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Chief Greg Terry
Bakersfield Police Department
1601 Truxtun Ave
Bakersfield, CA 93301

**Re: BPD Officer-Involved Shooting of Martiniano Jimenez on August 15th, 2022
Bakersfield Police Department Officer Jose Noguera
5726 Aquamarine Peak Way, Bakersfield CA
Documented in BPD Report 2022-160874**

Dear Chief Terry,

The Kern County District Attorney's Officer-Involved Shooting Committee has reviewed the reports and other materials submitted by your agency regarding the shooting noted above. The Officer Involved Shooting Committee reviews cases for criminal liability under state law. The Committee has completed its review. The findings are noted below.

Summary

On August 15th, 2022, Witness 1, his wife Witness 2 and their three juvenile children were asleep in their home on Aquamarine Peak Way. They were awoken at approximately 5:00 a.m. to their doorbell being repeatedly rung. They then heard someone, later identified as Martiniano Jimenez, kicking their front door repeatedly. They could hear and see (through a window) Jimenez kicking their door, throwing items at their house as well as their vehicle parked in the driveway in a clear attempt to damage the home and vehicle. Witness 1 attempted to talk to Jimenez through a window and Jimenez demanded to be let in the home. Fearing that Jimenez was trying to make entry and was possibly armed, Witness 1 exited the home to distract Jimenez while Witness 2 barricaded the front door and hid in a closet with the three children. Witness 2 called 911 and the Bakersfield Police responded.

Witness 1 confronted Jimenez in the driveway, where Jimenez was obviously intoxicated. Witness 1 and Witness 2 did not know Jimenez. Jimenez approached Witness 1 and threw rocks at him. The first Bakersfield Police Officer on scene was Officer Jose Noguera. Officer Noguera commanded Jimenez to

show his hands, and Jimenez did not comply. Instead, Jimenez rapidly approached officer Nogueta stating he was going to kill the officer and ignored the officer's commands stop, show his hands and back away. Officer Nogueta pointed his pistol at Jimenez, who was still remained undeterred. Jimenez threw a rock at Officer Nogueta, who fired one round from his pistol, missing the suspect. Nearly simultaneously to the shooting, a second officer, Andrew Radica, approached and deployed his taser two times (the first time was ineffective). The suspect was tased and taken into custody.

The ensuing investigation revealed that Jimenez was in the neighborhood attending a birthday party where he became heavily intoxicated, engaged in a physical fight with the host of the party, and then left the residence to go for a walk. Jimenez approached Witness 1's home where he attempted entry and began to vandalize the home and Witness 1's vehicles. This led to the confrontation with Witness 1 and Officer Nogueta and the subsequent officer involved shooting. Jimenez had a blood alcohol concentration of .143 (blood taken after arrest).

Legal Principles and Analysis

When Officer Nogueta confronted Jimenez, Jimenez had committed several crimes including, trespassing under Penal Code section 602, vandalism under Penal Code section 594, resisting arrest under Penal Code section 148(a)(1), resisting arrest with threat of force or violence under Penal Code section 69, and assault on a peace officer under Penal Code section 245(c), among others. An officer with reasonable cause to believe a crime is committed or a person is a danger to others may use reasonable force to affect arrest or detention, to prevent escape, or to overcome resistance. *Tennessee v. Garner* (1985) 471 U.S. 1; *Graham v. Connor* (1989) 490 U.S. 386; *see also* Penal Code section 835a(b). Officer Nogueta had probable cause to arrest Jimenez, and an obligation to put an end to the continuing crimes being perpetrated by Jimenez.

An officer may use deadly force upon another person only when the officer reasonably believes, based on the totality of the circumstances, that such force is necessary to defend against an imminent threat of death or serious bodily injury to the officer or another person. (CA Penal Code section 835a(c)(1)(A).) When evaluating the use of deadly force, one must decide whether the officers' beliefs and actions were objectively reasonable under all the circumstances known to him or her, as they appeared at the time. "The calculus of reasonableness must embody allowance for the fact that peace 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." *Graham v. Connor*, *supra* at pp.396-397. The law does not impose a duty to use less lethal options. "Requiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgment. In the heat of battle with lives potentially in the balance, an officer would not be able to rely on training and common sense to decide what would best accomplish his mission. Instead, he would need to ascertain the least intrusive alternative (an inherently subjective determination) and choose that option and that option only. Imposing such a requirement would inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves. (*Scott v. Henrich* (9th Cir.1994) 39 F.3d 912, 915). The appearance of danger is all that is necessary; actual danger is not. (*People v. Toledo* (1948) 85 Cal.App.2d 577 (*overruled on other grounds*); *People v. Jackson* (1965) 233 Cal.App.2d 639.) "The 'reasonableness' of a particular use of

force must be judged from the perspective of a reasonable officer on the scene rather than with the 20/20 vision of hindsight.” (*Graham v. Connor*, supra, 490 U.S. at p. 396.)

Officer Nogueta was faced with a hostile threat. Jimenez was a potential intruder, committing vandalism, trespass, and confronting a civilian. He was agitated, aggressive and undeterred by police presence, verbal commands, or displays of lawful force. Jimenez advanced on Officer Nogueta, had not been searched for weapons, and ignored Officer Nogueta’s commands to show his hands and back up. Jimenez threw rocks – a weapon -- at Officer Nogueta. Time is not in an officer’s favor when responding to the threat. Had officer Nogueta not fired his weapon he would have had to wait and see if the suspect produced additional weapons, hit him with a rock possibly causing death, great bodily injury, or incapacitation. Officer Nogueta at a minimum was going to have to engage the suspect hand to hand with his gun already unholstered thus ensuring a confrontation involving a deadly weapon. Jimenez was absolutely undeterred by verbal commands as well as the show of authority implicit in a uniformed officer responding to the open and obvious criminal acts being perpetrated by Jimenez. Additionally, Jimenez continued to advance upon Officer Nogueta after announcing his criminal intent – to kill the officer—and continued that advance despite the officer’s display of force of being armed and additional officers’ arrival. In this, Jimenez by his actions presented himself as an imminent threat of great bodily injury or death upon Officer Nogueta, and Officer Nogueta’s response of firing a single shot was reasonable and a justified use of potentially lethal force to respond to the imminent threat that Jimenez posed.

Conclusion

Based upon a review of the evidence submitted by the Bakersfield Police Department, Officer Jose Nogueta responded reasonably in self-defense to the threat presented. There is no state criminal liability for his use of deadly force under the circumstances of this case and the shooting is legally justified.

Sincerely,

Cynthia J. Zimmer
Kern County District Attorney