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February 17, 2016

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U.S. Attorney's Office Southern District of California  
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**Re: Request to Investigate Pattern or Practice of Misconduct by San Diego Police Department**

Dear Ms. Gupta and Ms. Duffy,

The American Civil Liberties Union of San Diego and Imperial Counties and the community organizations listed below request that the Civil Rights Division of the Department of Justice (DOJ) open a pattern or practice investigation into multiple incidents of excessive force by the San Diego Police Department (SDPD), particularly incidents of force used against people with mental illness or suffering a mental health crisis where the SDPD may have failed to make reasonable accommodations for the person's disability.

**Incidents of Excessive Force in Recent Years**

A series of incidents raises serious concerns that SDPD has a pattern or practice of violating the fundamental rights of people with mental illness or experiencing a mental health crisis. These encounters are marked by the questionable use of lethal force in incidents that officers may have unnecessarily escalated. The incidents suggest that the SDPD has made an insufficient effort to supply necessary training and resources for responding to matters involving the mentally ill. The fact that the violent encounters span a period of years

indicates an inability or unwillingness on the part of the SDPD to learn from past incidents and to take measures that would help the department avoid similar incidents going forward, absent outside investigation and intervention. These problems are especially noteworthy in light of recent findings by the Department of Justice documenting longstanding leadership and accountability failures within the SDPD that have resulted in numerous high-profile scandals.<sup>1</sup>

**April 30, 2015:** Fridoon Rawshan Nehad was an immigrant from Afghanistan who had battled mental illness and post-traumatic stress disorder ever since being captured and likely tortured while serving in the Afghan army. He was walking in a dark alley when San Diego Police Officer Neal Browder, who was responding to a call about a disturbance involving Mr. Nehad, pulled into the alley without activating his siren or light bars, but with his headlights on and shining in Mr. Nehad's direction, likely making it difficult for Mr. Nehad to see or identify the officer. Officer Browder, who had mistakenly been informed that Mr. Nehad was carrying a knife, exited his vehicle and shot and killed Mr. Nehad within two or three seconds. While the SDPD initially claimed that a "knife-wielding man charged at [Officer Browder] prompting him to open fire," Mr. Nehad in fact held only a blue pen, not a knife, and never charged or threatened the officer who killed him. We know, only because the shooting was captured on video, that Mr. Nehad had come to a stop twenty-five feet away from Officer Browder when he was shot.<sup>2</sup>

The San Diego Police Department failed to interview Officer Browder immediately after the shooting, or to test him for drugs or alcohol. While Officer Browder initially admitted at the scene of the shooting that Mr. Nehad had no weapon, they cut off questioning at this point, and only resumed questioning five days later, after Officer Browder and his attorney had watched the video of the incident. The San Diego County District Attorney declined to press charges against Officer Browder, and there has been no public announcement indicating that he has received any disciplinary action from SDPD command.<sup>3</sup>

The District Attorney's actions betray a lack of impartiality in evaluating officer-involved shootings such as Mr. Nehad's. After initially resisting release of the surveillance footage that captured Mr. Nehad's killing, saying that it could lead the public to "rush to judgment" because it would be viewed out of context, District Attorney Bonnie Dumanis ultimately released an edited version of the video on December 22, 2015, just after U.S. District Judge William Hayes ruled that Mr. Nehad's family could release the footage on December 24.

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<sup>1</sup> See Community Oriented Policing Services, U.S. Department of Justice, "Critical Response Technical Assessment Review: Police Accountability—Findings and National Implications of an Assessment of the San Diego Police Department," March 17, 2015, available at <http://ric-zai-inc.com/Publications/cops-w0756-pub.pdf> ("gaps in policies and practices, a lack of consistent supervision at many levels, and a failure to hold personnel accountable . . . allowed misconduct to occur and go undetected for some time.").

<sup>2</sup> The most comprehensive coverage of the circumstances surrounding Mr. Nehad's death has been archived at <http://www.voiceofsandiego.org/tag/fridoon-rawshan-nehad/>.

<sup>3</sup> Letter from District Attorney Bonnie Dumanis to San Diego Police Chief Shelly Zimmerman, November 9, 2015, available at <http://www.voiceofsandiego.org/wp-content/uploads/2015/11/Midway-OIS-Letter-FINAL-11-9-15.pdf>.

While Dumanis had justified her earlier refusal to release the video by saying that “We’re not going to have a trial in the media,” she in fact tried Mr. Nehad in the press, not only suggesting that he was responsible for his own death, but going so far as to show a completely unrelated video “of someone else twirling a butterfly knife to help visualize how menacing Mr. Nehad might have looked as he twirled a pen.”<sup>4</sup>

**February 16, 2015:** When a naked Philip McMahon, 27 years old, started pounding on his neighbor’s window in the Mira Mesa neighborhood of San Diego, the home’s residents quite reasonably called the police. By the time an officer arrived, McMahon had broken the window, and was standing in a pool of blood and glass. The San Diego Police Department claims that McMahon charged the officer, whose Taser was ineffective. The officer shot McMahon, and the bullet shattered his collarbone and tore through his jugular vein. McMahon survived the incident, likely due only to the efforts of his co-workers at the hospital where he was employed.<sup>5</sup>

**July 13, 2014:** A family member called the police when 21-year-old Ja Ma Lo Day, a Burmese refugee who had struggled with mental illness, threatened to kill family members. By the time officers arrived, Day’s family members had left the home, and Day was inside, alone, and holding a knife and stick. Police had difficulty speaking with Day, who understood little English. But, according to a family friend who knew Day from her volunteer work with a refugee assistance organization, the police failed to use a translator or bull horn to communicate with him, and instead broke down the door and sent in a police dog within twenty minutes of their arrival at the scene. Day responded to the police by grabbing a machete and threatening to kill the officers when they confronted him. After Day injured the dog with his machete, two officers fired at Day, who suffered multiple gunshot wounds and died of his injuries. Mr. Day’s sister was devastated by the thought that, if she hadn’t called 911, Mr. Day “would still be alive.”<sup>6</sup>

**May 20, 2010:** Nathan Manning, who had a long history of mental illness and had stopped taking his medication was killed by San Diego Police Detective Edward Jones. There is a serious discrepancy between the way the events leading up to Manning’s death have been portrayed by the San Diego Police Department and District Attorney’s office, on one hand, and by Manning’s family on the other.

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<sup>4</sup> Scott Lewis, “The Trial of Fridoon Nehad,” *Voice of San Diego*, January 4, 2016, available at <http://www.voiceofsandiego.org/topics/public-safety/the-trial-of-fridoon-nehad/>.

<sup>5</sup> Pauline Repard and Mike Peterson, “Are Cops Prepared to Deal with Mentally Ill?,” *San Diego Union-Tribune*, September 6, 2015, available at <http://www.sandiegouniontribune.com/news/2015/sep/06/police-mentally-ill-training-pert/> (discussing McMahon shooting in context where “the number of mental health-related calls to law enforcement has gone up 62.3 percent since 2008 for the San Diego’s Sheriff Department and 100 percent for the San Diego Police Department.”); Paul Wolf, “Ken and Cheryl Scott, and Their Son Phil,” *Generosity blog*, <https://www.generosity.com/medical-fundraising/ken-and-cheryl-scott-and-their-son-phil>.

<sup>6</sup> Debbi Baker and Lyndsay Winkley, “Man Killed by Police in Machete Attack ID’d,” *San Diego Union-Tribune*, July 14, 2014; *see also* Sandra Phillips, “Mentally Ill Refugee Killed by Police,” *Fox 5 San Diego*, July 14, 2014, available at <http://fox5sandiego.com/2014/07/14/mentally-ill-refugee-killed-by-police/>.

The SDPD and DA say that Detective Jones came to the scene of a violent fight between Manning and his roommate, Tom Montes. They claim that Detective Jones initially attempted to calm Manning down, but that this attempt failed. According to this account, Detective Jones resorted to lethal force only after Manning charged him, and began to choke him, and only as he became afraid that he would lose consciousness. San Diego District Attorney Bonnie Dumanis concluded that “Detective Jones fired at Mr. Manning in self-defense and he therefore bears no criminal liability for his actions.”<sup>7</sup>

In contrast, Mr. Montes has told local media that he and Mr. Manning were not fighting when Detective Jones arrived, and Mr. Montes’ family has emphasized that, while he had bipolar disorder and manic episodes, those episodes never turned violent. The family reported being frustrated by alleged inconsistencies in the SDPD’s press release and media accounts, and by the SDPD’s refusal to provide them with a copy of the police report.<sup>8</sup>

**April 26, 2010:** Bradford Sarten was diagnosed with mental illness in the early 1980s, and had been committed numerous times in the years between his initial diagnosis and his death decades later. On the day of his death, Mr. Sarten’s family members called the SDPD to their home to evaluate Mr. Sarten’s mental health. When the officers entered the home and saw Mr. Sarten in the kitchen, they ordered him to come out. He emerged with a knife in his hands, and, according to San Diego police Lieutenant Kevin Rooney, he told the officers that they would have to kill him. When he “advanced toward the officers with the knife,” one officer fired his gun. Sarten died at a hospital.<sup>9</sup>

### **These Violent Incidents Warrant a Department of Justice Investigation**

The Violent Crime and Control and Law Enforcement Act of 1994, 42 U.S.C. 14141 (“Section 14141”) authorizes the United States Attorney General to conduct investigations to eliminate a “pattern or practice of conduct by law enforcement officers ... that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.” The DOJ’s website explains that the statute “prohibits law enforcement agencies from regularly violating existing constitutional protections against police misconduct, such as excessive force, false arrests, unreasonable searches or seizures, and intentional racial or ethnic discrimination.”

The United States recently took the position that “[t]o comply with Title II [of the Americans with Disabilities Act of 1990 (ADA)] during an arrest, public entities must make

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<sup>7</sup> Letter from District Attorney to San Diego Police Chief William Lansdowne, September 22, 2010, available at <http://www.sandiego.gov/police/pdf/2010/100922nathangable.pdf>.

<sup>8</sup> Dorian Hargrove, “Mental Illness Meets a Bullet in Normal Heights,” *San Diego Reader*, November 23, 2010, available at <http://www.sandiegoreader.com/news/2010/nov/23/city-light-normal-heights/>.

<sup>9</sup> “Jose Luis Jiménez and Karen Kucher, Police Shoot, Kill Man Armed with Kitchen Knife,” *San Diego Union Tribune*, April 26, 2010.

reasonable modifications to accommodate an individual's disability.”<sup>10</sup> This position is in accord with that of the majority of circuits that have addressed the issue.<sup>11</sup>

Police violate Title II where “although [they] properly investigate and arrest a person with a disability for a crime unrelated to that disability, they fail to reasonably accommodate the person’s disability in the course of investigation or arrest, causing the person to suffer greater injury or indignity in that process than other arrestees.”<sup>12</sup> Depending on the circumstances, reasonable accommodations might include, for example, attempting to sufficiently defuse a potentially violent situation or taking advantage of the “opportunity to wait for backup and to employ less confrontational tactics.”<sup>13</sup>

As the Policy Council on Law Enforcement and the Mentally Ill has noted, “Families of persons experiencing mental health crises need to know that officers will not deliberately engage in behavior that is reasonably likely to provoke a violent response from the person in need of help.”<sup>14</sup> Given the growing numbers of encounters between police and the mentally ill or people experiencing a mental health crisis in San Diego, it is crucially important to provide oversight that will ensure that the SDPD avoids practices that might “dissuade [those] who need treatment from seeking help.”<sup>15</sup>

The San Diego County District Attorney’s Office recently commissioned a study that found that, of the 367 suspects shot by law enforcement officers in the county from 1993 to 2012,

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<sup>10</sup> *Brief for the United States as Amicus Curiae* at 10, 14, *City & Cty. of San Francisco, Calif. v. Sheehan*, 135 S.Ct. 1765 (2015). *See also Sheehan*, 135 S.Ct. at 1773 (“San Francisco, the United States as *amicus curiae*, and Sheehan all argue (or at least accept) that § 12132 [of the ADA] applies to arrests. No one argues the contrary view.”).

<sup>11</sup> *See Sheehan v. City & Cty. of San Francisco*, 743 F.3d 1211, 1217 (9th Cir.) *rev'd in part on other grounds, cert. dismissed in part*, 135 S. Ct. 1765.

<sup>12</sup> *Id.* at 1232.

<sup>13</sup> *Id.*; *see also Waller ex rel. Estate of Hunt v. Danville, VA*, 556 F.3d 171, 177 (4th Cir. 2009) (among the things considered in the ADA accommodation inquiry are whether officers “acted . . . in a manner that escalated tensions” or “attempted to calm the situation .”).

<sup>14</sup> *Brief of Amicus Curiae the Policy Council on Law Enforcement and the Mentally Ill* at 11, *Sheehan*, 135 S.Ct. 1765 (2015).

<sup>15</sup> *Whyte v. Connecticut Mut. Life Ins. Co.*, 818 F.2d 1005, 1010 n.13 (1st Cir 1987). It is important to note that the incidents enumerated in this letter may not be the only recent cases of SDPD excessive force deployed against the mentally ill. These incidents involve people that we *know* were suffering from mental illness or people experiencing a mental health crisis at the time of their encounters with the SDPD. However, nationally, at least one quarter and as many as one half of all fatal encounters with the police involve mental health disorders, which are frequently unreported. *See* Treatment Advocacy Center, “Overlooked in the Undercounted: The Role of Mental Illness in Fatal Law Enforcement Encounters,” December 2015, available at <http://www.tacreports.org/storage/documents/overlooked-in-the-undercounted.pdf>. There is no reason to think that San Diego is an outlier in this regard, so it is quite likely that we do not know the full extent of the problem that is partially documented in this letter.

123 had a documented mental health illness, were “exhibiting unstable behavior,” or both.<sup>16</sup> At least 67 incidents, or 19 percent were identified as “suicide-by-cop, meaning it appeared the subject wanted police to shoot him or her.”<sup>17</sup> Presumably, this label is meant to apply to the killing of Bradford Sarten, discussed above, and to deaths like his.

The District Attorney’s use of the phrase “suicide-by-cop” is troubling not only because it attaches all agency and responsibility to the *targets* of police violence, but also because it provides unwarranted justification for Ms. Dumanis’ public statements about police violence (as in the Fridoon Nehad case), and her apparent reluctance to prosecute officers who employ excessive force, regardless of the circumstances and evidence. In a climate in which the District Attorney’s office has publicly tried victims of police violence, blaming them for their own deaths, a Department of Justice investigation is the only way of ensuring public confidence that there is meaningful review of SDPD’s use of lethal force against persons with mental illness.

The DOJ is well-equipped to investigate the cause of recurring and troubling uses of force against the mentally ill and people experiencing mental health crises. The investigation should determine why the police initiated or escalated the confrontations; whether and why the officers perceived a threat from certain individuals; whether officers are properly trained in de-escalation tactics in responding to perceived law violations; whether SDPD supervisors promptly and properly gathered the evidence and fully investigated where excessive force has been alleged; what caused contradictions between the initial statements of the officers involved and other evidence; whether the City and SDPD have allocated sufficient resources to Psychiatric Emergency Response Teams (PERT) or other teams that are specifically designed and trained to respond to incidents involving mental health issues; and whether officers have made reasonable accommodations for people’s disabilities before employing force, lethal or otherwise.<sup>18</sup>

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<sup>16</sup> Tarryn Mento, “Study by District Attorney’s Office has Wealth of Information, Little Analysis,” KPBS, February 19, 2015, available at <http://www.kpbs.org/news/2015/feb/19/san-diego-officer-involved-shooting-report-has-wea/>.

<sup>17</sup> *Id.* (internal quotation marks omitted); see also Kelly Hessedal, “Major Study of Local Officer-Involved Shootings Released,” CBS8.com, February 19, 2015 (“Nineteen percent of the officer-involved shootings were ‘suicide-by-cop,’ Dumanis said.”), available at <http://www.cbs8.com/story/28154565/major-study-of-local-officer-involved-shootings-released>.

<sup>18</sup> According to a 2014 KQED report, the SDPD has adopted a 24-hour PERT training, “Mental Health Training for Police Officers Helps Defuse Crises,” KQED News, July 25, 2014, available at <http://ww2.kqed.org/stateofhealth/2014/07/25/mental-health-training/>. If this training is mandatory for all officers, it represents improvement since 2010, when the SDPD acknowledged that mental illness was a growing problem, but hadn’t yet committed to anything more than encouraging officers to attend PERT classes. Keegan Kyle, “Police: More Calls Involve Mental Illness,” *Voice of San Diego*, February 4, 2010, available at <http://www.voiceofsandiego.org/topics/public-safety/police-more-calls-involve-mental-illness/>. Still, 24 hours of training compares unfavorably with the 40 hours of training required by the San Francisco Police Department and law enforcement agencies in Monterey and Ventura. “Mental Health Training,” *supra*. Regardless of how many hours of training are required of all officers, recent incidents suggest that whatever training officers receive may be inadequate.

We request that the Civil Rights Division of the Department of Justice promptly investigate whether the San Diego Police Department has engaged in a pattern or practice of civil rights violations by using unnecessary and excessive force against San Diego residents in violation of federal law. The DOJ has the authority and tools to investigate these troubling incidents; to evaluate the SDPD's policies, practices, training and supervision; and to provide technical assistance, advice and guidance to the City of San Diego. Through such an investigation, the DOJ can significantly improve equality, fairness, and public safety throughout San Diego.

Sincerely,



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