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**REPORT ON THE MAY 13, 2012
SHOOTING OF LUIS CONTRERAS**

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I. INTRODUCTION

On May 13, 2012, Napa Police Department Officer Thomas Keener was on duty when he contacted Luis Alejandro Contreras after observing suspicious activity, at night in an area known for high crime and recent drug activity, near the intersection of Parrish Road and Imola Avenue in unincorporated Napa County. When Luis Contreras began running, Officer Keener issued commands, "Police! Stop!" A foot pursuit ensued through four backyards and over fences. Officer Keener attempted to subdue and incapacitate Luis Contreras by verbal command, flashlight strikes and carotid restraint. During the struggle, Officer Keener fell backwards and Luis Contreras grabbed at the officer's flashlight and gun. Officer Keener feared for his life, drew his weapon and shot Luis Contreras in the head. The injuries were serious, but Luis Contreras survived.

The Napa Police Department invoked the Napa County Law Officer-Involved Fatal Incident Protocol. It was unknown whether or not Luis Contreras would survive his injuries at that time. This protocol sets forth the procedures and guidelines to be used by Napa County law enforcement agencies in the criminal investigation of specifically defined incidents involving law enforcement employees. Under this protocol, in order to eliminate the risk or appearance of conflicts of interest, an outside law enforcement agency is to investigate law enforcement employee-involved fatalities. Accordingly, members of the Napa County Sheriff's Department assumed responsibility for the investigation of this shooting incident. Detective Todd Hancock was tasked with leading the investigation. He presented a comprehensive report to the Napa County District Attorney's Office. Members of the Napa County District Attorney's Office were also assigned to participate in the investigation.

The role of the Napa County District Attorney's Office in a law enforcement employee-involved shooting is to review the investigation to determine if there exists any criminal liability on the part of the law enforcement employee; provide assistance to the investigating agency regarding legal issues; supplement the investigation when necessary; and, when appropriate, prosecute any persons believed to have violated criminal law.

Once the investigation is complete, the District Attorney completes a thorough review of the investigation and prepares a report summarizing the investigation and documenting the legal conclusions. This review incorporates lengthy testing by the Department of Justice that was necessary to reaching any conclusions.

Accordingly, this report includes a summary of facts surrounding the shooting of Luis Alejandro Contreras, statement of the applicable law, legal analysis, specific conclusions, and relevant exhibits. This report relies heavily on the police investigation, interviews, evidence, case law, forensic science, and forensic testing to support its conclusions.

II. SCOPE OF REVIEW

The sole purpose of this criminal investigation and review is to establish the presence or absence of any criminal liability on the part of the involved law enforcement employee.

The District Attorney does not examine issues such as compliance with the policies and procedures of any law enforcement agency, police training, or issues involving civil liability. This report should not be interpreted as expressing an opinion on those matters.

III. STANDARD OF REVIEW

The District Attorney, as the chief law enforcement official of Napa County, and as the person responsible for deciding what cases to prosecute within this jurisdiction, has the responsibility to review and approve the filing of all criminal cases. The discretion to exercise this function, i.e. to charge a person with a crime, is not without limit.

The standard to be applied by the District Attorney in filing criminal charges is accurately expressed in a publication of the California District Attorneys Association, entitled, *Uniform Crime Charging Standards*. It provides:

The prosecutor should consider the probability of conviction by an objective fact-finder hearing the admissible evidence. The admissible evidence should be of such convincing force that it would warrant conviction of the crime charged by a reasonable and objective fact-finder after hearing all the evidence available to the prosecutor at the time of charging and after hearing the most plausible, reasonably foreseeable defense that could be raised under the evidence presented to the prosecutor.

Additional restraint on the charging authority is found in *The California Rules of Professional Conduct, Rule 5-110*, which provides that an attorney in government service (the definition includes prosecutors) shall not institute or cause to be instituted criminal charges when the member knows or should know that the charges are not supported by probable cause.

Simply put, the standard for charging a crime is high because the burden of proof required at trial is quite high, i.e. proof beyond a reasonable doubt, the highest burden of proof under the law.

IV. SUMMARY OF FACTS

The following is a summary of facts intended to assist the reader in understanding the report and its conclusions. It is not a substitute for the volumes of reports, interviews, and

other evidence from which it is derived. It is, however, an accurate composite of what the District Attorney believes the material facts in this case to be.

A. CRIME SCENE AND WITNESS INTERVIEWS

On May 13, 2012, Napa Police Department Officer Thomas Keener was on routine patrol after a 9:00 pm briefing. He patrolled "Beat 1" by himself in a marked patrol car. At approximately 11:00 pm, Officer Keener noticed 25 year-old Luis Contreras (hereinafter "Contreras") walking out of a 7-11 parking lot located at Parrish Road and Imola Avenue. Officer Keener attempted to contact due to what he believed was suspicious behavior but Contreras fled without pause. A chase ensued over several fences of a small apartment complex. Each unit had a small fenced-in backyard. After a struggle, Officer Keener shot Contreras in the face with his Glock pistol. Contreras survived the shooting.

Napa Police Department Sergeant Scott Holliday was the shift supervisor and heard the initial foot pursuit broadcast and responded "Code 3" with Officers Koford and Deguilio to cover Officer Keener. Other graveyard shift patrol Officers Davis, Muratori, O'Mary and Madigral also responded. Officers heard a single "pop" sound and found Officer Keener in the backyard of 2186 Parrish Road. His firearm was in the "low-ready" position. He had blood on his uniform and face, and dirt debris on the back of his uniform. Officer Keener stated, "I shot him once". Contreras was laying face down and suspended on an overturned metal patio chair. Contreras was conscious and moaning. First aid was administered until the arrival of medical personnel. No details were discussed with Officer Keener by law enforcement. A crime scene was set up immediately.

The neighborhood was canvassed for witnesses. Some witnesses reported hearing what sounded like officer commands (i.e. "don't move", "get down", "don't run" and "stop") and statements from Contreras (i.e., "no, no, no" and scream). The homeowner where Contreras briefly hid saw Officer Keener with his flashlight on and told him that a person could hide in the laundry room. She described the officer as "excited" and "worried". She saw Contreras jump the fence and heard "stop, stop, stop", a gunshot, and "don't move, don't move".

Luis Contreras' wife was interviewed. She stated that Contreras uses drugs, specifically methamphetamine, and they separated in November, 2011. She was afraid of Contreras because he has an anger management problem and threatened her. He does not carry weapons. She believes he went to 7-11 to sell drugs.

A 7-11 surveillance camera shows a subject resembling Contreras loitering in front of 7-11 for ten minutes with a cell phone to his ear. At 11:00 pm, he heads northbound on Parrish Road. Nine seconds later, a black and white patrol car is seen turning left on to northbound Parrish Road from eastbound on Imola Avenue. The camera captured no other evidence.

The police dispatch tape begins at 22:59:50 with Officer Keener advising that he is in "foot pursuit". Approximately 30 seconds later, he tells dispatch that he is running through a

backyard immediately north of a 7-11. Officer Keener updates that the subject ran into a door in a residence. He is overheard asking, "Is someone in your house?" Sgt. Holiday instructs the officer to hold his position and wait for cover. Officer Keener acknowledges the instruction and puts out a description of the subject. He transmits that the suspect ran into a "laundry room" and he believed there was no exit. Officer Keener states "he is coming out". At 23:02:35, a male voice commands "get on the ground". AT 23:03:26, Officer Keener shouts "shots fired, suspect down".

B. LUIS CONTRERAS INTERVIEW

Luis Contreras was interviewed at the Napa Sheriff's Department on June 20, 2012 by Detective Todd Hancock and bilingual District Attorney Investigator Alicia Jaramillo. Attorney Jim Jones was present representing Contreras. Contreras reported having pain, vision problems, a broken jaw and difficulty breathing.

Contreras stated he was walking home on the night of the incident. He saw the patrol car and spotlight and he turned and ran. The officer said something, but he couldn't hear exactly what. Contreras fled because he was scared he would be arrested and sent to Arizona for deportation. He jumped 2-3 fences and hid in a room. He heard the officer order him to come out, so he came out and jumped another fence. Contreras was running out of steam when Officer Keener hit him on the head with a flashlight. He protested, "Please, no more". The officer hit him a lot of times with the flashlight. He tried to cover up to protect his head. He was unarmed. He was covered in blood and it was difficult to see. Contreras grabbed the flashlight (or the officer's hand) so he wouldn't be hit anymore. Officer Keener retrieved his pistol and shot him.

Santa Rosa Hospital Dr. Russell stated that one bullet went thru his face, fracturing his jaw and damaging his sinuses. There are bullet fragments near his right eye. There did not appear to be any brain damage.

C. OFFICER KEENER INTERVIEW

On May 18, 2012, Officer Keener agreed to submit to an interview at the Napa County Sheriff's Department. Investigating Officer Todd Hancock conducted the questioning. Police Officers Association attorney David Garcia was present. The interview was videotaped.

Officer Keener stated he was employed by the Napa Police Department for 18 months and received training in the use of force. On the day of the incident, he went to 7-11. Officer Keener was familiar with this area and knew it to be a high crime area where he previously made narcotics arrests. He noticed Contreras who was wearing a hoodie, would not look at him, failed to respond to "hey, what's up man?", and moved his hand from his sweatshirt to his pants pocket. Believing that he was dumping narcotics and/or contraband, he parked his patrol

car and intended to briefly detain Contreras to speak to him. Contreras ran and Officer Keener yelled “police stop” and initiated a foot pursuit. Contreras continued to run and ignored the command. He jumped the fence trespassing into the backyard of 2192 Parrish Road.

Officer Keener chased Contreras over several fences and thru four backyards. At one point, Contreras hid in a laundry room and the officer drew his gun and kicked the door. He believed that Contreras was hiding behind the door and notified dispatch. The residents came out and Officer Keener told them to remain in the house. Contreras exited the room with his hands raised and Officer Keener commanded “police, get on the ground.” Contreras sidestepped and jumped the fence. The officer followed him into the next backyard.

Contreras attempted to jump over the next fence and Officer Keener pulled him back down. Contreras took a fighting stance and grabbed around the officer’s waist. Officer Keener hit the man with his flashlight four times while issuing verbal commands. He believed his cover officers were far away and so he hit the man with his flashlight. It had no effect. He wondered if the man was on methamphetamine or just had a high tolerance for pain. When the officer gave additional commands to stop resisting and get on the ground, Contreras tried to jump the fence and Officer Keener pulled him down again. He tried a carotid restraint but this had no effect on Contreras. The struggle continued.

Officer Keener issued more commands and Contreras took a fighting stance. The officer hit the man three more times in the head with the flashlight. Contreras finally relented by pleading, “stop, please, no more”. Officer Keener thought he was bluffing but told him to “stop resisting”. He hit Contreras on the head again and the man fell to his hands and knees. When he started to get up again, Officer Keener hit him in the midsection two more times. Contreras appeared muscular (“V” shaped back) and continued to get up. The officer went behind to “prone him out”. Contreras continued to get up despite additional flashlight strikes. Officer Keener fell into the northwest corner on his back. Instead of taking the opportunity to flee, Contreras approached the officer who was still on his back.

Contreras grabbed the flashlight with two hands and pulled. Officer Keener used two hands to hold the flashlight. Officer Keener began to pull his gun out and Contreras grabbed the slide of the gun. He believed that Contreras intended to take his gun away and kill him with it. Contreras appeared very strong and Officer Keener was fatigued. The officer re-holstered his gun and the man pulled the flashlight out of his hands. Contreras swayed back and raised the flashlight as if he were going to strike the officer. Officer Keener pulled out his gun and shot Contreras in the left temple. He believed that Contreras was preparing to hit him with the flashlight. Officer Keener believed he could be seriously injured or killed if struck in the head with the flashlight. He also believed he could be incapacitated and Contreras could take his gun.

D. PHYSICAL EVIDENCE

The crime scene was processed by Napa Police Department Forensic Specialists Janet Lipsey and Tara Fahey, and Napa Sheriff's Department Evidence Specialist Donna Kimmel-Lake. No drugs, weapons or contraband were located at the scene. A cigarette pack with a rolled up \$20 bill was found in the room where Contreras briefly hid. Physical evidence is consistent with Officer Keener's description of events. Blood and scuff evidence indicate that Contreras attempted to scale the final fence. The plant in the northwest corner was smashed and flattened consistent with someone laying on it. One copper bullet jacket was embedded in the east fence, indicating a trajectory that originated in the northwest corner of the yard. Debris on the back of Officer Keener's uniform shirt and pants is consistent with someone who fell backwards on to the planter. Bloodstains were found on the flashlight, slide area of the gun, arm and shoulders of Officer Keener. This indicates a very close and sustained presence by Contreras.

Physical evidence was tested by the Department of Justice at laboratories in Santa Rosa, Sacramento and Richmond (Jan Bashinski DNA Laboratory). Both the blood of Officer Keener and Contreras were tested for alcohol. Both showed 0.00% alcohol. Toxicology screening by the Department of Justice showed that Contreras was positive for methamphetamine and Officer Keener was negative for all screened drugs. This report was issued on January 20, 2013. Officer Keener's gun, belt, belt keepers, holders and flashlight were tested for fingerprints by Latent Print Analyst Richard Johnson. No usable latent impressions were developed.

Officer Keener's Glock pistol was swabbed for potential touch DNA evidence. This was on areas that did not have bloodstain evidence. On December 10, 2012, Senior Criminalist Kyle Duke presented his results in a report. The same male profile from Luis Contreras was detected on the swab of potential touch DNA from the Glock pistol. The evidence profile is estimated to occur at random in the population among unrelated individuals with a frequency of approximately 1 in 93 quintillion for African Americans, 1 in 16 quintillion for Caucasians, and 1 in 5.3 quintillion for Hispanics. This provides strong evidence that Luis Contreras is the source of the non-blood touch DNA detected on the Glock pistol.

Some human dynamic factors should be considered when discussing the physical evidence. The lighting in the backyard was poor. Officer Keener's attention and vision was narrowly focused on the flashlight that was raised by Contreras. Officer Keener had seconds to react to the perceived danger and make a decision once Contreras grabbed his flashlight. After running, jumping fences, and struggling with Contreras, Officer Keener was in a high state of emotional intensity. The rapidly unfolding event required time pressured decision making.

V. STATEMENT OF THE LAW

The sole issue to be resolved in this review is whether the shooting of Luis Conteras was unlawful because the force used by Officer Thomas Keener was not reasonably necessary under the circumstances to accomplish a lawful law enforcement purpose; or, put another way, whether the shooting was lawful because the force used by Officer Thomas Keener was reasonably necessary under the circumstances to accomplish a lawful law enforcement purpose.

Several key principles of law apply to the question posed by these legal facts.

A peace officer has the authority to make an arrest of an individual upon probable cause to believe a crime has been committed. An individual has a duty to submit to lawful arrest.

A peace officer who makes or attempts to make an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose the right to self-defense by the use of reasonable force to effect the arrest, to prevent escape, or to overcome resistance.

A peace officer may detain an individual upon a reasonable suspicion that the person to be detained has engaged in criminal activity. The purpose for the detention is to allow the peace officer an opportunity to confirm or dispel the suspicion of criminal activity. The legal standard that applies to a lawful detention is somewhat less than what is required for an arrest. An individual has a duty to submit to a lawful detention.

A peace officer who has reasonable cause to believe that a person to be arrested has committed a public offense may use reasonable force to effect the arrest, to prevent escape, or to overcome resistance.

Any person, including a peace officer, has a right to use reasonable force in self-defense. A person can be said to have acted in lawful self-defense if all of the following exist:

- The person reasonably believed that person was in imminent danger of being killed or suffering great bodily injury;
- The person reasonably believed that the immediate use of deadly force was necessary to defend against that danger;
- The person used no more force than was reasonably necessary to defend against that danger.

When deciding whether the person's beliefs were reasonable, one must consider all the circumstances as they were known to and appeared to the person at the time and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the person's beliefs were reasonable, the danger does not need to have actually existed.

In a leading California Appellate decision, *People v. Aris* (1989) 215 Cal.App.3d 1178, 1188, the court defines what is meant by imminent harm as applied to the law of self-defense:

“The definition of imminence in California has long been well settled. ‘A person whose life has been threatened by another, whom he knows or has reason to believe has armed himself with a deadly weapon for the avowed purpose of taking his life or inflicting a great personal injury upon him, may reasonably infer, when a hostile meeting occurs, that his adversary intends to carry threats into execution. The previous threats alone, however, unless coupled at the time with an apparent design then and there to carry them into effect, will not justify a deadly assault by the other party. There must be such a demonstration of an immediate intention to execute the threat as to induce a reasonable belief that the party threatened will lose his life or suffer serious bodily injury unless he immediately defends himself against the attack of his adversary. The philosophy of the law on this point is sufficiently plain. A previous threat alone, unaccompanied by any immediate demonstration of force at the time of the reencounter [*sic*], will not justify or excuse an assault, because it may be that the party making the threat has relented or abandoned his purpose, or his courage may have failed, or the threat may have been only idle gasconde, [*sic*] made without any purpose to execute it. On the other hand, if there be at the time such demonstration of force ... [indicating] that his adversary was on the eve of executing the threat, and that his only means of escape from death or great bodily injury was immediately to defend himself against the impending danger...” (Citations omitted.)

VI. LEGAL ANALYSIS

One preliminary issue is whether Officer Keener had a reasonable suspicion to detain Contreras. It is our conclusion that an officer does have reasonable suspicion to detain a suspect he sees walking in a relatively high crime area at night, and who ignores the officer’s attempt to speak with him, puts his hand in his pocket and flees when the officer stops his car. See *People v. Wardlow* (2000) 528 US 119, *U.S. v. Smith* (2011) 633 f.3D 889, and *People v. Sousa* (1994) 9 Cal. 4th 224.

The paramount issue is whether Officer Keener acted in lawful self-defense when he shot Contreras in the head. It is reasonable to believe that he was in imminent danger of being killed or suffering serious bodily injury when Contreras had the flashlight raised over his head ready to strike Officer Keener who was lying on his back. It is reasonable to believe that

immediate use of his gun was necessary to defend against that danger. Officer Keener had no other options at that point. His cover officers were not on scene and Contreras had his flashlight. He used no more force than was reasonably necessary to defend against the danger. Officer Keener shot Contreras one time. Contreras fell, was administered first aid, and survived the tragic incident.

Another question is whether Contreras committed any crimes during this interaction. Contreras committed multiple violations of Penal Code Sections 602(m) (a misdemeanor) for trespassing into several private yards; and arguably violated Penal Code Sections 148(a)(1), 148(b) (a felony/misdemeanor “wobbler” for taking the flashlight from Officer Keener); Penal Code Section 148(d) (a felony/misdemeanor “wobbler” for attempting to take the gun from Officer Keener); and Penal Code Section 69 (a felony/misdemeanor “wobbler” for resisting with force or violence). Additionally, though a jury would be required to balance a variety of factors, Contreras resisted and delayed Officer Keener in the performance of his duties when he initially fled and ignored the officer’s directives (a misdemeanor violation of Penal Code Section 148 for resisting, obstructing or delaying a peace officer during the lawful performance of his duties).

VII. CONCLUSION

It is a well established community expectation that peace officers must respond when summoned at a time of crisis and not retreat in the face of adversity. While in the lawful performance of his duties, Officer Keener became involved in a highly unpredictable and rapidly evolving situation.

The implementation of deadly force was a reasonable and lawful response under the totality of the circumstances. Therefore, the actions of Officer Thomas Keener were reasonable under the circumstances he faced, were legally justified, and criminal charges against him are neither warranted nor supported by the evidence.

Finally, while criminal charges against Luis Contreras are legally justified, no such charges will be filed based on the totality of circumstances and the interests of justice.

The review detailed herein conducted within the scope and jurisdiction of the District Attorney is complete and final. This report and its conclusions have been given to both Napa Police Chief Richard Melton , Officer Keener’s employer, and James V. Jones, attorney for Luis Contreras. At this time, this report is being released to the media and made available for public scrutiny.

Respectfully,

Gary Lieberstein, Napa County District Attorney