



PUBLIC INFORMATION RELEASE MEMORANDUM

DATE: August 14, 2024

SUBJECT: Officer Involved Shooting (Fatal)

Officers: Officer Zacary Ewing
San Bernardino Police Department

Involved Subject: Delfino Alvarado (Deceased)
Date of Birth **/**/**

Date of Incident: November 20, 2022

Incident location: **** W. Union Street
San Bernardino, CA

DA STAR #: 2023-48365

Investigating Agency: San Bernardino Police Department

Case Agent: Detective Dominick Martinez

Report Number#: DR# 2022-131834

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PREAMBLE

This was a fatal officer involved shooting by an officer from the San Bernardino Police Department. The shooting was investigated by the San Bernardino Police Department. This factual summary was based on a thorough review of all the investigative reports, photographs, audio recordings, and video recordings submitted by the San Bernardino Police Department, DR# 2022-131834.

FACTUAL SUMMARY

On the evening of November 30, 2022, Witness #1 called 9-1-1 to report a Hispanic male was setting fire to a palm tree in the backyard of a residence located at **** W. Union Street in the City of San Bernardino. Witness #1¹ knew the suspect, who was later identified as Delfino Alvarado. Officer Carla Gutierrez, from the San Bernardino Police Department, responded to the call for service and was the first to arrive at the location. Officer Gutierrez was in uniform and driving a marked patrol vehicle. Officer Gutierrez spoke with Witness #1 who directed her to the backyard of **** W. Union Street.

As Officer Gutierrez made her way over to the house, Officer Zacary Ewing, from the San Bernardino Police Department, arrived at the location. Officer Ewing was in uniform and driving a marked patrol vehicle. Officer Ewing and Officer Gutierrez started walking up the driveway of **** W. Union Street. As they were walking, Officer Ewing saw Alvarado exit from the backyard and start walking toward him. Officer Ewing had his firearm out and was using the tactical light to illuminate Alvarado.

Officer Ewing saw Alvarado was holding a wooden cross in his hand and waving it around. Officer Ewing ordered Alvarado to drop the weapon. Alvarado did not comply with Officer Ewing's commands. Officer Ewing asked Officer Gutierrez to speak to Alvarado in Spanish. Officer Gutierrez gave Alvarado commands, in Spanish, to drop the weapon. Alvarado did not comply with Officer Gutierrez's commands. Officer Ewing took a step toward Alvarado as Officer Gutierrez was giving Alvarado verbal commands. Alvarado swung the cross at Officer Ewing. Officer Ewing immediately backed up and unholstered his Taser.

Alvarado started walking to the backyard of the residence. Alvarado picked up a shovel as he walked backward. Again, Officer Gutierrez gave Alvarado commands, in Spanish, to drop the weapons. Alvarado failed to comply with Officer Gutierrez's commands and continued to hold both the wooden cross and the shovel. As Alvarado walked into the

¹ There are multiple witnesses with the shared last name of *****. Therefore, the witnesses will be referred to by their first name in the memorandum.

backyard, he threw the shovel to the ground and picked up a broom. Officer Ewing and Officer Gutierrez followed Alvarado into the backyard.

Alvarado threw the broom down on the ground and picked up a second wooden cross. Officer Ewing and Officer Gutierrez gave Alvarado verbal commands, both in English and Spanish, to drop the weapons. Alvarado started swinging the weapons at Officer Ewing and Officer Gutierrez. The officers could hear Alvarado mumbling but were unable to determine what Alvarado was saying. As Alvarado started walking closer to Officer Ewing and Officer Gutierrez, Officer Gutierrez deployed her Taser. Officer Ewing and Officer Gutierrez immediately noticed the Taser was ineffective.

Alvarado charged at Officer Ewing swinging both crosses at him. Officer Ewing was able to move out of Alvarado's path before being struck by Alvarado's weapons. Officer Ewing unholstered his firearm. Alvarado then charged at Officer Gutierrez with both crosses. Officer Ewing saw Alvarado swinging the crosses at Officer Gutierrez. Officer Ewing believed Alvarado was striking Officer Gutierrez with the crosses. Officer Ewing fired his duty weapon at Alvarado nine times.

After the shooting, Alvarado fell to the ground. Officer Ewing advised Dispatch of the incident and requested medical aid for Alvarado. Officer Ewing and Officer Gutierrez handcuffed Alvarado and started to render medical aid. San Bernardino Fire Department personnel responded to the scene to render medical aid to Alvarado. Alvarado was pronounced deceased at the scene.

Two wooden crosses were located at the scene. There was one large wooden cross approximately 2 feet long by 1 foot across. The circumference of that cross was approximately 1 to 2 inches. There was a second wooden cross 2 feet long by 1 foot across. The circumference of the second cross was approximately 1 inch.

STATEMENTS BY POLICE OFFICERS

On December 1, 2022, **Officer Carla Gutierrez** was interviewed by Detective Dominick Martinez.

On November 30, 2022, Officer Carla Gutierrez; from the San Bernardino Police Department, was assigned to patrol. Officer Gutierrez was wearing a San Bernardino Police Department uniform and driving a marked patrol vehicle. On that date, at around 10:20 in the evening, Officer Gutierrez responded to a call for service at a residence located at **** W. Union Street, in the City of San Bernardino. The call was in reference to a Hispanic male in the rear yard of a vacant residence trying to set a palm tree on fire. Officer Gutierrez believed she would be investigating a possible arson.

When Officer Gutierrez arrived at the location she spoke with the reporting party, Witness #1, who lived west of **** W. Union Street. Witness #1 advised the suspect was in the

backyard of **** W. Union Street lighting a palm tree on fire. Witness #1 indicated the residence was vacant and no one was allowed to be there. Witness #1 described the suspect as a Hispanic male wearing all dark clothing. While Officer Gutierrez was speaking with Witness #1, her partner, Officer Zacary Ewing arrived on scene.

Officer Gutierrez and Officer Ewing walked toward the rear of **** W. Union Street. As they walked north through the driveway, Officer Gutierrez saw a Hispanic male adult wearing dark clothing. The Hispanic male, later identified as Delfino Alvarado, matched the description that Witness #1 had provided to Officer Gutierrez. Officer Gutierrez noticed Alvarado was holding a wooden cross in his right hand. The cross appeared to be "big and heavy."

Officer Gutierrez immediately ordered Alvarado to drop the weapon in English. Officer Gutierrez was unsure whether Alvarado understood her commands because he was Hispanic and possibly spoke Spanish. Officer Gutierrez then gave Alvarado verbal commands in Spanish to drop the weapon. Officer Gutierrez advised Alvarado appeared to verbally respond to her commands but she could not understand what Alvarado was saying. Although Officer Gutierrez gave multiple commands to Alvarado, he did not comply and drop the weapon.

Officer Gutierrez saw Alvarado pick up a shovel that was near the garage. Alvarado was now holding both the wooden cross and the shovel. Officer Gutierrez removed her Taser from its holster. Alvarado turned away from the officers and started walking to the backyard. Alvarado was still holding the wooden cross and shovel in his hands. Officer Gutierrez followed behind Alvarado and continued to give verbal commands, in Spanish, for Alvarado to drop the weapons. Alvarado ignored Officer Gutierrez's commands. Officer Gutierrez and Officer Ewing continued to follow Alvarado as he walked towards the backyard. Officer Gutierrez believed she gave Alvarado verbal commands to drop the weapons two to three times in English and two to three times in Spanish.

The backyard was dark, but Officer Gutierrez was able to use the light from her Taser to illuminate Alvarado. Also, Officer Ewing was using the light on his duty weapon to illuminate Alvarado. Officer Gutierrez could clearly see Alvarado was armed with weapons that could harm her and Officer Ewing. While they were in the backyard, Officer Gutierrez continued to give Alvarado commands to drop the weapons. Officer Gutierrez saw Alvarado throw the shovel to the ground and then pick up a long stick like object.² Alvarado was now holding the wooden cross and the stick. Alvarado continued walking away from the officers. Officer Gutierrez observed Alvarado looking around. Alvarado then dropped the stick he was holding and picked up a pole³ from the ground. Alvarado was now holding the wooden cross in one hand and the pole in the other. Officer Gutierrez was concerned that Alvarado was now armed with two weapons that could potentially harm both her and Officer Ewing.

² The body worn camera recordings showed the object was a broom.

³ The body worn camera recordings showed the pole was another wooden cross.

Officer Gutierrez warned Alvarado that the Taser was going to be deployed. Officer Gutierrez estimated Alvarado was initially eight to ten feet away from the officers. Officer Gutierrez deployed her Taser but was unsure whether the Taser struck Alvarado. Officer Gutierrez realized the Taser deployment was ineffective. Alvarado "charged" at Officer Gutierrez and Officer Ewing. Alvarado was still holding the wooden cross and pole in his hands. Officer Gutierrez saw Officer Ewing move to the right of her to avoid being struck by Alvarado's weapons. Officer Gutierrez moved backwards as she pointed the Taser at Alvarado.

Alvarado continued to advance toward Officer Gutierrez. Alvarado had the weapons raised like he was going to strike her. Officer Gutierrez believed Alvarado was going to "stab or hit" her with the weapons. Officer Gutierrez indicated she was unable to retrieve her firearm because Alvarado was charging too quickly toward her. Officer Gutierrez estimated Alvarado was two feet away from her. As Alvarado charged towards her, Officer Gutierrez heard approximately three gunshots. Officer Gutierrez realized Officer Ewing had shot Alvarado. If Officer Ewing had not shot Alvarado, Officer Gutierrez indicated Alvarado would have struck her with the weapons. Officer Gutierrez believed she would have sustained great bodily injuries or have been killed if Alvarado struck her with the weapons.

After the shooting, Officer Gutierrez and Officer Ewing advised dispatch that a shooting had occurred. The officers requested medical assistance for Alvarado and provided updated location information to the other responding officers. Officer Gutierrez and Officer Ewing placed handcuffs on Alvarado to prevent him from retrieving the weapons. After Officer Gutierrez conducted a pat down search of Alvarado and determined he did not have any other weapons, the handcuffs were removed. Officer Gutierrez noticed Alvarado was having a difficult time breathing so she placed Alvarado on his left side to help him.

Officer Gutierrez believed Alvarado intended to harm or kill the officers. Officer Gutierrez based her opinion on the fact Alvarado ignored all commands that were given for him to drop the weapons. Also, Alvarado changed weapons multiple times during the incident and charged at both Officer Gutierrez and Officer Ewing with the weapons raised above his head and swinging them downward as though he intended to strike the officers.

On December 1, 2022, **Officer Zacary Ewing** was interviewed by Detective Dominick Martinez.

On November 30, 2022, Officer Zacary Ewing, from the San Bernardino Police Department, was assigned to patrol. Officer Ewing was wearing a San Bernardino Police Department uniform and driving a marked patrol vehicle. On that date, Officer Ewing responded to a call for service at a residence located on the **** block of W. Union Street, in the City of San Bernardino. The call for service was in reference to a Hispanic male adult, wearing a black baseball hat, at a vacant residence lighting palm trees on fire.

As Officer Ewing approached the location, he thought this was an arson call in a residential neighborhood with older homes that had a lot of dry vegetation. Officer Ewing was concerned with the possibility the houses could catch fire and there may be elderly individuals who would be trapped in their homes. As Officer Ewing drove westbound on Union Street, he saw Officer Gutierrez's patrol vehicle in the roadway parked to the front of **** W. Union Street. The overhead emergency lights on Officer Gutierrez's patrol vehicle were illuminated. Officer Ewing parked his patrol vehicle behind Officer Gutierrez's vehicle. Officer Ewing saw Officer Gutierrez speaking to a person who Officer Ewing believed may have been the reporting party or a witness.

After Officer Ewing exited his patrol vehicle, Officer Gutierrez advised him that the crime was occurring at the residence located at **** W. Union Street. Officer Ewing and Officer Gutierrez began walking northbound through the driveway along the eastern portion of **** W. Union Street. As they were walking, Officer Ewing observed a person exit from the rear yard. The subject, later identified as Delfino Alvarado, matched the description of the arson suspect.

Alvarado was holding what Officer Ewing described as a "hatchet, stick, pole."⁴ Officer Ewing ordered Alvarado to drop the stick. Alvarado did not acknowledge Officer Ewing or obey Officer Ewing's commands. Officer Ewing heard Alvarado "mumbling" something but Officer Ewing did not understand what Alvarado was saying. Officer Ewing believed Alvarado may have only spoke Spanish. Officer Ewing asked Officer Gutierrez to give Alvarado commands in Spanish. Officer Ewing heard Officer Gutierrez yell commands in Spanish. However, because Officer Ewing does not understand Spanish, he did not know what specifically Officer Gutierrez was telling Alvarado. Alvarado did not obey any commands given by Officer Gutierrez. At this time, Officer Ewing had his firearm unholstered and was using the tactical light to illuminate Alvarado.

Officer Ewing and Officer Gutierrez walked toward Alvarado as they gave him verbal commands to drop the stick. Alvarado was pointing and swinging the stick at the officers. Officer Ewing thought Alvarado may have been scared because he was pointing his firearm at him. Officer Ewing holstered his firearm hoping to de-escalate the situation. Officer Ewing took a step towards Alvarado as Officer Gutierrez continued to give Alvarado verbal commands. At that time, Alvarado swung the stick at Officer Ewing, who immediately backed up and unholstered his Taser.

Officer Ewing thought Alvarado was trying to strike him in the head with the hatchet. Officer Ewing backed away from Alvarado. Officer Ewing illuminated Alvarado with his Taser light and the red dot from the Taser. Officer Ewing gave Alvarado commands to drop the weapon. At this time, they were closest to the south wall of the garage. Alvarado picked up a shovel from the ground. Officer Ewing estimated the shovel was five feet in length. Alvarado was now armed with two weapons, a hatchet, and a shovel,

⁴ During his interview, Officer Ewing referred to the object as a "hatchet, stick, pole." The object was a wooden cross.

that Officer Ewing believed could harm him or Officer Gutierrez. Officer Ewing unholstered his firearm.

Officer Ewing used his firearm light to illuminate Alvarado. Officer Ewing had a clear view of Alvarado and gave him additional verbal commands to drop the weapon. Officer Ewing also heard Officer Gutierrez giving commands to Alvarado in Spanish. Alvarado did not comply with any of the commands given by either officer. Alvarado started walking toward the backyard. Alvarado was still holding both weapons in his hands. While he made his way to the backyard, Alvarado dropped the shovel and immediately picked up a pole⁵. Officer Ewing told Alvarado "Drop it" several times. Alvarado failed to comply with the commands. Alvarado swung the weapons around as he walked backward. When Officer Ewing noticed his Taser was not in his holster, he ran back to the driveway to retrieve it.

Officer Ewing returned to the backyard. Officer Gutierrez was still trying to communicate with Alvarado in Spanish. Officer Ewing saw that Officer Gutierrez had her Taser pointed at Alvarado. Alvarado walked to a large tree and threw down the pole he was holding. Alvarado picked up what Officer Ewing described as a "little hatchet."⁶ Alvarado started walking toward Officer Ewing and Officer Gutierrez with what Officer Ewing believed were two hatchets in his hands.

Officer Ewing pointed his Taser at Alvarado and said, "Hey man, drop it, drop it." Officer Ewing intended to use his Taser and started yelling, "Taser, Taser, Taser." At that same moment, Officer Gutierrez deployed her Taser at Alvarado. Officer Ewing saw a Taser prong hit Alvarado on the upper left side of his body, however, it was ineffective. After the Taser was deployed, Officer Ewing noticed Alvarado's behavior changed. Alvarado yelled and screamed. Officer Ewing described Alvarado's behavior as "ballistic and pissed off." Alvarado was swinging the hatchets and charged at Officer Ewing. Officer Ewing was able to move out of the way but believed Alvarado was trying to kill him. As Officer Ewing was backing away from Alvarado, he dropped his Taser and unholstered his firearm.

After he unholstered his firearm, Officer Ewing noticed Alvarado stopped "focusing" on him. Alvarado turned his attention toward Officer Gutierrez. Officer Ewing saw Alvarado swinging the hatchets at Officer Gutierrez. Officer Ewing believed Alvarado intended to kill him and/or Officer Gutierrez. As Alvarado continued charging, Alvarado was swinging the hatchets at Officer Gutierrez. Officer Ewing believed he had to save Officer Gutierrez's life and discharged his firearm. At the time of the shooting, Officer Ewing estimated Alvarado was within a foot of Officer Gutierrez and believed Alvarado had already struck her with the hatchets. Officer Ewing believed Officer Gutierrez was being "chopped up" with the hatchets. Officer Ewing estimated he was three to six feet away from Alvarado when he discharged his firearm.

⁵ Officer Ewing's body camera recording showed the object was a broom.

⁶ This "little hatchet" was also a wooden cross.

Officer Ewing recalled shooting "several times."⁷ After Officer Ewing fired his weapon, Officer Gutierrez was able to get away from Alvarado. Alvarado ran towards the house screaming and fell to his knees on the ground. Alvarado was still holding the hatchets in his hands when he fell to the ground. Officer Ewing asked Officer Gutierrez if she was okay and checked to see if she was injured. Officer Ewing advised dispatch of the incident and requested medical aid respond to the scene.

Alvarado was now lying on his abdomen. Officer Ewing noticed Alvarado's hands were no longer visible. Officer Ewing believed Alvarado was still armed with the hatchets. Officer Ewing approached Alvarado's right side. Officer Gutierrez approached Alvarado's left side. They pulled Alvarado's hands out from beneath Alvarado. Officer Ewing searched Alvarado for weapons and then handcuffed him.

Officer Ewing saw blood on Alvarado's body and realized Alvarado had been struck during the shooting. While Officer Ewing was assessing Alvarado, he treated Alvarado for shock. Officer Ewing tried to talk to Alvarado and placed him in the recovery position. Officer Ewing removed Alvarado's handcuffs so he could be treated by medical aid when they arrived.

Officer Ewing described the lighting conditions in the driveway of **** W. Union Street as "ambient." The driveway was illuminated from residential lights in the area. Officer Ewing there was also "ambient" lighting in the backyard. Officer Ewing used the light from his Taser and then the light on his duty weapon to illuminate Alvarado. The weapons in Alvarado's hands were clearly visible. Officer Ewing described the cross shaped weapon as a wooden or metal cross object two feet in length. Officer Ewing believed this was a deadly weapon that could cause major injuries or death to him and Officer Gutierrez.

STATEMENTS BY CIVILIAN WITNESSES

On December 1, 2022, **Witness #1**, was interviewed by Detective Dominick Martinez.⁸

On November 30, 2022, Witness #1 was residing at a home located at **** W. Union Street. On that date, Witness #1 was woken up by his son who told him to go look outside to see what "Lupe" was doing. "Lupe" was later identified as Delfino Alvarado. Witness #1 advised Alvarado was his landscaper and was known as the neighborhood landscaper. Witness #1 stated he had known Alvarado for approximately twenty years. Witness #1 described Alvarado as an alcoholic and Witness #1 believed Alvarado had mental health problems.

⁷ There were nine fired cartridge casings collected at the scene which indicated Officer Ewing fired nine rounds total.

⁸Witness #1 was first interviewed about the incident under review by Officer Raymond Ledezma on November 30, 2022. That interview was reviewed and appeared consistent with the second interview by Detective Martinez. Therefore, a summary of the first interview will not be included in this memorandum.

Witness #1 had recently discovered Alvarado was staying in the garage of **** W. Union Street. The residence, however, was vacant. Witness #1 contacted the property owner and was told Alvarado was not allowed to live in the garage. Alvarado was only allowed to store his lawn equipment in the garage.

On November 30, 2022, Witness #1 was told by his son that Alvarado set a big fire at **** W. Union Street. Witness #1 looked outside his bedroom window into the backyard of **** W. Union Street. Witness #1 saw a palm tree was on fire in the backyard and ran outside with his son. Witness #1 yelled at Alvarado to put the fire out and to leave the residence. Witness #1 told Alvarado he was going to call the police. Alvarado then looked at Witness #1 and said, "Call them." Witness #1 saw Alvarado fueling the fire with tree leaves. Witness #1 was worried the fire would spread and called the police. Witness #1 told the dispatcher Alvarado was trespassing at his neighbor's house and had lit a palm tree on fire.

Witness #1 estimated police arrived within five minutes of him calling 9-1-1. A female officer, Officer Gutierrez, was the first officer to speak with Witness #1. Officer Gutierrez asked Witness #1 where Alvarado was and Witness #1 said the backyard. After Officer Gutierrez walked away, Witness #1 saw a male officer, Officer Ewing, exit his patrol vehicle and immediately walk toward **** W. Union Street. Witness #1 heard Officer Ewing give commands to Alvarado to put his hands up and to stop what he was doing. Witness #1 knew Alvarado did not speak English and assumed Alvarado did not understand what Officer Ewing was telling him.

Witness #1 indicated Alvarado was holding a shovel in his right hand and what Witness #1 believed to be a metal tire iron star in Alvarado's left hand. Witness #1 heard Officer Gutierrez begin yelling commands to Alvarado in Spanish. Officer Gutierrez told Alvarado, "Drop your weapons" several times. Alvarado walked backward to the backyard. Witness #1 saw Officer Gutierrez was holding a Taser and Officer Ewing was holding his hand on his gun in his holster. When the officers and Alvarado moved to the backyard, Witness #1 walked to his backyard to watch what was happening.

Witness #1 saw Alvarado swing the shovel and star weapon around as he walked backwards through the yard. Witness #1 described Alvarado as "going crazy and not complying." Officer Gutierrez had her Taser pointed at Alvarado. Witness #1 heard Officer Gutierrez tell Alvarado in Spanish, "Drop your weapon or I'm going to tase you with the electric gun." Alvarado did not comply. Witness #1 then heard Officer Ewing say, "Tase him, tase him." Officer Gutierrez then deployed the Taser. Witness #1 thought Officer Gutierrez may have missed because he did not see Alvarado react. Witness #1 then saw Officer Ewing deploy his Taser at Alvarado. Witness #1 indicated Alvarado did not react and was still armed with the weapons.

Witness #1 saw Alvarado run towards Officer Gutierrez. Witness #1 saw Alvarado swing the shovel at Officer Gutierrez. Officer Gutierrez then backed up to avoid being struck. Witness #1 stated Alvarado had Officer Gutierrez pinned against the side of the house. As Alvarado moved towards Officer Gutierrez, Witness #1 heard Officer Gutierrez yell,

"Shoot him." Witness #1 then saw Officer Ewing shoot Alvarado. Witness #1 said if Officer Ewing had not shot at Alvarado, Alvarado would have hit Officer Gutierrez with the shovel or star weapon.

After the first shot was fired, Witness #1 and his children ran back inside their house. Witness #1 estimated he heard a total of five shots fired. After the shooting, Witness #1 looked out his window. Witness #1 saw Alvarado on the ground. It sounded like Alvarado was struggling to breathe. Witness #1 saw the officers provide medical attention to Alvarado immediately after the shooting. Officer Gutierrez was speaking to Alvarado in Spanish and telling Alvarado medical aid was responding.

Witness #1 advised Officer Gutierrez was speaking clear fluent Spanish. Witness #1 heard Officer Gutierrez give Alvarado commands to drop the weapon four to five times. Witness #1 recalled Officer Ewing give commands once when he initially contacted Alvarado. Witness #1 believed Alvarado was swinging the weapons at Officer Gutierrez with the intention of hurting Officer Gutierrez. Witness #1 believed Officer Gutierrez would have been hurt if Officer Ewing did not shoot Alvarado. Witness #1 stated Officer Ewing fired his weapon as Alvarado swung the weapon in his right hand at Officer Gutierrez. Witness #1 said the weapon was in Alvarado's right hand, above his head, moving down towards Officer Gutierrez.

On November 30, 2022, **Witness #2** was interviewed by Officer Raymond Ledezma.

On November 30, 2022, Witness #2 was residing at a home located at **** W. Union Street. Witness #2 was in the kitchen getting water. He looked out the kitchen window and saw the suspect, Delfino Alvarado, on top of the shed next door. Alvarado appeared to have wood or metal poles in his hands and was throwing things towards a palm tree. Witness #2 called his dad to see what was going on outside. Witness #2 then saw a fire on the ground and Alvarado throwing items into the fire. Witness #2 got scared when he saw the fire getting big. Witness #2's father, Witness #1, and his brother, Witness #3, went outside to tell Alvarado to put the fire out or they would call the police. Alvarado told Witness #1 and Witness #3, in Spanish, he did not care and to call the police.

Witness #2 indicated police officers did arrive at the location but he only witnessed the last part of the incident when Alvarado was tased. Witness #2 could not see the Taser but he heard one police officer yell, "Taser, Taser, Taser." Witness #2 said Alvarado had two crosses in his hand and was swinging them. Witness #2 was unsure if Alvarado may have blocked the Taser because Alvarado did not appear injured from the Taser and did not fall. Alvarado then attacked the officer. Alvarado rushed toward the officer and was swinging the crosses. Witness #2 said he saw and heard two to three gunshots. Witness #2 got scared and ran inside the house.

On November 30, 2022, **Witness #3** was interviewed by Officer Anthony Iwami.

On November 30, 2022, Witness #3 was residing at his home located at **** W. Union Street. Witness #3 advised he knew the suspect, later identified as Delfino Alvarado, for about fifteen years. Alvarado used to be the neighborhood gardener. Witness #3 was inside his room when his mother texted him and asked if he was still awake. Witness #3's mother told him Alvarado was in the backyard of the neighbor's residence. Witness #3 looked outside and saw Alvarado lighting a tree on fire. When the fire began to grow, Witness #3 woke up his father, Witness #1. Witness #3 and Witness #1 went outside. Witness #1 told Alvarado to put the fire out or he was going to call the police. Alvarado told Witness #3 to call the police. Witness #1 called 9-1-1 from Witness #3's phone.

When police officers arrived at the location, Witness #3 and Witness #1 were both in the driveway of their residence. Witness #3 saw Officer Gutierrez and Officer Ewing walk towards the backyard of the neighbor's residence. Witness #3 and Witness #1 walked up their driveway and stood to the front of their truck which has a clear view into the backyard of the neighbor's residence. Witness #3 heard the officers tell Alvarado to drop the shovel. Witness #3 saw Alvarado holding a four to five foot shovel in his right hand and an unknown object in his left hand. Witness #3 was unable to see what Alvarado was holding in his left hand because it was dark outside.

Witness #3 stated Alvarado was not cooperating with Officer Gutierrez and Officer Ewing. Witness #3 saw Alvarado approach the officers while he was still holding the shovel. Alvarado then backed up, dropped the shovel, and grabbed an unknown object. Again, Alvarado walked towards the officers who warned him about a Taser. Witness #3 heard the Taser deploy and saw it did not have any effect on Alvarado. Witness #3 said Alvarado continued moving towards Officer Gutierrez who was backed up against the house with nowhere to go. Witness #3 heard four to five gunshots before he ran inside his house. Witness #3 heard officers asking if they were okay.

INCIDENT VIDEO

AXON VIDEO RECORDINGS. Officer Ewing and Officer Gutierrez were equipped with body worn cameras on the date of the incident under review. The body worn cameras were activated and recording at the time of the lethal force encounter. Both body camera recordings were approximately twenty-four minutes in length.⁹ Axon body cameras have a standard thirty second delay before audio on the recordings can be heard.

Officer Ewing

At the start of the video, Officer Ewing was seen arriving at the location in his patrol vehicle. Officer Ewing exited his vehicle and walked towards another patrol vehicle that had its overhead lights activated. Officer Gutierrez could be seen walking on the sidewalk. Officer

⁹ The summary of the body camera video recordings will only cover from the start of the recording through the lethal force encounter.

Ewing took his firearm out of its holster and pointed it at Alvarado who was standing at the end of the driveway at **** W. Union Street. Officer Ewing had Alvarado illuminated with his tactical light. Alvarado was wearing dark clothing.

Officer Ewing started walking northbound on the driveway of the residence. Alvarado appeared to be holding an object in his hand. Officer Ewing could be heard telling Alvarado, "Hey drop that in your hand. Drop what's in your hand. Drop it." Officer Ewing was walking towards Alvarado as he gave these commands. Officer Gutierrez was heard in the background giving Alvarado commands in Spanish. As Officer Ewing got closer, it appeared Alvarado was holding a large cross in his right hand. Alvarado could be heard talking to the officers in Spanish.

Alvarado appeared to take a few steps toward Officer Ewing and Officer Gutierrez. Alvarado was holding the cross upright in his right hand and out in front of his body. Officer Ewing and Officer Gutierrez could be seen taking a few steps towards Alvarado. Officer Gutierrez told Alvarado, "Stop." Officer Ewing told Alvarado, "You're going to drop this." Officer Ewing then appeared to reach for the cross Alvarado was holding. Alvarado then raised the cross above his shoulder and took a few steps backward away from the officers.

Officer Ewing backed away from Alvarado. Alvarado was then seen picking up a shovel that was leaning up against a door. Alvarado was holding the shovel in his left hand. Alvarado was still holding the cross in his right hand. Officer Ewing could be heard telling Alvarado, "Hey, hey, drop the shovel. Drop the shovel. Drop the shovel." Officer Ewing has his duty weapon drawn and pointed at Alvarado. Officer Ewing could be heard telling Officer Gutierrez to talk to Alvarado in Spanish. Alvarado could be seen dropping the shovel and immediately picking up another object with a long handle. That object appeared to be a broom. Officer Ewing turned around and went back to retrieve his Taser which was on the driveway.

Officer Gutierrez could be seen following Alvarado as he walked into the backyard of the residence. Officer Gutierrez had her Taser out and pointed towards Alvarado. Officer Ewing could be heard talking on the radio. Officer Gutierrez could be heard talking to Alvarado in Spanish. Alvarado could be seen near a tree. Alvarado dropped the object with a long handle and picked up another object. That object appeared to be a thicker cross. Officer Ewing could be heard saying, "Hey. Taser, Taser, Taser." Alvarado appeared to swing the cross he was holding in his left hand at Officer Ewing.

A Taser was deployed. Alvarado could be heard grunting. Alvarado then yelled and ran towards Officer Gutierrez with a cross in each hand. Gunshots are heard as Alvarado neared Officer Gutierrez. Officer Ewing could be seen firing his weapon. Alvarado was seen falling to the ground. Officer Ewing was then heard on the radio advising "Adam Eleven. Shots fired, shots fired. Officers Code Four. Start AMR." Officer Ewing could be heard asking Officer Gutierrez if she was "Code Four." Alvarado could be heard groaning in the background while he was on the ground.

Officer Gutierrez

At the start of the video, Officer Gutierrez was seen arriving at the location. Officer Gutierrez exited her patrol vehicle and walked over to where two civilians were standing in front of a residence. Both pointed and appeared to direct Officer Gutierrez to the house next door. Officer Gutierrez could be seen walking on the sidewalk toward the other house. Officer Ewing could then be seen walking up.

Officer Ewing had his firearm out and illuminated Alvarado with his tactical light. Alvarado could be seen at the end of the driveway. Alvarado was holding an object in his left hand. Officer Ewing could be heard saying, "Let me see your hands. Come here." Officer Gutierrez told Alvarado, "Hey, come here." Officer Ewing then said, "Hey, drop that in your hand. Drop what's in your hand. Drop it." Officer Gutierrez could also be heard telling Alvarado, "Drop it." Officer Gutierrez could then be heard giving Alvarado commands in Spanish. Officer Gutierrez gestured downward with her left hand as she gave Alvarado the commands.

Alvarado could be seen holding an object in the shape of a cross. Alvarado was holding the object in his right hand. Alvarado was holding the object out in front of his body. Alvarado could be heard speaking but it was unclear what he was saying to Officer Gutierrez and Officer Ewing. Alvarado walked toward Officer Ewing and Officer Gutierrez with the cross held up. When Officer Gutierrez and Officer Ewing stepped toward Alvarado, he initially lowered the cross and held it pointed toward the driveway. Alvarado then swung the cross back up and held it out towards Officer Gutierrez and Officer Ewing as they got closer.

Officer Ewing stepped toward Alvarado with his left hand held out. Alvarado started to swing the cross at Officer Ewing. Officer Ewing could be seen backing up. Officer Gutierrez pulled out her Taser and pointed it at Alvarado. Officer Gutierrez could be heard saying, "I have Taser." Alvarado could then be seen grabbing a shovel that was leaning up against a door. Alvarado started moving towards the backyard. Officer Ewing could be heard telling Alvarado, "Hey, hey, drop the shovel. Drop the shovel. Drop the shovel." Alvarado dropped the shovel and picked up another object with a long handle. The object appeared to be a broom. Alvarado could be seen walking into the backyard. Officer Ewing told Officer Gutierrez to talk to Alvarado in Spanish. Officer Ewing appeared to go back, out of sight of Officer Gutierrez's body camera, to retrieve something. Officer Gutierrez could be heard giving Alvarado commands in Spanish.

Officer Gutierrez followed Alvarado into the backyard. Alvarado was still holding the cross in his right hand and was holding the other object with his left hand. Alvarado could be seen walking toward a tree. There was a red light visible on Alvarado while he walked toward the tree. When Alvarado got to the tree, he dropped the object with the long handle and picked up another object. Officer Gutierrez yelled, "Hey!" She then continued to give Alvarado commands in Spanish.

Officer Ewing appeared in view of Officer Gutierrez's body camera. Alvarado could be seen walking toward Officer Ewing. Alvarado could be heard saying something. Alvarado appeared to be holding another cross in his left hand. This cross appeared to be made of thicker and heavier wood than the cross Alvarado was holding in his right hand. Officer Gutierrez could be heard telling Officer Ewing, "Okay, I'm going to tase." Officer Ewing could then be heard saying, "Taser, Taser, Taser." Officer Gutierrez could also be heard saying, "Taser, Taser, Taser." Officer Gutierrez could be seen deploying her Taser at Alvarado.

Alvarado could be heard yelling and then charging toward Officer Ewing and Officer Gutierrez. Officer Ewing moved out of the way. Alvarado could be seen swinging the cross at the officers. Officer Ewing could be seen with his firearm out and pointed at Alvarado. Officer Ewing could be seen firing his weapon multiple times at Alvarado as Alvarado charged toward Officer Gutierrez. As he was firing his weapon, Officer Ewing could be seen moving forward toward Alvarado. Alvarado fell to the ground and could be heard groaning. Officer Ewing could be heard on the radio advising "Shots fired." Officer Ewing then asked Officer Gutierrez if she was "Code Four."

WEAPONS

One wooden cross, approximately 2 feet long by 1 foot wide across. The circumference of the cross was approximately 1 to 2 inches.

One wooden cross, approximately 2 feet long by 1 foot wide across. The circumference of the cross was approximately 1 inch.

DECEDENT

AUTOPSY. Witness #4, Forensic Pathologist for the Coroner Division of The San Bernardino County Sheriff's Department, conducted the autopsy of Delfino Alvarado on December 2, 2022. Witness #4 determined the cause of death was gunshot wounds of the abdomen.

Number One - Gunshot Wound of the Head¹⁰:

An entry wound was noted on the right frontal scalp, 2 inches from the top of the head and 1 ½ inches right at midline. It consisted of a ¾ inch circular defect. The direction of the wound path was back to front, right to left, and downward. There was an exit wound noted

¹⁰ The numbering of the gunshot wounds is for reference only and not meant to indicate the order in which the gunshot wounds occurred.

on the upper lip skin, 6 inches from the top of the head and midline. It consisted of a 1 x ¼ inch defect. There were additional exit wounds seen around the right eye and right side of the nasal area.

Number Two – Gunshot Wound of the Back:

An entry wound was noted on the right shoulder, 8 inches from the top of the head and 1 ½ inches right at midline. It consisted of a ¼ circular defect. The direction of the wound path was from front to back, left to right, and downward. There was an exit wound noted on the right upper back, superior, 15 inches from the top of the head and 5 inches right at midline. It consisted of a 1 inch irregular shape defect.

Number Three – Gunshot Wound of the Abdomen:

An entry wound was noted on the right lower chest, 15 inches from the top of the head and 7 inches left at midline. It consisted of a ½ inch irregular shape defect. The direction of the wound path was from front to back, right to left, and downward. There was an exit wound noted on the right upper back, inferior, 18 inches from the top of the head and 7 inches right at midline. It consisted of a ¾ inch irregular shape defect.

Number Four – Gunshot Wound of the Abdomen:

An entry wound was noted on the right lower chest, 14 inches from the top of the head and ½ inch right at midline. It consisted of a ¾ inch irregular shape defect. The direction of the wound path was from front to back, right to left, and downward. There was no exit wound noted.

Number Five – Gunshot Wound of the Abdomen:

An entry wound was noted on the midline chest, inferior, 18 ½ inches from the top of the head and 1 inch right at midline. It consisted of a ½ inch irregular shaped defect. The direction of the wound path was from front to back, right to left, and downward. There was no exit wound noted.

Number Six – Gunshot Wound of the Pelvis:

An entry wound was noted on the left side of the pelvis, 33 inches from the top of the head and 1 inch left of midline. It consisted of a ¾ circular defect. The direction of the wound path was from front to back, right to left, and downward. There was an exit wound noted on the left buttock skin, 34 inches from the top of the head and 4 inches left at midline. It consisted of a ¼ inch irregular shape defect.

Number Seven – Gunshot Wound of the Left Flank:

An entry wound was noted on the left shoulder, 8 inches from the top of the head and 6 inches left of midline. It consisted of a $\frac{3}{8}$ inch circular defect. The direction of the wound path was from front to back, right to left, and downward. There was no exit wound noted.

Number Four – Graze Wound of the Right Arm:

An entry wound was noted on the proximal right arm, 6 inches from the top of the right shoulder and midline to anterior vertical line through the right arm. It consisted of a 1 x $\frac{1}{2}$ inch defect. The direction of the wound path was skin and subcutaneous tissue. There was no exit wound noted.

TOXICOLOGY. Femoral blood and vitreous samples were collected from Delfino Alvarado on December 2, 2022.

Toxicology results for the femoral blood sample were listed as follows:

- Amphetamine – 47 ng/mL
- Methamphetamine – 540 ng/mL

CRIMINAL HISTORY.

No known criminal history.

DE-ESCALATION

From the time Officer Ewing and Officer Gutierrez arrived at the location to the time of the lethal force encounter was approximately one minute and twenty seconds. Officer Ewing and Officer Gutierrez were responding to a call of a subject setting a tree on fire. Both Officer Ewing and Officer Gutierrez were wearing San Bernardino Police Department uniforms identifying them both as law enforcement officers. There were multiple attempts by both Officer Ewing and Officer Gutierrez to de-escalate the incident through the use of verbal commands and a less lethal weapon.

When Officer Ewing and Officer Gutierrez first contacted Alvarado, they saw that he matched the description of the arson suspect. Officer Ewing saw Alvarado was holding an object in his hand and swinging it around. Officer Ewing believed the object was a hatchet, stick, or pole. The object was a wooden cross. Officer Ewing attempted to de-escalate

the situation by giving Alvarado verbal commands to drop the weapon. Alvarado did not comply with those commands. Officer Ewing believed Alvarado may be Spanish speaking. Officer Ewing continued to try to de-escalate the situation by asking Officer Gutierrez to talk to Alvarado in Spanish. Officer Gutierrez then gave Alvarado verbal commands in Spanish. Officer Gutierrez told Alvarado to drop the weapon. Alvarado also failed to comply with Officer Gutierrez's verbal commands.

It was dark outside and Officer Ewing was using the tactical light on his duty weapon to illuminate Alvarado. Officer Ewing thought Alvarado may be scared because there was a gun pointed at him. Officer Ewing holstered his weapon thinking it could help de-escalate the situation. Officer Gutierrez continued to give verbal commands to Alvarado in Spanish. When Officer Ewing took a step toward Alvarado, Alvarado then swung the wooden cross at Officer Ewing. Officer Ewing immediately backed up and unholstered his Taser. Officer Ewing's efforts to create distance and to reach for a less lethal force option were further attempts to de-escalate the situation. Similar to Officer Ewing, Officer Gutierrez took steps to de-escalate the situation. Officer Gutierrez gave Alvarado verbal commands to drop the weapon. Officer Gutierrez gave verbal commands first in English and then in Spanish. Alvarado failed to comply with Officer Gutierrez's commands to drop the wooden cross.

After Alvarado picked up a shovel, Officer Gutierrez removed her Taser from the holster and continued to give Alvarado verbal commands to drop the weapon. Alvarado dropped the shovel to the ground and picked up another object with a long handle. As Alvarado walked towards the backyard, Officer Ewing and Officer Gutierrez followed at a distance. When Alvarado was near a tree, he dropped the object with the long handle and picked up another wooden cross. This cross was thicker and appeared sturdier than the first cross, which was still in Alvarado's hand. When Alvarado moved towards the officers, Officer Gutierrez advised she was going to deploy her Taser. Officer Gutierrez deployed the Taser but it was ineffective. Alvarado then charged at the officers.

APPLICABLE LEGAL PRINCIPLES

A peace officer may use objectively reasonable force to effect an arrest if he believes that the person to be arrested has committed a public offense. (Calif. Penal C. §835a(b).)¹¹ Should an arresting officer encounter resistance, actual or threatened, he need not retreat from his effort and maintains his right to self-defense. (Penal C. §835a(d).) An officer may use objectively reasonable force to effect an arrest, prevent escape or overcome resistance. (Penal C. §835a(d).)

An arrestee has a duty to refrain from using force or any weapon to resist arrest, if he knows or should know that he is being arrested. (Penal C. §834a.) This duty remains even if the arrest is determined to have been unlawful. (*People v. Coffey* (1967) 67 Cal.2d 204, 221.) In the interest of orderly resolution of disputes between citizens and the

¹¹ All references to code sections here pertain to the California Penal Code.

government, a *detainee* also has a duty to refrain from using force to resist detention or search. (*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.)

An officer-involved shooting may be justified as a matter of self-defense, which is codified in Penal Code at §§196 and 197. Both of these code sections are pertinent to the analysis of the conduct involved in this review and are discussed below.

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 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:

- (1) to defend against an imminent threat of death or serious bodily injury to the officer or another, or
- (2) to apprehend a fleeing felon who threatened or caused death or serious bodily injury, if the officer also reasonably believes that the fleeing felon would cause further death or serious bodily injury unless immediately apprehended,

(Penal C. §835a(c)(1).) Discharge of a firearm is "deadly force." (Penal C. §835a(e)(1).) The "[t]otality of the circumstances" means all facts known to the peace 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.*)

While the appearance of these principals was new to section 835a in 2020,¹² 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 committed a crime involving the infliction or threatened infliction of serious physical harm" to the officer or

¹² Assem. Bill No. 392 (2019-2020 Reg. Sess.) approved by the Governor, August 19, 2019. [Hereinafter "AB-392"]

others, 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 the requirements of Penal Code § 196 are also 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, developed upon the former iteration of section 196, is still instructive.

There are two new factors in section 835a that did not appear in the section previously, nor did they develop in caselaw pertaining to use of deadly force. First, a peace officer must make reasonable efforts to identify themselves as a peace officer and warn that deadly force may be used, prior to using deadly force to affect arrest. (Penal C. §835a(c)(1).) This requirement will not apply if an officer has objectively reasonable grounds to believe that the person to be arrested is aware of those facts. (Penal C. §835a(c)(1).) Second, deadly force cannot be used against a person who only poses a danger to themselves. (Penal C. §835a(c)(2).)

While the codified standards for use of deadly force in the course of arrest are set forth at subsections (b) through (d) of Section 835a, the legislature also included findings and declarations at subsection (a). 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;¹³

¹³ 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

- (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).)

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 under section 835a(c)(1), as stated *supra*.

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*

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).

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 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 use of force to effect an arrest, 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).)

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.)

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 reasonable person in a similar situation with similar knowledge would have believed. (CALCRIM 505.) It was previously held that 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.)¹⁴ 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.*)

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.) The threatened use of a gun or knife, for example, is the sort of immediate threat contemplated by the United States Supreme Court, that justifies an officer's use of deadly force. (*Reynolds v. County of San Diego* (9th Cir. 1994) 858 F.Supp. 1064, 1071-72 "an officer may reasonably use deadly force when he or she confronts an armed suspect in close proximity whose actions indicate an intent to attack.") 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. 3, *infra*.)

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

¹⁴ The legislative findings included in Penal C. section 835a(a)(4) suggest to the contrary that "the decision by a peace officer to use force shall be evaluated from the perspective of a reasonable officer in the same situation". As such, if the officer using force was acting in an effort to *effect arrest*, as is governed by section 835a, then it appears the more generous standard included there would apply.

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 therefore, the Supreme Court will surround the police with a fairly wide "zone of protection" when the aggrieved 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.)

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 v. Connor* (1989) 490 U.S. [386], 395.) The *Graham* balancing test, as described *supra*, 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 Taser or a shotgun-fired bean bag has been categorized as intermediate non-lethal force. (*Bryan v. MacPherson*, *supra*, 630 F.3d at 825[Taser]; *Deorle v. Rutherford*, *supra*, 272 F.3d at 1279-80 [bean bag].) This designation exists despite the fact that 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 a Taser or shotgun-fired bean bag both fall 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 [not excessive to use physical force and tase an unarmed but actively resisting subject with 14 Taser cycles where such was needed to gain physical control of him].)

ANALYSIS

In this case, Officer Ewing had an honest and objectively reasonable belief that Alvarado posed an imminent risk of serious bodily injury or death. Witness #1 had called 9-1-1 to report Alvarado was setting a tree on fire. Officer Ewing responded to the location in a marked patrol vehicle. Officer Ewing was wearing a law enforcement uniform identifying him as a police officer with the San Bernardino Police Department. When Officer Ewing got to the location he saw Officer Gutierrez. Officer Gutierrez was also wearing a law enforcement uniform identifying her as a police officer with San Bernardino Police Department. Officer Gutierrez had been directed to where Alvarado was setting fire to the tree.

The incident under review occurred within one minute and twenty seconds of Officer Ewing arriving at the location. Throughout the incident under review, Alvarado's demeanor was uncooperative and aggressive. When Officer Ewing first observed Alvarado, he was holding a wooden cross and swinging it around. Officer Ewing had pulled his firearm out of its holster and was using the tactical light to illuminate Alvarado. Officer Ewing gave Alvarado verbal commands to drop the weapon but Alvarado would not comply. Officer Ewing then asked Officer Gutierrez to speak to Alvarado in Spanish. Officer Gutierrez gave verbal commands for Alvarado to drop the weapon in Spanish but Alvarado refused to comply.

Instead, Alvarado picked up a shovel and started moving toward Officer Ewing and Officer Gutierrez. Officer Ewing's concern that Alvarado intended to injure or kill the officers was objectively reasonable. Alvarado was being given verbal commands to drop his weapon from two officers dressed in law enforcement uniforms. Officer Ewing had his firearm pointed at Alvarado when the verbal commands were being given. Officer Ewing attempted to de-escalate the situation by holstering his firearm. However, when Officer Ewing took a step toward Alvarado, Alvarado swung the wooden cross at Officer Ewing. Officer Ewing immediately backed up and unholstered his Taser.

Alvarado refused to comply with the officers' verbal commands to drop the wooden cross he was holding. Instead, Alvarado chose to pick up a shovel. Officer Ewing reasonably believed Alvarado was now armed with two weapons that could inflict serious bodily injury or death. Alvarado would eventually drop the shovel and immediately picked up a broom as he made his way to the backyard of the residence. Officer Ewing and Officer Gutierrez followed Alvarado into the backyard. Officer Gutierrez gave Alvarado additional commands in Spanish for Alvarado to drop the weapons. Alvarado then threw the broom to the ground and picked up a thicker wooden cross. Alvarado appeared agitated and started moving toward Officer Ewing and Officer Gutierrez. Alvarado was holding a wooden cross in each hand. Officer Ewing pointed his Taser at Alvarado and gave Alvarado commands to "drop it."

At this time, Officer Gutierrez had her Taser out of its holster. Officer Gutierrez warned Alvarado she was going to use her Taser. Officer Ewing also intended to deploy his Taser and started to yell, "Taser, Taser, Taser!" At the same time, Officer Gutierrez deployed her Taser at Alvarado. The Taser struck Alvarado but it was ineffective. Alvarado then yelled and charged at the officers swinging the two wooden crosses. Officer Ewing backed out of the way, dropped his Taser, and unholstered his firearm. Officer Ewing was able to avoid being struck by Alvarado.

Alvarado then appeared to focus on Officer Gutierrez. Alvarado charged at Officer Gutierrez and swung the wooden crosses. Witness #1, Witness #2, and Witness #3 all saw Alvarado swinging the wooden crosses and charging at Officer Gutierrez. According to Witness #3, Officer Gutierrez was backed up against the house and had nowhere to go. Witness #1 indicated he heard Officer Ewing shoot Alvarado right as Alvarado swung the weapon above his head and then down towards Officer Gutierrez. Witness #1 believed Alvarado intended to hurt Officer Gutierrez.

Given that Alvarado had just physically attacked Officer Ewing, Officer Ewing reasonably believed Alvarado intended to kill Officer Gutierrez. Alvarado was refusing to comply with officers' verbal commands to drop the weapons. The manner in which Alvarado was swinging the wooden crosses, the speed at which he was charging at Officer Gutierrez, and the close proximity of Alvarado to Officer Gutierrez all factored into Officer Ewing's belief he needed to quickly act in order to save Officer Gutierrez's life. Officer Ewing's belief that had he not fired his weapon at Alvarado, Officer Gutierrez would have been seriously injured or killed was objectively reasonable. Given those circumstances, the decision by Officer Ewing to use deadly force was justified.

CONCLUSION

Based on the facts presented in the reports and the applicable law, Officer Ewing's use of lethal force was a proper right of defense of others and therefore his actions were legally justified.

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