



PUBLIC RELEASE MEMORANDUM

Date: September 25, 2020

Subject: **Non-Fatal Officer-Involved Incident**

Involved Officers: Deputy Amir Awad,
San Bernardino County Sheriff's Department

Deputy Gaetano Nicassio,
San Bernardino County Sheriff's Department

Involved Subject: Juan Jose Bermudez (DOB 06/29/1988)
Subject's Residence: Fontana, CA

Incident Date: March 20, 2019
Incident Time: 11:39 a.m.

Case Agent: Detective Bruce Southworth
San Bernardino County Sheriff's Department

Agency Report #: 601900026

DA STAR #: 2019-43935

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PREAMBLE

The summary of this non-fatal incident is drawn from a submission of materials prepared by the San Bernardino County Sheriff's Department (SBCSD).

The submission reviewed includes the following: reports of witness law enforcement; reports summarizing interviews of the involved law enforcement officers and civilian witnesses; audio recordings of law enforcement officer and civilian interviews; deputy belt-recorder audio recordings; transcripts of the shooting deputies' interviews; law enforcement photographs; scientific investigation reports; and a 3-D rendering of the crime scene. The investigating case agent for this submission was Detective Bruce Southworth.

FACTUAL SUMMARY

On March 20, 2019, at approximately 11:39 a.m., Deputy Amir Awad and Deputy Gaetano Nicassio fired their duty pistols at Juan Jose Bermudez, in the City of Fontana. Mr. Bermudez was injured as a result. Mr. Bermudez survived his injuries.

The shooting of Mr. Bermudez occurred during an SBCSD, Specialized Enforcement Division (SED) operation to serve an arrest warrant for Mr. Bermudez, and a search warrant for a residence on Ceres Avenue (the "Fontana Residence"). The warrant service was assigned to SED Squad Two, which at the time, was led by SBCSD Sergeant Joshua Smith, and also consisted of SBCSD Deputies Awad, Nicassio, Adam Duncan, Andrew Pollick, and San Bernardino Police Department (SBPD) Officer Mike Madrigal.

To prepare for the warrant service, Deputy Pollick created an Operations Plan for SED Squad Two, that provided detailed information about Mr. Bermudez, the Fontana Residence and steps to be taken by the team. Deputy Pollick advised the team of the factual basis for the warrants, specifically that on March 16, 2019, Mr. Bermudez pointed a .38 caliber revolver at his victim and robbed him of his iPhone XR at the Fontana Residence. Additionally, it was reported that Mr. Bermudez was known by the robbery victim to possess an AR-style rifle in a gray truck at the residence. Deputy Pollick also advised his squad of Mr. Bermudez's criminal history, that included assault, firearms violations and criminal street gang participation.

On the morning of the shooting, SED Squad Two began surveilling the Fontana Residence from approximately 10:00 a.m. Deputy Nicassio took a position that allowed him to have a direct visual of the residence and reported to his team via radio. Less than an hour and a half later, Witness #1 drove his truck into the driveway at the Fontana Residence and honked his horn. Mr. Bermudez came out of the house. It appeared to Deputy Nicassio that Mr. Bermudez was talking to Witness #1. Deputy Nicassio then watched Mr. Bermudez go into the residence and back out to Witness #1 several times, while carrying a bundle of clothes. Before Mr. Bermudez came out of the residence the last time, Witness #1 went inside a motorhome parked on the street in front

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of the Fontana Residence. Within two minutes Mr. Bermudez came out and joined Witness #1 inside the motorhome. The motorhome's cabin door remained open behind them.

As the two men sat inside the motorhome, SED Squad Two coordinated an approach to apprehend Mr. Bermudez. At approximately 11:37 a.m., the squad began moving toward the motorhome, with Deputy Nicassio set to make first contact and Deputy Awad behind him. The deputies' approach brought them to the front of the motorhome's cabin doorway, with an immediate view of Mr. Bermudez's left profile. The motorhome door was open. Mr. Bermudez was sitting at a table inside. Deputy Nicassio stood square to the doorway, about one to two feet outside the threshold and Deputy Awad stood to his right.

Deputy Nicassio stated, "Hey Juan, lets see your hands." Mr. Bermudez made eye contact with the deputies. Deputy Nicassio demanded again to see Mr. Bermudez's hands. From a seated position, Mr. Bermudez made a reaching motion with his right hand, down towards his waist or seat. Both deputies instantly feared that Mr. Bermudez was reaching for a gun. Both deputies fired their guns at Mr. Bermudez. Deputy Nicassio fired first, and ultimately fired six times. Deputy Awad fired three times. Deputy Pollick saw Deputies Awad and Nicassio fire their weapons, but did not himself fire his weapon because he could not see into the motorhome. Meanwhile, Witness #1 had thrown himself to the floor inside the motorhome.

After the initial volley of gunfire, Deputy Pollick got behind Deputies Nicassio and Awad, who had moved back and away from the motorhome's doorway. Then, all three deputies began giving orders to Mr. Bermudez to show his hands, none of which Mr. Bermudez complied with. Instead, Mr. Bermudez slid under the table he was seated at. Then, Deputy Nicassio saw Mr. Bermudez make another sudden reaching movement and fired one more time at Mr. Bermudez.

Mr. Bermudez put up both of his hands after Deputy Nicassio's final shot. However, Mr. Bermudez continued to disregard the continued commands given by Deputies Nicassio and Awad. Deputy Duncan and Officer Madrigal had also arrived to assist. It appeared that Mr. Bermudez wouldn't or couldn't come out. So, Deputy Nicassio pulled Mr. Bermudez out. Deputy Awad proceeded to get Witness #1 out of the motorhome. Simultaneously, Deputies Duncan and Pollick triaged Mr. Bermudez's wounds until medical transport arrived.

Mr. Bermudez was transported to Arrowhead Regional Medical Center, where he received medical treatment. An examining physician determined that Mr. Bermudez suffered gunshot wounds to the left ankle, left thigh, left forearm and right shoulder. Mr. Bermudez also suffered a fracture in his left arm, secondary to the gunshot wound to the left forearm.

A loaded .22 caliber revolver was discovered laying on Mr. Bermudez's bed and a black air rifle was located in the back yard of the Fontana Residence. A baggie containing three grams of heroin was discovered where Mr. Bermudez sat immediately prior to the shooting.

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STATEMENTS BY LAW ENFORCEMENT OFFICERS¹

The law enforcement officers involved in this shooting incident are members of SBCSD, SED Squad Two. Each member of the team gave a voluntary statement relating to the incident. The shooting officers were interviewed five days after the incident. The remainder of the team was interviewed simultaneously by different detectives, about six and a half hours after the shooting occurred.

Each member of SED Squad Two consistently identified their teammates and explained that they had been tasked with serving a search warrant for the Fontana Residence and an arrest warrant for Mr. Bermudez. Prior to the incident, SED Squad Two developed and discussed an "Operations Plan" to safely effectuate their task of arresting Mr. Bermudez. Each team member understood that Mr. Bermudez was wanted for committing an armed robbery at the Fontana Residence. On the morning of March 20, 2019, SED Squad Two assembled to go over their operation plan then deployed to the area of the Fontana Residence. The squad's communication and movements at the scene were coordinated via radio. The shooting incident occurred at the motorhome to the front of the Fontana Residence and during the search warrant operation that morning.

Deputy Gaetano Nicassio was interviewed by Detectives Southworth and McChristian, in the presence of his attorney.

At the time of the shooting incident, Deputy Nicassio had been a sheriff's deputy for approximately 11 years. He was dressed in plain clothes but wore a department issued olive vest with the SBCSD star on the center of his chest above the word "Sheriff" in large yellow block letters. The back of the vest also displayed the word "Sheriff" in large yellow block letters. Deputy Nicassio also wore his duty belt and a thigh holster—where he held his duty weapon, a Kimber 1911 .45 caliber semi-automatic pistol. Deputy Nicassio recorded the incident with his belt recorder and reviewed his recording prior to his interview. He was also asked to listen to his belt recording during the interview.

Additional relevant portions of Deputy Nicassio's statement are as follows:

From an initial SED Squad Two team briefing, Deputy Nicassio understood that Mr. Bermudez was reported to possess a .38 caliber revolver that was used in the robbery, as well as an AR-15 rifle that was kept in a silver truck also at the Fontana residence. Deputy Nicassio was informed that Mr. Bermudez was a documented gang member with an extensive criminal history, which included assault, unlawful firearm possession and obstructing/delaying law enforcement.

¹ All referenced law enforcement officers described here were on duty for the San Bernardino County Sheriff's Department, except for San Bernardino Police Department Officer Mike Madrigal. Herein is a summary only. 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 the Fontana Residence, Juan Bermudez or any witness by name are made here for ease of reference only.

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Deputy Nicassio's assignment on the morning of the operation was to be the "point" person—who would watch the target and relay what was happening to the other team members.

Approximately an hour after the team took positions around the Fontana Residence on March 20, 2019, Deputy Nicassio saw a silver truck pull into the driveway, driven by Witness #1. Shortly after Witness #1's arrival, Mr. Bermudez came out of the Fontana Residence to meet him. Deputy Nicassio asked Officer Madrigal to drive by the Fontana Residence while Witness #1 and Bermudez were in the driveway to get a closer look and provide positive identification of Mr. Bermudez. Officer Madrigal was immediately able to drive by and affirmed identification of Mr. Bermudez.

Next, Deputy Nicassio watched Mr. Bermudez quickly go from the truck to the house several times. During one of those trips Deputy Nicassio saw Mr. Bermudez holding "something big, covered up in...some type of clothing and he walked into the house." Deputy Nicassio thought that Mr. Bermudez may be taking the AR-15 rifle from the truck to the house. The deputy explained that all he knew was that the rifle was said to be in a silver truck at the property, and perhaps this was it. On the other hand, Deputy Nicassio expanded that the AR is also easy to "take down and conceal."

Deputy Nicassio continued to watch Witness #1 and Mr. Bermudez interact in the driveway, then he saw Witness #1 go into the motorhome parked in the street. Shortly thereafter, Mr. Bermudez also went into the motorhome. The motorhome door stayed open behind them. SED Squad Two determined that this was the moment that they should make contact to avoid potential harm to the other occupants of the Fontana Residence, whom Deputy Nicassio believed included elderly persons and children. Deputy Nicassio also believed that the "element of surprise" in this situation would work in the team's favor.

After finalizing their manner of approach, SED Squad Two began their movement toward apprehending Mr. Bermudez at the motorhome. Deputy Nicassio pulled his unmarked unit (a silver Dodge Caravan) to the front of the motorhome so that the passenger-side of the front quarter was facing the motorhome. He turned his unit's front and rear blue and red lights to identify themselves as law enforcement. Deputy Nicassio then got out and approached the motorhome door on foot, with his duty weapon drawn.

The door to the motorhome was still ajar when Deputy Nicassio went up to it. Deputy Nicassio was himself surprised to see Mr. Bermudez instantly visible from the doorway and sitting at a table inside. Deputy Nicassio was squared up to the doorway with his chest facing Mr. Bermudez, and said, "Hey Juan, how you doing?" and "Let me see your hands." Juan looked at Deputy Nicassio and immediately reached down towards his waist and toward the side of his pants. Deputy Nicassio recalled saying "don't" or "stop reaching." In that moment, Deputy Nicassio believed that Mr. Bermudez was reaching to

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pull a gun and shoot him. The deputy explained that “people don’t make that movement unless they’re reaching for a gun.” Deputy Nicassio explained his next thought was, “I need to get out of the way and I need to send my rounds down range to keep Juan from pulling a gun on me or my partners and shooting us.”

Deputy Nicassio was aware that Deputy Awad was immediately to his right at the time. At a distance of about eight feet, Deputy Nicassio fired multiple rounds at Mr. Bermudez. Deputy Nicassio stated that he was backing up as he was firing, to try to create more distance between him and Mr. Bermudez, and to “try to get as much cover at least to the side of the [motorhome].”

Deputy Nicassio recalled that while firing his pistol, that it jammed. He cleared the jam, replaced his magazine clip and continued to give Mr. Bermudez orders. Deputy Nicassio recalled telling Mr. Bermudez repeatedly to show his hands, which Mr. Bermudez had up to that point refused to do. Then, Deputy Nicassio recalled seeing Mr. Bermudez turn away and make “another abrupt movement down towards [the ground].” Deputy Nicassio believed that Mr. Bermudez was either trying to hide or gain cover. Deputy Nicassio also thought “[Mr. Bermudez] was going for the gun, that maybe it fell to the floor.” Deputy Nicassio fired another round at Mr. Bermudez. He explained, “I didn’t want [Mr. Bermudez] pulling up a gun and just taking off one shot and hitting [Deputy Awad] or myself or anybody else that was behind us.” Immediately after that round was fired, Deputy Nicassio finally saw both of Mr. Bermudez’s hands go up.

Deputy Nicassio believed he fired a total of seven or eight rounds.

Deputy Nicassio acknowledged that he felt scared during the incident. While firing his first volley of shots and backing away, he recalled pulling the trigger but did not hear any rounds go off. When his gun jammed, he recalled seeing Deputy Awad’s weapon fire in slow motion. Deputy Nicassio stated that going into this operation, that he did not think he was going to get into a shooting. He explained that the plan was to use less-lethal, but that everything happened too fast, and he believed that they were about to be engaged in a “fire fight.” Deputy Nicassio stated that usually when he points a gun at someone and tells them to show their hands, that by the second command they throw their hands up in the air. Instead, Deputy Nicassio explained, “this was like the first time that I honestly thought like this dude was gonna shoot me.”

Deputy Amir Awad was interviewed by Detectives Southworth and McChristian, in the presence of his attorney.

At the time of the shooting incident, Deputy Awad had been a sheriff’s deputy for approximately seven years. Deputy Awad had also worked as a sheriff’s deputy in Riverside for three years. During the use of force incident, Deputy Awad was dressed in plain clothes under a department-issued olive vest with the word “Sheriff” in large yellow block letters, next to the SBCSD star on his left chest. The back of the vest also displayed the word “Sheriff” in large yellow block letters.

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Deputy Awad also displayed his metal SBCSD badge on his right hip, upon his duty belt, and wore a thigh holster—where he held his duty weapon, a Kimber 1911 .45 caliber semi-automatic pistol. Deputy Awad recorded the incident with his belt recorder and reviewed his recording prior to his interview.

Additional relevant portions of Deputy Awad's statement are as follows:

Deputy Awad believed that the objective of the operation was to identify Mr. Bermudez, apprehend him (per the arrest warrant) and serve the search warrant. Deputy Awad understood that Mr. Bermudez had a pistol and an AR15, and had an extensive criminal history including assault on a school official, assault with a firearm, assault causing serious bodily injury, felon in possession of a firearm with a gang enhancement and assault causing great bodily injury.

On the morning of the incident, Deputy Awad was assigned the "westbound takeaway" position to the west of the Fontana Residence. While on location, Deputy Awad received the radio updates by Deputy Nicassio, including that Mr. Bermudez and Witness #1 were inside the motorhome. Deputy Awad recalled that the squad's approach plan took into consideration that there were elderly people in the Fontana Residence. Deputy Awad was concerned that Mr. Bermudez was armed and a contact plan at the motorhome avoided elderly hostages as well as the possibility that the AR-15 rifle was in the house.

When Squad Two began its movement toward the motorhome, Deputy Awad decided to park his unit (a silver Dodge truck) between the residence and the motorhome because it provided "better safety." Deputy Awad then turned on his red and blue blinkers to the front and rear of his unit to identify themselves as law enforcement.

Deputy Awad followed Deputy Nicassio to the motorhome's open door, and stood to the right of Deputy Nicassio. Deputy Awad recalled hearing Deputy Nicassio say, "Hey Juan." Next, Deputy Awad saw Deputy Nicassio pointing his duty weapon at Mr. Bermudez and saw Mr. Bermudez, as well. Deputy Awad could see that Mr. Bermudez was sitting with his left profile exposed to the motorhome door. Deputy Awad heard Deputy Nicassio say "let me see your hands." Deputy Awad stated that he did not also give commands at this point because Deputy Nicassio was already giving them and didn't want to cause confusion.

Deputy Awad then saw Mr. Bermudez reach down toward his right, and it looked to Deputy Awad like Mr. Bermudez was reaching for a gun. Deputy Awad described Mr. Bermudez's right elbow "went high," his left hand looked like it was pulling his shirt up, and his right hand was drawing something out. Deputy Awad explained his thought in that moment:

[H]e's reaching for a gun right now and given...his warrants for what he is wanted for and his history, I was like, okay oh my God this is real like I've never

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experienced this before in my life and it was... sort of like almost a[n] instant fear. ... I thought he was going to come out with a gun.

Deputy Awad stated that he and Deputy Nicassio were in the “fatal funnel” or “exposed with absolutely no cover.” He heard Deputy Nicassio fire his weapon. Deputy Awad stated that he and Deputy Nicassio were standing approximately seven to eight feet away from Mr. Bermudez, and one to two feet in front of the motorhome door. Deputy Awad also pointed his pistol at Mr. Bermudez and fired it.

Deputy Awad recalled firing three rounds at Mr. Bermudez, after which he heard Deputy Nicassio continue to give Mr. Bermudez commands to show his hands. Deputy Awad could see Mr. Bermudez’s right hand at that point, but not his left. Still inside the motorhome, Mr. Bermudez rotated to his right so that his back was towards the doorway, slid down under the table to his knees and hunched over the seat. Mr. Bermudez had his right hand on the seat but his left hand was not visible. Deputy Awad was still concerned about “the unknown threat” but felt Deputy Nicassio was in a better position to see while giving commands. Deputy Awad then heard Deputy Nicassio fire one more shot. Deputy Awad saw Mr. Bermudez put his left hand up after the last shot, but he was at that point trying to see where Witness #1 was. Deputy Awad stated that he knew Mr. Bermudez had been hit by their gunfire. After Mr. Bermudez put both of his hands up, he saw Deputy Nicassio pull Mr. Bermudez out so that they could provide Mr. Bermudez medical aid. Deputy Awad then pulled Witness #1 out and “cleared” the motorhome.

Deputy Awad explained that had he not fired his weapon, that there was potential for both he and Deputy Nicassio to get shot. He stated “[Bermudez] would’ve had a good drop on us and being that we were exposed, and we had zero cover and concealment he would’ve been able to get a easy couple rounds off and shoot me and [Deputy Nicassio].

Deputy Adam Duncan was interviewed by Detective Kunzman. At the time of the shooting incident, Deputy Duncan had been a sheriff’s deputy for approximately 10 years. Deputy Duncan wore plain clothes under a department-issued vest with the SBCSD cloth badge on the front, and “Sheriff” patches on both the front and back. Deputy Duncan recorded the incident with his belt recorder and reviewed his recording prior to his interview.

Additional relevant portions of Deputy Duncan’s statement are as follows:

Deputy Duncan believed that the primary objective of the operation was to apprehend Mr. Bermudez away from the Fontana Residence, for “officer safety reasons.” Deputy Duncan was aware of the details of the operation plan, including Mr. Bermudez’s criminal history.

On the morning of the shooting incident, Deputy Duncan took a position to the west of the Fontana Residence and was following his squad’s communications by radio. Deputy Duncan understood that the decision to contact Mr. Bermudez at the motorhome was

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because weapons were believed to be inside the Fontana Residence, and it was unknown who else was inside. Whereas, he believed there were only two known occupants in the motorhome.

Deputy Duncan stated that as he and Officer Madrigal approached the motorhome, that he heard Deputy Nicassio yell, "don't reach," then heard shots fired. Deputy Duncan saw both Deputies Nicassio and Awad two feet from the threshold of the motorhome and directly in front of the open doorway. Deputy Duncan heard approximately six shots in the initial volley, and about two seconds later heard a single shot. Deputy Duncan did recall hearing the shooting deputies give commands like "show me your hands" and "don't move" before the last shot was fired.

Deputy Duncan then stated he saw Deputy Nicassio drag Mr. Bermudez out of the motorhome by his right arm, as Mr. Bermudez was either unable or refusing to come out. Deputy Duncan then administered medical aid to Mr. Bermudez for gunshot wounds, including applying three tourniquets to stop his bleeding. The fire department and emergency medical arrived within minutes.

Officer Mike Madrigal was interviewed by Detective McChristian, in the presence of his attorney.

At the time of the shooting incident, Officer Madrigal had been a police officer for the City of San Bernardino for approximately 11.5 years. Officer Madrigal wore plain clothes under a black raid vest with the word "police" in bold letters on the back, and the SBPD star on the front left breast.

Additional relevant portions of Officer Madrigal's statement are as follows:

Officer Madrigal believed that the main objective of the operation was to locate Mr. Bermudez, detain and arrest him. The officer stated that the team wanted to detain Mr. Bermudez away from the Fontana Residence to avoid a hostage situation there.

On the morning of the operation, Officer Madrigal recalled driving by the Fontana Residence to get a "secondary positive I-D" of Mr. Bermudez as he stood in the driveway. Officer Madrigal alerted the rest of the team of the identification via radio and was the first to move towards the Fontana Residence, after that. He drove his unit (silver Ford F-150 truck) to the back of the Fontana Residence and Deputy Duncan pulled behind him. After he got out, Officer Madrigal had his weapon out at a "low ready" position started to move towards the motorhome when he heard four to six shots. Officer Madrigal ran towards the shots and saw Deputies Nicassio and Awad pointing their guns into the doorway, side-by-side. Officer Madrigal tapped Deputy Awad's shoulder to let him know that he was also there.

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Officer Madrigal explained that he didn't fire his weapon because there was a sheet or something in the doorway that obstructed his view into the motorhome. The officer stated that someone reached up and ripped down the sheet. At that point, Officer Madrigal saw Mr. Bermudez between a table and seat cushion, but couldn't see Mr. Bermudez's hands. Officer Madrigal heard both Deputies Awad and Nicassio command loudly and clearly, "show me your hands." It appeared to Officer Madrigal that Mr. Bermudez wasn't complying and had his hands "digging in the couch."

Officer Madrigal stated that after several attempts were made to call Mr. Bermudez out of the motorhome, deputies grabbed Mr. Bermudez and pulled him out. The officer then gave commands for Witness #1 to come out and Officer Madrigal detained him.

Deputy Andrew Pollick was interviewed by Det. Southworth. At the time of the shooting incident, Deputy Pollick had been a sheriff's deputy for five years. He was wearing plain clothes under a green SBCSD raid vest with "high visibility patches" on the front and back, as well as a cloth badge on the chest.

Additional relevant portions of Deputy Pollick's statement are as follows:

Deputy Pollick explained that the warrant for Mr. Bermudez had to be executed by SED due to the increased threat involved. He prepared the operation plan to serve the search and arrest warrants on Mr. Bermudez. Deputy Pollick believed that Mr. Bermudez kept an AR-15 rifle in a broken down vehicle in the back yard of the Fontana Residence. Deputy Pollick's plan included information about Mr. Bermudez, including his criminal history. Deputy Pollick explained that based on the allegation of weapons at the Fontana Residence that it was best for the team to take Mr. Bermudez into custody away from the residence.

On the morning of the operation, Deputy Pollick briefed the team at 9:00 a.m. to make sure everyone understood their roles. After about two hours of surveillance with Deputy Nicassio announcing over the radio what was happening, the team moved forward with their operation. Deputy Pollick was posted to the east of the motorhome. Then he drove his unit (white Ford Explorer) to the back of the motorhome, got out and moved toward the passenger side.

As Deputy Pollick approached on foot, he saw Deputies Nicassio and Awad with their duty weapons drawn. He heard someone say "don't reach," then saw Deputies Nicassio and Awad fire several rounds into the motorhome's doorway. He was approximately 20 feet away toward the right rear passenger-side tire of the motorhome and heard eight rapid shots. Deputy Pollick stated that he did not fire because he couldn't see into the motorhome from his position. But Deputy Pollick did announce "Sheriff's Department" and heard multiple commands given.

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After the initial volley of gunshots, Deputy Pollick moved to a position behind Deputies Awad and Nicassio and heard them give multiple commands from about five feet from the motorhome's door. Deputy Pollick also heard "show me your hands," "don't reach," "stop reaching," and "Sherriff's Department." Deputy Pollick heard "show me your other hand" multiple times, then another shot was fired. Deputy Pollick finally saw Mr. Bermudez when he crawled and was pulled out of the motorhome. Deputy Pollick then returned to his unit to announce the shots fired, request additional units and medical aid.

Deputy Pollick provided first aid to Mr. Bermudez. Later, he went inside the Fontana Residence and discovered a loaded revolver on Mr. Bermudez's bed, under a pillow.

Sergeant Joshua Smith was interviewed by Detective Nicholas Clark. At the time of the shooting incident, Sergeant Smith had been a sheriff's deputy for almost 19 years. He was dressed in plain clothes under a green ballistic vest with the word "sheriff" on the front and back in yellow letters.

Additional relevant portions of Sergeant Smith's statement are as follows:

Sergeant Smith understood that his team's objective was to identify Mr. Bermudez and apprehend him away from the Fontana Residence to avoid an armed barricade or hostage situation there. He believed Mr. Bermudez was armed, a gang member and alleged to sell narcotics.

On the morning of the incident and while on location, Sergeant Smith took a position northeast of the motorhome. After his team started moving, Sergeant Smith heard yelling and approximately seven to nine gunshots. He maintained his position to make sure no one ran towards him, then he made his way toward the motorhome. When Sergeant Smith arrived at the scene, Mr. Bermudez was being moved out of the motorhome. He asked Deputies Nicassio and Awad if they were, "ok" and asked them how many shots they fired. Deputy Nicassio said he fired seven or eight shots. Deputy Awad stated he fired two or three. Sergeant Smith noticed later that the lights were flashing on Deputies Nicassio and Awad's units. So, he told them to turn them off to keep their batteries from dying.

STATEMENTS BY CIVILIAN WITNESSES²

Witness #1, a 52 year-old man, gave a voluntary interview to Detectives Southworth and Kunzman almost three hours after the shooting incident and while still at the scene. Witness #1 described his and Mr. Bermudez's movement in the driveway that morning in a manner

² All reports of civilian statements made were reviewed, though not all are summarized here. Any reference to Juan Bermudez by name here is made for ease of reference only. Unless otherwise noted, no witness referred to Mr. Bermudez by name.

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essentially consistent with that observed by Deputy Nicassio. Additional relevant portions of that interview are as follows:

Witness #1 stated that he lived “down the block” and was familiar with Mr. Bermudez, whom he called “homie;” the men met about a year prior. Witness #1 parked the motorhome in front of the Fontana Residence as he intended to sell it to Mr. Bermudez.

On the morning of the shooting, Witness #1 went into his motorhome and Mr. Bermudez joined him there. While the men were sitting at a table inside the motorhome, the door was suddenly “snatched open.” Witness #1 then heard someone say, “freeze, don’t move” approximately three or four times. Witness #1 stated that he automatically thought it was the police as soon as the door opened, explaining that law enforcement always says “freeze, don’t move.” Witness #1 got on the ground immediately. Then, he saw Mr. Bermudez look over his left shoulder, while his right hand was reaching toward the seat cushion. Witness #1 then saw a gun or two at the doorway, followed by the sound of gunfire. Witness #1 stated that the deputies may have thought Mr. Bermudez was reaching for a gun.

After the shots were fired, Mr. Bermudez fell in between the table and the seat. He was facing away from the deputies. Witness #1 could see Mr. Bermudez’s left hand was now holding onto the seat. Next, Witness #1 heard the deputies say, “show us your hand, if you make the wrong move, I ‘aint got no problem shooting your ass again.” Witness #1 heard the deputies keep on giving Mr. Bermudez commands, but Mr. Bermudez wasn’t following them because he was too upset. Mr. Bermudez was screaming. The deputies then grabbed Mr. Bermudez’s leg and pulled him out.

Witness #1 denied ever seeing Mr. Bermudez with a gun inside the motorhome.

Fontana Residence Occupants were interviewed by SBCSD detectives in the late afternoon and evening of the shooting incident, while still at the scene. All five were family members of Mr. Bermudez, ranging in age from 11 years to 61 years old. None of the Fontana Residence Occupants saw the shooting incident. The 11-year-old saw and heard nothing, and slept through the entire incident. A few occupants heard the shots and screaming. None of the occupants ever saw Mr. Bermudez with a firearm. Mr. Bermudez was described as staying at the house, on and off, and slept in a room referred to as “Juan’s room” and the “spare” room.

Fontana Residence Neighbors were interviewed by SBCSD detectives at their homes. Of the eight neighbors contacted, seven were interviewed on the evening of the shooting incident. Only one neighbor saw one of the deputies run up to the motorhome with his gun and fire it. That same neighbor heard someone say, “show me your hands, show me your hands.” None of the other neighbors actually saw any part of the shooting incident, but some heard gunshots and yelling. Specifically, a second neighbor heard “hey don’t move” and “get down.” The second neighbor also recalled Mr. Bermudez telling him about a month prior, that there was a warrant for his arrest. A third neighbor heard “don’t run,” “please stop,” “put your hands up,” and “stop

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where you're at." A fourth neighbor heard "get down on the ground." All of the neighbors who looked towards the scene during the incident identified the people there as law enforcement, either by uniform or weaponry. Two neighbors specifically referred to the distinctive flashing lights on the cars.

INCIDENT AUDIO

BELT RECORDING. Audio recordings were captured by the belt recorders of Deputies Awad, Duncan, Nicassio and Pollick. The recordings are of varied length, and what was audible in each was dependent on the wearer's position at the scene. Below is a partial summary of audible statements compiled together from the submitted belt recordings:

Nicassio: Alright, we're rolling in. Polli...or, Mike is driving down the driveway.
[via radio] Adam is going down the driveway. I'm pulling in front of the R-V, right now.

J. Smith: Clear the air...

[via radio]

Nicassio: Hey Juan, let's see your hands. Let me see your fucking hands. You reach down, I will fucking...I will...

[MULTIPLE GUN SHOTS HEARD]

Awad: Let's see your hands
Pollick: Sheriff's Department. Let me see your hands.
Nicassio: 61-Zebra-25, shots fired. 61-Zebra 25, shots fired.
Awad: Let me see your hands.
Bermudez: My hand is right here.
Awad: Put your other hand up.
Nicassio: Put your other hand up.
Bermudez: I'm right here.

[SINGLE GUN SHOT HEARD]

Nicassio: Put your other hand up.
Awad: Put your other hand up. Other hand.
Nicassio: Let me see your other hand.
Awad: Let me see it.
Nicassio: Let me see your other hand. Let me see your other hand.
Pollick: 61-Zebra-23 Shots fired.
Awad: Come out this way.
Nicassio: Let me see your other hand.
Awad: Come out this way. Ok, I got your OBS.
Nicassio: Roll towards me.

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Awad: Come out this way.
Nicassio: Roll towards me.
Awad: Come out this way.
Duncan: Can you guys see ok?
Nicassio: Come out towards me. Come out towards me. Come out towards me.
Pollick: Go ahead and stage medical. Let me get a couple units down here to shut
[via radio] down east and westbound traffic on Ceres.
Duncan: Hey
Awad: Come on out this way. Come on.
Duncan: Rip that down. There you go.
D.Smith: Listen to 'em, man.
Awad: Come out.
Nicassio: Come out towards me.
Duncan: One person give commands, one person.
Nicassio: Come out towards me. Ok, I got this one. Come out, Juan.
Roll towards out, towards me, Juan.

The above summary transpires over the course of approximately two minutes and 17 seconds. Approximately three seconds pass between the first command and the first gunshot. Approximately 14 seconds pass between the start of the first volley of gunshots, and the last gunshot.

INCIDENT SCENE INVESTIGATION

Detective Narcie Sousa reported the description of the incident scene. The Fontana Residence was a one-story single family home, with its front door and several windows facing south towards Ceres Avenue. A .22 caliber revolver containing six live rounds in the cylinder was located on a bed in the southeast portion of the southwest bedroom of the residence. A California Driver's License for Mr. Bermudez was also located in the southwest bedroom. A black Spyder airsoft gun was located in the trunk of a red Geo Tracker in the rear yard.

A white FLDST Motorhome was parked on Ceres Avenue, facing west and along against the north curblineline of Ceres Avenue, immediately south of the Fontana Residence. Deputy Nicassio's unmarked unit was also on Ceres Avenue, facing east and pulled to the front of the motorhome. Deputy Awad's unmarked unit was parked facing east, on a grass patch in between Deputy Nicassio's unit and the Fontana Residence.

The door to the motorhome swung outward from left to right. One live round and seven fired cartridge casings were found in the grass area north of the motorhome. A silver handgun magazine containing one round was also found in the grass area north of the motorhome door.

Inside the motorhome, Detective Sousa reported that there was a seated dining area on the driver-side of the cabin. A yellow plastic baggie was located on the seat closest to the driver's seat.

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Later testing revealed that the baggie contained three grams of heroin. Detective Sousa identified 11 bullet strikes, nine of which appeared to go through the motorhome. The other two bullet strikes were noted at two residences across the street from where the motorhome was parked.

Examination of Deputy Awad's duty weapon revealed that Deputy Awad fired three rounds during this incident. Examination of Deputy Nicassio's duty weapon and the magazine at the scene revealed that Deputy Nicassio fired seven rounds during this incident.

INVOLVED PARTY

INJURIES. Mr. Bermudez was transported to and received medical treatment at Arrowhead Regional Medical Center after the shooting incident. Detective McChristian interviewed the emergency room physician, who found that Mr. Bermudez suffered gunshot wounds to the left ankle, left thigh, left forearm and right shoulder. Each of those gunshot wounds presented both entry and exit points. No medical records were submitted by the case agent. Mr. Bermudez declined to make a statement regarding the incident to the case agent.

CRIMINAL HISTORY. Juan Jose Bermudez is presently facing multiple felony counts in San Bernardino Superior Court, Rancho Cucamonga Division; none of the alleged crimes occurred on the date of the shooting incident:

(Pending Matter)

Case No. FWV19000965

Next Date: Pre-Trial, October 29 2020

The case includes the following charges:

- (1) Penal C. §211 [robbery, second degree]
- (2) Penal C. §29800(a)(1) [felon in possession of firearm]
- (3) Penal C. §422 [criminal threats]

Mr. Bermudez has been convicted of the following:

Case No. MWV1002708 Convicted on 8/27/2010 of Pen. C. §490.5 [retail petty theft] (misdemeanor). Sentenced to 2 days jail, 12 months probation.

Case No. FVA1200665 Convicted on 5/24/2012 of Pen. C. §496(a) [receiving stolen property] (misdemeanor). Sentenced to 210 days jail, 36 months probation.

Case No. FVI1201349 Convicted on 11/15/2012 of Pen. C. §245(a)(4) [assault w/deadly weapon with force likely to cause GBI] (felony); Pen. C. §186.22(a) [gang participation] (misdemeanor). Sentenced to 2 years state prison on the felony, consecutive to 1 year in jail on the misdemeanor.

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Case No. FWV17004839 Convicted on 03/28/18 of Health & Saf. §11377 [drug possession] (misdemeanor). Sentenced to 180 days jail and placed on 36 months probation.

APPLICABLE LEGAL PRINCIPLES

A peace officer may use reasonable force to effect an arrest if he believes that the person to be arrested has committed a public offense. (Calif. Penal C. §835a)³ Should the arresting officer encounter resistance, actual or threatened, he need not retreat from his effort and maintains his right to self-defense or to use reasonable force to effect that arrest. (*Id.*) An arrestee has a duty to refrain from using force or any weapon to resist lawful arrest, if he knows or should know that he is being arrested. (Penal C. §834a.) An officer-involved shooting may be justified as a matter of self-defense, which is codified in Penal Code at §197. These code sections are pertinent to the analysis of the conduct involved in this review and are discussed below.

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, and;
- (2) he reasonably believed that the immediate use of deadly force was necessary to defend against that danger.

(CALCRIM 505.)

“Imminence is a critical component of both prongs 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 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

³ All references to code sections here pertain to the California Penal Code, as they existed at the time of the incident. Significant modifications were made to sections 196 and 835a pursuant to Assembly Bill 392. (Assem. Bill No. 392 (2018-2019 Reg. Sess.) as Chaptered August 19, 2019.) However, those modifications do not apply retroactively. Even if they did, the conclusion of the analysis would be the same.

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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* (9th Cir. 1994) 39 F. 3d 912, 915.)

There is no requirement that a person (including a police officer) retreat even if safety could have been achieved by retreating. (*Id.*, see also CALCRIM 505.) 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* (1996) 47 Cal.App.4th 334, 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 v. Henrich, 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* (1989) 490 U.S. 386, 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.)

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.) If the person's beliefs were reasonable, the danger does not need to have actually existed. (CALCRIM 505.) Yet, a person may use no more force than is reasonably necessary to defend against the danger they face. (CALCRIM 505.)

When deciding whether a person's beliefs were reasonable, a jury is instructed to consider the circumstances as they were known to and appeared to the person and considers what a

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reasonable person in a similar situation with similar knowledge would have believed. (CALCRIM 505.) When considered in the context of an officer-involved incident, this standard does not morph into a “reasonable police officer” standard. (*People v. Mehserle* (2012) 206 Cal.App.4th 1125, 1147.) To be clear, the officer’s conduct should be evaluated as “the conduct of a reasonable person functioning as a police officer in a stressful situation.” (*Id.*)

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.*)

The “most important” *Graham* factor in the analysis is whether the suspect posed an immediate threat to the safety of the officer or others. (*Mattos v. Agarano* (9th Cir. 2011) 661 F.3d 433, 441-442.) Yet, other factors are taken into consideration when “necessary to account for the totality of the circumstances in a given case.” (*Id.*) In particular, when law enforcement is tasked with serving a warrant upon a target believed to be “armed and dangerous” and having committed a recent violent crime, the “reasonableness” calculus must consider that the operation, at the outset, is inherently dangerous and that the government’s interest is “at their maximum.” *Muehler v. Mena* (2005) 544 U.S. 93, 100.

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

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.) Specifically, when a police officer reasonably believes a suspect may be armed or arming himself, it does not change the analysis even if subsequent investigation reveals the suspect was unarmed. (*Baldrige v. City of Santa Rosa* (9th Cir. 1999) 1999 U.S. Dist. LEXIS 1414 *1, 27-28.)

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.) In close-cases, the Supreme Court will surround the police with a fairly wide “zone of protection” when the aggrieved

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conduct pertains to on-the-spot choices made in dangerous situations. (*Id.* at 343-344.) One court explained that the deference given to police officers (versus a private citizen) as follows:

unlike private citizens, police officers act under color of law to protect the public interest. They are charged with acting affirmatively and using force as part of their duties, because ‘the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.’

(*Munoz v. City of Union City* (2004) 120 Cal.App.4th 1077, 1109, citing *Graham v. Connor*, [*supra*] 490 U.S. 386, 396.)

ANALYSIS

This report evaluates the use of deadly force by Deputies Amir Awad and Gaetano Nicassio upon Juan Bermudez, on March 20, 2019 in Fontana. As indicated above, Penal Code §§197, 835a state legal bases to justify an officer-involved shooting in the context of an arrest. We draw our conclusion here based upon these principles and a careful examination of the case agent’s submission.

Attempted Arrest. At the time of the shooting, Deputies Awad and Nicassio were acting in concert with their team to procure Mr. Bermudez’s arrest per arrest warrant. The case agent’s submission includes copies of both arrest and search warrants duly signed by a judge of the San Bernardino Superior Court and dated prior to the day of the shooting. The warrants reveal that the armed robbery was reported to have occurred on March 16, 2019. SED Squad Two was well-informed of the existence of the recent factual basis for the warrants and were operating under a coordinated plan to carry out the court’s orders.

The in-person contact by Deputies Awad and Nicassio with Mr. Bermudez immediately prior to the shooting was very brief—mere seconds. Yet, the circumstances suggest that Mr. Bermudez knew he was being contacted by law enforcement. The shooting occurred at mid-day. As Mr. Bermudez sat in the motorhome, he had a direct view to the outside and from an elevated position in the motorhome. When Deputies Awad and Nicassio presented themselves in the doorway, they were wearing distinctively marked “sheriff” vests with their duty weapons drawn. Deputy Awad also wore his metal SBCSD badge on his right hip. On first contact, Deputy Nicassio said, “Hey Juan, let me see your hands.” In context, Witness #1 heard something markedly different: “freeze, don’t move.” More importantly, Witness #1 instantly believed that this was a law enforcement contact based only upon what was said. It would be reasonable to infer that Mr. Bermudez, who had a direct visual of the deputies in addition to the audible statement, had the same belief. Moreover, Mr. Bermudez mentioned to a neighbor that he knew there was a warrant out for his arrest. Mr. Bermudez was not referring to the warrant that SED Squad Two was acting upon, but it would still support an inference that Mr. Bermudez expected police contact and was evading his warrant. Lastly, the discovery of heroin on Mr. Bermudez’s

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seat supports a theory that Mr. Bermudez was trying to stash the contraband at the time the deputies appeared in the doorway. Put another way, there would be no reason to “stash” contraband if Mr. Bermudez didn’t recognize the deputies as law enforcement. These inferences, in sum, support a conclusion that Mr. Bermudez knew he was being contacted by law enforcement for arrest immediately upon contact with Deputies Awad and Nicassio.

An officer has authority to use reasonable force to effectuate an arrest. The framework for determining what is “reasonable” is included in *Graham, supra*, which in turn informs the elements of Penal Code §197. Whether the officers were justified in their use of a firearm under the principles of self-defense and defense of others per Penal Code §197 involves a two-part analysis: (1) did the officer subjectively and honestly believe he needed to protect himself or others from an apparent, imminent threat of death or great bodily injury; and (2) was the officer’s belief in the need to protect himself or others from an apparent, imminent threat of death or great bodily injury objectively reasonable.

Subjective Belief of Imminent Need to Protect. Deputies Awad and Nicassio each detailed their recollection of the shooting incident, including that Mr. Bermudez was armed and motioning to fire upon them immediately prior to firing their own weapons at Mr. Bermudez. The deputies’ subjective beliefs were at that moment hinged upon their familiarity with Mr. Bermudez’s violent past criminal conduct including assault, firearm possession and gang participation. The deputies each articulated consideration of the recent armed robbery committed by Mr. Bermudez, and in particular the weapons he was believed to possess. When coming face-to-face with Mr. Bermudez, the deputies were surprised to find themselves open and exposed to Mr. Bermudez’s profile. Deputy Awad described himself and Deputy Nicassio as being in the “fatal funnel.” The deputies both specifically reported that in the moment they saw Mr. Bermudez reach on his right side, that both believed Mr. Bermudez was about to shoot at them. Within seconds of the first round of shots, Deputy Nicassio fired another shot. At least one of Mr. Bermudez’s hands was not visible to Deputies Awad and Nicassio at the time. Deputy Nicassio stated that he saw Mr. Bermudez turn away and it looked as if he was reaching under the table. Deputy Nicassio fired his last round, believing that Mr. Bermudez was still reaching for a firearm. As such, at the times they fired their weapons, Deputies Awad and Nicassio each had a subjective and honest belief of an imminent need to protect themselves and each other.

Reasonable Belief of Imminent Need to Protect. More than the stated belief of each involved deputy, however, the submission contemplated in total supports a finding that Deputies Awad and Nicassio had an objectively reasonable belief of the need to use deadly force to protect themselves or another.

A threat assessment matrix included in the case agent’s submission concludes that SED was tasked with executing the arrest warrant due to the dangerous nature of the underlying crime and the propensity for a violent encounter in apprehending Mr. Bermudez. Specifically, the following factors are noted: that Mr. Bermudez was believed to be a gang member, firearms were believed to be on the premises, Mr. Bermudez made threats to use a firearm, there was a likelihood of a violent/armed confrontation, and that a high-caliber (AR-style) rifle was known to be present. As

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already discussed, Deputies Awad and Nicassio's concerns mirror the factors noted in the threat assessment matrix. Indeed, a neutral magistrate had already found probable cause to believe that Mr. Bermudez had committed a violent felony. It is reasonable, therefore, for Deputies Awad and Nicassio to approach Mr. Bermudez with caution.

In the context of SED Squad Two's cautious approach, only three seconds pass between Deputy Nicassio's first order and his first shot. This is the definition of a tense, uncertain and rapidly-evolving police encounter. Deputy Nicassio's recollection of the first contact is insignificantly different than what was captured by his belt recorder. Deputy Nicassio recalled saying, "Hey Juan, how you doing?" whereas the belt recorder instead captured an even-tempered, "Hey Juan, let me see your hands." Next, Deputy Nicassio recalled saying, "don't" or "stop reaching," whereas the belt recording reveals that the deputy stated, now excitedly, "Let me see your fucking hands. You reach down, I will fucking...I will..." A precise recitation of what was said is not expected. What's more significant is that Deputy Nicassio recalled that Mr. Bermudez immediately began to reach as they became aware of each other's presence, and that recollection is supported by Deputy Nicassio's belt recording.

Deputy Awad, who was next to Deputy Nicassio at the time of the initial contact, recalled seeing Mr. Bermudez reach with a distinctive gun-drawing right "high elbow." Deputy Nicassio stated that "people don't make that movement unless they're reaching for a gun." Even Witness #1 recalled seeing Mr. Bermudez reach with his right hand towards his seat cushion. As such, *every* person who was in a position to see what Mr. Bermudez was doing immediately before the first shots were fired saw Mr. Bermudez make a reaching movement with his right hand.

In addition, it can be inferred that Mr. Bermudez did hear Deputy Nicassio's initial commands prior to making his reaching movement. In that moment, Witness #1 heard something like "freeze, don't move," which conveys a similar sentiment to what Deputy Nicassio actually said. Also, Deputies Pollick and Duncan and Officer Madrigal all heard Deputy Nicassio say something like, "don't reach" prior to the time gunshots were heard, and they were much further away from Mr. Bermudez at the time. Even neighbors in and around the residences nearby heard commands being given from their far off positions. Whereas, Mr. Bermudez was only 7-8 feet away from Deputy Nicassio. Therefore, the facts in sum support the conclusion that immediately prior to the first volley of shots fired, that audible commands were given, that Mr. Bermudez knew the deputies were indeed law enforcement (as discussed above), that he chose to ignore those commands, and made a furtive reaching movement with his right hand, instead.

The immediacy of the threat posed by Mr. Bermudez's reaching right hand is highlighted by both deputies' statements that they believed they were about to be fired upon for the first time in their law enforcement careers. Deputy Awad had approximately 10 years of experience and Deputy Nicassio had approximately 11 years of experience. Their beliefs in this moment cannot be assessed in a vacuum. It is reasonable to consider, as the deputies also articulate, what Mr. Bermudez was wanted for and the likelihood that weapons were present. During the pre-shooting surveillance, Deputy Nicassio was concerned that Witness #1's truck, *was* the vehicle associated with the AR-style rifle. Deputy Nicassio also pointed out that had Mr. Bermudez pulled out the

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revolver, there would have been no way to actually see it, until it was being pointed at them. It was also Deputy Nicassio's experience that when giving orders to a subject at gunpoint, that the subject would comply at least by the second command. Whereas, Mr. Bermudez's response to Deputy Nicassio's two commands was to make a reaching movement. Such a movement, in the time, place and manner it was made, can reasonably be perceived to be an act of resistance on one hand, or an act of violence on the other. Either way, the act presented the officers with an imminent situation requiring a split-second judgment.

In addition, prior to firing their weapons, the deputies found themselves in a precarious position; they were both exposed and without cover as they first faced Mr. Bermudez. As pointed out by Deputy Awad, Mr. Bermudez "would've had a good drop on [the deputies]." Deputy Nicassio stated that seeing Mr. Bermudez so immediately, surprised him. With these factors in mind, it would be unreasonable to expect the deputies to wait to see *what* Mr. Bermudez was actually pulling out. It would be unreasonable at this point, to expect that the deputies had time to consider any less lethal form of defense and act upon it. While both deputies did state that they were afraid, the facts do not support a conclusion that they acted out of fear alone. Rather, the facts support a conclusion that they fired their weapons based upon a reasonably perceived imminent threat to their lives.

The analysis is similar as it pertains to the last shot taken by Deputy Nicassio. Approximately seven seconds pass between the end of the first volley of gunfire and the second volley; the situation is still tense, uncertain and rapidly-evolving. During this time, a total of five commands were given—all demanding to see Mr. Bermudez's hands. Deputy Awad gave three of those commands. Deputy Nicassio also had presence of mind to radio to dispatch that shots had been fired (the first round). Also, Deputy Pollick announced "Sheriff's Department." Deputy Awad explained that he could see Mr. Bermudez had fallen to his knees on the floor and was hunching over his seat but under the table. Deputy Awad recalled that Mr. Bermudez's right hand was visible, but not his left. The belt recordings captured during this time does include Deputies Nicassio and Awad both saying "put your other hand up" immediately before the sound of a single gunshot is heard.

When interviewed, Deputy Nicassio stated that he saw Mr. Bermudez take cover or hide under the table, and make "another abrupt movement" towards the floor. Deputy Nicassio believed that Mr. Bermudez was reaching towards the floor for a gun. Deputy Nicassio explained that he fired his weapon to keep Mr. Bermudez from shooting him, Deputy Awad or anyone behind him. By that time, Deputy Duncan and Officer Madrigal were behind Deputies Awad and Nicassio. Deputy Nicassio recalled that he saw Mr. Bermudez's hand go up immediately after his last shot. However, the belt recordings seem to suggest that another thirteen seconds pass before the commands transition from demanding "the other hand" go up, to "roll towards me." In other words, Deputy Nicassio's single shot did *not* immediately prompt Mr. Bermudez's left hand to go up. Again, an exact recollection is not expected, but the urgency heard in the voice of Deputy Nicassio as he ordered Mr. Bermudez show his "other" hand, as indicated in his belt recording, is consistent with the deputy's stated belief that a danger existed. Also, the fact remains, that in the

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seven seconds after the end of the first volley and Deputy Nicasso's last shot, that Mr. Bermudez has not yet revealed both of his hands.

Deputy Awad did not state that he saw Mr. Bermudez's second reach. However, Deputy Awad did recognize that Deputy Nicassio was in a better position to see Mr. Bermudez at that time. Deputy Awad also admittedly divided his attention towards Witness #1's position around the time of the second volley. Still, Officer Madrigal did state that he saw Mr. Bermudez between the table and seat cushion, that Mr. Bermudez wasn't complying with commands and had his hands "digging in the couch." This is not precisely how Deputy Nicassio described it, but in sum, the facts support a conclusion that Deputy Nicassio's second round of gunfire—a single shot, was also based upon a perceived reach by Mr. Bermudez. Furthermore, the circumstances under which the reach was made, as before, lend to the conclusion that Deputy Nicassio reasonably perceived that Mr. Bermudez posed an imminent threat to his life and the lives of those behind him.

Hindsight. 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. The inquiry allows for the fact that split-second judgments are being made under tense, uncertain and rapidly-evolving circumstances. For example, the fact that no gun was located in the motorhome or on Mr. Bermudez's person is precisely the kind of hindsight that cannot negate the reasonableness of the deputies' conduct here. No circumstance occurred during SED Squad Two's operation to convey Mr. Bermudez was not actually armed and dangerous, as the deputies had been informed. On the contrary, the discovery of a revolver and black airsoft at the Fontana Residence revealed that the danger the team prepared for was quite real. The airsoft rifle could have been easily mistaken for a lethal weapon as it did not have any distinctive marks or colors distinguishing it. In spite of that discovery, the safety of the members of SED Squad Two depended upon their assumption that the danger was exactly what they believed it was. Similarly, that Mr. Bermudez was out-manned, out-gunned and facing a specially-trained law enforcement unit also cannot change the analysis. These facts do not vitiate the danger perceived by Deputies Awad and Nicassio, under the circumstances in which they perceived it. The shooting deputies were pressed to make split-second judgements based upon the information that was available to them. As such, based upon the totality of the circumstance, the necessity of the use of deadly force by Deputies Awad and Nicassio cannot be successfully second-guessed. Under the applicable law, the use of lethal-force by Deputies Awad and Nicassio was justifiable under Penal Code §197 and was therefore lawful.

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CONCLUSION

Under the facts, circumstances, and applicable law in this matter, the use of deadly force by Deputy Amir Awad and Deputy Gaetano Nicassio was justifiable in self-defense and the defense of others. Accordingly, no criminal liability attaches in this case.

Submitted By:

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Dated:

