathan McCarthy on June 4, 2012. A District Attorney Investigator responded to the scene and was briefed by your investigators. This case was presented to the District Attorney's Office for review on November 6, 2012.

***Summary***

Officer McCarthy responded to a call of domestic violence. McCarthy saw Mr. Ortega, who matched the description of the suspect, walking in the area. After a foot pursuit, a physical altercation took place between Officer McCarthy and Mr. Ortega. During the altercation, Officer McCarthy fired twice fatally wounding Mr. Ortega.

***Persons Involved***

Mr. Ortega was 31 years old and lived with his wife and two children in the 8000 block of Flanders Drive in San Diego. He stood 6'1" and weighed 182 pounds.

Officer McCarty was in full uniform and operating a marked police car. Officer McCarthy is 5'11" and weighed 160 pounds. Officer McCarthy has been a police officer for almost three years.

***Incident***

On Monday, June 4, 2012, at 7:38 a.m., Ms. Shakina Campbell called 911 reporting her husband, Victor Ortega, beat her and she described injuries she suffered that morning. She also told the dispatcher her husband was trying to leave their home (located in the 8800 block of Flanders Drive) and supplied the dispatcher with her husband's name and physical description.

Officer McCarthy was one of several officers who responded to the call. While checking the neighborhood, McCarthy saw Mr. Ortega who turned around and then ran. McCarthy chased Ortega east through the apartment complex from the 10500 block of Westonhill Drive. The foot chase lasted for about one minute and a covered distance of about 775 feet.

Officer McCarthy caught up to Mr. Ortega in a confined and gated breezeway. When McCarthy tried to arrest Ortega, Ortega resisted. During the struggle, a revolver McCarthy had concealed on his left leg fell out of its holster and onto the pavement, landing a few feet from Ortega's head.

In Officer McCarthy's statement, he stated he cuffed Mr. Ortega's left hand and said he was trying to handcuff Ortega's right hand when he saw Ortega reach for the nearby revolver with his right hand. McCarthy said he grabbed Ortega's right arm, pushed Ortega's body to the right, and then reached out and pushed the revolver away from Ortega. McCarthy stated he then let go of Ortega and rose up to one knee. McCarthy said he drew his pistol and pointed it at Ortega. When Ortega reached with both hands for McCarthy's pistol, the officer fired twice.

Both shots struck Mr. Ortega and he died at the scene. The incident of the foot pursuit, struggle and shooting took place in about 68 seconds.

#### ***Call and Dispatch Recordings***

Ms. Campbell's emergency call was recorded and reviewed in detail. Ms. Campbell requested an ambulance and the police as a result of the injuries she sustained from Mr. Ortega attacking her. Ms. Campbell told the dispatcher her husband needed to go to jail and was trying to leave.

The police dispatch tapes were also reviewed in detail. Ms. Campbell's call was received at 7:38 a.m., and dispatched two minutes later at 7:40 a.m. Officer McCarthy was assigned at 7:41 a.m., and arrived three minutes later at 7:44 a.m. At 7:47 a.m., McCarthy radioed he was in pursuit of the suspect "eastbound through the villages" and provided a suspect description. Within a minute, McCarthy radioed, "Shots fired! Shots fired!"

#### ***Witness Statements***

Detectives spoke to Ms. Campbell's neighbors. One neighbor said when officers arrived, the witness heard Ms. Campbell say her husband was "getting away." The witness also saw Mr. Ortega "bolt" from the officers and the officers drive away in search of him.

Several witnesses saw and heard different portions of the incident. No one saw the shooting.

Witness #1: One witness heard and saw portions of the events from a second story window. The witness first heard a male voice yelling, "stop running!" The witness looked out the second story window and saw a man in the breezeway with an officer chasing him. Although the witness thought the officer was going to handcuff him, she said the officer didn't have the man pinned and was struggling to do so. The witness left the window and went down the stairs to look out the front window. While walking downstairs, she heard the officer yelling for the subject to get

on the ground and heard two shots fired. After the shots had been fired, the witness saw the officer check the man's neck for vital signs and then started giving him CPR. Regarding whether or not the man was complying, the witness replied, "No. Absolutely not." Regarding her perception of the struggle, the witness said, "It was kinda of a... like a brawl really. It was really, it was very physical..."

At the scene, there is a shed that sits adjacent to the breezeway where the struggle and shooting took place. One witness said he was inside this shed when he heard what he thought were the sounds of two people wrestling, some yelling and a large thud. He heard one voice yelling, "Are you kidding me? Come on, come on, get the fuck off me" and the second voice yelling, "Get down on the ground!" The witness heard the sounds two gunshots. After the shooting, the witness heard one voice saying shots had been fired.

A third witness was inside his home and heard loud yelling and banging against the breezeway fencing. He heard two people wrestling and heard one say, "I'm gonna sue you." The witness also heard, "the cop like trying to get handcuffs out ... a couple seconds after that I heard more movement... then I heard the two gunshots." He estimated the entire incident took place in 30 seconds or less. This witness later heard the shooting officer explaining to another officer that the reason he fired was because, "the guy he shot was reaching for something, but I didn't hear what it was... I couldn't make it out."

Several additional people witnessed portions of the events including sounds of a struggle; one voice saying things like "get on the ground!" and "get down!"; another voice saying "are you kidding me?" and "I'm gonna sue" or "you're gonna get sued"; the sounds of shots fired; and, the officer giving CPR and calling for assistance. No witnesses saw the actual shooting.

#### ***Officer McCarthy's Statement***

Because Mr. Ortega was deceased and his body still at the scene, investigators decided against a walk-through interview with Officer McCarthy at that time. McCarthy had provided an initial statement to Sergeant Karsh. Sergeant Karsh's reported that McCarthy said he chased and caught Ortega in the walkway area in between the buildings. McCarthy told Karsh Ortega fought with him and during the struggle McCarthy's back-up gun came loose from its ankle holster. When Ortega grabbed for the weapon, McCarthy drew his handgun and fired twice at Ortega at close range.

Officer McCarthy later supplied Homicide Detectives with a recorded statement. McCarthy said he heard the radio call as it was being dispatched and was aware the reporting party said her husband had punched and kicked her and she was bleeding from the mouth. When he arrived, McCarthy saw Ms. Campbell outside pointing north and saying, "He's running that way."

Officer McCarthy spotted Mr. Ortega walking west through the complex in the 10500 block of Westonhill Drive. Mr. Ortega saw him and ran away east through the complex. McCarthy got out of his patrol car and gave chase. McCarthy said during the foot chase he yelled at and ordered Mr. Ortega to stop running.

Officer McCarthy said Mr. Ortega ran into a breezeway and slammed a gate closed behind him. McCarthy kicked open the gate entering the small alley. Ortega engaged him in a physical fight immediately. McCarthy said he grabbed Ortega to force him to the ground and ordered him to get on the ground. Ortega wrestled with McCarthy and was yelling, "What are you doing? Get away from me! I'm gonna sue your ass!"

Officer McCarthy said they were pushing one another and bumping up against the breezeway walls as they struggled. McCarthy used his left leg to trip Mr. Ortega which caused Mr. Ortega to fall face down onto his chest. McCarthy purposely fell onto Mr. Ortega so he could use his body weight to try and control him. McCarthy placed a knee on Mr. Ortega's back, drew his Taser and ordered Mr. Ortega to put his hands behind his back. Mr. Ortega did not comply.

Officer McCarthy said he was able to get one of Mr. Ortega's hands back but then noticed his back-up revolver, laying on the cement about two feet away from Ortega's head. McCarthy then got both of Ortega's hands behind his back so he holstered his Taser and told Ortega not to move and took out his handcuffs. McCarthy said he was hoping Ortega had not seen the revolver and was able to handcuff Ortega's left hand. Ortega was still struggling and he reached for the revolver and made contact with it, but was unable to get a grip on it. McCarthy then got off Ortega, pushed the revolver further away and drew his service pistol.

After Officer McCarthy got off of Mr. Ortega, they both remained partially on the ground. McCarthy was kneeling on one knee when he drew his service pistol and pointed it at Ortega. At this point, McCarthy and Ortega were facing each other. When Ortega reached for McCarthy's service pistol with both hands, McCarthy fired twice. McCarthy estimated Ortega's hands were about a foot away from the gun and believed Ortega was trying to grab the gun to kill McCarthy with it.

Officer McCarthy radioed dispatch immediately after the shooting. He then retrieved the revolver, handcuffed Mr. Ortega's right hand behind his back, and laid him on his back. McCarthy began CPR, performing chest compressions until he was relieved by another police officer.

### ***Investigation***

The investigation revealed Officer McCarthy fired twice. One shot struck Mr. Ortega in the abdomen and one struck him in the back of the neck. Two expended 9 mm shell casings were recovered at the scene. Both shell casings were located in areas consistent with McCarthy's stated firing position. Ortega's body, which was originally positioned in the breezeway area, had been moved by medical personnel to enable them to attempt emergency life-saving procedures.

Photographs of Officer McCarthy's back-up revolver, revealed multiple scratches and imperfections which appear recent. All of these imperfections appear consistent with the weapon being recently dropped onto or scrapped across a hard surface. The revolver was also examined for latent fingerprints. No fingerprints, either those of McCarthy or Mr. Ortega's, were found on the gun.

Mr. Ortega's hands were examined for gunshot residue and later analyzed by the crime laboratory. Particles unique to gunshot residue were found. The presence of gunshot residue can be expected to occur when one is in close proximity to a firearm when discharged.

Officer McCarthy had abrasions on both of his knees, left thumb and elbow and right knee and arm. Scuff marks were present in the knee areas of McCarthy's pants as well as a hole in the left knee.

### ***Autopsy and Crime Scene Reports***

A Supervising Criminalist and a Deputy Medical Examiner responded to the scene and prepared reports. A Supervising Criminalist submitted a report detailing the crime scene. That report included the conclusions that Officer McCarthy and Mr. Ortega were facing each other when both shots were fired, and Ortega was bent forward, at the waist when struck by both shots. In addition, an autopsy was conducted on June 5, 2012. The autopsy examination noted that Ortega's right wrist had a handcuff in place and the other handcuff was in an open position. Abrasions on both knees, both wrists, the right elbow and forehead of Ortega were noted. Ortega sustained two gunshot wounds; one to the abdomen and one to the back of the neck. The Deputy Medical Examiner opined, "Although the decedent had entrance wounds of both the back of his neck and abdomen, it is possible that he sustained both of these wounds while facing the officer if his (Mr. Ortega's) body was flexed at the neck and torso."

### ***Legal Analysis***

This review was conducted pursuant to the joint protocol between this office and all San Diego law enforcement agencies calling upon the District Attorney to conduct an independent assessment of the circumstances surrounding the use of deadly force.

Under California law, peace officers may use deadly force to protect themselves from the threat of death or great bodily harm and to use reasonable force in making an arrest. California Penal Code section 835a allows an officer to use reasonable force to make an arrest and to overcome resistance by a person for whom he has reasonable cause to believe has committed a public offense. That section states the officer need not retreat or end his effort to make an arrest because of that person's resistance. Penal Code section 196 declares that homicide is justifiable when committed by public officers when necessarily committed in overcoming actual resistance in the discharge of any legal duty.

In accordance with Penal Code section 196, peace officers may use deadly force in the course of their duties under circumstances not available to members of the general public. We are mindful, however, that certain limits on the use of deadly force apply to peace officers. The U.S. Ninth Circuit Court of Appeals, in the case of *Scott v. Henrich* (9th Cir. 1994) 39 F.3d 912, relied on language from the U. S. Supreme Court when it delineated those circumstances under which deadly force may be used:

“[P]olice may use only such force as is objectively reasonable under the circumstances. An officer’s use of deadly force is reasonable only 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.’ All determinations of unreasonable 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.’” [Citations omitted.]

Irrespective of any laws applicable to situations where peace officers use deadly force in accomplishing their duties, the law of self-defense is available to any person. Homicide is justifiable in accordance with Penal Code 197 when resisting any attempt by a person to commit great bodily injury on or kill any person.

***Conclusions***

During this incident, Officer Jonathan McCarthy responded to an emergency call of a man beating his wife. When the officer spotted Mr. Ortega, he ran after and caught up to Ortega in a fenced and gated breezeway. A struggle ensued when McCarthy made efforts to arrest Ortega. During the struggle, the officer’s back-up revolver fell out of its holster and onto the pavement. When Ortega reached for the revolver, McCarthy released his hold on Ortega, rose to one knee and drew and pointed his pistol at Ortega. When Mr. Ortega reached for and tried grabbing McCarthy’s pistol, McCarthy fired twice. Ortega was struck by the gunfire and died at the scene.

Based on the totality of the circumstances and evidence available, we find it reasonable to conclude that Officer McCarthy fired at Mr. Ortega while attempting to arrest Ortega and in self-defense. Therefore, Officer McCarthy bears no criminal liability for his actions.

A copy of this letter, along with the materials submitted for our review will be retained in our files.

Sincerely,

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BONNIE M. DUMANIS  
District Attorney  
County of San Diego

BMD:jh  
cc: Captain Terrence McManus