



PUBLIC RELEASE MEMORANDUM

DATE: July 13, 2021

Subject: Fatal Officer-Involved Incident

Involved Officer: Officer Daniel Smith
Rialto Police Department

Involved Subject/DOB: David Viveros
11/07/1993

Subject's Residence: San Bernardino

Incident Date: November 6, 2020
Incident Time: 7:11 a.m.

Case Agent/Agency: Detective Max Kunzman, Detective Adrian Bustamante
San Bernardino County Sheriff's Department

Agency Report #: DR# 602000192
H# 2020-127

DA STAR #: 2021-00-9954

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PREAMBLE

This was a fatal officer-involved shooting by an officer from the Rialto Police Department. The shooting was investigated by the San Bernardino County Sheriff's Department. This factual summary is based on a thorough review of all the investigative reports, photographs, body-worn camera video recordings, and surveillance video recordings submitted by the San Bernardino County Sheriff's Department.

FACTUAL SUMMARY

In the early morning hours of November 6, 2020, Rialto Police Department Officers Daniel Smith, Rusty Lamm, and Carlos Vera were investigating a shooting at the USA Gasoline station on East Foothill Boulevard in the city of Rialto. The officers had finished their investigation of the scene and were awaiting the arrival of a tow truck for the shooting victim's vehicle and the arrival of the gas station manager so they could obtain the surveillance video from the gas station. Officer Vera was sitting in his patrol unit, with his driver's door open, working on paperwork related to the investigation. Officer Smith was standing next to the driver's side of Officer Lamm's patrol unit conversing with Officer Lamm, who was seated inside his vehicle. Officer Lamm's patrol unit was parked several feet away from Officer Vera's patrol vehicle.

At approximately 7:11 a.m., David Viveros approached the gas station on foot. Officer Vera watched Viveros as he walked toward his patrol unit. Viveros walked past the passenger side of Officer Vera's vehicle. Viveros then walked around the back of Officer Vera's vehicle and quickly headed for the open driver's door toward Officer Vera. Seeing this, Officer Vera began to get out of his vehicle. As Officer Vera stepped out of his patrol unit, Viveros charged and began attacking him. A struggle ensued. Officers Smith and Lamm saw Viveros attacking Officer Vera and came to Officer Vera's aid. Officer Smith yelled at Viveros to stop fighting with the officer, but Viveros continued to fight. Officer Smith discharged his Taser at Viveros and Viveros fell to the ground, taking Officer Vera with him. At this point, Officer Smith saw that Viveros had a knife in his hand. Officer Smith yelled to his partners, warning them about the knife. Viveros quickly jumped back up to his feet and began heading for Officer Vera again. Officer Lamm grabbed onto Viveros to try to stop him but was unsuccessful. Officer Smith deployed a second set of Taser darts at Viveros. Viveros fell to the ground a second time but quickly got back up to his feet. With the knife in his hand, Viveros began charging toward Officer Smith. Officer Smith fired several rounds from his handgun at Viveros. Viveros was struck and fell to the ground.

It was only after the shooting when Officer Lamm realized he had been stabbed by Viveros. Officer Vera had also been injured when Viveros took him to the ground. Medical aid was called for Viveros and both of the injured officers. While waiting for medical aid to arrive, Officer Smith tended to Viveros. Upon finding Viveros had no pulse, Officer

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Smith began chest compressions. Viveros was transported to the hospital, but succumbed to his injuries at approximately 8:04 a.m.

STATEMENTS BY POLICE OFFICERS¹

All Rialto Police Department officers who responded to the scene on November 6, 2020, wore readily identifiable police uniforms and drove marked Rialto Police Department patrol units. The officers' uniforms consisted of dark blue pants and dark blue long-sleeved shirts adorned with Rialto Police Department badges and their names on the chest and cloth police patches on each shoulder. All officers carried the following tactical gear: Body worn camera, a police radio, oleoresin pepper spray, a baton, a taser, handguns, ammunition magazines, and handcuffs. The officers' duty weapons were Glock 22 handguns.

On November 6, 2020, at approximately 2:16 p.m., **Officer Daniel Smith** was interviewed by Detective S. Abernathy and Detective M. Kunzman of the San Bernardino County Sheriff's Department.

Officer Smith was employed by the Rialto Police Department as a police officer. On November 4, 2020, Officer Smith was on duty, assigned to patrol as a field training officer to Officer Carlos Vera. Officer Vera was in phase one of his training and had been training with Officer Smith for roughly three weeks. While at the police station, during briefing, they received a tone out for a priority call at a gas station located at 280 East Foothill Boulevard in Rialto for suspicious circumstances and possible shots fired.²

Officers Smith and Vera responded to the call, driving to the scene together in a distinctively marked black and white Rialto Police Department Ford Explorer.³ Officer Rusty Lamm also responded to the call in a separate police unit. Once there, the officers found a male subject who had been shot. The officers summoned medical aid, the male subject was transported to the hospital, and the officers began their investigation into the shooting. The officers waited at the scene for a manager to arrive so they could obtain the gas station surveillance footage for their investigation. It was shortly after 7:00 a.m. and it was daylight outside. Officer Smith was standing beside Officer Lamm's patrol car conversing with Officer Lamm who was seated in the driver's seat. Officer Lamm's patrol car was parked, facing eastbound, in the gas station lot. Officer Lamm's car was positioned north of Officer Vera's patrol unit. Officer Vera's patrol unit was positioned in the south portion of the lot facing eastbound. Officer Vera was sitting inside his patrol unit working on paperwork related to their investigation. While conversing with Officer Lamm, Officer Smith looked to his left in a southeast direction and saw a male subject standing at the northeast corner of Sycamore Avenue and Foothill Boulevard. Officer Smith believed the male was waiting for the light to cycle so he could cross the intersection. The

¹ Herein is a summary only. All reports submitted were reviewed, but not all are referenced here.

² The call for service was received by police dispatch at 6:22 a.m.

³ Per the dispatch history, the officers arrived on scene at 6:26 a.m.

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male subject (later identified as David Viveros⁴) then walked westbound on Foothill Boulevard.

Initially, Officer Smith did not notice anything unusual about Viveros. Viveros continued walking westbound and Officer Smith continued speaking with Officer Lamm. Officer Smith then noticed Viveros near the back end of Officer Vera's patrol unit. Viveros had changed his direction of travel and had walked around the back end of Officer Vera's vehicle. Viveros then walked from the rear bumper along the driver's side of Officer Vera's unit, approaching Officer Vera who was sitting in the driver's seat. Officer Smith believed Officer Vera's driver's door was open as Viveros approached. Officer Smith could not see the right side of Viveros' body or whether Viveros had anything in his right hand as he approached Officer Vera. Officer Vera got out of the patrol unit and as he did so, Viveros charged and immediately began attacking him. Officer Vera yelled something, but Officer Smith did not know exactly what he yelled. Officer Vera tried to push Viveros away but Viveros fought and struggled with him. It was clear to Officer Smith that Viveros approached Officer Vera specifically to attack him. The attack was immediate and "like an ambush," giving Viveros the upper hand.

Officer Smith ran to them and yelled, "Stop fighting with my partner!" or "Stop fighting!" Viveros continued fighting and Officer Vera continued trying to defend himself. As the fight continued, Officer Smith deployed one set of Taser darts.⁵ Officer Smith estimated he was approximately six to eight feet away from Viveros when he deployed the Taser. The darts hit Viveros in the lower right quadrant of his back. Viveros and Officer Vera fell to the ground. Officer Smith was not sure if the Taser darts caused Viveros and Officer Vera to fall to the ground or if Viveros had deliberately taken Officer Vera down to the ground, but the darts did not appear to be effective in incapacitating Viveros because he continued to fight and got back up onto his feet. It was at this point that Officer Smith saw Viveros had a knife in his right hand. Viveros held the knife near his upper torso. Officer Smith yelled to his partners, "He has a knife, guys, he has a knife!"

Approximately three inches of the knife blade stuck out of Viveros' hand as Viveros continued fighting with Officer Vera.⁶ Officer Vera broke free of Viveros and Officer Smith deployed a second set of Taser darts at Viveros, hoping to incapacitate him and stop the threat. Viveros fell onto his back but then immediately jumped back to his feet. Viveros "had the knife out at the ready position." Both Officer Vera and Officer Lamm moved away from Viveros, Officer Vera headed in a southeast direction and Officer Lamm headed in a southwest direction. Officer Smith realized the situation had completely escalated even though he tried to use a low level of force to stop Viveros with the Taser. Neither

⁴ Subsequent investigation by the San Bernardino County Sheriff's Department revealed David Viveros' identity. It should be noted, none of the Rialto Police Department officers interviewed identified or referred to Viveros by name.

⁵ Officer Smith's Taser had two sets of darts which made it capable of two separate deployments.

⁶ Review of the surveillance video revealed that at this point, Viveros was actually fighting with Officer Lamm.

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deployment was effective in incapacitating Viveros and Viveros "still had that fight in him." Officer Smith dropped the Taser and transitioned to his handgun.

Viveros was approximately 10 to 12 feet from Officer Smith when he got up from the ground. Viveros yelled something unintelligible, raised the knife to his upper chest at shoulder level, and "instantaneously and quickly" charged directly at Officer Smith. It happened so quickly that Officer Smith did not have time to verbalize any commands to Viveros. Viveros "seemed to be a man on the mission to kill me." As Viveros charged him with a knife, Officer Smith believed Viveros was going to kill him. Fearing for his life, Officer Smith fired his handgun at Viveros, aiming for his upper torso. Officer Smith believed he fired six rounds in quick succession and stopped firing when Viveros was no longer a threat. When he fired his gun, Viveros was approximately 8 to 10 feet away. Viveros' momentum carried him forward and he fell to the ground. Viveros still held the knife in his hand. Viveros was breathing and making noises. Officer Smith held Viveros at gunpoint. Officer Smith had never, to the best of his knowledge, contacted Viveros before and said, "I never had any intention to meet him today, yet he somehow had a vendetta or wanted to ambush us and it-- that's frankly, that's scary." Viveros' violent and unpredicted actions scared Officer Smith more than he has ever been in his career. Officer Smith did not know for certain what Viveros' end goal was, but believed it was to kill him or his partners.

As he held Viveros at gunpoint, Officer Smith heard Officer Lamm announce over the radio that shots had been fired. Officer Smith also heard Officer Lamm request medical aid. Officer Lamm said he had been cut.⁷ Officer Smith looked in a southwest direction, toward Officer Lamm and saw a large portion of the left side of Officer Lamm's uniform shirt appeared to have been torn by a knife. Officer Smith asked Officer Lamm if he was okay and Officer Lamm replied, "He got me," or, "He stabbed me, he's cut me." Officer Lamm told Officer Smith, "Hey, he still has the knife." Officer Smith told Officer Lamm, "Step aside, check yourself," to make sure he was okay. Officer Smith asked Officer Lamm if he was bleeding. Officer Lamm said he was injured and was bleeding. As Officer Smith held Viveros at gunpoint, Rialto Police Sergeant Borchard arrived. Sergeant Borchard removed the knife from Viveros.⁸ Officer Smith rolled Viveros onto his back. Viveros had shallow breathing, but he stopped moving. Officer Smith checked for Viveros' pulse, at both his radial and carotid arteries. Finding no pulse, Officer Smith began CPR. Officer Smith continued performing CPR until the Rialto Fire Department arrived on scene less than five minutes later, at which time paramedics took over primary responsibility for Viveros' care.

⁷ Officer Smith was not asked about Officer Lamm's location in relation to Viveros during the struggle with Viveros. For details regarding this, please see the summary of Officer Lamm's interview.

⁸ Officer Smith did not specify whether Viveros had the knife in his hand or whether the knife was on the ground nearby.

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On November 6, 2020, at approximately 3:40 p.m., **Officer Carlos Vera** was interviewed by Detective S. Abernathy and Detective M. Kunzman of the San Bernardino County Sheriff's Department.

Officer Vera was employed by the Rialto Police Department as a police officer. On November 6, 2020, Officer Vera was on duty, assigned to patrol, in field training with his field training officer, Officer Daniel Smith. Around 6:00 a.m., Officer Vera was in the Rialto Police station in briefing when a call was received for shots fired with a person injured at the USA Gasoline Station.

Officer Vera and Officer Smith drove to the gas station and began investigating the shooting. Officer Rusty Lamm also responded to the gas station in a separate police unit. The victim of the shooting was transported to the hospital. Officers Vera, Smith and Lamm remained at the gas station to conduct their investigation. Officer Vera was sitting in the driver's seat of his patrol unit working on paperwork. His patrol unit was a distinctively marked Rialto Police Department Ford Explorer and it was parked facing east in the gas station lot, parallel to Foothill Boulevard, nearest the sidewalk. Officer Lamm's patrol unit was a distinctively marked Rialto Police Department Ford Taurus and it was parked facing east in the gas station lot, nearest the gas station's convenience store. Officer Lamm's patrol car was to Officer Vera's left and was parallel to Officer Vera's patrol unit. Officer Lamm and Officer Smith were at the driver's side of Officer Lamm's vehicle.

While sitting in the driver's seat of his patrol unit, Officer Vera looked east and saw a male Hispanic (Viveros) standing on the north side of Foothill Boulevard just east of the gas station. Viveros was stopped at the red light, waiting to cross, toward the gas station. Viveros looked suspicious because he was looking around in both directions, back and forth like he was looking for something or somebody, with one hand in his pocket. Officer Vera believed Viveros was possibly grabbing something inside his pocket. Viveros began walking toward Officer Vera's location. Viveros passed by the right side of Officer Vera's patrol unit and Officer Vera kept an eye on him utilizing his rear-view mirrors. Officer Vera thought Viveros was going to go towards Officers Smith and Lamm, or through the crime scene they had taped off from the public. Viveros darted around behind Officer Vera's patrol unit and came up towards his driver's side. Officer Vera got out of his vehicle to see where Viveros was going and to make sure he wasn't going into the crime scene. Right as Officer Vera stepped out of his patrol unit, Viveros charged him and began attacking him. Viveros "ambushed" Officer Vera. Officer Vera felt like he had just gotten out of his vehicle and reacted without any time to think or do anything else. Officer Vera put his hands up to defend himself and yelled out to Officer Smith, "I'm fighting with him!" Viveros continued grabbing Officer Vera, grabbing his shirt, and trying to take him to the ground. Viveros was larger and stronger, overpowering Officer Vera. Officer Vera ended up on the ground but did not recall exactly how he ended up there, "I just know that I ended up on the ground and that's when he (Viveros) ended up next to me on the ground, on, on facing down, 'cause I remember the Taser was deployed at his back." At this moment, the "fear started kicking in." Officer Vera thought about what was happening and

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the fact that he was "on the ground right now." Officer Vera heard a Taser but was not sure who deployed it. "I heard the Taser being deployed and I saw [Viveros] pop up after the Taser was deployed, so I assumed that the Taser was ineffective at that point."

Officer Vera got up and backed away from Viveros. Officer Vera ran to the front of his patrol unit. At this point, Officer Vera saw Viveros had a knife. Viveros waved the knife around at all three officers. The blade on the knife appeared to be four to five inches long. Officer Vera tried to take cover behind his patrol vehicle when he heard gunshots being fired. Officer Vera believed he heard three gunshots in rapid succession. Officer Vera looked and saw Viveros fall forward onto the ground. Viveros was face down, his hands were underneath him, and the knife was on the ground just to Viveros' right. Viveros' head was toward the east and his feet were toward the west. Officer Smith was beside Officer Lamm's patrol car and was in between it and Officer Vera's patrol unit. Officer Lamm was behind Officer Vera's patrol unit. The three officers' positions created a triangle and Viveros was in the center of the triangle.

After Viveros was shot, they waited for other responding police units to arrive to assist. Both Officer Vera and Officer Lamm were injured and Viveros "still had the knife." Once other officers arrived and removed the knife, they rolled Viveros onto his back and started CPR.

Officer Vera did not realize he was injured until the other units arrived. He felt something on his elbow, so he touched it and after doing so, he saw blood on his hand. Officer Vera believed he injured his elbow when he fell to the ground during the fight with Viveros because he landed pretty hard. Officer Vera believed the pain did not kick in right away "because of the adrenalin." Medics cut Officer Vera's shirt off and saw he had been cut and had abrasions to his elbow. Officer Vera was transported to the hospital at that point.

Officer Vera believed if Viveros had not been shot, he would have attacked one of the three officers with the knife because Viveros had already tried to attack Officer Vera. Officer Vera did not provoke Viveros and there was nothing that caused him to attack Officer Vera.

On November 9, 2020, at approximately 1:05 p.m., **Officer Rusty Lamm** was interviewed by Detective S. Abernathy and Detective M. Kunzman of the San Bernardino County Sheriff's Department

Officer Lamm was employed by the Rialto Police Department as a police officer. On November 6, 2020, Officer Vera was on duty, assigned to patrol. While Officer Lamm was at the station that morning during briefing a tone went out for a call regarding a possible shooting at the USA Gasoline station on Foothill Boulevard in Rialto. The gas station was located on the northwest corner of the intersection of Sycamore Avenue and Foothill Boulevard.

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Officer Lamm responded to the gas station along with his partner, Officer Alexander. Officer Lamm and Officer Alexander were the first to arrive at the location, followed by Officers Smith and Vera. Officer Lamm parked his patrol car, a Rialto Police Department Ford Taurus, facing northeast just west of the gas station entrance, west of the gasoline pumps that were located just south of the door to the gas station convenience store. Officer Alexander went to the hospital with the shooting victim while Officers Lamm, Smith, and Vera remained at the gas station to conduct their investigation. The officers secured the crime scene with yellow caution tape.

While at the scene, Officer Lamm was sitting in the driver's seat of his patrol car typing his supplemental report. His driver's door was open, and Officer Smith stood beside the driver's side, in the "triangle of the door frame," talking to Officer Lamm. Officer Vera was sitting in his patrol unit which was parked approximately two car length's south of Officer Lamm's unit. Suddenly, Officer Smith yelled, "Stop fighting," and took off running. Officer Lamm did not know what was occurring because he hadn't seen anything. Officer Lamm got out of his car and ran southeast around the back of his car where he saw a man (Viveros) and Officer Vera fighting. Officer Vera was struggling and trying to push Viveros away in an attempt to get Viveros off of him. Officer Lamm saw Officer Smith deploy his Taser at Viveros, but the Taser did not appear to be effective because Viveros was able to get right back up and "most people cannot stand up when they get Tased." Officer Lamm explained that when someone gets Tased, their body locks up and they cannot move. Viveros was able to move his arms around and to push himself up when he was being Tased.

At first, Officer Lamm thought Viveros was going to run toward Officer Vera again, so Officer Lamm was going to grab Viveros to take him to the ground, but Viveros started coming towards Officer Lamm. Officer Lamm grabbed onto Viveros. Officer Lamm explained to the detectives "When I grabbed onto him, I kind of felt like I reached around him and for some reason I pushed off. I don't know-- I pushed off, but I just pushed off. That's all I remember, just grabbing onto him for like a couple of seconds and then pushing off."⁹ Viveros was quite a bit larger and was stronger than Officer Lamm. After disengaging from Viveros, Officer Lamm saw that Viveros had a knife in his hand. The knife was black and appeared to have a 6-inch blade. Viveros held the knife with the blade pointed away from his thumb, toward Officer Lamm. Viveros said, "Fuck this," and started charging toward Officer Smith with the knife. Officer Smith started backing up. Officer Lamm also started backing up, south towards Foothill Boulevard.¹⁰ Officer Lamm backed up because he did not want to be in Officer Smith's line of fire because he believed Officer Smith was going to shoot Viveros. When Viveros charged at Officer Smith, Officer Lamm was afraid for Officer Smith's life. However, Officer Lamm was unable to fire his gun at Viveros because Officer Smith was in Officer Lamm's line of fire. Officer Smith discharged

⁹ Officer Lamm could not remember if he grabbed onto Viveros before or after Officer Smith deployed the Taser. Officer Lamm recalled that Officer Smith deployed the Taser two separate times and that each time, the Taser did not seem to have any effect on Viveros.

¹⁰ Officer Lamm did not know where Officer Vera was at this point in the incident.

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his firearm at Viveros. Officer Lamm believed Officer Smith fired four rounds in quick succession. Viveros continued forward slightly and fell to the ground face down, slightly angled to his side. Viveros fell on the ground, "kind of where Smith was."

When Viveros fell to the ground, he still had the knife in his hand. Officer Lamm told Officer Smith Viveros still had the knife. Officer Lamm and Officer Smith held Viveros at gunpoint. Officer Lamm looked down and saw his shirt was cut open from the breast pocket down. Officer Smith told Officer Lamm to check himself. Officer Lamm started to take his shirt off and saw his bullet proof vest was cut open and he could see the interior of his bullet proof vest. Officer Lamm also felt and saw his black undershirt was wet and had a hole in it. At that point, Officer Lamm realized he had been stabbed in his stomach and he was bleeding. Officer Lamm felt sharp, burning pain. By that time, Officer Smith radioed that shots had been fired and requested medical aid respond to the scene. Officer Lamm saw Officer Smith was performing CPR on Viveros. The fire department arrived and tended to Viveros. A second ambulance arrived and transported Officer Lamm to the hospital. Officer Lamm remained hospitalized until the following evening.

Officer Lamm explained that during the entire incident, he was scared. Officer Lamm had never experienced anything like this. Officer Lamm did not know who Viveros was or why he was attacking them. The incident happened very quickly. The officers would gain space from Viveros, but Viveros continued charging at them and attacking them. Officer Lamm thought he was "going to die that day."

On November 6, 2020, at approximately 1:25 p.m., **Sergeant Nicholas Borchard** was interviewed by Detective R. Ripley of the of the San Bernardino County Sheriff's Department.

Sergeant Borchard was employed by the Rialto Police Department as a police officer sergeant. On November 4, 2020, at approximately 5:45 a.m., Sergeant Borchard was on duty as the day-shift patrol supervisor. Officer Smith and his trainee, Officer Vera, along with Officer Lamm investigated an assault with a deadly weapon at the USA Gasoline station at 280 E. Foothill Boulevard in Rialto. Sergeant Borchard briefly stopped by the location to assist officers before returning to the Rialto Police Station.

At approximately 7:11 a.m., Officer Lamm broadcasted over the radio that officers were involved in a physical altercation. Seconds later, Officer Lamm broadcasted shots were fired. There was a significant amount of noise in the radio's background when Officer Lamm made each broadcast. Sergeant Borchard also recognized that Officer Lamm's voice sounded panicked and at a higher pitch than usual. Sergeant Borchard heard Officer Smith request emergency services through dispatch. Sergeant Borchard and Sergeant Lindsey drove to the scene quickly with their emergency lights and siren, arriving approximately two minutes later.

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When they got to the scene, Sergeant Borchard saw the two Rialto Police Department vehicles (a Ford Taurus and a Ford Explorer) investigating the previous call for service were still there and were parked in the same location they had been when Sergeant Borchard left the location earlier. The gas station had an island with pumps located on the north and on the south side. A civilian vehicle was parked in the center of the north and south pumps. The civilian vehicle was blocked off with caution tape. The Rialto Police Ford Taurus was located directly west of the civilian vehicle. The Ford Taurus faced almost directly east. The Rialto Police Ford Explorer was south of the southernmost gas pump. Both patrol units still had their emergency lights activated.

Sergeant Borchard saw a subject (Viveros) face down on the ground between the two patrol units, directly west of the south gas pump. Sergeant Smith had his gun out and was maintaining lethal coverage over Viveros because Viveros still had a knife. Sergeant Borchard saw Officer Lamm pacing back and forth near the back of the Explorer. Officer Vera walked in an east to west direction and sat down on the west curb of the gas station. Sergeant Lindsey checked on Officers Lamm and Vera while Sergeant Borchard assisted Officer Smith. Sergeant Borchard and Officer Mooney approached Officer Smith who told them Viveros still held a knife. Viveros' right elbow was cocked up slightly and Sergeant Borchard could see Viveros' right hand beneath his body. Sergeant Borchard pulled Viveros' right hand from beneath his body and removed a black folding knife. The knife was either in Viveros' hand or right next to his hand. The knife was locked open and had a four to five-inch blade. Sergeant Borchard tossed the knife away from Viveros' to render it safe. Sergeant Borchard did not handcuff Viveros because when he pulled Viveros' arm out from beneath his body, it was limp and Viveros was unresponsive. Sergeant Borchard advised they needed to start first aid and cut off Viveros' shirt to check for injuries. Officer Smith checked for a pulse and began chest compressions.

Rialto Fire Department paramedics arrived on scene. Sergeant Borchard approached Officer Lamm and Sergeant Lindsey and learned Officer Smith was the officer who fired his weapon.¹¹ Sergeant Borchard then walked back to Officer Smith and escorted him to his unit. Sergeant Borchard obtained a public safety statement from Officer Smith. Sergeant Borchard learned Officer Smith was not injured, Officer Lamm had sustained a puncture wound to his lower left abdomen, and Officer Vera had sustained blunt force trauma, abrasions, and contusions to his right elbow. Paramedics transported Viveros, Officer Lamm, and Officer Vera to Arrowhead Regional Medical Center.

STATEMENTS BY CIVILIAN WITNESSES¹²

On November 6, 2020, at approximately 2:53 p.m., **Witness #1** was interviewed by Detective R. Ripley of the San Bernardino County Sheriff's Department.

¹¹ Based on radio traffic and observations at the scene, Sergeant Borchard believed Officer Lamm was the officer who had fired his weapon. Sergeant Borchard did not initially know Officer Smith was, in fact, the one who had fired his weapon.

¹² All reports of civilian statements made were reviewed, though not all are summarized here.

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Witness #1 was employed by the Rialto Fire Department (RFD) as a paramedic. On November 4, 2020, Witness #1 was on duty, assigned to RFD Medic Ambulance 201. At approximately 7:10 a.m., Witness #1 and his partner were dispatched to 280 E. Foothill Boulevard for a subject with a hemorrhaged laceration. The notes relayed to them on their dispatch monitor said Rialto Police Department officers were on scene. A minute later, dispatch told responding units that the Rialto Police Department had a subject at gunpoint and fire units were clear to enter the scene. The RFD captain asked dispatch to confirm the information. Witness #1 and his partner were told to stage in the area of Foothill Boulevard and Palm Avenue for their safety until further information was received.

Fire dispatch told the RFD captain to switch over to Rialto Police Department's dispatch channel for further information. Several seconds later, the RFD captain broadcasted over the radio for RFD units to respond to the scene. Witness #1 and his partner responded Code 3, with lights and siren, and arrived approximately one minute later. Witness #1 and his partner were instructed to park the ambulance behind a police patrol unit on scene, so they stopped the ambulance near the north curb, east of the gas station. An unknown Rialto Police Department officer told Witness #1 two officers were injured and an additional subject was in cardiac arrest.

Witness #1 saw two unknown police officers performing chest compressions on an unknown Hispanic male adult (Viveros). Viveros was on the ground, west of the gas pumps between two Rialto Police Department patrol cars. Viveros' shirt was removed before Witness #1 arrived, exposing his chest and abdomen. Witness #1 placed cardiac monitor pads on Viveros and determined his heart was asystole. Witness #1 described asystole as a heart having no electrical activity. Witness #1 and his partner took over CPR and placed Viveros onto a gurney and into the ambulance.

CPR was continued and Witness #1 removed Viveros' clothing to assess his injuries. Witness #1 found Taser barbs attached to Viveros' shirt. Witness #1 located some marks on Viveros' right flank which he believed were caused by the Taser barbs. Viveros had a gunshot wound to the center of his back, between the shoulder blades, and blood coming out of his mouth. Viveros had a three to four-inch graze wound or laceration above his navel. Viveros was transported with lights and sirens to Arrowhead Regional Medical Center. During the transport, Witness #1 suctioned Viveros' airway and attempted to intubate him but could not because of a possible gunshot wound that penetrated his airway.¹³ Witness #1 placed an oropharyngeal airway into Viveros' mouth, started an intraosseous line in his leg, and administered one milligram of epinephrine through the intraosseous line. Witness #1's partner continued cardiopulmonary resuscitation. Witness #1 estimated three to five minutes elapsed from the time they arrived on scene until they arrived at the hospital. Once they arrived at the hospital, Viveros' care was transferred to the hospital medical staff.

¹³ No gunshot wound was found in this location during the autopsy.

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On November 6, 2020, at approximately 4:03 p.m., **Witness #2** was interviewed by Detective R. Ripley of the San Bernardino County Sheriff's Department.

Witness #2 was employed by the Rialto Fire Department as a paramedic. On November 4, 2020, Witness #2 was on duty, assigned to RFD Medic Ambulance 202. At approximately 7:10 a.m., he and his partner were dispatched to 280 E. Foothill Boulevard for a subject with a stab wound. Once they arrived on scene, approximately three to four minutes later, Witness #2 and his partner were instructed by an unknown police officer to park in front of RFD Medic Ambulance 201 which was stopped near the north curb, east of the gas station.

Witness #2 was directed to Officer Lamm who was seated on the north curb of Foothill Boulevard. Officer Lamm wore his uniform pants and a plain undershirt. Witness #2 and his partner removed the gurney from the ambulance and approached Officer Lamm. Witness #2 completed a rapid trauma assessment of Officer Lamm. Officer Lamm said he was in pain and held his hands over his abdomen. Witness #2 located a penetrating wound to Officer Lamm's left abdomen. The wound was considered life-threatening due to its proximity to larger arteries and veins in the torso. The wound was approximately one centimeter in length and was not actively bleeding. Witness #2 estimated there was approximately 20 cc's of blood soaked into Officer Lamm's shirt. After Officer Lamm removed his shirt, Witness #2 concluded that Officer Lamm had received no other injuries. Witness #2 assisted Officer Lamm onto the gurney and loaded him into the ambulance. Witness #2 started an intravenous line in Officer Lamm's right antecubital vein and applied an occlusive dressing to the penetrating wound. Witness #2 did not administer any medications. Officer Lamm was transported to Arrowhead Regional Medical Center, the nearest trauma hospital. There was no change in Officer Lamm's vitals during transport. Once they arrived at the hospital, Officer Lamm's medical care was transferred to the hospital staff.

On November 6, 2020, at approximately 3:55 p.m., **Witness #3** was interviewed by Detective R. Ripley of the San Bernardino County Sheriff's Department.

Witness #3 was employed by the Rialto Fire Department (RFD) as a paramedic. On November 4, 2020, Witness #3 was on duty, assigned to RFD Medic Ambulance 205 (B). At approximately 7:10 a.m., Witness #3 and his partner were dispatched to an officer-involved shooting and stabbing at 280 E. Foothill Boulevard. They were the third ambulance dispatched to the scene. Witness #3 learned through the dispatch notes that there had been an officer who had been stabbed and another officer who had received minor injuries. While en route to the scene, Witness #3 radioed in and asked the incident commander where he would like them. The RFD incident commander told them to turn right on Foothill and advised he would meet them at the scene. Witness #3 and his partner parked near the north curb, next to the gas station.

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Witness #3 was told the patient they would be transporting was Officer Vera. Witness #3 saw Officer Vera was out of his uniform shirt and was wearing a plain undershirt with his uniform pants. Witness #3 contacted Officer Vera and completed a rapid trauma assessment on him. Officer Vera's right elbow was wrapped in a bandage by an unknown firefighter before Witness #3 arrived. Officer Vera had been involved in a scuffle and had fallen onto the ground, injuring his right arm. Witness #3 and his partner assisted Officer Vera into the back of the ambulance and transported him to Arrowhead Regional Medical Center. Officer Vera's only complaint of pain was to his right arm and his vitals were stable. Once they arrived at the hospital, Officer Vera's care was transferred to the hospital staff.

On November 6, 2020, at approximately 11:00 a.m., **Witness #4** was interviewed by Sergeant A. Gibilterra and Detective M. Kunzman of the San Bernardino County Sheriff's Department.

Witness #4 worked for a geotechnical drilling company that sampled soil at sites about to be developed. Witness #4 had driven to a job site in Rialto on November 6, 2020 at approximately 7:00 a.m. Witness #4 drove west on East Foothill Boulevard and came to a stop in the left turn lane at Sycamore Avenue.¹⁴ Witness #4 had both of his truck windows rolled down. Witness #4 looked west and saw a marked Rialto Police Department patrol vehicle and three uniformed officers standing in the USA Gasoline station parking lot, near the west driveway entrance. A white or Hispanic male (Viveros) dressed in all black clothing approached the three police officers. Witness #4 described Viveros as "zombie-ish" and "out of it," and said it appeared, "like maybe he was high or drunk." Viveros was in the middle of the gas station between the gas pumps. To Witness #4, the police officers' demeanor and body language looked like they were "ready for something." One of the officers had his hands out and the other officers appeared to be "hesitant" in their demeanor.

When the signal turned green, Witness #4 began to drive south on Sycamore. At that moment, Witness #4 heard someone yell but he could not understand what was said. This led Witness #4 to believe something had changed between the officers and Viveros. Witness #4 drove south on Sycamore and then west into the Viva Tacos La Estrella drive-through.¹⁵ Witness #4 ordered his food and drove north in the drive-through on the east side of the business. When Witness #4 drove north, he saw one of the police officers quickly stepping backwards and heading behind his patrol car. At that moment, a truck that was in front of Witness #4 in the drive-through pulled forward to turn left out of the drive-through. The truck momentarily blocked Witness #4's view of the police officers and Viveros. Witness #4 heard four loud gunshots but could not see which officer had fired

¹⁴ Witness #4 was not familiar with the street names in Rialto. During his interview, detectives provided a map to Witness #4 to assist him with identifying street names.

¹⁵ The restaurant was located at 271 East Foothill Boulevard, Rialto.

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because the truck blocked his view. When the truck pulled out, Witness #4 could see the police officers again.

Witness #4 pulled out of the drive-through and headed west on Foothill Boulevard. Witness #4 made a U-turn and drove back east toward the gas station. As he neared the gas station, Witness #4 saw the police officers remove Viveros' shirt and begin CPR. Witness #4 continued east and parked in a parking lot nearby, near his job site. Witness #4 did not record the incident with his cellular phone or any other device.

On November 6, 2020, at approximately 10:06 a.m., **Witness #5** was interviewed by Detective R. Ripley of the San Bernardino County Sheriff's Department.

Witness #5 was employed as a store clerk at the USA Gasoline Station, located at 280 E. Foothill Boulevard in Rialto. On November 5, 2020, Witness #5 started her shift at the gas station at 11:00 p.m. and was scheduled to work until 7:00 a.m. on November 6, 2020.

At approximately 6:15 a.m., on November 6, 2020, an unknown Hispanic male adult entered the gas station store and asked Witness #5 to call 911 because he had been shot. Witness #5 called 911 and went outside to find the male's black BMW parked near pump number two. Witness #5 saw bullet holes in the BMW. Several minutes later, the Rialto Fire Department and the Rialto Police Department arrived at the gas station. The fire department transported the male to the hospital and approximately five Rialto Police Department Officers remained at the location to investigate the shooting. Two Rialto Police Department patrol units were parked on the southwest side of the property near pumps #4 and #7. Both units faced east. Pump #4 was directly north of pump #7. The police officers requested a copy of the surveillance video from the store but Witness #5 did not have access to the recorder. Witness #5 called her manager and he said he would be there by 7:30 a.m. to provide the video to the officers.

At approximately 7:10 a.m., Witness #5 went outside to her Jeep, which was parked beside pump #1, the northwest pump close to the front door to the store. Witness #5 spoke to an acquaintance named Darrell, a homeless man who lived nearby. Witness #5 stood approximately 16 feet east of her Jeep, between the fuel pumps and Sycamore Avenue. The scene appeared calm. A minute or two later, Witness #5 heard an unknown number of officers yelling at someone to, "Get down! Get down," or "Stay down, stay down!" Witness #5 looked west, between the BMW and pump #5 and had a clear line of sight of the officers. Witness #5 saw approximately four¹⁶ uniformed Rialto Police Department officers on the ground wrestling with an unknown white male adult with dark hair (Viveros). Viveros was a "big guy," but Witness #5 was unable to determine Viveros' age or provide more detail due to her poor eyesight. The officers were located in between pumps #4 and #7 and the marked patrol units. The officers tried to wrestle Viveros to the

¹⁶ Surveillance video and body-camera video reveal there were only three officers, Officer Lamm, Officer Vera, and Officer Smith.

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ground. One officer stood behind Viveros and placed one arm over Viveros' shoulder and the other around Viveros' waist in an attempt to force him to the ground.

Witness #5 saw an officer positioned near the southernmost patrol vehicle's driver's door fire what Witness #5 believed was a Taser at Viveros. Witness #5 could not see the officer but could see the Taser lines which she described as lightning bolts, shoot in a northerly direction from where the patrol vehicle closest to pump #7 was positioned. Witness #5 believed the Taser made a popping sound.¹⁷ The other officers ran toward Viveros and forced him to the ground with the Taser's assistance.

Within seconds, Viveros quickly stood back up, facing away from Pump #4, toward Sycamore. Viveros either deliberately turned or turned as he tried to prevent himself from falling as he got up. Viveros ended up facing toward an officer (Officer Smith) who was standing near the passenger side, rear quarter panel of the patrol unit near pump #4. Viveros waved his closed hands around. Witness #5 could not see if Viveros had anything in his hands but said he might have had something in his hands. Witness #5 could no longer see the Taser lines attached to Viveros. Several officers ran away from Viveros, retreating behind the patrol vehicle parked near pump #7. When Viveros stood up, Officer Smith yelled, "Stay down, stay down" before firing three gunshots at Viveros. When the officer fired the gun at Viveros, Viveros was less than five feet away from the officer.

Viveros fell face down, with his head facing east toward Sycamore. All the officers moved toward Viveros, who appeared lifeless. The officers rolled Viveros onto his back, cut his t-shirt off, and started chest compressions. Within five minutes more officers and the fire department arrived. Medical aid was given to Viveros and the fire department personnel transported Viveros away. Witness #5 did not see anyone else treated by emergency medical personnel at the scene.

Witness #5 thought she was approximately 20 feet away from the officers and Viveros at the time of the shooting. Witness #5 thought it was "overkill" and the officers didn't give Viveros a chance to get down. Witness #5 believed the officer who shot might have thought Viveros was going to "go towards him." Witness #5 did not see how the incident began or what caused the confrontation. Witness #5 estimated the entire incident took place in less than five minutes.

On November 6, 2020, at approximately 5:51 p.m., **Witness #6** was interviewed by Sergeant A. Gibilterra and Detective S. Abernathy of the San Bernardino County Sheriff's Department.

Witness #6 started dating Viveros in 2013. In 2017, Witness #6 and Viveros had a son. Witness #6 and Viveros were no longer in a dating relationship but they lived together at Witness #6's residence in San Bernardino. A male roommate also lived at the residence. According to Witness #6, Viveros kept to himself and did not have many friends. Viveros

¹⁷ Later during the interview, Witness #5 said she did not know if she heard the Taser make any sound.

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worked at the Department of Motor Vehicles in San Bernardino. Viveros mostly stayed home when he was not working.

On Friday, November 6, 2020, at approximately 2:00 a.m., Viveros and Witness #6 were at their home in San Bernardino when they began arguing with each other. Viveros was jealous because Witness #6 was talking to another male on the phone. Viveros told Witness #6 she was not allowed to speak to other males when she was at "his" residence. Witness #6 left the residence but planned to return the next morning.

At approximately 6:19 a.m., Viveros sent Witness #6 a text message saying, "Please answer. I need you here now. Please. I'm leaving and I'm leaving my phone. I left a video for you guys and I love you and the baby so so [sic] much. Never blame yourself for anything that I do. I love you with all my heart and I will always be with you and the baby."

Witness #6 returned home a short time later. Witness #6 found that Viveros and her car were missing. Witness #6 located a video on Viveros' cellular phone that showed Viveros talking to the camera. Witness #6 said the video was "basically a suicide video." In it Viveros apologized to Witness #6 and implied he would not see her again. Witness #6 reported this to the San Bernardino Police Department.

Viveros had a "roller coaster" of emotions. When Viveros got frustrated, he would punch the wall. Witness #6 believed Viveros had an "issue with the police from when he went to juvie for robbing houses."

To Witness #6's knowledge, Viveros had not attempted suicide before. According to Witness #6, Viveros believed he was a burden to his friends and family because he had epilepsy. Witness #6 was unsure if Viveros wanted his life to end because of their recent argument, his epilepsy, or for another unknown issue.

On November 6, 2020, at approximately 5:51 p.m., **Witness #7 and Witness #8** were interviewed by Detectives A. Alvarado and M. Kunzman of the San Bernardino County Sheriff's Department.

Witness #7¹⁸ and Witness #8 were David Viveros' parents. They were notified Viveros was involved in a shooting with Rialto Police Department officers, which lead to his death. Witness #7 and Witness #8 became distraught with the news. Witness #7 told Witness #8 he believed Viveros had provoked the police officers. Detective Kunzman informed Witness #7 and Witness #8 that investigators had obtained a video depicting Viveros attacking the police officers and in accordance with state law, the Rialto Police Department would release the video.

Witness #7 said he had watched the video Viveros had left on his cell phone and after seeing the video, Witness #7 believed Viveros was looking to confront the police officers.

¹⁸ Virgilio Viveros shares the same last name as David Viveros and will therefore be referred to as Virgilio throughout the remainder of this memorandum.

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Witness #7 explained Viveros "was going through a lot." Viveros had a history of seizures and took an unknown medication to help control them, but his medical condition prevented him from obtaining a driver's license and maintaining steady employment. Approximately two days earlier, Viveros told Witness #7 he had relationship issues with his girlfriend and mother of his child, Witness #6. According to Witness #7, Viveros occasionally used marijuana and consumed alcohol. Witness #7 did not believe Viveros was an alcoholic or an illegal drug user. Witness #7 did not know Viveros was depressed or suicidal.

Witness #8 told detectives she had received a call from Witness #6 on Friday, November 6, 2020, at approximately 7:00 a.m. Witness #6 told her Viveros had left a concerning video on a cell phone and he appeared to be depressed. Witness #8 drove to San Bernardino and met with Witness #6 at approximately 8:30 a.m. Witness #8 drove around San Bernardino looking for Viveros, but she never found him. Later in the afternoon, Witness #8 saw Viveros' video and she knew something was wrong with him.

INCIDENT AUDIO AND VIDEO¹⁹

BODY WORN CAMERA

Officer Smith

Officer Smith's body-worn camera captured what happened immediately after the officer-involved shooting. The video began with Officer Smith standing southwest of Officer Lamm's patrol car. Officer Smith faced southeast with his handgun pointed toward Viveros. Viveros was lying on the ground between Officer Lamm's patrol car and Officer Vera's patrol unit.

Officer Smith appeared to speak to Officer Vera and asked, "Are you good?" Officer Smith appeared to speak to Officer Lamm and asked, "Are you okay?" Officer Smith spoke into his chest mounted police radio and said, "Paul 30, we need RFD for Paul 40. Uh, small laceration to his left abdomen."

Officer Lamm said, "Hey, he still has the knife." Officer Smith replied, "Okay, I know." Officer Smith then asked, "Are you okay? You're not hit?" Officer Smith then appeared to speak to Viveros and said, "You need to put that knife away." Officer Smith then said, "He keeps reaching for the knife." Officer Smith appeared to speak to Officer Lamm and said, "I have him at gunpoint. Check yourself for me. Put your gun away and check yourself." Officer Smith asked Officer Lamm, "How bad is it?" Officer Smith spoke into his police

¹⁹ The officers herein were equipped with Axon body-worn cameras. The camera system turns on when the operator activates the camera. When the camera is activated, the previous 30 seconds of video are included but without any audio. All video recordings were reviewed in their entirety. The summaries of the videos will only cover the events from the beginning through the point immediately after the incident under review. All videos were reviewed though not all are summarized here.

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radio and said, "30, just for info., Paul 40 is cut, and I have him at gunpoint. Suspect still has a knife." Multiple officers were seen arriving and Officer Smith appeared to speak to them, saying, "He stabbed, he stabbed Rusty." The remainder of the video shows officers tending to Viveros and Officer Smith performing chest compressions on Viveros.

Officer Vera

Officer Vera's body-worn camera began recording while he was seated inside the driver's seat of his patrol unit. Officer Vera's body-worn camera faced east and captured the interior compartment of his patrol vehicle. Fifteen seconds into the video, Viveros was seen walking west along the front passenger side of Officer Vera's vehicle. At the 23 second mark, Officer Vera quickly got out of his unit and turned west. At this moment, Viveros came into camera view as he approached Officer Vera from the west beside the driver's side of the unit. Viveros rushed toward Officer Vera and grabbed ahold of Officer Vera with his left hand in the chest area.²⁰ Viveros held a knife in his right hand at waist level. The blade extended from Viveros' hand and pointed outward, toward Officer Vera. Officer Vera grabbed ahold of Viveros, near the left shoulder and chest. Officer Vera attempted to push Viveros away, but Viveros continued to grab onto him. With his left palm, Viveros grabbed onto Officer Vera's face. Officer Vera's arms extended outwards as he continued to attempt to push Viveros away. Viveros reached his right arm forward, with the knife blade, directly toward Officer Vera's lower torso, in an apparent attempt to stab Officer Vera. Viveros' continued to hold onto Officer Vera's face with his left hand. Officer Vera turned to his right as he and Viveros spun around slightly toward the north. As they spun around, Viveros' left hand was near Officer Vera's body-worn camera. Officer Vera continued to try to push Viveros away, but Viveros held onto Officer Vera in the upper chest area with his left hand.

As Viveros continued grabbing onto Officer Vera, Officer Vera continued to turn to his right while extending his right arm toward Viveros. As Officer Vera turned his body to the right, Officer Lamm's patrol unit²¹ came into view, several feet north. Officer Vera continued to struggle against Viveros. Officer Smith briefly came into camera view as he ran from the north toward Officer Vera and Viveros. Officer Vera and Viveros spun counterclockwise, in a southwest direction, and at the 30 second mark, grunting was heard, followed by the sound of Officer Vera's body and equipment hitting the ground, as he and Viveros fell to the ground. Officer Vera's body-worn camera was momentarily covered by a hand. Officer Vera's face came into camera view briefly before the video momentarily went completely black. The images on the video then appeared blurry, as Officer Vera and Viveros tumbled on the ground several times. Grunting continued to be heard. During this time, the camera briefly captured Officer Smith with the Taser in his right hand.

²⁰ As soon as Viveros grabbed onto Officer Vera, a struggle ensued. Because the events captured during the struggle unfolded rapidly and because Officer Vera's body-worn camera was knocked loose during the struggle, the video speed had to be slowed in order to observe the events.

²¹ Officer Lamm's patrol unit's emergency lights were illuminated.

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Officer Vera appeared to tumble and roll on the ground as the camera recorded the asphalt, the gas pumps, Officer Vera's patrol unit, and the sky several times. During this point, the camera captured images of Officer Vera's legs and right hand, on the ground. At the 34 second mark, the Taser was heard being deployed. At the same time, Officer Vera rose from the ground and the camera captured images of Viveros supine on the ground. Viveros' right arm was bent at the elbow, across his abdomen. A knife was on the ground, just to the right of Viveros, near his torso. Officer Smith, armed with the Taser, stood near Viveros' feet. Officer Vera's body-worn camera faced toward the ground, apparently knocked loose from its original position on Officer Vera's chest. Because the camera was knocked loose, the images recorded appeared to be upside down and were captured only briefly as the camera swung loosely from Officer Vera's body. Officer Vera appeared to make a 360-degree turn, ultimately facing toward Officer Smith and Viveros. Viveros, still supine on the ground, reached for the knife with his right hand. Officer Vera's camera shifted slightly and Viveros was seen with his right hand on the knife. Viveros rose from the ground with the knife in his right hand. Viveros held the knife clasped in his right hand with the blade protruding from the side nearest his thumb. As Viveros rose from the ground, Officer Lamm was captured in the video standing just south of and to the right of Viveros. Officer Lamm's right hand was positioned near his lapel mic. At the 36 second mark, Officer Vera yelled, "He has a knife! He has a knife!" Viveros turned to his right, toward Officer Lamm as he got up from the ground. Viveros lunged toward Officer Lamm and appeared to make physical contact with him before the camera shifted away.

As the camera shifted and faced south, Officer Vera's patrol unit was briefly captured. The camera shifted back to the right, and Viveros was briefly captured as he struggled with either Officer Lamm or Officer Smith²² just west of Officer Vera's patrol unit. At the 37 second mark, Officer Vera said, "Paul 30, 415 with one!" Multiple voices were heard yelling in the background. Officer Vera's camera again shifted to the left and Officer Vera's patrol unit came into view as Officer Vera headed toward the front of his patrol unit. The camera faced east and the black BMW sedan was briefly captured in the video. Caution tape was seen attached to the gas pump located near the front of Officer Vera's patrol vehicle. The camera shifted slightly to the right as Officer Vera headed in a southeast direction. The camera briefly faced southeast and captured images of East Foothill Boulevard.

At the 40 second mark, four gunshots were heard, in quick succession. An unknown officer announced, "Shots fired, shots fired." At this point in the video, it is clear Officer Vera's body-worn camera is hanging from his back because the camera captured images of the back of Officer Vera's duty belt, his legs, feet, and the concrete. An unknown officer said, "Don't move, don't move." Officer Vera said, "I saw him, I saw him walking up this way towards me."

²² Because the images were blurry, it is not possible to determine whether it was Officer Lamm or Officer Smith.

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Officer Lamm

Officer Lamm's body-camera video begins after the officer-involved shooting. Officer Lamm was positioned several feet west of Viveros. Officer Lamm held his handgun in his right hand, pointed away from his body and aimed slightly north of Viveros. Viveros was lying on the ground in between Officer Lamm's and Officer Vera's patrol units. Both patrol units' emergency lights were activated. Viveros was face down but was turned slightly to his left side. Viveros' right arm was bent at the elbow and his right hand was near his chest. Officer Vera was in front of his patrol unit, several feet east of Viveros. Officer Lamm sidestepped south and a yellow Taser was seen on the ground.

Officer Lamm spoke into his chest mounted radio and said, "Paul 40, he still has the knife and I think he got me." Officer Lamm could be heard breathing heavily, out of breath. Officer Lamm continued moving south and Officer Smith came into the camera's field of view. Officer Smith stood just north of Viveros. Officer Smith held his gun in his right hand, pointed at Viveros. With his left hand, Officer Smith held onto his chest mounted police radio. Officer Lamm continued sidestepping south toward the rear of Officer Vera's patrol unit. Viveros could be heard moaning as he lifted his head slightly. Dispatch was heard asking for the officer's location and Officer Lamm replied, "We're at the USA Gas." Officer Lamm was then heard saying, "Did he get me? I don't know, it just hurts." Officer Lamm then said, "Hey, he still has the knife," as Viveros continued to move his head upward slightly. Sirens were heard approaching the scene.

SURVEILLANCE VIDEO

The USA Gasoline station's surveillance camera recorded the incident between Viveros and the officers.²³ The camera was affixed to the south exterior wall of the gas station's convenience store. The camera faced in south/southwest direction. The camera's field of view captured gas pumps #3, #7, and #8 as well as a portion of the west driveway apron. Also captured in the camera's field of view, south of the gas pumps, were the concrete sidewalk on the north side of East Foothill Boulevard, the roadway and traffic on East Foothill Boulevard, and several commercial buildings located on the south side of East Foothill Boulevard.²⁴

Officer Lamm's marked patrol unit was parked near the southwest corner of pump #3, facing northeast. Officer Vera's marked patrol unit was parked facing northeast, just south of pump #7 and just north of the concrete sidewalk along East Foothill Boulevard. At

²³ The surveillance video camera recorded the scene from the moment the victim of the unrelated shooting arrived at the USA Gasoline station. There is no audio. The video camera recorded the Rialto Police officers as they investigated the scene and placed caution tape around the gas pumps and the victim's vehicle. At 51:55 into the video, Viveros was captured on video as he approached the scene on foot. This summary will only cover from the point immediately before Viveros appeared until the point immediately after the officer-involved shooting. It should be noted that due to the distance between the camera and all involved parties, no weapons or objects could be seen in anyone's hands at any point in the video.

²⁴ See Incident Scene Investigation section for photograph depicting scene.

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50:15, Officer Vera entered and sat in the front driver's seat of his patrol unit. Shortly thereafter, Officer Lamm entered and sat in the front driver's seat of his patrol car. Both Officers Vera and Lamm left their driver's doors open. Officer Smith walked to the driver's side of Officer Lamm's vehicle and stood next to the driver's door, appearing to speak to Officer Lamm.

At 51:55, Viveros came into camera view as he walked west on the north concrete sidewalk of East Foothill Boulevard. As he walked, Viveros kept his right hand positioned steadily near his right front pants pocket, just below his waist. Viveros' left arm swung normally. Viveros continued walking west and at 52:02, Viveros reached the front of Officer Vera's patrol unit. Viveros continued walking as he passed beside the passenger side of Officer Vera's vehicle. At 52:05, Viveros reached the rear of Officer Vera's vehicle. Viveros then turned and headed north, walking behind the rear of Officer Vera's patrol unit. Viveros walked northwest into the gas station lot and was momentarily blocked from camera view by pump #3. At 52:09, Viveros came back into camera view as he walked east, in a straight line, toward the driver's door of Officer Vera's patrol unit. At 52:10, Officer Vera began to get out of his unit and as he did so, Viveros increased his speed and lunged at Officer Vera. Viveros kept his right hand positioned near his waist as he lunged at Officer Vera. As Officer Vera got out of his unit, he extended one of his arms, in an apparent attempt to stop Viveros, but Viveros continued forward and grabbed onto Officer Vera's arm. Officer Vera continued to push Viveros away from him, but Viveros held onto Officer Vera and a violent struggle ensued.

At 52:12, Officer Smith turned his head in the direction of Officer Vera and Viveros. Officer Smith quickly ran behind Officer Lamm's vehicle toward Officer Vera and Viveros. Officer Lamm got out of his patrol unit and followed Officer Smith. At the same time, Viveros quickly pulled Officer Vera west, toward the rear of Officer Vera's patrol unit. Officer Vera and Viveros spun around and then appeared to fall to the ground but were blocked from the camera's field of view by pump #3.

At 52:16, Pump #3 momentarily blocked the camera's view of Officer Smith and Officer Lamm. At 52:18, Officer Smith came back into camera view as he stepped backwards. Officer Smith faced south with both arms extended to the front of his body. At 52:19, Viveros was still partially blocked from camera view by pump #3, but Viveros' legs could be seen as he kicked them into the air, apparently from a supine position on the ground. At the same moment, Officer Vera briefly came back into camera view as he stood up and backed away from Viveros. Viveros was still blocked from view by pump #3. Officer Smith moved south, toward Viveros. Officer Vera stepped backwards (east) while Officer Lamm circled west and was blocked from camera view by pump #3. At 52:22, Officer Lamm came back into camera view as he quickly stepped backwards. At the same time, Viveros came into camera view as he fell onto his back in the parking lot, west of the patrol units. Officer Lamm stood near the west driveway apron and Officer Vera began to retreat east, toward the front of his patrol car. Officer Smith quickly stepped backwards,

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heading northeast toward the rear of Officer Lamm's patrol unit.

At 52:24, as the officers retreated away from Viveros, Viveros quickly got up, separated his feet, and took a fighting stance. As Viveros got up, Officer Vera ran east toward the front of his patrol unit. Viveros began running southeast with his right hand extended to the front of his body toward Officer Lamm and Officer Smith, both of whom were still retreating. Officer Lamm continued backstepping quickly away from Viveros, heading southeast toward the rear passenger side of Officer Vera's patrol unit. As he moved backwards, Officer Lamm's right hand was extended out to the front of his body. At the same time, Officer Smith retreated backwards in a northeast direction toward the rear passenger side of Officer Lamm's patrol unit where he was partially blocked from camera view by pump #3. At 52:26, Viveros, partially blocked from view by pump #3, now headed east straight toward Officer Smith. As Viveros ran toward Officer Smith, pump #3 partially blocked the camera view of Viveros and Officer Smith. At 52:27, Viveros fell to the ground.²⁵ After Viveros fell to the ground, Officer Smith was blocked from view by pump #3. Viveros fell in between Officer Lamm's and Officer Vera's patrol vehicles. Pump #3 partially blocked the camera view of Viveros, but Viveros could be seen lying on the ground just south of the passenger side of Officer Lamm's patrol unit. Viveros did not get back up from the ground but could be seen lifting his head and moving around. Officer Vera was seen pacing near the front of his patrol unit. Officer Lamm walked north back toward the rear of his patrol unit. Officer Smith remained blocked from camera view by pump #3.

DAVID VIVEROS' CELL PHONE VIDEO

The cell phone video recorded by Viveros was six minutes, 51 seconds long. It begins with Viveros videoing himself kissing a sleeping child. Viveros then looked at the cell phone camera and said, "Hey Cristal. I don't want you to blame yourself." Viveros explained that he had not been happy for a long time. Viveros said he was "always mad or sad" because he couldn't "do shit," and believed he would never be able to do anything for "you guys." Viveros said, "Never blame yourself, okay, for what I'm about to do," and then said, "I love you with all my life."

Viveros then addressed several other people in the video, including his child, his parents, and several friends. Viveros apologized to his parents for "doing stupid things when he was a kid" and for "doing drugs." Viveros thanked his friends and family for all they had done for him. Viveros told his friends and family not to blame themselves and to "keep going." Viveros spoke in English and in Spanish during the video.

Viveros again videoed himself kissing the child sleeping on a bed and apologized. Viveros told "Cristal" what the codes to his credit cards were. While recording the video, Viveros received a phone call from a person named, "Mando," with a 760-area code number, but Viveros touched the screen on the phone and declined the call. Viveros then addressed

²⁵ It should be noted, at this point only 17 seconds had elapsed from the moment Viveros first engaged Officer Vera.

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“Mando,” and said, “Thank you for talking to me that night. You and your whole family. Love you guys.” Viveros received a new voicemail notification from an 805-area code number, but Viveros swiped the screen to ignore the notification. Viveros finished the video by saying, “I love you so much. Bye.”

INCIDENT SCENE INVESTIGATION

San Bernardino County Sheriff’s Detective Bruce Southworth conducted the scene investigation at 280 East Foothill Boulevard in Rialto. Measurements were taken using a Leica laser measuring device from reference points as follows: 1. The south wall of the USA Gasoline building; and 2. City of Rialto light pole #R2960.²⁶

The incident location was near the gas pumps at the USA Gasoline station, located on the northeast corner of East Foothill Boulevard and Sycamore Avenue. The business consisted of eight gas pumps and a convenience store. There was a surveillance camera affixed to the convenience store’s exterior wall, above the front door. (See below for photograph depicting an overall view of the scene.)



Evidence found at the scene was marked with placards numbered 1 through 15.

²⁶ All measurements were reviewed. For purposes of this memorandum, only the measurements for Placards 1-4, 10, and 11 will be listed.

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Placards 1-4: Fired cartridge casings, located on the asphalt north of the Rialto Police Department vehicle (Placard 5.) Measurements were as follows:

<u>Placard #</u>	<u>Description</u>	<u>Reference Point #1</u>	<u>Reference Point #2</u>
1	Fired Cartridge Casing	21'10" South	40'4" East
2	Fired Cartridge Casing	33'2" South	38'5" East
3	Fired Cartridge Casing	34'8" South	42'0" East
4	Fired Cartridge Casing	36'9" South	44'9" East

Placard 5: Officer Lamm's Rialto Police Department Ford Taurus patrol vehicle. Placard 5 was north of Placard 4. The patrol vehicle faced northeast and was south of gas pump #4.²⁷

Placard 6: Deployed Axon Taser wires with probes, located on the asphalt, west of Placard 5.

Placard 7: Rialto Police Department issued Apple iPhone, located on the asphalt, southwest of Placard 6. The screen was damaged during the incident.

Placard 8: Rialto Police Department issued body-worn camera bracket, located on the asphalt, east of Placard 7.

Placard 9: Magnetic bracket used to secure the body-worn camera to the officer's uniform, located on the asphalt southwest of Placard 8.

Placard 10: Black t-shirt, Axon Taser wires with probes, and a blood stain, located on the asphalt south of Placard 5. Measurements were as follows:

<u>Placard #</u>	<u>Description</u>	<u>Reference Point #1</u>	<u>Reference Point #2</u>
10	Bloodstain, black t-shirt, Taser wires with probes	42'0" South	47.4" East

Placard 11: Black folding knife, located on the asphalt east of Placard 10. The folding knife was in the open position with the blade exposed. The blade was approximately 3.5 inches in length. Measurements were as follows:

<u>Placard #</u>	<u>Description</u>	<u>Reference Point #1</u>	<u>Reference Point #2</u>
11	Black folding knife	40'7" South	52'10" East

Placard 12: First aid kit, located on the asphalt south of Placard 10.

Placard 13: Yellow Axon Taser 7, located on the asphalt, southwest of Placard 9. The Taser was found to belong to Officer Smith.

²⁷ Pump #4 was in the same location as pump #3, on the opposite side.

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Placard 14: A bullet strike, located on the asphalt west of Placard 13.

Placard 15: Officer Vera's Rialto Police Department Ford Explorer patrol vehicle was found south of Placard 5. The patrol vehicle faced east and was south of gas pump #8.

Non-Placarded Evidence: Officer Lamm's and Officer Vera's ballistic vests and uniform shirts were removed before the officers were transported to Arrowhead Regional Medical Center. Officer Lamm's and Officer Vera's shirts were damaged. Officer Lamm's ballistic vest was damaged.

INJURED PARTY/DECEDENT

Viveros was pronounced deceased at approximately 8:04 a.m. by a physician at Arrowhead Regional Medical Center.

AUTOPSY

Witness #9, M.D., Forensic Pathologist for the San Bernardino County Sheriff's Department Coroner Division, conducted the autopsy of David Viveros on November 18, 2020. Witness #9 noted three gunshot wounds. Witness #9 determined the cause of death was a gunshot wound of the torso.

Gunshot Wound of the Upper Abdomen

A tangential type gunshot wound is on both sides of the upper abdomen, centered 26 ½ inches from the top of the head and 1 ¼ inch right of the anterior midline. It measures 2 7/16 inches in length with a width of up to 1 inch. It is oriented from 2 to 8 o'clock with an eccentric rim of abrasion from 1-2 and 6-8 o'clock, up to 1 inch at 2 o'clock. The depth of the wound is up to 1/8 inch with exposed subcutaneous adipose tissue.

Gunshot Wound of the Left Upper Back

A gunshot entrance wound is on the left upper back, centered 16 ¼ inches from the top of the head and 1 ¼ inch left of the posterior midline. It is a 3/16 inch in diameter circular defect with a circumferential rim of abrasion, up to 1/16 inch. An ecchymosis circumferentially surrounds the wound. There is no soot or stippling around the wound.

Path: After perforating the skin and soft tissue, the projectile perforates the 9th thoracic vertebrae, thoracic aorta (2.0 and 1.3 cm defects), pericardium, posterior left ventricle of the heart, and terminates in the left atrium of the heart.

Recovery: A deformed yellow metal jacketed projectile is recovered from the left atrium.

Direction: The direction the projectile travelled was back to front, left to right and upward.

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Gunshot Wound of the Left Buttock

A gunshot entrance wound is on the left buttock, centered 32 inches from the top of the head and 5 ½ inches left of the posterior midline. It is a 3/16 inch in diameter circular defect with an eccentric rim of abrasion from 4 to 11 o'clock, up to 1/8 inch at 10 o'clock. An ecchymosis circumferentially surrounds the wound. There is no soot or stippling around the wound.

Path: After perforating the skin, the projectile perforates the soft tissue of the left buttock, soft tissue posterior to the bladder, and terminates in the soft tissue of the anterior right thigh.

Recovery: A deformed yellow metal jacketed projectile is recovered from the anterior right thigh.

Direction: The direction the projectile traveled was back to front, left to right, and downward.

Thermal (Electrical) Injuries

1. A puncture is on the right chest with a small eccentric area of the skin erythema from 12 to 3 o'clock and is surrounded by an area of skin pallor. Past the area of skin pallor is a crescent shaped area of skin erythema from 12 to 6 o'clock containing a full-thickness white-tan burn.
2. A puncture is on the right lateral torso with a small surrounding rim of erythema. A linear tan burn is at 12 o'clock which connects superiorly to a crescent shaped area of skin erythema and full-thickness with-tan burn.
3. A puncture with a surrounding area of skin erythema is on the right lateral torso.

TOXICOLOGY

Heart blood and urine were collected during the autopsy.

Toxicology results for the Heart Blood sample were listed as follows:

- Delta-9 Carboxy, THC 7.2 ng/mL
- Delta-9 THC, 0.99 ng/mL

CRIMINAL HISTORY

David Viveros has a criminal history that includes the following convictions:

2012, 23152 (b) of the Vehicle Code, Driving Under the Influence, and 22450 (a) of the Vehicle Code, Failure to Stop at a Stop Sign, San Bernardino County case number TV11201253, a misdemeanor and an infraction.

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Crimes Upon Peace Officers

Attempted Murder of a Peace Officer

California Penal Code section 664/187. Every person who attempts to commit any crime, but fails, or is prevented or intercepted in its perpetration, shall be punished where no provision is made by law for the punishment of those attempts, as follows:

(e) [...] if attempted murder is committed upon a peace officer or firefighter, [...], and the person who commits the offense knows or reasonably should know that the victim is a peace officer [...] engaged in the performance of his or her duties, the person guilty of the attempt shall be punished by imprisonment in the state prison for life with the possibility of parole.

This subdivision shall apply if it is proven that a direct but ineffectual act was committed by one person toward killing another human being and the person committing the act harbored express malice aforethought, namely, a specific intent to unlawfully kill another human being. The Legislature finds and declares that this paragraph is declaratory of existing law.

(f) Notwithstanding subdivision (a), if the elements of subdivision (e) are proven in an attempted murder and it is also charged and admitted or found to be true by the trier of fact that the attempted murder was willful, deliberate, and premeditated, the person guilty of the attempt shall be punished by imprisonment in the state prison for 15 years to life. Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall not apply to reduce this minimum term of 15 years in state prison, and the person shall not be released prior to serving 15 years' confinement. (Penal Code section 664/187, summarized in pertinent part.)

Assault With a Deadly Weapon

California Penal Code section 245 (a)(1). Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars, or by both fine and imprisonment.

(c) Any person who commits an assault with a deadly weapon or instrument, other than a firearm, or by any means likely to produce great bodily injury upon the person of a peace officer or firefighter, and who knows or reasonably should know that the victim is a peace officer or firefighter engaged in the performance of his or her duties, shall be punished by

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imprisonment in the state prison for four, six, or eight years. (Penal Code 245, summarized in pertinent part.)

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 Code §835a(b).) ²⁸ Should an arresting officer encounter resistance, actual or threatened, he need not retreat from his effort and maintains his right to self-defense. (Penal Code §835a(d).) An officer may use objectively reasonable force to effect an arrest, prevent escape or overcome resistance. (Penal Code §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 Code §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 government, a *detainee* also has a duty to refrain from using force to resist detention or search. (*Evans v. City of Witness #1sfield* (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 sections 196 and 197. Both 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 Section 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

²⁸ All references to code sections here pertain to the California Penal Code.

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fleeing felon would cause further death or serious bodily injury unless immediately apprehended,

(Penal Code §835a(c)(1).) Discharge of a firearm is “deadly force.” (Penal Code §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 Code §835a(e)(3).)

While the appearance of these principals is new to section 835a in 2020,²⁹ 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 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 Code §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 Code §835a(c)(1).) Second, deadly force cannot be used against a person who only poses a danger to themselves. (Penal Code §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;

²⁹ Assem. Bill No. 392 (2019-2020 Reg. Sess.) approved by the Governor, August 19, 2019. [Hereinafter “AB-392”]

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- (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,³⁰
- (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 Code §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 section 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.

³⁰ Penal Code §835a (a)(3) conflates a demand for thorough evaluation of a use of force incident with a dictate that it be done “in order to ensure that officers use force consistent with law and agency policies.” On its face, the section is clumsily worded. Nothing included in AB-392 plainly requires that a use of force also be in compliance with agency policies. A provision in the companion bill to AB-392—Senate Bill No. 230 [(2019-2020 Reg. Sess.) approved by the Governor, September 12, 2019] (Hereinafter “SB-230”), does explicitly state that “[a law enforcement agency’s use of force policies and training] may be considered as a factor in the totality of circumstances in determining whether the officer acted reasonably, but shall not be considered as imposing a legal duty on the officer to act in accordance with such policies and training.” (Sen. Bill No. 230 (2019-2020 Reg. Sess.) §1.) It is noteworthy, however, that this portion of SB-230 is uncodified, unlike the aforementioned portion of Penal Code §835a (a)(3).

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(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 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 newly 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 Code §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.)

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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.)³¹ 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.)

³¹ The legislative findings included in Penal Code 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.

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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 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.)

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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.)

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

Officers Smith, Vera, and Lamm were at the USA Gasoline station conducting an investigation related to a shooting when Viveros approached the scene. Viveros had no involvement in the crime the officers were investigating.

Officer Vera was sitting in his patrol unit when he first noticed Viveros. Because Viveros acted suspiciously, Officer Vera watched as Viveros walked toward him. Viveros walked along the passenger side toward the back end of Officer Vera's patrol unit. Officer Vera kept an eye on Viveros, watching him in his rear-view mirrors. When Viveros walked behind his patrol unit toward Officers Smith, Officer Lamm, and the crime scene, Officer Vera began to get out of his unit to see where Viveros was headed. As Officer Vera began to get out, Viveros began walking toward Officer Vera's open driver's door. As soon as Officer Vera stepped out of his vehicle, Viveros charged and began attacking him. Because Viveros charged so quickly, Officer Vera did not see that Viveros was armed with a knife. Viveros held the knife in his right hand with the blade pointed directly at Officer Vera's abdomen when he attacked him. Officer Vera tried to push Viveros away and struggled to keep Viveros at arm's length. In so doing, Officer Vera was fortunate enough to escape the blade wielded by Viveros. However, Viveros was larger and stronger than Officer Vera and quickly began to overpower him.

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Seeing the attack, Officer Smith quickly ran to Officer Vera's aid. Officer Lamm followed behind Officer Smith. While Viveros continued attacking Officer Vera, Officer Smith yelled at Viveros to stop fighting. Viveros ignored Officer Smith's order and continued attacking Officer Vera. Officer Smith deployed the Taser at Viveros in an attempt to force Viveros to stop his attack. Upon being tased, Viveros fell to the ground, pulling Officer Vera down to the ground with him. Viveros quickly got back to his feet, at which time Officer Smith saw Viveros had a knife in his hand. Officer Smith yelled that Viveros had a knife, attempting to warn his partners.

At the same time, Officer Lamm, believing Viveros was going to run toward Officer Vera again, decided he was going to grab onto Viveros and attempt to take him to the ground. As he made that decision, Officer Lamm did not know Viveros was armed with a knife. Instead of running toward Officer Vera, Viveros quickly charged toward Officer Lamm. Officer Lamm grabbed onto Viveros, but then "pushed off" of him. Officer Lamm did not know why he pushed off of Viveros. Officer Lamm explained to the detectives "When I grabbed onto him, I kind of felt like I reached around him and for some reason I pushed off. I don't know-- I pushed off, but I just pushed off. That's all I remember, just grabbing onto him for like a couple of seconds and then pushing off." What Officer Lamm did not realize was that it was at this moment when Viveros stabbed him. As shown by Officer Vera's body-camera video and the gas station surveillance video, this was the only time Viveros made physical contact with Officer Lamm. As such, this was the only chance Viveros had to stab Officer Lamm. Viveros stabbed Officer Lamm with enough force that his blade tore through Officer Lamm's uniform shirt, undershirt, ballistic vest, and into his abdomen. The force used by Viveros makes it clear that he was intent on causing as much injury as possible.

Officer Lamm disengaged from Viveros and saw that Viveros had a knife in his hand. Officer Lamm quickly retreated backwards heading southeast toward the rear of Officer Vera's patrol unit. As Officer Lamm broke free from Viveros, Officer Smith deployed the Taser at Viveros a second time. Viveros fell to the ground, dropping his knife. Viveros grabbed his knife and grasping it in his right hand, quickly got up and took a fighting stance. Realizing that the Taser had absolutely no effect on Viveros and observing his fighting stance, Officer Smith realized that he had no other options available. Officer Smith dropped his Taser and pulled his handgun. When Viveros got up from the ground with the knife, all three officers quickly backed away from Viveros, in obvious fear. As the officers backed away from Viveros, their distance between each other grew. Officer Vera retreated east toward the front of his patrol unit. Officer Lamm retreated southeast, toward the rear of Officer Vera's patrol unit. Officer Smith retreated northeast, toward the passenger side of Officer Lamm's vehicle. Both Officer Lamm and Officer Vera's retreat took them toward Officer Vera's patrol unit, affording each some measure of coverage and concealment from Viveros. Officer Smith's retreat; however, provided him with no coverage or concealment from Viveros.

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While the officers retreated, Viveros, armed with the knife, charged in a southeast direction toward Officer Lamm. As all three officers continued retreating, Viveros continued charging, but within a split second, he changed his course, veered left and ran in a northeasterly direction straight toward Officer Smith, who was still retreating backwards, away from Viveros. Viveros got to within 8 to 10 feet of Officer Smith. Fearing for his life, Officer Smith fired his gun at Viveros. Officer Smith fired four rounds, striking Viveros three times. Viveros was struck in the abdomen, the left buttock, and the left upper back. Viveros fell to the ground. The bullets travelled from the left to the right side of Viveros' body. When Viveros began his charge, he initially ran southeast and as he did so, the left side of his body faced Officer Smith. However, Viveros very quickly changed course and ran in a northeast direction toward Officer Smith, who was located only 8 to 10 feet away and to the left of Viveros. When Officer Smith fired, Viveros was in motion and had just changed course directly toward Officer Smith. The trajectory of the bullets coincides with the direction of Viveros' charge, initially southeast and within a split second, northeast.

From the time Viveros began attacking Officer Vera until the gunshots were fired, only 17 seconds elapsed. Given that Officer Smith did not see the attack until two seconds after it began, we know that only 15 seconds elapsed before Officer Smith used deadly force. In that short time, Officer Smith attempted to de-escalate the situation. Officer Smith ordered Viveros to stop fighting with Officer Vera. Viveros ignored this command and continued attacking Officer Vera. Officer Smith then deployed the Taser at Viveros in an attempt to get him to stop. Viveros was struck and fell to the ground but was not deterred by the Taser. Viveros got back to his feet, charged toward Officer Lamm, and stabbed him. As Officer Lamm broke free from Viveros, Officer Smith deployed a second set of Taser darts, again in an attempt to stop Viveros. But this did not stop him. When Viveros fell after being struck with the second set of Taser darts, he dropped his knife. But instead of staying down and stopping his attack, Viveros chose to pick up his knife from the ground and to get back up to continue his attack on the officers. Despite Officer Smith's best efforts to de-escalate the situation, Viveros was not deterred.

When Viveros was not deterred and instead charged with his knife raised and pointed at Officer Smith, Officer Smith's belief that Viveros posed a deadly threat was honestly and objectively reasonable. When Viveros got back to his feet, Officer Smith estimated he was only 10 to 12 feet away from him. Viveros charged and closed the gap very quickly. Officer Smith believed Viveros was only 8 to 10 feet away when he began firing his gun at Viveros. Officer Smith fired four rounds, stopping as soon as Viveros was no longer a deadly threat.

To Officer Smith, Viveros "seemed to be a man on the mission to kill me." This is an accurate assessment. Viveros' actions clearly demonstrated this. Viveros attacked Officer Vera and attempted to stab him. When Viveros was unable to stab Officer Vera, he attacked Officer Lamm and stabbed him. After being hit with the Taser a second time, falling to the ground and dropping his knife, Viveros picked up the knife, raised it to his

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upper chest at shoulder level and charged toward Officer Lamm and then Officer Smith. As Viveros charged at Officer Smith, Officer Smith honestly and reasonably believed Viveros was going to kill him. Officer Lamm also believed Viveros was going to kill Officer Smith. As Officer Lamm retreated, he raised his handgun and pointed it at Viveros, but was unable to fire because Officer Smith was in such close proximity to Viveros.

The cell phone video left by Viveros less than an hour before his attack on the officers is consistent with someone who wanted to be killed by the police. While Officer Smith was unaware of the cell phone video and what Viveros' ultimate goal was, Viveros' actions clearly demonstrated an intent to kill. Officer Smith recognized this and acted accordingly. Officer Smith's belief that his own life, and the lives of his partners, were in imminent danger was honestly and objectively reasonable.

CONCLUSION

Based on the facts presented in the reports and the applicable law, Officer Smith's use of force was a proper exercise of Officer Smith's power of arrest, right of self-defense, and defense of others and therefore his actions were legally justified.

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