



PUBLIC RELEASE MEMORANDUM

Date: June 2, 2021

Subject: **Fatal Officer-Involved Incident**

Involved Officers: Officer Daryl Avila,
Fontana Police Department

Corporal Thomas Borden,
Fontana Police Department

Officer Casey Mutter,
Fontana Police Department

Officer Edgar Perez,
Colton Police Department

Officer Shannon Vanderkallen,
Fontana Police Department

Involved Subject: Alonso Malagon (DOB 02/23/1969)
Subject's Residence: Fontana, CA

Incident Date: May 28, 2020

Case Agent: Detective Malcolm Page
San Bernardino County Sheriff's Department

Agency Report #: 602000091

DA STAR #: 2020-57748

TABLE OF CONTENTS

PREAMBLE 3

FACTUAL SUMMARY 3

STATEMENTS BY LAW ENFORCEMENT..... 6

 FPD Patrol Officers 6

 Officer Casey Mutter 7

 Officer Daryl Avila 9

 Officer Edgar Perez 10

 Corporal Thomas Borden 12

 Officer Shannon Vanderkallen 14

 Additional IVS Personnel..... 16

 SBCSD Criminalists 17

STATEMENT BY CIVILIAN WITNESSES 17

 Victim 18

INCIDENT AUDIO/VIDEO 19

 Victim’s 9-1-1 Call..... 19

 Body Worn Camera Recordings 19

 Radio Dispatch Recordings..... 21

 Audio Recording of Officer-Involved Shooting 22

INCIDENT SCENE INVESTIGATION 24

DECEDENT..... 25

 Autopsy 25

 Criminal History..... 26

APPLICABLE LEGAL PRINCIPLES 26

ANALYSIS 31

CONCLUSION 39

PUBLIC RELEASE MEMORANDUM

Fatal Officer-Involved Incident

DA STAR # 2020-57748

June 2, 2021

Page 3

PREAMBLE

The summary of this fatal incident is drawn from a submission of materials prepared by the San Bernardino County Sheriff's Department (SBCSD). The case agent for this submission was SBCSD Detective Malcolm Page.

The submission reviewed included the following: reports of law enforcement witnesses, transcripts of interviews of involved law enforcement, police dispatch audio recordings, an audio recording of the officer-involved shooting, officer body-worn camera (BWC) recordings, video and/or audio recordings of law enforcement and civilian witness interviews, law enforcement photographs, a three-dimensional image scan of the incident scene and scientific investigation reports.

FACTUAL SUMMARY

On May 28, 2020, at approximately 3:17 p.m., police officers of the Inland Valley SWAT (IVS) team were accosted by 51-year-old Alonso Malagon at Mr. Malagon's Fontana residence. During this contact, Fontana Police Department (FPD) Officer Daryl Avila and Colton Police Department (CPD) Officer Edgar Perez fired their duty weapons at Mr. Malagon. Less than lethal force options were also used against Mr. Malagon during the same incident. Ultimately, Mr. Malagon sustained two gunshot wounds and died at the scene.

About five hours prior to the shooting incident, Victim called 9-1-1, and reported "my brother wants to kill me." Victim explained to the dispatch operator that he was disabled and wheelchair-bound, yet his brother attempted to hit him with a crowbar and metal spike. FPD officers were dispatched to the scene at approximately 10:24 a.m. Two marked FPD patrol units with two uniformed officers in each unit arrived at the scene—a quiet residential area, in less than ten minutes.

One of the first responders—Officer Andrew Larsen and his field training officer, Officer Joshua Rodriguez, established phone contact with Victim and learned that Mr. Malagon had threatened to kill Victim and tried to stab Victim with a metal spike. Victim relayed that he was able to lock himself in his garage bedroom to avoid further attack. However, Victim was unable to free himself due to his physical infirmities and begged officers to rescue him.

The officers on scene learned quickly that any attempt to try to communicate with Mr. Malagon would be complicated by the fact that there were no telephone lines into the house, nor did Mr. Malagon have a cellular phone. At approximately 10:51 a.m., Officer Larsen was directed to begin making public address ("PA") announcements over the loudspeaker of his patrol unit, which was parked across the street from the subject residence. With the assistance of Victim, the volume of the PA announcements was confirmed to be audible inside of the residence. Officer Larsen made six to eight announcements demanding that Mr. Malagon come outside to talk to officers.

PUBLIC RELEASE MEMORANDUM

Fatal Officer-Involved Incident

DA STAR # 2020-57748

June 2, 2021

Page 4

Receiving no response to the initial PA announcements, a team of five FPD officers approached the subject residence to further attempt contact with Mr. Malagon and extricate the Victim. At least four of the officers who approached the residence wore dark blue department-issued FPD uniforms with FPD patches on both shoulders and a metal badge on the left chest. The officers went around to the rear (north) of the residence where they identified an open window. The officers stood outside the open window and yelled at Mr. Malagon to come outside. In response, Mr. Malagon closed the open window. An FPD officer repeated "Alonzo, come out man, we know you're here." The officers received no audible response, nor did they see Mr. Malagon.

Meanwhile, Victim was still sheltering in the garage. Victim alerted officers that he could be rescued through a pedestrian garage door on the east side of the residence. Mr. Malagon was heard kicking or shutting doors on the interior of the garage as officers planned to make entry. Subsequently, Victim assured officers that Victim was the only person in the garage. Officers pried an external metal security door open and asked Victim to open the door behind it to let himself out. Victim attempted to open the interior door but found it too was jammed shut. Officers rammed the jammed door to extricate Victim from the garage at approximately 11:11 a.m. FPD officers then entered the garage to make sure no assailants lurked there; they announced "police department" several times as they did so. No other persons emerged and FPD officers kept watch at that exterior pedestrian garage doorway.

While Victim provided additional information to FPD officers at the scene, FPD Lieutenant Joseph Brian Binks and FPD Sergeant Jon Vantuinen arrived to assess the situation. Continuous PA announcements were made from a marked FPD unit parked in front of the subject residence, demanding for Mr. Malagon to come outside and surrender to police. Mr. Malagon continued to barricade himself. After discussing with FPD personnel on scene, Lieutenant Binks, who was also IVS Commander, determined that it was appropriate for IVS teams to respond. IVS is a regional team comprised of police officers from the cities of Fontana, Colton and Rialto who receive regular specialized training in contacting barricaded subjects.

At approximately 11:45 a.m., two IVS teams were called to respond to the incident scene involving Mr. Malagon. IVS team operators were advised that Mr. Malagon barricaded himself and was wanted for violation of Penal Code sections 245(a) [assault with a deadly weapon] and 422 [criminal threats]. When an FPD armored vehicle arrived at the scene, it replaced the FPD unit to the front of the residence and resumed PA announcements. Mr. Malagon neither complied nor made any verbal response to PA announcements. As IVS personnel trickled to the scene, senior IVS personnel formulated a plan to establish contact with Mr. Malagon by placing a "throw phone" into the subject residence.

Elsewhere, FPD Detective Robert Miller prepared a search warrant for the subject residence to locate and seize Mr. Malagon and his weapon. Detective Miller's warrant was authorized by a San Bernardino County Superior Court Judge at approximately 12:47 p.m.

PUBLIC RELEASE MEMORANDUM

Fatal Officer-Involved Incident

DA STAR # 2020-57748

June 2, 2021

Page 5

At approximately 1:11 p.m., a team of eight IVS operators primarily identified as the “Green Team” began its approach to the residence under the leadership of Sergeant Vantuinen. The Green Team entered the garage of the subject residence through the same east access door that Victim was extricated from earlier that day. Once inside, the team found the interior garage space to be small—roughly eight feet by eight feet, and the door to the primary interior living space of the residence was locked. The Green Team took steps to open the locked door by removing its hinge pins and prying the door off its hinges. Operators intended to be as covert as possible to avoid a confrontation with Mr. Malagon and to minimize damage to the residence. Removing the pins took approximately three minutes and just as the team was ready to lay the door down like a draw bridge, Mr. Malagon came with running force over the top of the door. While doing so, Mr. Malagon swung a 30” metal bar—approximately the size of a quarter in diameter, sharpened to a point on one end and with a flattened pry edge on the other. The door came down over Rialto Police Department (RPD) Officer Martin DeSchepper as Mr. Malagon struck Officer Perez over the top of his helmeted head. Officer Perez, who was holding up the door, was stunned by the strike and fell. Mr. Malagon continued to push against the door and a brief pushing match with the Green Team ensued. Several officers ordered Mr. Malagon to show his hands and put his weapon down. Officer Daryl Avila who was to the east of the door frame was able to push Mr. Malagon back with the muzzle of his gun and away from the doorway. Mr. Malagon then retreated to the interior of the house.

Green Team operators began to pursue Mr. Malagon into the house before Sergeant Vantuinen called them back and asked that FPD K-9 Unit Officer Casey Mutter and his police dog—Wyatt, be deployed instead. Officer Mutter deployed Wyatt. The Green Team moved forward behind Wyatt, as Wyatt attempted to bite Mr. Malagon. Mr. Malagon proceeded to repeatedly wallop Wyatt in the head with his metal bar. Mr. Malagon, exhibiting no intent to surrender, then moved towards Green Team operators while swinging his weapon. Within the span of a second, FPD Corporal Thomas Borden and FPD Officer Shannon Vanderkallen each fired a less-lethal 40 mm impact rubber round and Officers Perez and Avila each fired one rifle round at Mr. Malagon. Mr. Malagon immediately dropped to the ground thereafter. Approximately 30 seconds passed from the time Mr. Malagon rushed the garage door to the time that any shots were fired.

An IVS volunteer physician who was standing-by outside the east pedestrian door to the garage began attending to Mr. Malagon less than a minute after shots were fired. However, Mr. Malagon sustained gunshot wounds that were grave in nature. A second IVS volunteer physician at the scene pronounced Mr. Malagon’s death four minutes later, at 1:21 p.m.

Officer Perez was examined for head trauma immediately after the incident. No apparent trauma was discovered at the time. However, in the days thereafter, Officer Perez reported feeling notable head, shoulder, neck and arm pain as a result of being struck by Mr. Malagon.

After an examination of the scene and the collection of evidence by SBCSD Crime Scene Specialists, two eXact iMpacT 40 mm less lethal fired cartridge casings (FCC’s) and two associated rubber projectiles were located. One 5.56 mm and a .223 caliber FCC were also recovered. The weapons used by Officers Perez and Avila were collected. After examination by

PUBLIC RELEASE MEMORANDUM

Fatal Officer-Involved Incident

DA STAR # 2020-57748

June 2, 2021

Page 6

a SBCSD Scientific Investigations Division Criminalist, Officers Avila and Perez's weapons were determined to be regularly functioning Colt select-fire 5.56x45mm caliber rifles.

A SBCSD Forensic Pathologist determined after an autopsy that Mr. Malagon suffered two gunshot wounds, one entering at the mid-chest and the other entering at the top of the left shoulder. The cause of death was determined to be due to these gunshot wounds. The forensic pathologist opined that Mr. Malagon's wounds would have resulted in his death within minutes.

STATEMENTS BY LAW ENFORCEMENT OFFICERS¹

FPD Patrol Officers who responded to the initial call for service were interviewed on the evening of the shooting incident by SBCSD detectives.

Officer Andrew Larsen was a trainee officer at the time and responded to the scene in a marked FPD unit with his field training officer—Officer Joshua Rodriguez. Officers Larsen and Rodriguez responded to the scene after being dispatched on a residential disturbance involving a “51-50” subject armed with a crowbar. Officer Larsen stated that he contacted Victim by phone after arriving at the scene. Victim told Officer Larsen that his brother—Mr. Malagon, turned off his electricity, told Victim he was going to kill him and tried to stab Victim with a spike. Officer Larsen stated that Victim was crying and told him, “I want you to rescue me from my brother. He wants to kill me. He already tried. He's going to kill me. You guys need to help me.” From his conversation with Victim, Officer Larsen determined that Mr. Malagon had committed “two pretty serious felonies”—violations of Penal Code section 245, for attempting to stab Victim with a spike, and section 422, for threatening to kill Victim.

Officer Larsen stated that prior to attempting to extricate Victim from the house, that he made six to eight PA announcements from his patrol unit parked across the street from the house. Officer Larsen confirmed with Victim over the phone that the announcements were audible inside the house.

Officer Rodriguez stated that while Officer Larsen made announcements asking that Mr. Malagon come out, that the curtains west of the front door moved. However, Mr. Malagon did not communicate with officers or come outside. Thereafter, Officer Rodriguez and several other FPD officers went to the back of the residence, where Officer Rodriguez saw a kitchen window and blinds were partially open. Officer Rodriguez stated that officers yelled for Mr. Malagon to exit, but that the window thereafter was slammed shut and the blinds were closed. Officer Rodriguez concluded that Mr. Malagon heard officers. After confirming with Victim that he could not let himself out, Officer Rodriguez stated that officers forced the pedestrian doors open

¹ Herein is a summary only. All shooting and witness officers were Fontana Police Department officers and/or on-duty pursuant to an Inland Valley SWAT assignment. The lethal force investigating officers were from the San Bernardino County Sheriff's Department. All reports submitted were reviewed, but not all are referenced here. No law enforcement personnel became aware of or used any civilian person's name until investigations revealed it, or as otherwise specified. All references to any witness or Alonso Malagon by name are made here for ease of reference.

PUBLIC RELEASE MEMORANDUM

Fatal Officer-Involved Incident

DA STAR # 2020-57748

June 2, 2021

Page 7

at the east side of the garage and extricated Victim from there.

Officer Mark Tucker, who assisted with rescuing Victim from the garage, stated that he believed that Mr. Malagon knew police officers were outside and did not want police contact.

Officer Daniel Wells, who was Officer Tucker's partner and also present during the effort to rescue Victim, stated that after Mr. Malagon shut the rear window and blinds, it appeared to Officer Wells that Mr. Malagon was fortifying the entry points and trying to limit visibility into the house while barricading himself. Officer Wells recalled that Victim confirmed that it was Mr. Malagon who kicked or slammed the interior garage door shut to keep the officers from coming inside.

At the time Officers Larsen, Rodriguez, Tucker and Wells responded to the scene, they each wore dark blue department-issued uniforms with a FPD metal badge on the left chest, a name plate on the right chest, and FPD patches on both shoulders.

Officer Casey Mutter gave a voluntary statement to SBCSD Detectives Tony Romero and David Carpenter in the presence of Officer Mutter's attorney on May 28, 2020, approximately seven hours after the shooting incident. Officer Mutter did not preview any audio or video of the incident prior to his interview. At the time of the shooting incident, Officer Mutter had been a Fontana police officer for 13 years. Officer Mutter's partner was Wyatt, a police service dog. Officer Mutter and Wyatt trained together as a K-9 Unit for approximately four years.

During his contact with Mr. Malagon, Officer Mutter wore a department-issued black ballistic plate carrier vest with the word "POLICE" in large white block letters on the front, "C.MUTTER" on the right chest and a FPD cloth badge on the left chest. "POLICE" and "K-9" appeared in large white block letters on the back of the vest, and near the back neck was, "C.MUTTER" in smaller block letters. Officer Mutter wore a short-sleeved shirt under his tactical vest and dark athletic shorts. Officer Mutter carried a department-issued Glock 22, .40 caliber semi-automatic pistol that the officer had previously loaded with 16 rounds. Officer Mutter did not fire his handgun during this incident.

Additional relevant portions of Officer Mutter's statement can be summarized as follows:

Officer Mutter heard the FPD radio dispatch regarding the Victim's call for service and that Victim had been rescued from the garage. Officer Mutter arrived at the scene with Wyatt and was told that Mr. Malagon threatened to kill his wheelchair-bound brother while also trying to hit him with a crowbar. Officer Mutter parked his marked FPD unit to the front of the residence and Corporal Hunt used Officer Mutter's unit to make PA announcements. The announcements included an order that Mr. Malagon come out with his hands up and an announcement that the police were there. Officers in the back yard confirmed that PA announcements were loud and clear. Officer Mutter took a position to the southwest side of the residence, in the event Mr. Malagon presented himself for surrender at the front door. Mr. Malagon never responded to PA announcements.

PUBLIC RELEASE MEMORANDUM

Fatal Officer-Involved Incident

DA STAR # 2020-57748

June 2, 2021

Page 8

While at the scene, Officer Mutter learned that the SWAT team had been activated. When the SWAT armored vehicle (“bearcat”) arrived, Officer Mutter moved his unit across the street and the bearcat took its place to the front of the residence. The bearcat resumed making announcements and sounded a very loud and annoying siren and horn, in addition. Sometime thereafter, Sergeant Vantuinen told Officer Mutter to join the entry team on their approach. Sergeant Vantuinen explained that the team was going to enter the house via the garage to insert a robot and phone to establish communication with Mr. Malagon.

Officer Mutter approached the residence towards the back of the “stack” of eight to ten SWAT team members. Officer Mutter was still outside of the side garage door when he heard a door crash inside the garage. Officer Mutter also heard commands were being given, such as “drop the weapon” and “get down.” Shortly thereafter, Officer Mutter heard “dog up,” to which he responded by moving inside the garage with Wyatt on a short leash.

As Officer Mutter entered the interior from the exterior, Officer Mutter explained that his eyes had to adjust to the change in light, but that to his right he noticed a person with a “big metal stick” that would have been consistent with the reported crowbar that Mr. Malagon used. Officer Mutter made sure that Wyatt “target locked” on Mr. Malagon and then said, “*fass*”—the command Wyatt responded to by biting.

At the time he released Wyatt, Officer Mutter stated that he was behind two to four other officers and that Mr. Malagon was about seven to eight feet away from those officers. Based upon Mr. Malagon’s stance, Officer Mutter believed that Mr. Malagon was not giving up, intended to fight and would use his crowbar to hit officers. Officer Mutter, himself, was about 10 feet back from Mr. Malagon. Officer Mutter understood that Mr. Malagon posed a threat to officers with his edged weapon. Officer Mutter believed that if he had waited to release Wyatt, Mr. Malagon would have struck or killed an officer with his crowbar. At the time Officer Mutter deployed Wyatt, he did not know that Mr. Malagon had already struck Officer Perez.

Officer Mutter’s view of Mr. Malagon was obstructed by the other officers, but he was focused on Wyatt and making sure Wyatt was doing what he was supposed to do. As soon as Wyatt entered the interior room, Officer Mutter heard a thud and knew that Wyatt had been hit. Officer Mutter recalled that Wyatt was stunned by the strike and looked “out of it” for a second, came to, and re-engaged Mr. Malagon. Officer Mutter thereafter heard a couple more thuds. Officer Mutter could tell that Wyatt was still biting based on the wrestling or fighting sounds he heard. Officer Mutter recalled feeling helpless and not hearing much else, as he was “watching [his] partner basically get killed.”

Officer Mutter eventually saw Mr. Malagon move back into view and Wyatt was on his hind legs being dragged by Mr. Malagon while biting or trying to bite Mr. Malagon on

PUBLIC RELEASE MEMORANDUM

Fatal Officer-Involved Incident

DA STAR # 2020-57748

June 2, 2021

Page 9

the tricep of one of his arms. Then, Officer Mutter heard two pops that he believed sounded like sponge rounds from the 40 mm launcher. Wyatt let go of Mr. Malagon after the pops either because Wyatt was startled or because Mr. Malagon fell to the ground. After Mr. Malagon fell, Wyatt re-engaged his bite on Mr. Malagon's buttock and remained there. About 20 seconds later, after SWAT officers told Officer Mutter it was safe to do so, Officer Mutter removed Wyatt from Mr. Malagon.

After removing Wyatt from Mr. Malagon, Officer Mutter saw a large amount of blood coming from Wyatt's mouth. Officer Mutter took Wyatt away from the scene and to the Rialto Animal Hospital.

Officer Daryl Avila gave a voluntary statement to SBCSD Detectives Gerad Laing and James Tebbetts, in the presence of Officer Avila's attorney on June 1, 2020, four days after the shooting incident. Officer Avila was permitted to listen to an audio recording of the shooting incident prior to his interview. At the time of the shooting incident, Officer Avila was 37 years old and had been a California peace officer for more than 15 years. Officer Avila served FPD for 14 years, and previously served with the Los Angeles County Sheriff's Department for a year and a half. Prior to his law enforcement career, Officer Avila served in the military for six years.

During his contact with Mr. Malagon, Officer Avila wore a department-issued uniform including a ballistic plate carrier vest with the word "POLICE" in large block letters on the front and green battle dress uniform pants. Officer Avila also wore a ballistic helmet with the words "POLICE" and "AVILA" written on masking tape and affixed to the back of the helmet. During the shooting, Officer Avila carried a department-issued Colt select-fire M4LE, 5.56 x 45mm caliber rifle that the officer had previously loaded with 30 rounds. Officer Avila was also carrying a Kimber 1911 Custom, .45 caliber semi-automatic handgun containing a total of nine rounds. Officer Avila did not fire his handgun during this incident.

Additional relevant portions of Officer Avila's statement can be summarized as follows:

Officer Avila was a member of the IVS Green Team and was notified that Mr. Malagon was wanted for assault and criminal threats as a result of trying to stab his brother and threatening to kill people in his household. Officer Avila believed that law enforcement had been on scene for hours trying to get Mr. Malagon out of the house by using PA announcements. When he arrived at the scene, Officer Avila heard announcements being made and he perceived them to be loud and clear.

Officer Avila stated that he was briefed about the incident circumstances by Sergeant Vantuinen. The IVS operation plan involved trying to establish communication with Mr. Malagon via "throw phone" since there was no working phone in the subject residence. Officer Avila stated that there was no plan to go inside the house or aggress Mr. Malagon. Officer Avila stated that he entered the residence garage through the garage and the team worked on removing the hinges off an internal door. Officer Avila explained that the team was trying to be stealth to avoid confrontation. After the door hinge pins

PUBLIC RELEASE MEMORANDUM

Fatal Officer-Involved Incident

DA STAR # 2020-57748

June 2, 2021

Page 10

were removed officers “were immediately contacted by the suspect rushing the door trying to push it over on top of [the officers].”

Officer Avila stated that he saw Mr. Malagon swing a two to three-foot sharpened crowbar and with two hands, down on top of Officer Perez’s helmet. Officer Perez looked dazed by the strike to his helmeted head. Fearing that Officer Perez was seriously injured and might be struck again, Officer Avila stated that he “punched” Mr. Malagon in the upper body with the barrel of his gun, two to three times. In response, Mr. Malagon backed into the house while continuing to swing his crowbar.

Officer Avila stated that he attempted to stay close to Mr. Malagon to keep Mr. Malagon from getting a full swing. However, when the police dog was deployed, Officer Avila had to give the police dog some space to work. This is when Officer Avila saw Mr. Malagon hit the police dog in the head.

Even as the police dog bit at Mr. Malagon, Mr. Malagon still swung his crowbar towards officers with the dog attached to him. As Officer Avila stood within two to three feet away from Mr. Malagon, when Mr. Malagon was shot with less lethal 40 mm rounds. After the 40 mm rounds were fired, Officer Avila switched his rifle from safe to fire. Officer Avila approximated that Mr. Malagon took two to three swings at him, which Officer Avila dodged. Officer Avila explained that Mr. Malagon was going to hurt or kill one of the officers with his crowbar. Mr. Malagon’s crowbar got within two feet of Officer Avila. As such, Officers Avila fired his rifle at Mr. Malagon. At the time he shot, Officer Avila heard another officer shoot, but did not find out who it was until later. Mr. Malagon immediately dropped his crowbar and fell to the ground. Officers Avila and Perez then handcuffed Mr. Malagon.

Officer Avila stated that he did not fire his weapon after Officer Perez was assaulted because he was trying to use “restraint” and give Mr. Malagon, “a chance to, to stop the assault” on officers. Officer Avila admitted that his stress level was high from the point where they entered the residence. Despite commands given to Mr. Malagon by others, Mr. Malagon never complied or said he would surrender. Instead, Mr. Malagon maintained an aggressive posture towards officers and there was no safe opportunity for officers to retreat. Officer Avila also explained that the active assault on the police dog was a consideration of his. However, ultimately, Officer Avila explained that he felt like Mr. Malagon was going to kill him and Officer Avila was trying to avoid getting injured or killed.

Officer Edgar Perez gave a voluntary statement to SBCSD Detectives Nicholas Clark and Tebbetts, in the presence of Officer Perez’s attorney on June 2, 2020, five days after the shooting incident. Officer Perez was permitted to listen to an audio recording of the shooting incident prior to his interview. At the time of the shooting incident, Officer Perez was 36 years old and had been a California peace officer for approximately five years. The entirety of Officer Perez’s

PUBLIC RELEASE MEMORANDUM

Fatal Officer-Involved Incident

DA STAR # 2020-57748

June 2, 2021

Page 11

law enforcement career had been spent with CPD. Prior to joining CPD, Officer Perez served 11 years as a United States Marine.

During his contact with Mr. Malagon, Officer Perez wore a department-issued uniform including a ballistic plate carrier vest with the word "POLICE" in large block letters on the front and back, green battle dress uniform pants and a ballistic helmet. During the shooting, Officer Perez carried a department-issued Colt select-fire M4 Commando, 5.56 x 45mm caliber rifle that the officer had previously loaded with 29 rounds. Officer Perez was also carrying a Glock 22, .40 caliber semi-automatic handgun containing a total of 15 rounds. Officer Perez did not fire his handgun during this incident.

Additional relevant portions of Officer Perez's statement can be summarized as follows:

Officer Perez responded to the scene after IVS notification that a barricaded subject was wanted for assaulting and making criminal threats to a wheelchair-bound paraplegic. Officer Perez believed that the Hostage and Negotiation Team had been attempting to reach Mr. Malagon for about an hour prior to his arrival, without success.

Officer Perez stated that he was briefed by Sergeant Vantuinen. Officer Perez believed that an arrest warrant was already in place and IVS personnel would approach the residence after a search warrant was also authorized. Officer Perez understood that his assignment in this operation was to be on the "arrest team" with Officer Avila. Officer Perez stated that together with Officer Avila, he would clear the garage and downstairs living area of the residence. After clearing the area, Officer Perez understood that he was to put his weapon down and go upstairs to locate and detain Mr. Malagon. Officer Perez stated that his mission was to "safely detain the gentleman" (Mr. Malagon).

Officer Perez stated that when he went up to the residence with his IVS team, Officer Perez was positioned toward the back of the group. After entry, Officer Perez cleared the garage. To avoid making a lot of noise, Officer Perez stated that the team decided to take the interior garage door off its hinges instead of using a ram and a pick. After Sergeant Vantuinen took the door hinge pins out, Officer Perez was given a long screwdriver to pry the door off its hinges. After prying the hinges, Officer Perez peeked behind the door and did not see anyone. Officer Perez had begun to lower the door when Mr. Malagon ran up on the door from the inside. Officer Perez stated that the door came down on his chest as Mr. Malagon rushed the door. Mr. Malagon held a silver crowbar in his right hand that was about two to three feet long with a jagged flat edge. Mr. Malagon stepped down on the door, swung the crowbar over his head in a "samurai sword" or "axe movement" and hit Officer Perez on the top of the head, hitting the Kevlar plate of the officer's helmet. At the time, Officer Perez's entire head and neck were exposed over the top of the falling door. Officer Perez had his weapon slung and two hands on either side of the door to hold the door up and he felt Mr. Malagon put his weight on the door. Officer Perez stated that the door dropped down to a 45-degree angle. Officer Perez described the strike to his head as "pretty hard," radiating to his head and neck and causing him to get dazed and

PUBLIC RELEASE MEMORANDUM

Fatal Officer-Involved Incident

DA STAR # 2020-57748

June 2, 2021

Page 12

fall. Officer Perez stated that he got “foggy” and it took a second or two for him to regain his composure.

Officer Perez stated that when he was able to “get back into the fight” that he saw Officer Avila poke Mr. Malagon in the chest or body with his rifle, causing Mr. Malagon to move backwards. He could hear other officers say, “Let me see your hands!” Once Mr. Malagon stepped off the door, Officer Perez was able to push back and allow the door to drop to the ground. Mr. Malagon, meanwhile, retreated (north) into the residence via a narrow hallway and tucked back behind a corner in a bladed stance and looking back towards the IVS team at the doorway to the garage.

Officer Perez explained that due to Mr. Malagon’s position, the IVS team was unable to immediately use less-lethal weaponry. The police dog was deployed, instead. Officers Perez and Avila were the first to enter the hallway after the dog. When the hallway opened into the living space, Officer Avila moved to the left (west) and Officer Perez moved to the right (east). Officer Perez saw Mr. Malagon hit the police dog with the crowbar in a two-handed downward motion, almost knocking the dog out. Then, Mr. Malagon looked at Officer Perez and walked forward towards Officers Perez and Avila. Mr. Malagon held the crowbar over his head and with both of his hands over his shoulder. Mr. Malagon got within one to two feet away from Officer Avila, and within three feet of Officer Perez. Mr. Malagon did not say anything, but Officer Perez believed that the “crazy look” on Mr. Malagon’s face conveyed that Mr. Malagon intended to hurt them. Officer Perez stated that as Mr. Malagon approached, he feared for his and Officer Avila’s lives. Officer Perez believed that Mr. Malagon had already attempted to kill Officer Perez once and Mr. Malagon was making another attempt on him and now Officer Avila. Officer Perez took his rifle off “safe” and stated that he fired his weapon one time to save his and his fellow officers’ lives. Mr. Malagon fell immediately thereafter. Officer Perez stated that he assisted with handcuffing Mr. Malagon as he lay on the ground and that the IVS volunteer surgeon was called to render aid immediately.

Officer Perez stated that during the operation that his face, ears and neck were fully exposed. Officer Perez believed that Mr. Malagon could have either killed him or continued to hurt him had he not acted. Officer Perez also explained that he had no time to put his rifle down and use less-lethal means because he would have increased his risk of death to do so. Officer Perez also explained that after being hit on the head, he did not retreat backwards into the garage because his teammates were behind him and the limited space did not safely allow it. Had Officer Perez retreated into his teammates, he risked falling or causing others to fall and would have given Mr. Malagon further opportunity to kill them.

Corporal Thomas Borden gave a voluntary statement to SBCSD Detectives Laing and Clark, in the presence of Corporal Borden’s attorney on June 8, 2020, 11 days after the shooting incident. Corporal Borden was permitted to listen to an audio recording of the shooting incident prior to

PUBLIC RELEASE MEMORANDUM

Fatal Officer-Involved Incident

DA STAR # 2020-57748

June 2, 2021

Page 13

his interview. At the time of the shooting incident, Corporal Borden had been an FPD officer for 14 and a half years.

During his contact with Mr. Malagon, Corporal Borden wore a department-issued uniform including a ballistic plate carrier vest with the word "POLICE" in large block letters on the front and back. Corporal Borden also used green battle dress uniform pants and a ballistic helmet. During the shooting, Corporal Borden carried a department-issued Defense Technology single fire 40 mm less lethal launcher and two 40 mm munitions. Corporal Borden was also carrying a Smith and Wesson MMP 9 mm caliber semi-automatic handgun containing a total of 18 rounds. Corporal Borden did not fire his handgun during this incident.

Additional relevant portions of Corporal Borden's statement can be summarized as follows:

Corporal Borden was aware of the original call for service and recalled mention that Mr. Malagon was schizophrenic. Corporal Borden also learned that Mr. Malagon attacked Victim with a metal spike, tried to kill Victim previously and had shut off the power to Victim's medical equipment.

Corporal Borden responded to the scene as part of the IVS team and was initially assigned to relieve patrol officers who were holding the east garage door. At the time Corporal Borden assumed his position, he noted that a bearcat was in the front of the residence and making loud PA announcements. Corporal Borden believed that PA announcements had been made for 45 minutes when it was determined the Green Team would place a phone into the house to attempt to communicate with Mr. Malagon.

When the Green Team came up to the residence and went into the garage, Corporal Borden was outside the east garage pedestrian door. Corporal Borden believed that an arrest warrant had already been obtained and the approach of the Green Team signified that a search warrant had also been authorized. Corporal Borden saw Officer DeSchepper was up against the door to the interior of the residence with a large ballistic shield. Corporal Borden described the open space in the garage to be smaller than would allow a single car, yet there were six to eight operators from the Green Team inside.

Corporal Borden heard the Green Team discuss how to open the interior door. Then, Corporal Borden watched the Green Team pry the door hinges. Corporal Borden stated, "As soon as that door got away from that hinge about an inch...the suspect just slammed straight into the door." Corporal Borden then saw the door fall over Officer DeSchepper and his shield and that Mr. Malagon was swinging a "giant metal pole down onto the entry team." Corporal Borden stated that Mr. Malagon was "slamming" his weapon from over his head and down onto the top of officers' heads or shoulders. Corporal Borden believed that Mr. Malagon was "actively trying to kill" Officers Avila and Perez. In response, Corporal Borden thought he needed to shoot with his less lethal launcher, but unfortunately did not have a good shot. So, Corporal Borden moved into the garage and got behind Officer Avila to help push Mr. Malagon back into the hallway of the

PUBLIC RELEASE MEMORANDUM

Fatal Officer-Involved Incident

DA STAR # 2020-57748

June 2, 2021

Page 14

residence. Corporal Borden recalled that many officers were yelling, and he heard “Drop the crowbar, drop the crowbar.”

While at the open doorway to the residence and behind Officer Avila, Corporal Borden heard someone call for the K-9 unit. After the police dog went inside, Corporal Borden saw Mr. Malagon hit the police dog on the head as the police dog was trying to bite Mr. Malagon. Corporal Borden believed that Mr. Malagon was trying to kill the police dog. Corporal Borden saw Mr. Malagon hit the police dog five to eight times.

Corporal Borden stated that he contemplated shooting Mr. Malagon in the face with his 40 mm launcher because Corporal Borden feared that Mr. Malagon would attack officers, including himself. However, Corporal Borden was also trying not to shoot his partners and Corporal Borden was confined to the narrow hallway, with no space to fan out as Mr. Malagon was aggressing them. Corporal Borden stated that Mr. Malagon was swinging his metal pipe at officers and the dog, when the corporal finally found a “good spot” to deliver the less lethal round. As soon as Corporal Borden fired his launcher, he heard two to three other pops. Corporal Borden was aiming for Mr. Malagon’s solar plexus, about mid-way up Mr. Malagon’s torso but he did not see where the sponge round hit Mr. Malagon. Mr. Malagon immediately dropped thereafter. Corporal Borden reloaded his launcher as Mr. Malagon was being handcuffed.

Corporal Borden explained that he placed himself with the entry team because he needed “to try and de-escalate the situation by using a less lethal munition” on Mr. Malagon and also to protect his and other officers’ lives. Corporal Borden believed that lethal force was warranted, but that he chose his less lethal launcher because he didn’t have enough time to transition to his handgun.

Officer Shannon Vanderkallen gave a voluntary statement to SBCSD Detectives Simon Demuri and Clark, in the presence of Officer Vanderkallen’s attorney on June 8, 2020, 11 days after the shooting incident. Officer Vanderkallen was permitted to listen to an audio recording of the shooting incident prior to his interview. At the time of the shooting incident, Officer Vanderkallen had been a California peace officer for approximately 15 to 16 years. Officer Vanderkallen served as an FPD officer for the last 12 years.

During his contact with Mr. Malagon, Officer Vanderkallen wore a department-issued ballistic plate carrier vest with the word “POLICE” in large block letters on the front and back, over a dark t-shirt and shorts. Officer Vanderkallen also wore a ballistic helmet. During the shooting, Officer Vanderkallen carried a department-issued single fire 40 mm less lethal launcher and a total of six 40 mm less lethal munitions. Officer Vanderkallen was also carrying a Sig Sauer P226 9 mm caliber semi-automatic handgun containing a total of 16 rounds. Officer Vanderkallen did not fire his handgun during this incident.

Additional relevant portions of Officer Vanderkallen’s statement can be summarized as follows:

PUBLIC RELEASE MEMORANDUM

Fatal Officer-Involved Incident

DA STAR # 2020-57748

June 2, 2021

Page 15

Officer Vanderkallen responded to the scene as part of the IVS Green Team. Officer Vanderkallen was told that Mr. Malagon was assaulting and harassing his wheelchair-bound brother. Officer Vanderkallen understood that the Green Team would be making entry at the scene via the garage but were waiting for a search warrant to be authorized. Officer Vanderkallen was assigned to the 40 mm less lethal launcher and to bring chemical agents. Sergeant Vantuinen advised the Green Team that their mission was to get into the garage, breach the interior door and put a phone inside to communicate with Mr. Malagon to see if he might come outside.

While the Green Team waited outside, Officer Vanderkallen recalled that loud and clear announcements were being made outside the residence, wherein Mr. Malagon was called by name, told to come outside and give up.

Once the search warrant was signed, the Green Team entered the garage. There was limited foot space in the garage; Officer Vanderkallen described the team being packed "like sardines" in the garage. The team was trying to be quiet when they decided to take the door hinge pins out instead of ramming the door open. Prior to the door coming down, Officer Vanderkallen saw Officer DeSchepper holding the door with a shield. As the door was angling downwards, like a bridge, Mr. Malagon ran up the door with a "chrome icpick" and hit Officer Perez in the head with it. Mr. Malagon's weapon was over two feet long, thick and heavier than a crowbar. Officer Vanderkallen believed that the weapon could kill you if you got hit in the head with it. Officer Vanderkallen saw Officer Perez "kind of froze" after Mr. Malagon hit him. Mr. Malagon swung the weapon three to four times at the doorway. Officer Vanderkallen thought that Officers Avila or Perez would have shot at that time, but Officer Vanderkallen then saw Officer Avila hit Mr. Malagon with the butt of his rifle, instead. Officer Vanderkallen was unable to deploy his 40 mm launcher because Officer Avila was in Officer Vanderkallen's way.

After Officer Vanderkallen saw Officer Avila get Mr. Malagon to move off the door, the door came down with Officer DeSchepper under it. Officers and the police dog went over the door to go inside. Due to the limited space in the hallway on the interior side of the doorway, Officer Vanderkallen recalled having to stay behind Officer Avila. Officer Vanderkallen had to get down low to get the barrel of the 40 mm launcher past Officer Avila. Officer Vanderkallen saw Mr. Malagon hit the police dog in the head with his weapon and never saw the police dog latch onto Mr. Malagon. Officer Vanderkallen stated that Mr. Malagon was "teeing-off" on the dog's head, hitting the police dog five times.

Officer Vanderkallen stated that others were giving commands like "Drop the crowbar" and "Get on the ground," but that the commands were ineffective. Mr. Malagon just grunted and continued to swing the crowbar. Officer Vanderkallen stated that Mr. Malagon never indicated that he would comply or give up. Mr. Malagon came towards officers with the police dog biting him and the dog was positioned between Mr. Malagon and the officers. Officer Vanderkallen stated that he fired his 40 mm less lethal launcher

PUBLIC RELEASE MEMORANDUM

Fatal Officer-Involved Incident

DA STAR # 2020-57748

June 2, 2021

Page 16

because he believed that Mr. Malagon was going to kill the dog and was also within reach of Officers Perez and Avila, as well. Officer Vanderkallen explained that he wanted to end the confrontation and normally when someone is shot with the less lethal launcher, they “just drop.” However, when Officer Vanderkallen shot Mr. Malagon somewhere in the upper torso or abdomen at a distance of seven or eight feet, Mr. Malagon didn’t really react at all, almost as if the round didn’t hit Mr. Malagon.

Officer Vanderkallen heard Officer Avila fire his weapon, as well. After Mr. Malagon was shot, Mr. Malagon froze, fell to his knees and then fell onto his stomach. Officer Vanderkallen did not hear any other shots at the time but learned later that Officer Perez also fired his rifle.

Officer Vanderkallen stated that significant efforts were made to try to avoid the outcome of this incident. De-escalation efforts began with the presence of uniformed patrol at the scene, followed by their effort in making PA announcements. PA announcements were made for hours to the front of the house. Officer Vanderkallen believed that the announcements gave Mr. Malagon sufficient time and opportunity to surrender. Officer Vanderkallen also explained that he had been to over 50 SWAT calls, and usually the mere presence of the SWAT team causes barricaded subjects to surrender. Yet, Mr. Malagon made no effort to communicate with SWAT personnel. Officer Vanderkallen also stated that use of the police dog and less lethal launcher were further efforts made to de-escalate the situation.

Additional IVS Personnel who responded to the scene were also interviewed by SBCSD detectives. IVS Commander Lieutenant Binks, who arrived at the scene before the determination was made to call in IVS operators, stated that announcements calling for Mr. Malagon’s surrender had been made for almost two hours. Lieutenant Binks estimated that hundreds of announcements were made during that time. After the search warrant was secured and at approximately 1:11 p.m., the Green Team moved towards the residence with the throw phone. Lieutenant Binks explained that the plan to place the phone in the house was meant to put Mr. Malagon in touch with hostage negotiators. Negotiators would attempt to settle Mr. Malagon down if he was wound-up, empathize with him and make him feel like everything was going to be okay, in an ultimate effort to get Mr. Malagon to peacefully surrender. After the phone was inserted, Lieutenant Binks stated that the team would back out and “hold” the garage. Lieutenant Binks stated that including an “arrest team” was only meant as a contingency, in the event “the opportunity for an arrest comes up.”

IVS Green Team Leader Sergeant Vantuinen, who arrived at the scene with Lieutenant Binks, was responsible for making specific assignments to Green Team members. Sergeant Vantuinen also made entry with his team and witnessed the shooting incident. Sergeant Vantuinen’s statement was generally consistent with those of the involved officers. Sergeant Vantuinen stated that although the team was briefed on Mr. Malagon’s size prior to making entry, Mr. Malagon looked even bigger than as anticipated and had an “overwhelming strength.” Sergeant Vantuinen stated that Mr. Malagon initially overwhelmed his team as they were surprised by Mr. Malagon

PUBLIC RELEASE MEMORANDUM

Fatal Officer-Involved Incident

DA STAR # 2020-57748

June 2, 2021

Page 17

violently kicking the garage door into them. Sergeant Vantuinen also perceived that Mr. Malagon was not trying to communicate with or run away from officers, but rather was intent on attacking and trying to kill or injure officers with his weapon.

Officer DeSchepper and CPD Officers Gabriel Martinez and Ronald Vogelsang were also witnesses to the officer-involved shooting. These witness officers were all IVS operators at the time and gave statements materially consistent with their IVS teammates. Officer DeSchepper confirmed that the interior garage door (to the interior living space) was locked prior to the team's efforts to remove the door's hinge pins. Officer DeSchepper also stated that when the door came down, it was on top of him and his team did run over him. Officers DeSchepper and Martinez stated that they did not actually enter the interior living space of the house until after shots were fired.

During their contact with Mr. Malagon, Sergeant Vantuinen, Officers DeSchepper, Martinez and Vogelsang all wore department-issued ballistic plate carriers with the word "POLICE" in large block letters across the front, ballistic helmets and green battle dress pants. Officer DeSchepper's ballistic plate carrier also bore a cloth badge on the center chest area. Sergeant Vantuinen and Officers Martinez and Vogelsang, each wore department-issued shirts under their plate carriers, with IVS patches displayed on both shoulders.

Additional IVS personnel were interviewed about their involvement during the incident, including four IVS operators and an IVS volunteer physician who remained immediately outside the east exterior garage doorway until after shots had been fired. Also notable were three IVS operators and a FPD K-9 Officer, who together remained outside the residence and in the backyard with RPD's bearcat. FPD's bearcat was parked to the front of the residence and manned by three IVS operators. A second IVS volunteer physician and a volunteer medic also assisted in rendering aid to Mr. Malagon, after which Mr. Malagon was pronounced deceased at 1:21 p.m. Many other IVS operators participated in this operation, but their statements included no additional material information.

SBCSD Criminalists were asked to examine the weapons fired by Officers Avila and Perez during the lethal force encounter. Each officer's rifle was test-fired and determined to be functioning normally.

STATEMENTS BY CIVILIAN WITNESSES²

Civilians in the area immediately surrounding the subject residence were interviewed regarding the incident. The heavy presence of officers and SWAT vehicles was notable to all civilian

² Multiple civilian witnesses were interviewed pursuant to the submitted investigation. Every civilian statement and recorded statement submitted was reviewed in totality. However, only selected parts of those statements are included here. Other than Victim, no civilian witness used the name of any person involved in the lethal force encounter, unless otherwise indicated. Names are included in this summary for ease of reference only.

PUBLIC RELEASE MEMORANDUM

Fatal Officer-Involved Incident

DA STAR # 2020-57748

June 2, 2021

Page 18

witnesses. Civilians recalled hearing numerous PA announcements calling Mr. Malagon's name, demanding that Mr. Malagon come out and that the residence was surrounded.

Victim was interviewed twice on the day of the shooting incident. First, Victim was interviewed by Officer Larsen outside the subject residence immediately after being rescued. SBCSD Detectives Guerry and Laing interviewed Victim at the FPD station approximately seven hours after Officer Larsen's interview.

Victim told Officer Larsen that earlier in the day, Mr. Malagon turned off the electricity to the house. When Victim confronted Mr. Malagon to restore the electricity, Mr. Malagon lunged at Victim with a chrome metal spike. Victim demonstrated this lunging with a forward stabbing motion. Victim expanded that as Mr. Malagon did so, Mr. Malagon said "I'm going to fucking kill you. You're dead to me." Victim also stated that Mr. Malagon threatened, "I'll fucking kill you if you get near the door." This confrontation is what prompted Victim to call 9-1-1 that morning. Victim stated that his mother, who also lived in the house, was "terrified for her life every fucking day" because Mr. Malagon also terrorized her. Victim stated that he prayed for his own life every day.

During Officer Larsen's interview of Victim, another family member arrived and told Officer Larsen that he just learned of the day's incident. This family member stated that Mr. Malagon had stabbed him in the head in the past, and that he too was afraid that if he confronted Mr. Malagon that Mr. Malagon would kill him.

Victim made a generally consistent statement to SBCSD Detectives later at the FPD station. Beyond what Victim told Officer Larsen, Victim explained that Mr. Malagon moved into the subject residence with Victim and his mother in 2007. During that time, Victim stated that Mr. Malagon was always fighting and wanting to control everyone. Mr. Malagon had assaulted Victim three times since 2007.

On the day of the incident, Victim stated that he avoided getting stabbed by Mr. Malagon because he was able to back up fast enough to avoid it. Victim confirmed that Mr. Malagon attempted to stab Victim with the pointed end of his weapon. For fear of further harm, Victim sequestered himself in his garage room and called 9-1-1. After Victim called 9-1-1, Victim stated that the cops arrived within a few minutes and that he could hear Mr. Malagon moving within the house. Victim stated that Mr. Malagon had jammed the garage door locks so that Victim could not open them. Victim confirmed that the PA announcements could be heard inside the house.

In the past, Victim believed that the way that Mr. Malagon looked at passers-by to the subject residence that Mr. Malagon was looking for a fight. Victim relayed that since Mr. Malagon was a big guy, Mr. Malagon "felt that he could kick everybody's ass." Victim also expressed disbelief that the police would be able to get Mr. Malagon out of the home and stated that Mr. Malagon hated the police or anyone in a position of authority.

PUBLIC RELEASE MEMORANDUM

Fatal Officer-Involved Incident

DA STAR # 2020-57748

June 2, 2021

Page 19

INCIDENT AUDIO/VIDEO³

The case agent's submission included Victim's 9-1-1 call for service and radio dispatch broadcasts of the initial patrol response as well as the subsequent IVS response. The actual timing of these recordings was not apparent from the recordings themselves. There is some indication of timing when the audio recordings are considered alongside the dispatch logs prepared by FPD, which notes approximate timestamps for radio communications delayed only by the time to receive and record the information. These summaries of notable recordings are prepared in the context of the entire submission:

Victim's 9-1-1 Call was received at approximately 10:17 a.m. and lasted for approximately 12 and a half minutes. The call began as follows:

Operator: 9-1-1. What are you reporting?
Victim: My brother wants to, wants to kill me.
Operator: Your brother wants to kill you how?
Victim: He has a crowbar. He has a metal spike. He turns off the lights, the electricity to my room. I tried, I tried to tell him to keep, to turn it back on. He started turning, he swung...he's trying. He's trying to fucking kill me.

The operator determined where Victim needed help and tried to ascertain why Mr. Malagon was trying to hurt Victim. Victim relayed that Mr. Malagon had undiagnosed mental health issues based on Mr. Malagon's observed behavior. Victim told the operator "I can't even go outside because he's fucking trying to hit me." Victim continued to identify Mr. Malagon by name and age. Victim also relayed to the operator that Victim was disabled, confined to a wheelchair and only able to move one arm. The operator dispatched officers and relayed the officers' arrival to Victim. Then, the following exchange occurred:

Operator: Can you come out and lock the front door? Your brother is outside.
Victim: Yeah, I can't. I can't.
Operator: Why can't you? The officers are there.
Victim: If I get near, get near him, he's going to fucking want to attack me.

After further coordination with the Victim to try to ascertain Mr. Malagon's location within the residence, Victim notified the operator that Mr. Malagon had neither a cell phone or a house phone that Mr. Malagon could be reached at. Victim also believed that Mr. Malagon was still armed with his crowbar. Victim's call was then disconnected so that officers at the scene could speak directly with Victim by phone.

Body Worn Camera Video Recordings. The case agent's submission included video

³ All submitted audio and video recordings were reviewed but only selected portions of selected items are summarized here.

PUBLIC RELEASE MEMORANDUM

Fatal Officer-Involved Incident

DA STAR # 2020-57748

June 2, 2021

Page 20

recordings from cameras worn by FPD patrol officers only; no IVS operators wore BWC devices. The identity of the officer from whom the footage was received can be inferred by the name given to these video files as submitted as well as from the video content. The BWC recordings do not include the date and time being recorded. Five BWC recordings from three FPD officers were submitted. None of the BWC captured the officer-involved shooting. All submitted BWC footage pertained to incidents occurring hours before the shooting occurred. Each recording was reviewed considering the interview given by the person to whom the recording is attributed. The submitted BWC recordings were generally consistent with the wearing-officer's interview. The location of the BWC device upon the recording officer's person is uncertain. However, it is understood that the resulting footage is subject to the limitations of the camera recording mechanism and the vantage available from the camera's position. The BWC footage cannot recreate what the wearing officer perceived by his senses. With those factors in mind, below is a summary of events captured:

Officer Rodriguez made two BWC recordings; the first recording is approximately 10 minutes long and the second is approximately nine minutes long. In the first recording, it appears that Officer Rodriguez is on a speakerphone phone call with Victim, and PA announcements are being made from across the street from the residence. Repeated PA announcements by Officer Larsen include: "Alonzo, you're not into trouble. We just need to talk to you. Come outside." "Alonzo, come out and talk to us. You're not in any trouble." Officer Rodriguez asked Victim to tell Mr. Malagon to open the front door to talk to police.

After PA announcements were made, Officers Larsen and Rodriguez met up with at least three other officers in dark blue FPD police uniforms and a fourth officer with a black vest marked "POLICE" in the back and front, in large white block letters. Officer Larsen announced that they would be making entry through an open back door. The group of officers then proceeded to walk up a driveway on the west side of the residence that lead to the back of the residence. When the officers reached the back of the residence, they stopped behind a parked van and Officer Rodriguez yelled, "Hey Alonzo, come outside." The officers realized that the patio slider was closed and that it was instead a window that was open. Another officer then yells, "Alonzo, we know you're inside. Come out to the back with your hands up." Receiving no response, the officers moved east along the backyard. While doing so, the closing of a window is audible. An officer asked, "Did he close it?" Another responded, "Yup, yup."

Officer Rodriguez's video footage shows that the officers in the yard had firearms drawn and pointed at the back of the residence. Officer Rodriguez announced, "Alonzo, come out man, we know you're here." Officer Larsen announced via radio that Mr. Malagon just closed the rear window. Officer Larsen then resumed talking to Victim on the phone and they coordinated Victim's rescue via the east garage door. Victim told the officers that the kicking on the door they heard was not him. Officers let Victim know that they were trying to open the door.

PUBLIC RELEASE MEMORANDUM

Fatal Officer-Involved Incident

DA STAR # 2020-57748

June 2, 2021

Page 21

Officer Rodriguez's second video begins after the exterior garage door was opened. Victim was still audible by speakerphone and was asked to open the garage wood core door. After trying, victim advised the officers that the door was jammed and he was unable to open it. Though it is not seen in the video footage, officers are heard asking Victim if he is in the garage by himself. Within seconds of Victim confirming that he was in the garage by himself, officers told Victim to back away from the door. Then, a loud thump was heard. There was no video footage of Victim coming out of the garage, but Officer Rodriguez can be heard saying, "Alright, come out now." Officer Rodriguez then asked Officer Larsen to take Victim to their unit and get a statement from Victim. Officer Rodriguez then advised dispatch that Victim was rescued from the garage. Officer Rodriguez maintained watch at the northeast corner of the house while other officers went inside the garage.

Corporal Hunt made one BWC recording that is approximately seven minutes long but showed little due to the position of the BWC on Corporal Hunt's torso. One officer can be seen ramming the interior garage door open. Corporal Hunt asked officers to do "a quick security sweep" of the garage after the Victim was extricated. Officers thumped on the screen door twice, entered the garage and announced, "Police department, make yourself known." Corporal Hunt stayed outside the garage, but also announced, "Police department." Once inside, another officer repeated, "Police department." Corporal Hunt then alerted dispatch via radio that the garage had been cleared and the victim rescued.

Officer Larsen made two BWC recordings of his interview of Victim. The combined BWC video footage was approximately 13 and a half minutes long. The contents of that interview are indicated *supra*.

Radio Dispatch Recordings. FPD dispatch operators alerted officers to the incident involving Victim and Mr. Malagon at approximately 10:24 a.m. The following is a summary of FPD dispatch radio announcements:

At approximately 10:31 a.m., FPD Officer Leonard Sein alerted responding units that the suspect was standing on the porch, just staring out into the street. About a minute and a half later, it was announced via radio per Victim that Mr. Malagon was back inside of the house. Officer Larsen announced his arrival at the scene at approximately 10:35 a.m. Within a few minutes of that, dispatch was advised that Officer Larsen would be calling Victim by phone.

By approximately 10:51 a.m., Officer Larsen confirmed via dispatch that Victim was locked in the garage and that PA announcements would be made to coax Mr. Malagon outside. About eight minutes thereafter, the radio traffic included information that the PA announcements were "loud and clear" and could be heard at the back yard of the residence.

At approximately 11:04 a.m., Officer Larsen announced, "We have an open back door,

PUBLIC RELEASE MEMORANDUM

Fatal Officer-Involved Incident

DA STAR # 2020-57748

June 2, 2021

Page 22

we're going to try to make entry that way." About a minute later, Officer Larsen radioed, "Suspect just closed the rear window." At 11:07 a.m., Officer Larsen advised dispatch, "we're going to kick open the garage door, the side door." Approximately five minutes later, Officer Rodriguez advised that Victim had be "rescued out of the garage."

At approximately 11:50 a.m., Lieutenant Binks announced via dispatch that arrest teams had been placed to the front and back of the residence, then stated:

For all the units on scene, suspect is supposed to be armed with a large metal spike that he attacked his brother with. He's also possibly armed with a crowbar. No other firearm is in the house. No other animals in the house. And uh, I think just that crowbar and that knife is all he's going to have.

Lieutenant Binks asked that announcements be made from a unit to the front of the residence until a "bearcat" arrived. It is confirmed thereafter that the announcements could be heard, "loud and clear" to units at the rear of the house.

IVS dispatch took over radio traffic once IVS operations at the scene got underway, but no companion dispatch log was generated to allow the timing of the IVS radio traffic to be inferred. The following is a summary:

IVS radio traffic began with confirmation of use of a bearcat in the back yard of the residence for cover. Units were also noted covering the east garage door. The utilities to the residence were shut off by Corporal Borden prior to the time that the Green Team began moving toward the garage. Lieutenant Binks then announced, "Info for the units on scene: Green Team is going to enter the garage, breach the garage door that goes into the house, insert a throw phone and insert a robot." This announcement was repeated by the IVS dispatch operator.

Next, Sergeant Vantuinen announced: "Aye, we pulled the pins off the hinges on the door and uh, we're ready to open it up and put the phone in. We're ready." The IVS dispatch operator repeated Sergeant Vantuinen's broadcast and Lieutenant Binks let Sergeant Vantuinen know he could proceed. Sergeant Vantuinen echoed back, "We'll be breaching now."

Sergeant Vantuinen's next communications were better understood upon review of the sergeant's audio recording of the incident, as noted below. The IVS dispatch operator did repeat the sergeant's broadcasts for the IVS channel. The submitted IVS channel broadcasts ceased with announcement of the residence being clear and all IVS operators "Code-4."

Audio Recording of Officer-Involved Shooting. The case agent's submission included one audio recording of the officer-involved shooting that appears to have been recorded by Sergeant

PUBLIC RELEASE MEMORANDUM

Fatal Officer-Involved Incident

DA STAR # 2020-57748

June 2, 2021

Page 23

Vantuinen. Sergeant Vantuinen's audio recording is nine minutes and 37 seconds long and appears to include audio footage of the officer-involved shooting in real time. This is a summary:

The recording began with shuffling noises. At about 27 seconds (:27) someone is heard saying "the door is locked." This is followed by inaudible discussion by multiple voices, until approximately (:42), when one person can be heard saying the following: "Hey, let's get the, let's be smart. If you notice, the hinge side [inaudible] if we have to, instead of beating ourselves up, beating the door up, we can fucking, grab a fucking screwdriver, knock the pins up and take it out that way." There is subsequent chatter among IVS operators, followed by some thumping noises and the sound of small metal objects hitting the concrete floor.

At about two minutes and 19 seconds into the recording (2:19) Sergeant Vantuinen says, "Hold on, before we pull it off..." and proceeds to announce via IVS radio to Lieutenant Binks at (2:34), that the door hinge pins were removed and that they were ready to place the phone. At (2:56), a *woot*-sound siren is audible, the IVS dispatch operator repeats Sergeant Vantuinen's announcement. At (3:09), Lieutenant Binks announces, "You're good, Jon." At (3:12), Sergeant Vantuinen states, "Copy, we'll be breaching now."

There was additional discussion among IVS operators about the door, then at (3:28) a loud thump is heard followed by the sounds of a scuffle. While the scuffling sounds continue and at about (3:30) someone is heard saying, "Hands up! Hands up!" "Stop" and "Get on the ground" are also audible but the continued commotion and noise render some voices unintelligible. At (3:34) someone can be heard saying, "Get out of the way." At (3:35), Sergeant Vantuinen is heard saying, "Hey, hold up, hold up, hold up. Come here. Hold up. Come back. Come back." At (3:39), Sergeant Vantuinen asked that the less-lethal operators come forward by saying "40, 40 up" and then at (3:41), he asked for the K-9 unit by saying, "get the dog in there."

At (3:42), Sergeant Vantuinen radioed, "he's got a, got a crowbar, he's got a crowbar." At (3:46), Sergeant Vantuinen radioed, "We're fighting with one. He's got a crowbar. Standby." In the middle of this radio broadcast, Officer Mutter can be heard saying, "Fass." At (3:47), despite continued scuffling noises, someone said, "Put it down. Put it down." At (3:50), another voice can be heard saying, "Hey, let the dog do the work." At (3:51), within the approximate span of a second, four loud consecutive bangs are heard, followed by the sound of a metal object hitting the ground.⁴ Within about three seconds, Sergeant Vantuinen asked, "Was that shots fired? Was that a shot?" After receiving confirmation, at approximately (4:08), Sergeant Vantuinen radioed, "Green One. Shots fired. Shots fired."

As the operation continued, at (4:14), Sergeant Vantuinen stated, "Get him cuffed. Get the dog off him." Officer Mutter can then be heard saying "Aus" multiple times as

⁴ Discerning the sound of four shots was only possible by reduced speed playback.

PUBLIC RELEASE MEMORANDUM

Fatal Officer-Involved Incident

DA STAR # 2020-57748

June 2, 2021

Page 24

someone says, “cuffs up.” At (4:30), Sergeant Vantuinen stated, “Let’s get him in custody. Get the doc in here. Get the Doc up.” By (5:07), an IVS doctor can be heard noting one center mass wound. At (5:19), Sergeant Vantuinen radioed, “Green One, C-P. We’re just clearing the rest of the house. Doc is working on our downed suspect now.”

INCIDENT SCENE INVESTIGATION

Detective Nicholas Clark managed the incident scene investigation. The officer-involved shooting occurred inside a two-story single-family residence on the 1500-block of Sandhurst Street in the city of Fontana. The residence fronted Sandhurst Street and faced south. The immediate area consisted of other single-family homes. The case agent submitted over 700 photos of the scene and a three-dimensional image scan with spatial coordinates.

The primary residence was rectangular. A two-car attached garage extended from the southeast quadrant of the home. The interior of the garage was converted to a one-bedroom living and storage space. There was one exterior pedestrian access point on the east side of the garage. The east pedestrian garage access point consisted of one exterior metal screen security door abutting an interior wood door. There was one pedestrian garage access point on the interior of the garage to the interior of the primary residence that consisted of a wood door. There were two driveways at the residence from Sandhurst Street. The south driveway lead to two apparent single garage doors on the exterior of the home; the doors were not operable at the time. Another driveway on the west side of the residence lead to a concrete pad on the northwest of the residence and the fenced backyard.

The interior garage access point opened to an interior hallway of the primary residence that was approximately three feet wide and six feet long. The hallway was flanked by a bathroom and laundry room, though it does not appear that those spaces were breached during the incident. The open space adjoining the hallway on the interior appeared to be a multi-purpose room comprising the northeast quadrant of the home that measured approximately 14 feet by 14 feet; the officer-involved shooting occurred within this room. The open space in the garage (south of the hallway) was approximately 60 square feet. A five-foot wall extended into the garage on the immediate west side of the interior garage access point doorway. The placement of a box freezer immediately to the east side of the interior garage access point doorway therefore also narrowed the entry into the home from the garage, on the garage-side of the doorway, for approximately two and a half feet.

Two eXact iMPact 40 mm less-lethal FCC’s were located within the northeast multi-purpose room, towards the south portion of the room. One associated 40 mm rubber projectile was located next to the north patio slider. A second associated 40 mm rubber projectile was located in the northwest portion of the house. Two rifle FCC’s were located within the northeast multi-purpose room. One FCC with a headstamp “WINCHESTER 223 REM” was attributable to Officer Perez’s weapon and located between the northeast corner of the multi-purpose room and the north patio slider. The second rifle FCC bore a headstamp “WIN USA 5.56” and was

PUBLIC RELEASE MEMORANDUM

Fatal Officer-Involved Incident

DA STAR # 2020-57748

June 2, 2021

Page 25

attributable to Officer Avila's weapon; it was located near the southeast corner of the multi-purpose room.

Mr. Malagon's body laid supine with his head oriented to the south and his feet to the north, along the west side of the multi-purpose room. Mr. Malagon lay handcuffed to the rear. He wore thick-soled ankle-high leather boots. Mr. Malagon's weapon was located approximately 10 feet away from Mr. Malagon, near the southeast portion of the multi-purpose room. The case agent weighed Mr. Malagon's weapon and discovered the 30" metal bar weighted four and a half pounds.

At the time of the incident, two large armored vehicles were parked immediately outside the residence. Both armored vehicles were black, marked with the word "POLICE" in large white block letters across the front hood and sides. Both armored vehicles also bore visible police department and IVS decals. One armored vehicle was noted northwest of the residence, in the backyard and less than three feet from the northwest corner of the home. It is estimated that the rear-placed armored vehicle was approximately 30 feet from the rear patio slider that opened to the interior room where the officer-involved shooting occurred. The second armored vehicle was placed south of the residence, approximately 36 feet from the front door and hopped-up onto the pedestrian sidewalk abutting the front yard.

SBCSD Deputy Coroner Investigator Carol Fostore responded to the scene at 12:52 a.m., on May 29, 2020. Coroner Investigator Fostore found Mr. Malagon deceased and wearing a gray jacket over a white t-shirt, gray shorts, over blue sweat shorts, over underwear. Mr. Malagon also wore compression wraps over both lower legs and black work boots. Coroner Investigator Fostore noted Mr. Malagon's gunshot wounds to the chest, flank, shoulder and upper back, as well as punctate marks on the left leg above and on the knee and the left buttock.

DECEDENT

AUTOPSY. A SBCSD Forensic Pathologist performed the autopsy of Mr. Malagon on June 18, 2020. In her examination, the forensic pathologist found Mr. Malagon to be a 51-year-old Hispanic male, approximately five foot and eight inches tall, and weighing 185 pounds. Mr. Malagon's clothing included a white t-shirt, two pairs of shorts and boxers.

In the Autopsy Protocol report, the forensic pathologist noted two gunshot wounds to Mr. Malagon's torso. She opined that one gunshot entered at the mid-chest, exited the right lower chest, and bore a front-to-back, left-to-right, and downward trajectory. The second gunshot was opined to have entered the upper back and left scapula and exited at the back left axilla.⁵ In layman's terms, Det. Tebbetts described the upper back gunshot wound to have entered the top

⁵ The text of the Autopsy Protocol report refers to the entry of the gunshot wound to the upper back specifically at the "upper back and right scapula." However, the anatomical diagram prepared by the pathologist and attached to the Autopsy Protocol report clearly noted the upper back gunshot wound to the area of the *left* scapula, leading this reviewer to conclude that written report's referral to the *right* scapula is a typo.

PUBLIC RELEASE MEMORANDUM

Fatal Officer-Involved Incident

DA STAR # 2020-57748

June 2, 2021

Page 26

of the left shoulder and exited below the left armpit. The forensic pathologist specified that the upper back gunshot wound path was back-to-front, downwards, with a variable right/left deviation. The forensic pathologist also noted that Mr. Malagon had bite marks on the left buttock. Blood obtained by the forensic pathologist was processed for toxicology and determined to contain measurable values of both and Delta-9 THC (6.0 ng/mL) and Delta-9 Carboxy THC (7.6 ng/mL). In the forensic pathologist's opinion, Mr. Malagon's cause of death was two gunshot wounds to the torso. It was further opined that death would have occurred within minutes. The forensic pathologist found no evidence of close-range firing for either gunshot wound.

CRIMINAL HISTORY. The case agent's submission included Mr. Malagon's criminal history, which included one 2008 felony conviction for assault with a deadly weapon.

APPLICABLE LEGAL PRINCIPLES

Although it appears that the involved officers in this matter were not attempting to detain or arrest Mr. Malagon immediately before they encountered Mr. Malagon, the involved officers were actively engaged an attempt to induce Mr. Malagon's peaceful surrender. IVS operators were authorized by search warrant to enter the residence to seize Mr. Malagon and his weapon. After Mr. Malagon unexpectedly presented himself and accosted the IVS team, the operation instantly transformed into detention and arrest.

A peace officer may use objectively reasonable force to effect an arrest, to prevent escape or to overcome resistance. (Calif. Penal Code §835a(b)).⁶ An arrestee has a duty to refrain from using force to resist arrest, if he knows or should know that he is being arrested. (Penal C. §834a.) In the interest of orderly resolution of disputes between citizens and the government, a *detainee* also has a duty to refrain from using force to resist detention. (*Evans v. City of Bakersfield* (1994) 22 Cal.App.4th 321, 332-333.) An arrestee or detainee may be kept in an officer's presence by physical restraint, threat of force, or assertion of the officer's authority. (*In re Gregory S.* (1980) 112 Cal. App. 3d 764, 778, *citing, In re Tony C.* (1978) 21 Cal.3d 888, 895.) The force used by the officer to effectuate the arrest or detention can be justified if it satisfies the Constitutional test in *Graham v. Connor* (1989) 490 U.S. 386, 395. (*People v. Perry* (2019) 36 Cal. App. 5th 444, 469-470.)

PENAL CODE SECTION 196. Police officers may use *deadly* force in the course of their duties, under circumstances not available to members of the general public. Penal Code §196 states that homicide by a public officer is justifiable when it results from a use of force that "is in compliance with Section 835a." Section 835a(c)(1) specifies a ***police officer is justified in using deadly force*** when he reasonably believes based upon the totality of the circumstances, that it is necessary "defend against an imminent threat of death or serious bodily injury to the officer or another." The "[t]otality of the circumstances' means all facts known to the peace

⁶ All references to code sections here pertain to the California Penal Code.

PUBLIC RELEASE MEMORANDUM

Fatal Officer-Involved Incident

DA STAR # 2020-57748

June 2, 2021

Page 27

officer at the time, including the conduct of the officer and the subject leading up to the use of deadly force.” (Penal C. §835a(e)(3).)

A peace officer need not retreat or desist from efforts to arrest a resistant arrestee. (Penal C. §834a(d).) A peace officer is neither deemed the aggressor in this instance, nor does he lose the right of self-defense by the use of objectively reasonable force to effect the arrest, prevent escape or overcome resistance. (*Id.*)

PENAL CODE SECTION 197. California law permits *all persons* to use deadly force to protect themselves from the imminent threat of death or great bodily injury. Penal Code §197 provides that the use of deadly force by any person is justifiable when used in self-defense or in defense of others.

The pertinent criminal jury instruction to this section is CALCRIM 505 (“Justifiable Homicide: Self-Defense or Defense of Another”). The instruction, rooted in caselaw, states that a person acts in lawful self-defense or defense of another if :

- (1) he reasonably believed that he or someone else was in imminent danger of being killed or suffering great bodily injury;
- (2) he reasonably believed that the immediate use of deadly force was necessary to defend against that danger; and
- (3) he used no more force than was reasonably necessary to defend against that danger.

(CALCRIM 505.) The showing required under section 197 is principally equivalent to the showing required for a police officer to use lethal force under section 835a(c)(1), as stated above.

While the appearance of these principals was new to section 835a in 2020,⁷ the courts have been defining the constitutional parameters of use of deadly force for many years. In 1985, the United States Supreme Court held that when a police officer has probable cause to believe that the suspect he is attempting to apprehend has “threatened infliction of serious physical harm” to the officer, using deadly force to prevent escape is not constitutionally unreasonable. (*Tennessee v. Garner* (1985) 471 U.S. 1, 11-12.) California courts have held that when a police officer’s actions are reasonable under the Fourth Amendment of our national Constitution, that state statutory requirements may also be satisfied. (*Martinez v. County of Los Angeles* (1996) 47 Cal.App.4th 334, 349; *Brown v. Grinder* (E.D. Cal., Jan. 22, 2019) 2019 WL 280296, at *25.) There is also a vast body of caselaw that has demonstrated *how* to undertake the analysis of what is a reasonable use of force under the totality of the circumstances. (See *Reasonableness* discussion, *infra*.) As such, our pre-2020 state caselaw is still relevant.

⁷ Assem. Bill No. 392 (2019-2020 Reg. Sess.) approved by the Governor, August 19, 2019. [Hereinafter “AB-392”]

PUBLIC RELEASE MEMORANDUM

Fatal Officer-Involved Incident

DA STAR # 2020-57748

June 2, 2021

Page 28

There is one additional pertinent and new factor in section 835a that did not appear in the section previously, nor was it developed in prior caselaw: deadly force cannot be used against a person who only poses a danger to themselves. (Penal C. §835a(c)(2).)

In addition, the legislature included generalized findings and declarations at subsection (a) of Section 835a that are instructive. These findings and declarations lend guidance to our analysis but are distinct from the binding standards that succeed them within the section. In sum, the findings are as follows:

- (1) that the use of force should be exercised judiciously and with respect for human rights and dignity; that every person has a right to be free from excessive uses of force;
- (2) that use of force should be used only when necessary to defend human life and peace officers shall use de-escalation techniques if it is reasonable, safe and feasible to do so;
- (3) that use of force incidents should be evaluated thoroughly with consideration of gravity and consequence, lawfulness and consistency with agency policies;⁸
- (4) that the evaluation of use of force is based upon a totality of the circumstances, from the perspective of a reasonable officer in the same situation; and
- (5) that those with disabilities may be affected in their ability to understand and comply with peace officer commands and suffer a greater instance of fatal encounters with law enforcement, therefore.

(Penal C. §835a(a).)

IMMINENCE. “Imminence is a critical component” of self-defense. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1094.) A person may resort to the use of deadly force in self-defense, or in defense of another, where there is a reasonable need to protect oneself or someone else from an apparent, *imminent* threat of death or great bodily injury. “An imminent peril is one that, from appearances, must be instantly dealt with.” (*In re Christian S.* (1994) 7 Cal.4th 768, 783.) The

⁸ Penal C. §835a (a)(3) conflates a demand for thorough evaluation of a use of force incident with a dictate that it be done “in order to ensure that officers use force consistent with law and agency policies.” On its face, the section is clumsily worded. Nothing included in AB-392 plainly requires that a use of force also be in compliance with agency policies. A provision in the companion bill to AB-392—Senate Bill No. 230 [(2019-2020 Reg. Sess.) approved by the Governor, September 12, 2019] (Hereinafter “SB-230”), does explicitly state that “[a law enforcement agency’s use of force policies and training] may be considered as a factor in the totality of circumstances in determining whether the officer acted reasonably, but shall not be considered as imposing a legal duty on the officer to act in accordance with such policies and training.” (Sen. Bill No. 230 (2019-2020 Reg. Sess.) §1.) It is noteworthy, however, that this portion of SB-230 is uncodified, unlike the aforementioned portion of Penal C. §835a (a)(3).

PUBLIC RELEASE MEMORANDUM

Fatal Officer-Involved Incident

DA STAR # 2020-57748

June 2, 2021

Page 29

primary inquiry is whether action was instantly required to avoid death or great bodily injury. (*Humphrey, supra*, 13 Cal.4th at 1088.) What a person knows, and his actual awareness of the risks posed against him are relevant to determine if a reasonable person would believe in the need to defend. (*Id.* at 1083.) In this regard, there is no duty to wait until an injury has been inflicted to be sure that deadly force is indeed appropriate. (*Scott v. Henrich, supra*, 39 F. 3d at 915.)

Imminence more recently defined in the context of police use of lethal force is similar:

A threat of death or serious bodily injury is “imminent” when, based on the totality of the circumstances, a reasonable officer in the same situation would believe that a person has the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury to the peace officer or another person. An imminent harm is not merely a fear of future harm, no matter how great the fear and no matter how great the likelihood of the harm, but is one that, from appearances, must be instantly confronted and addressed.

(Penal C. §835a(e)(2).)

In addition, police officers are not constitutionally required to use all feasible alternatives to avoid a situation where the use of deadly force is reasonable and justified. (*Martinez v. County of Los Angeles, supra*, 47 Cal.App.4th at 348.) The court in *Scott* explained:

Requiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgment...Imposing such a requirement would inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves.

(*Scott, supra*, 39 F.3d at 915.)

REASONABLENESS. Self-defense requires both subjective honesty and objective reasonableness. (*People v. Aris* (1989) 215 Cal.App.3d 1178, 1186.) The United States Supreme Court has held that an officer’s right to use force in the course of an arrest, stop or seizure, deadly or otherwise, must be analyzed under the Fourth Amendment’s “reasonableness” standard. (*Graham v. Connor, supra*, 490 U.S. at 395.)

The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on scene, rather than with the 20/20 vision of hindsight....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 rapidly evolving—about the amount of force that is necessary in a particular situation.

(*Id.* at 396-397, citations omitted.)

PUBLIC RELEASE MEMORANDUM

Fatal Officer-Involved Incident

DA STAR # 2020-57748

June 2, 2021

Page 30

The “reasonableness” test requires an analysis of “whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.” (*Id.* at 397, citations omitted.) What constitutes “reasonable” self-defense or defense of others is controlled by the circumstances. A 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.)

The *Graham* court plainly stated that digestion of the “totality of the circumstances” is fact-driven and considered on a case-by-case basis. (*Graham v. Connor, supra*, 490 U.S. at 396.) As such, “reasonableness” cannot be precisely defined nor can the test be mechanically applied. (*Id.*) Still, *Graham* does grant the following factors to be considered in the “reasonableness” calculus: the severity of the crime committed, whether the threat posed is immediate, whether the person seized is actively resisting arrest or attempting to flee to evade arrest. (*Id.*)

Whether the suspect posed an immediate threat to the safety of the officer or others has been touted as the “most important” *Graham* factor. (*Mattos v. Agarano* (9th Cir. 2011) 661 F.3d 433, 441-442.) An officer may reasonably use deadly force when he confronts an armed suspect in close proximity whose actions indicate an intent to attack. (*Reynolds v. County of San Diego* (9th Cir. 1994) 858 F.Supp. 1064, 1071-72.) Again, the specified factors of *Graham* were not meant to be exclusive; other factors are taken into consideration when “necessary to account for the totality of the circumstances in a given case.” (*Mattos v. Agarano, supra*, 661 F.3d at 441-442.)

The use of force policies and training of an involved officer’s agency *may* also be considered as a factor to determine whether the officer acted reasonably. (Sen. Bill No. 230 (2019-2020 Reg. Sess) §1. See fn. 8, *supra*.)

When undertaking this analysis, courts do not engage in *Monday Morning Quarterbacking*, and nor shall we. Our state appellate court has warned,

under *Graham* we must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. 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.

(*Martinez v. County of Los Angeles, supra*, 47 Cal.App.4th at 343, citing *Smith v. Freland* (6th Cir. 1992) 954 F.2d 343, 347.) The Supreme Court’s definition of reasonableness is, therefore, “comparatively generous to the police in cases where potential danger, emergency conditions or other exigent circumstances are present.” (*Martinez v. County of Los Angeles, supra*, 47 Cal.App.4th at 343-344, citing *Roy v. Inhabitants of City of Lewiston* (1st Cir. 1994) 42 F.3d 691, 695.)

PUBLIC RELEASE MEMORANDUM

Fatal Officer-Involved Incident

DA STAR # 2020-57748

June 2, 2021

Page 31

NON-LETHAL FORCE. This does not suggest that anything *less than* deadly force requires no justification. “[A]ll force—lethal and non-lethal—must be justified by the need for the specific level of force employed.” (*Bryan v. MacPherson* (9th Cir. 2010) 630 F.3d 805, 825, citing *Graham, supra*, 490 U.S. at 395.) The *Graham* balancing test is used to evaluate the reasonableness of lethal and non-lethal force, alike. (*Deorle v. Rutherford* (9th Cir. 2001) 272 F.3d 1272, 1282-83.)

Use of a shotgun-fired projectile has been categorized as intermediate non-lethal force. (*Deorle v. Rutherford, supra*, 272 F.3d at 1279-80.) This designation exists even though such force is *capable* of being used in a manner causing death. (*Id.*) To be deemed “lethal force” the instrumentality must be force that “creates a substantial risk of death or serious bodily injury.” (*Smith v. City of Hemet* (9th Cir. 2005) 394 F.3d 689, 693.); use of shotgun-fired projectile falls short of this definition. (*Bryan v. MacPherson, supra*, 630 F.3d at 825; *Deorle v. Rutherford, supra*, 272 F.3d at 1279-80.) Similarly, the use of a trained police dog does not qualify as “deadly force” as it too has fallen short of the lethal force definition set forth in *Smith*. (*Thompson v. County of Los Angeles* (2006) 142 Cal.App.4th 154, 165-169.)

Beyond the traditional *Graham* factors, and particularly in the use of non-lethal force, the failure of officers to give a warning and the subject’s mental infirmity can also be considered when assessing the totality of the circumstances. (*Bryan v. MacPherson, supra*, 630 F.3d at 831; *Deorle v. Rutherford, supra*, 270 F.3d at 1283-84.) Failure to pass-muster under *Graham* can deem the use of non-lethal force as “excessive” and therefore violate the Fourth Amendment. (*Id.*) On the other hand, active resistance could justify multiple applications of non-lethal force to gain compliance and would not be deemed “excessive” nor violate the Fourth Amendment. (*Sanders v. City of Fresno* (9th Cir. 2008) 551 F.Supp.2d 1149, 1182.)

ANALYSIS

This report evaluates the use of deadly force by FPD Officer Daryl Avila and CPD Officer Edgar Perez. This report will also address the intermediate less-lethal force used by FPD Corporal Thomas Borden, FPD Officer Casey Mutter and RPD Officer Shannon Vanderkallen. As indicated above, there are legal bases that must be met before a use of force is justified and before the right to self-defense ripens. We draw our conclusion here based upon those principles and the required careful examination of the totality of the circumstances evidenced by the case agent’s submission.

USE OF LETHAL FORCE

A use of force must be “reasonable” in order to be deemed lawful. When considered in the context of self-defense, whether Officers Avila and Perez were justified in employing lethal force involves a two-part analysis: (1) did each officer subjectively and honestly believe he needed to protect himself from an apparent, imminent threat of death or great bodily injury; and

PUBLIC RELEASE MEMORANDUM

Fatal Officer-Involved Incident

DA STAR # 2020-57748

June 2, 2021

Page 32

(2) was the officer's belief in the need to protect himself from an apparent, imminent threat of death or great bodily injury objectively reasonable.

Subjective Belief of Imminent Need to Protect. The subjective belief of Officers Avila and Perez are stated here based upon each officer's statement.

Officer Avila was aware that Mr. Malagon was wanted for having committed a violent felony and that a search warrant had been authorized for the residence. Officer Avila believed that the Green Team's plan in approaching the residence was to breach the garage door to place a phone inside without going inside themselves. Officer Avila further explained that the team was trying to be stealth in doing so, to avoid a confrontation with Mr. Malagon. Officer Avila recognized that the PA announcements were not working and putting a phone inside was done in hope of achieving a "peaceful ending" by getting the negotiation team to talk to Mr. Malagon into coming outside. However, Officer Avila stated that the mission changed because Mr. Malagon actively assaulted officers and the police dog.

As soon as Mr. Malagon pushed through the doorway, Officer Avila recalled that his stress level was "high" and feared that he or one of his partners would be hurt or killed. Yet, Officer Avila stated that he did not fire after the first strike to Officer Perez in an effort to use restraint and was "trying to give [Mr. Malagon] a chance to, to stop the assault," as well as to distract Mr. Malagon from Officer Perez, to give Officer Perez an opportunity to get away. From the distance of about a foot, Officer Avila elected to hit Mr. Malagon in the left rib or abdomen with the barrel of his gun approximately three times. Mr. Malagon continued to swing his weapon towards the team, but after Officer Avila's third strike, Officer Avila observed Mr. Malagon back away from the door.

Officer Avila also stated that he observed the police dog deploy and physically moved back so that the police dog could work. However, in Officer Avila's opinion, "the dog couldn't do much work at the time" because it too was being attacked by Mr. Malagon. In short order, Officer Avila recognized that 40 mm projectiles were fired and had little to no effect. A second or two later, Officer Avila switched his rifle from the "safe" to "fire" position. Officer Avila recalled being about two to three feet away from Mr. Malagon and that Mr. Malagon maintained an aggressive posture and was still actively trying to assault Officer Avila. Officer Avila stated that he felt like Mr. Malagon was going to kill him before the officer fired his rifle.

Officer Perez was also aware that Mr. Malagon was a wanted for assaulting a disabled family member and that a search warrant was in place prior to the Green Team approaching the residence. Officer Perez also knew that Mr. Malagon was not responding to PA announcements. In contrast to Officer Avila, however, Officer Perez believed that he would be entering the home without weapons to locate, detain and arrest Mr. Malagon.

At the time Mr. Malagon charged the garage door and struck Officer Perez on the head, Officer Perez's weapon was slung and both of Officer Perez's hands were holding up the unhinged garage door. Officer Perez recalled that Mr. Malagon put his weight on the door as Officer Perez

PUBLIC RELEASE MEMORANDUM

Fatal Officer-Involved Incident

DA STAR # 2020-57748

June 2, 2021

Page 33

held the door up. Officer Perez was both exposed and unable to defend himself. Officer Perez explained that had he not been struck where his head was helmeted, he believed he would have been killed. Both Officers Avila and Perez appreciated during the operation that Mr. Malagon's weapon strikes posed a risk of serious harm or death to officers, and were especially vulnerable where their faces, ears and necks were exposed.

After being struck, Officer Perez recalled that he and Officer Avila were the first to enter the residence interior hallway, but not before the police dog was deployed. Officer Perez stated that he saw Mr. Malagon hit the police dog with a two-handed downward motion, almost knocking the dog out. Officer Perez stated that he did not choose to fire when Mr. Malagon was assaulting the dog. Officer Perez stated that he chose to fire when Mr. Malagon looked at and advanced toward him and Officer Avila with the crowbar raised over Mr. Malagon's head. Officer Perez believed that Mr. Malagon had already tried to kill Officer Perez once and that the "blank crazy look" on Mr. Malagon's face indicated his further intent to hurt officers. Officer Perez perceived that Mr. Malagon was within one to two feet away from Officer Avila, and about three feet from Officer Perez at the time Officer Perez fired his weapon. Officer Perez believed that Mr. Malagon knew that they were the police, but that Mr. Malagon did not care. Officer Perez stated that he was afraid for his and his partners' lives and believed that he needed to fire at Mr. Malagon to save his and his partners' lives.

Although it appears that Officer Avila and Officer Perez each had a different understanding of what was *planned* after the residence door was breached, Mr. Malagon's surprise attack truncated those plans and unified the officers' *actual* subsequent approach. Both Officers Avila and Perez believed that they shot at the same time as the other. A review of the audio recording of the officer-involved shooting does appear to be consistent with each officers' account of the incident, specifically regarding the delay between the sound of the door breach and the sound of shots being fired. Additionally, the shots are fired within the span of a second, with the final two shots being almost undiscernible from each other. The clustered gunfire does give rise to an inference that the firing officers each perceived the same threat at the same time. The perceived threat also comes immediately upon the heels of the assault on Officer Perez and the police dog. Based upon the foregoing, it is reasonable to conclude that Officers Avila and Perez each bore an honest and subjective belief that he was under threat of imminent deadly harm or bodily injury at the time he used lethal force.

Reasonable Belief of Imminent Need to Protect. Although Penal Code section 835a(c)(1) is the authority for an officer's use of lethal force, the analytical framework for determining what is "reasonable" is included in *Graham* and its progeny. This analysis also overlaps with the second component to a self-defense claim: a finding that each officer had an objectively reasonable belief of the need to use deadly force to protect himself from imminent threat of death or serious injury.

As in *Graham*, we first consider the severity of the crime at issue. This incident was set in motion by Victim's initial report that Mr. Malagon assaulted Victim with a spiked crowbar and threatened to kill Victim—two serious felonies. These crimes were the basis for the search

PUBLIC RELEASE MEMORANDUM

Fatal Officer-Involved Incident

DA STAR # 2020-57748

June 2, 2021

Page 34

warrant obtained. In addition, it would have been reasonable for Officers Avila and Perez to believe that at the time Mr. Malagon approached with his weapon that Mr. Malagon intended to assault or kill an officer in the course of performance of his duties. The circumstances support an inference that Mr. Malagon was aware that the police were attempting to contact him. From about 10:30 a.m. until after 1:00 p.m.—a period of more than two and a half hours, multiple uniformed officers and multiple marked police vehicles alerted Mr. Malagon to their presence at the scene and demanded Mr. Malagon’s surrender. Indeed, other civilians in the surrounding homes readily identified the police activity at the scene. Every law enforcement officer who encountered Mr. Malagon’s attack wore a uniform distinctively marked with the word “POLICE” in large block letters. The use of a police dog and verbal commands by IVS operators also reasonably communicated to Mr. Malagon that he was being encountered by law enforcement.

Despite all apparent audible and visual cues that Mr. Malagon faced police officers on police business, Mr. Malagon persisted in his attack. By Sergeant Vantuinen’s admission, Mr. Malagon bested his team, initially. Sergeant Vantuinen stated that Mr. Malagon looked bigger than the team expected and had an “overwhelming strength.” Each eyewitness to Mr. Malagon’s attack upon the IVS Green Team perceived the attack to be one where officers were in immediate danger of being seriously injured or killed. After all, Mr. Malagon wielded a 30” metal crowbar weighing approximately four and a half pounds with one end sharpened to a point. Moreover, Mr. Malagon’s barrage targeted the heads of Officer Perez and the police dog. It is reasonable to conclude that Mr. Malagon sought to seriously injure or kill Officer Perez and the police dog in doing so. As such, it would have been reasonable for Officers Avila and Perez to consider in their deliberative processes that in addition to the crimes reported by Victim, Mr. Malagon was committing a crime against each of them that was among the most serious and violent under California statute—the assault or attempted murder of a peace officer in the course of performance of his duties.⁹

Resistance is another essential consideration in a *Graham* analysis. As discussed above, the submission supports a conclusion that the officers involved reasonably believed Mr. Malagon knew he was in contact with police officers. By using his rifle muzzle to push Mr. Malagon back and away from Officer Perez, it reasonably made clear to Mr. Malagon that a police officer was poised to shoot at him, obviating any need by the officers to either further announce themselves or issue spoken warnings that deadly force may be used. Arguably, Mr. Malagon can be said to have seen the FPD patrol officers who pointed their weapons at the house much earlier in the day. Mr. Malagon’s response to this show of lethal force was to close an open patio window and draw the blinds, suggesting again that he was aware of the police presence. Mr. Malagon disregarded the officers, as he ignored every PA announcement made in the subsequent hours. Lieutenant Binks estimated that hundreds of PA announcements were made. Meanwhile, Mr. Malagon readied himself for battle as he barricaded; he chose to arm himself and don thick-soled work-type boots. Mr. Malagon then moved into active resistance when he used his weapon to

⁹ The willful and malicious assault of a police dog acting under supervision of a peace officer in the attempted discharge of the officer’s duty, that results in serious injury to the police dog is also a felony. (Penal C. §600(a).)

PUBLIC RELEASE MEMORANDUM

Fatal Officer-Involved Incident

DA STAR # 2020-57748

June 2, 2021

Page 35

strike officers as soon as he had an opportunity to do so. Even in the moments before shots were fired, Mr. Malagon was again given orders to show his hands, to stop and to put his weapon down. Still, Mr. Malagon ignored commands. Set aside that Mr. Malagon had a statutory duty to refrain from using force to resist arrest, an individual who would refuse to obey commands given at gunpoint by multiple uniformed officers must be perceived to be especially dangerous, irrational and unpredictable. Mr. Malagon presented himself in a manner conveying that he intended to inflict serious harm or death to police officers—Mr. Malagon continued to assault the police dog and aggressed IVS operators with a deadly weapon. It was well within reason for officers encountering such an individual to believe that Mr. Malagon intended to kill and/or be killed. The facts and evidence support a finding that Mr. Malagon was actively resisting officers at the time Officers Avila and Perez used lethal force.

Immediacy is the “most important” *Graham* factor. A qualifying imminent threat is one that would cause a reasonable person to believe that action was instantly required to avoid death or great bodily injury. By all accounts, Mr. Malagon’s sudden and violent appearance at the garage door was unexpected. The surprise aspect of this contact highlights that officers were making split-second judgments under tense, uncertain and rapidly evolving circumstances. In the evaluation of the question of necessity at the time shots were fired, it must be noted that the courts have employed a standard that is highly deferential and viewed from the vantage of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. Beginning with the strike to Officer Perez’s head, Mr. Malagon’s assault on officers and the police dog continued for approximately half a minute. During this time, officers found themselves limited in their ability to approach Mr. Malagon due to the narrow hallway that separated them from Mr. Malagon. Still, each Green Team officer had the immediate ability to use lethal force but did not do so. Officers first used verbal commands, followed by physical pushing. The use of less-lethal methods continued with deployment of the K-9 unit. Mr. Malagon persisted and batted the police dog several times over the head with his sharpened metal crowbar. Officer Avila was also able to appreciate that less-lethal projectile rounds had been fired and had no effect on Mr. Malagon. From the moment he attacked officers, Mr. Malagon made no appreciable attempt to cease in his attack, nor to surrender. Officers Avila and Perez stood closest to Mr. Malagon and both appreciated that Mr. Malagon had turned his attention toward them. Officer Avila and Perez shot at Mr. Malagon as Mr. Malagon approached. Indeed, the front-to-back and top-entry gunshot wound trajectories later noted by the forensic pathologist would be consistent with a forward assault by Mr. Malagon.¹⁰ In light of all of Mr. Malagon’s behavior up until lethal force was used, Officers Avila and Perez were afforded no other reasonable choice but to act swiftly to defend against the perceived imminent danger to themselves and others in their immediate vicinity. As such, the necessity of the use of deadly force by Officers Avila and Perez cannot be second-guessed. Officers Avila and Perez reasonably believed that their action was instantly required to avoid death or great bodily injury.

¹⁰ The existence of an entry wound at the top of the left shoulder and exit wound below the left armpit is not unfeasible in light of Mr. Malagon’s forward approach toward shooting officers. Specifically, had Mr. Malagon been impacted at the mid-torso by a lethal or less-lethal round, it is reasonable to believe that he would have bent forward to expose the top of his shoulder by the time the last lethal round was fired.

PUBLIC RELEASE MEMORANDUM

Fatal Officer-Involved Incident

DA STAR # 2020-57748

June 2, 2021

Page 36

Based on the foregoing, each of the primary *Graham* factors as applied, support a finding that the use of lethal force by Officers Avila and Perez was reasonable. Officers Avila and Perez had to act instantly to confront the danger posed by Mr. Malagon, which by all indication was an immediate threat to kill the officers. As such, the use of lethal force by Officers Avila and Perez is also justifiable under Penal Code §197.

Pre-Shooting De-escalation. Section 835a(a) does advise that lethal force be used only “when necessary to defend human life” and that safe and feasible de-escalation should be employed. Extensive and well-known efforts were made to avoid a use of force encounter with Mr. Malagon before, during and after Victim’s rescue from the residence.

At approximately 10:30 a.m., before Victim was rescued from the residence, multiple marked FPD units and uniformed FPD officers appeared to the front of the residence. Victim conveyed to dispatch and to the first responders at the scene that Victim was in grave danger and implored officers to save him from Mr. Malagon. After the first PA announcements were made to the front of the residence, movement was noticed in the front window of the house. Victim was still in the residence at the time and confirmed that PA announcements could be heard. Victim reported, and it was later confirmed, that throughout the entire stand-off Mr. Malagon was the only person inside of the primary interior of the house. After the initial approach of five uniformed FPD officers and additional announcements were made to the rear of the house, Mr. Malagon closed an open window and immediately drew its blinds. FPD officers visually and verbally made their presence known and repeatedly demanded Mr. Malagon’s surrender. By his actions, it can be inferred that Mr. Malagon was aware early-on of the police presence outside of the home and specifically intended *not* to comply.

Prior to extricating Victim from the garage, Mr. Malagon jammed shut an interior garage door such that Victim was unable to let himself out. FPD patrol officers had to ram the door open before Victim could be assisted outside at about 11:11 a.m. Immediately after Victim was led to safety, FPD officers repeatedly announced themselves inside the residence garage. As before, Mr. Malagon made no attempt to show himself or surrender. FPD patrol officers held the scene and continued to make PA announcements to try to get Mr. Malagon to exit the home without forcing a physical confrontation.

Additional FPD units responded to the scene, but by approximately noontime IVS personnel had also begun to respond to the scene. A distinctively marked armored police vehicle was placed directly in front of the residence, and another was placed behind of the residence. A team of uniformed IVS operators manned each armored vehicle. The IVS team had previously had success in inducing the surrender of barricaded subjects just by the mere presence of its IVS members and their armored vehicles. Unfortunately, such was not the outcome in the case of Mr. Malagon. PA announcements were made from the armored vehicle to the front, again announcing the presence of police and demanding that Mr. Malagon surrender. Loud and annoying sirens were also used to try to get Mr. Malagon’s attention. The IVS Commander, who had been at the scene from approximately 11:20 a.m., believed that hundreds of announcements

PUBLIC RELEASE MEMORANDUM

Fatal Officer-Involved Incident

DA STAR # 2020-57748

June 2, 2021

Page 37

had been made before the Green Team ultimately moved towards the residence just after 1:00 p.m.

In yet another effort to gain Mr. Malagon's compliance without use of force, the Green Team's plan was to place a phone into the house so that trained police hostage negotiators could communicate with Mr. Malagon. To avoid agitating Mr. Malagon, IVS operators attempted to place the phone covertly. Despite that effort, Mr. Malagon provoked a physical confrontation with IVS operators as they began lowering the garage door to insert the phone by assaulting Officer Perez with his sharpened metal bar.

Moreover, Officer Avila had his rifle in-hand at the time that Mr. Malagon struck Officer Perez in the head. Yet, Officer Avila chose specifically *not* to fire at that point. Officer Avila instead poked at Mr. Malagon with the muzzle of his rifle. Being poked with a rifle reasonably put Mr. Malagon on notice that he was in danger of being shot if he persisted in his assault on IVS operators. IVS operators simultaneously gave Mr. Malagon orders to stop, show his hands or disarm himself. Mr. Malagon refused. A call for use of less-lethal shotguns and deployment of the trained police dog were the last efforts made by IVS operators to de-escalate. Mr. Malagon met that attempt by striking the police dog in the head multiple times before turning towards officers with his weapon raised overhead once more. Less-lethal projectiles were fired at Mr. Malagon but had little to no effect that was appreciated separately from the impact of lethal fire from Officers Avila and Perez.

As discussed above, despite the intent and use of de-escalation techniques by the involved law enforcement officers, Mr. Malagon dictated a circumstance where there was no further feasible, safe or reasonable opportunity for Officers Avila and Perez to de-escalate.

Other Statutory Considerations. The additional considerations mentioned in §835a(a) further support a conclusion that the use of deadly force by Officers Avila and Perez was lawful.¹¹ First, there is no indication that Officers Avila and Perez acted excessively. Officers Avila and Perez's conduct discussed herein appears to have been judiciously exercised. Deadly force was not employed as a knee-jerk reaction to the assault on Officer Perez. Quite the contrary, as noted above, significant de-escalation measures were taken to avoid the use of lethal force. Officers endured almost half a minute of a potentially deadly assault upon them. Deadly force was delayed and used to overcome that assault only when Mr. Malagon made it blatantly clear to Officers Avila and Perez that each officer was in immediate danger of being killed. Both Officers Avila and Perez were within arm's-reach from Mr. Malagon at the time shots were fired. Furthermore, Officers Avila and Perez fired one shot each, and ceased in any further shooting as they immediately appreciated that the threat posed by Mr. Malagon ceased as Mr. Malagon dropped his weapon and fell. Ultimately, it was only the use of lethal force that ended Mr. Malagon's attack. As such, Officers Avila and Perez can be found to have well-appreciated the

¹¹ This review is based on a totality of the circumstances from the perspective of a reasonable officer in the same situation. (Penal C. §§835a(a)(3)-(4).) However, this review does not undertake additional examination of whether agency use of force policies were violated because (1) no law requires it, and (2) the submitted materials do not indicate or otherwise suggest that any use of force policy was violated.

PUBLIC RELEASE MEMORANDUM

Fatal Officer-Involved Incident

DA STAR # 2020-57748

June 2, 2021

Page 38

gravity and consequence of their use of lethal force evidenced by the delay and judicious manner in which they employed lethal force.

Victim's statements to officers on the day of the incident suggest that Mr. Malagon may have long-suffered an undiagnosed mental condition. Yet, nothing in the case agent's submission supports a finding that Mr. Malagon suffered an actual mental disability at the time of the shooting incident that would have rendered Mr. Malagon unable to understand and comply with commands. Rather, Mr. Malagon's conduct suggests that his interaction with law enforcement was by his own volition. Mr. Malagon made the specific choice to arm himself prior to breaching the garage door and meeting IVS operators with violence. Victim relayed that Mr. Malagon "hated cops" and believed he could beat anyone. Indeed, Mr. Malagon's conduct immediately prior to being shot is consistent with that assessment.

It bears mention that Mr. Malagon had a measurable amount of the narcotic component of marijuana in his blood. This is consistent with Victim's statement that Mr. Malagon was known to lately smoke marijuana. Even if it might be inferred that Mr. Malagon's decision-making was impacted by his recent marijuana use, Mr. Malagon's physical conduct towards officers was all that could be instantly appreciated by the officers under the circumstances. Mr. Malagon exhibited acute physical and mental dexterity that permitted him to best the IVS team for a brief time, accurately strike an IVS officer on the head, as well as to repeatedly strike a moving animal on the head. Ultimately, Mr. Malagon's choice to attack an armed squad of police officers was a perilous one and proved that Mr. Malagon was a danger to more than himself. Specifically, Mr. Malagon presented himself as a lethal threat to Officers Avila and Perez, who reasonably believed Mr. Malagon intended to kill them.

USE OF NON-LETHAL FORCE

The use of intermediate non-lethal force, such as a shotgun-launched rubber projectile or use of a trained police dog, must satisfy *Graham* to be lawful. As discussed below, the use of intermediate non-lethal force by Corporal Borden and Officers Mutter and Vanderkallen against Mr. Malagon was also justifiable.

The discussion of Mr. Malagon's criminality included above is equally applicable to Corporal Borden and Officers Mutter and Vanderkallen. Prior to their use of less-lethal force, each officer was aware that Mr. Malagon was sought for the assault of a wheelchair-bound family member with a metal spike or crowbar. The officers who used less-lethal force were also well-aware of the efforts that had been made to procure Mr. Malagon's peaceful surrender. Officer Mutter was present at the scene for about two hours before he deployed his trained police dog, personally witnessing law enforcement efforts to de-escalate the situation. Corporal Borden and Officer Vanderkallen arrived in response to Lieutenant Binks' IVS call-out notification but also understood that PA announcements had been made for a significant amount of time.

Mr. Malagon's active resistance was also apparent to Corporal Borden and Officers Mutter and Vanderkallen. Corporal Borden and Officer Vanderkallen both observed Mr. Malagon strike

PUBLIC RELEASE MEMORANDUM

Fatal Officer-Involved Incident

DA STAR # 2020-57748

June 2, 2021

Page 39

Officer Perez on the head. Both Corporal Borden and Officer Vanderkallen stated that they believed Mr. Malagon was trying to kill Officer Perez and each would have fired his less-lethal shotgun, but that neither was at a good vantage point to be able to do so due to the limited space crowded by IVS personnel. Officer Mutter did not actually see Officer Perez get struck in the head as he was not inside the garage, nor did he have a view of the interior door from his position outside. However, Officer Mutter did hear the interior garage door crash and the commotion including orders to “drop the weapon” and “get down.” When Officer Mutter heard, “dog up,” he moved to the interior of the garage and saw Mr. Malagon with a “big metal stick” or crowbar. Upon appreciating Mr. Malagon’s stance, Officer Mutter believed that Mr. Malagon intended to use his weapon to fight and not surrender.

Corporal Borden and Officers Mutter and Vanderkallen also appreciated the immediacy of the threat Mr. Malagon posed, prior to utilizing less-lethal means to try to stop Mr. Malagon. Officers continued to give verbal commands to Mr. Malagon, all which Mr. Malagon ignored. Officer Mutter deployed Wyatt to apprehend Mr. Malagon and prevent Mr. Malagon from hurting officers in the process. Officer Mutter stated that had he not deployed his police dog that Mr. Malagon might continue in his assault and injure or kill him or one of the IVS operators. Similarly, Corporal Borden explained the purpose of using the less-lethal shotgun was “to get pain compliance, to stop [Mr. Malagon] from attacking Officer Perez and Officer Avila.” Officer Mutter explained that Wyatt was previously trained to bite at the tricep area and saw that Wyatt bit Mr. Malagon at the back of his arms. Despite witnessing Mr. Malagon repeatedly hit Wyatt in the head, Corporal Borden and Officers Mutter and Vanderkallen did not use any weapons to try to stop Mr. Malagon. Corporal Borden and Officer Vanderkallen did not fire their less-lethal weapons at Mr. Malagon until Mr. Malagon once more turned towards officers while wielding his weapon. Corporal Borden and Officer Vanderkallen also waited until they could position themselves such that they could safely fire past other officers and at Mr. Malagon’s torso. After hearing two “pops” he associated with a 40 mm less-lethal shotgun, Officer Mutter stated that Wyatt released or fell away from Mr. Malagon, but then re-engaged on Mr. Malagon’s buttocks. Corporal Borden and Officer Vanderkallen each fired one less-lethal round at Mr. Malagon, as Mr. Malagon fell to the ground shortly after they fired. As such, no less-lethal weapons appear to have been utilized in a lethal or excessive manner. To the contrary, Corporal Borden and Officers Mutter and Vanderkallen were assigned and delivered a measured less-lethal response.

Based upon a totality of the circumstances, the use of intermediate less-lethal force by Corporal Borden and Officers Mutter and Vanderkallen was also reasonable and justified.

CONCLUSION

Under the facts, circumstances and applicable law in this matter, the use of deadly force by Officers Daryl Avila and Edgar Perez was exercised in self-defense and in a reasonable manner. Additionally, the less-lethal force used by Corporal Thomas Borden, and Officers Casey Mutter

PUBLIC RELEASE MEMORANDUM

Fatal Officer-Involved Incident

DA STAR # 2020-57748

June 2, 2021

Page 40

and Shannon Vanderkallen was also reasonable. Accordingly, no criminal liability based on each officer's conduct attaches in this incident.

Submitted By:

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Dated: June 2, 2021

