



## PUBLIC RELEASE MEMORANDUM

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**Date:** January 8, 2024

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

**Involved Peace Officers:** Officer Aaron Ortiz  
San Bernardino Police Department

**Involved Subject:** "VA" (*a juvenile*)  
**Subject's Residence:** San Bernardino, CA

**Incident Date:** August 5, 2021

**Case Agent:** Det. Donald Sawyer  
San Bernardino Police Department

**Agency Report #:** 2021-00089297

**DA STAR #:** 2023-17264

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**PREAMBLE**

The summary of this non-fatal incident is drawn from a submission of materials prepared by the San Bernardino Police Department (SBPD). The original case agent for this submission was SBPD Detective Donald Sawyer.

The submission reviewed included the following: reports of law enforcement witnesses, law enforcement dispatch audio recordings, video recordings of law enforcement interviews, audio recordings of civilian witness interviews, civilian and law enforcement video recordings, law enforcement photographs, and law enforcement scientific investigation reports.

**FACTUAL SUMMARY**<sup>1</sup>

On September 5, 2021, at approximately 2:15 p.m., SBPD Officer Aaron Ortiz shot 13-year-old [REDACTED] [hereinafter "VA"] at the Pioneer Cemetery in the city of San Bernardino. VA sustained a gunshot wound to the neck, received first aid at the scene, and was transported from the scene to a hospital for medical treatment. At the time he was shot, VA was armed with a loaded semi-automatic pistol outfitted with an extended capacity magazine. VA survived his injuries. No other persons were reported to be injured.

The shooting was the culmination of a series of events set into motion when VA called 9-1-1 at approximately 1:52 p.m. on the day he was shot. VA told the operator that he had killed three people and that he would be waiting for police officers. VA was audibly sobbing during this phone call. The operator determined that VA was at the Pioneer Cemetery and immediately dispatched officers to respond there. While waiting for officers to arrive, VA told the operator that he was armed and that officers were going to have to kill him. When the operator pressed VA as to *why* officers would have to kill him, VA said, "If they don't kill me, I'm going to have to kill them." VA provided the operator his name, age, said he was five feet and nine inches tall, had a blue backpack and was wearing a grey shirt and black pants.

SBPD Officers Federico Corral and Gerardo Orozco, arrived at the 9<sup>th</sup> Street driveway on the north side of the cemetery at approximately 2:06 p.m. Officers Corral and Orozco were both in police uniform and each drove a marked black and white patrol unit. The officers approached in a southerly direction along the driveway and when parked, they saw VA standing at the northeast corner of the cemetery. VA was still communicating with the dispatch operator at the time; VA told the operator that he could see that officers had arrived. Shortly thereafter, VA admitted to the operator that he hadn't killed anyone and suddenly fired his gun into the air three times. Officers Corral and Orozco got out of their patrol units and took cover approximately 50 to 70 yards away from VA. VA then told the operator, "I'm not shooting at them, I just want them to

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<sup>1</sup> The factual conclusions included here are based upon the totality of the circumstances evidenced by the submission. All incident-involved law enforcement officers and investigators were SBPD employees at the time of their involvement.

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kill me.” So as not to be misunderstood, the operator asked VA if he just fired a gun. VA admitted he “took a shot.” Officer Corral made a radio announcement that VA had fired four shots into the air. Thereafter, Officer Corral began shouting commands to VA to drop his gun. VA screamed, “Kill me!” and “I’m coming for you, so you have to kill me!” VA remained on the line with the operator as he screamed. The operator repeatedly asked VA to put his gun down. Officers Corral and Orozco remained behind cover. Since the officers on the 9<sup>th</sup> Street driveway made no attempts to approach VA where he stood, VA told the operator, “I’m going to walk up to them and let them kill me.” VA then screamed to the officers “Kill me, I’m going to walk out to you. Kill me!”

SBPD Officer Edgar Chavez arrived at the 9<sup>th</sup> Street driveway at approximately 2:10 p.m. At that approximate time, two men (Civilians 1 and 2) in the cemetery approached VA. Civilians 1 and 2 saw that VA was distraught and armed; they asked VA to drop his gun. While Civilians 1 and 2 were within five to ten feet of VA, VA fired another shot into the air and screamed at them to go away. Civilians 1 and 2 moved away from VA thereafter.

At 2:12 p.m., SBPD Sergeant Ronald Passo and Officer Ortiz arrived at the 9<sup>th</sup> Street driveway behind Officer Chavez. Sergeant Passo and Officers Chavez and Ortiz wore police uniforms and drove separate marked black and white SBPD patrol units that they parked in the order of their arrival behind Officers Corral and Orozco’s patrol units. Officers Corral, Chavez, Orozco and Ortiz each took staggered positions using the parked patrol units as cover, with rifles in hand. Meanwhile, inside the cemetery, southwest of where VA stood, additional officers gathered behind the marked patrol unit of SBPD Officer Alex Cerritos. Officer Cerritos and the officers to the south had been alerting several bystanders in the cemetery to move out of the area.

While bystanders were being evacuated out of the cemetery, VA continued to speak to the 9-1-1 operator. The operator repeatedly asked VA to put his gun down. VA retorted he could not put his gun down, that was not going to jail, and began to ask if getting killed would hurt. The operator told VA that the officers were there to help him and not hurt him. While VA and the operator were still speaking to each other, the call disconnected. Just before the call disconnected, VA said, “I’m going to have to walk up to [the officers]...there’s no other option.” After officers were alerted by dispatch that VA’s call disconnected, the officers on the 9<sup>th</sup> Street driveway saw VA toss his cell phone to the ground and walk in a westerly direction. VA stopped at a position west of a cemetery maintenance building that was southeast of the end of the 9<sup>th</sup> Street driveway. VA had walked towards the officers on the 9<sup>th</sup> Street driveway and still held his handgun in his hand. Officer Corral, who was closest to where VA was standing continued to command VA to put his gun down. Sergeant Passo also used a patrol unit loudspeaker to announce, “Sir, we’d like to help you. We need you to set your gun down. So far, there’s no felonies.” Instead of doing so, VA raised his right hand and pointed his gun north towards Sergeant Passo and Officers Corral, Chavez, Orozco and Ortiz. Officer Ortiz, who was the furthest north on the driveway from VA, fired his weapon once from approximately 50 yards and struck VA. VA dropped his handgun to his feet and fell to the ground onto his back. Officers approached VA within seconds. While on the ground, VA told officers that he didn’t shoot anyone and that he just wanted the officers to kill him. Thereafter, officers began assessing VA

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for injuries and administered first aid. Less than seven minutes after VA was shot, San Bernardino Fire Department paramedics arrived at the scene and assumed care of VA.

A scene investigation at the cemetery revealed that the gun that VA held in his hand at the time he was shot contained 24 rounds, including one round in the firing chamber. However, a second loaded and operable semi-automatic handgun and multiple 9mm magazines were discovered in VA's backpack. More than 150 live 9mm rounds were contained in the backpack. The scene investigation showed that during the incident, VA fired his handgun four times and that Officer Ortiz fired his rifle one time. VA's handguns and Officer Ortiz's rifle were each examined by a SBCSD Scientific Investigations Division (SID) criminalist. No damage or malfunction were noted in either the handguns or rifle.

**STATEMENTS BY LAW ENFORCEMENT OFFICERS<sup>2</sup>**

**Officer Aaron Ortiz** gave a voluntary interview to SBPD Detective Sawyer on August 6, 2021, in the presence of his attorney, approximately 10 hours after the shooting. At the time, Officer Ortiz had served as a SBPD officer for 11 years. During the incident, Officer Ortiz wore department-issued black pants and a black buttoned-down short-sleeved shirt with a gold SBPD metal star badge affixed to the left chest and a metal nameplate affixed to the right chest. SBPD agency patches were displayed on both of Officer Ortiz's shirt outer shoulders. Officer Ortiz recorded the incident using his BWC video recorder, but the investigation did not reveal whether Officer Ortiz reviewed his BWC video footage prior to giving his interview. (See Submitted Media, Officer Ortiz BWC video, *infra*.)

The following is a summary of relevant information disclosed by Officer Ortiz about the subject incident:

On the afternoon of August 5, 2021, Officer Ortiz was assigned to patrol, driving a SBPD-marked black and white patrol unit. While on duty Officer Ortiz heard a fellow SBPD officer (Officer Corral) announce over the radio that an armed subject had fired four rounds. Officer Ortiz believed that Officer Corral was in danger. Officer Ortiz looked up the incident information on his patrol unit computer, assigned himself to the call, and responded to the location indicated—Pioneer Cemetery. Officer Ortiz knew that there were numerous residences around Pioneer Cemetery and that transients frequented or camped there. As such, the announcement of shots being fired also caused Officer Ortiz to have concern for the safety of those transients and residents.

When Officer Ortiz arrived at the cemetery driveway off of 9<sup>th</sup> Street, Officer Ortiz noticed that other SBPD officers had arrived ahead of him and had their rifles out. Officer Ortiz parked, got out of his patrol unit, retrieved his duty rifle, and chambered a round in

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<sup>2</sup>All investigative reports submitted were reviewed, but not all are referenced here. No law enforcement personnel became aware of or used any civilian person's name until investigations revealed it, or as otherwise specified. All references to any witness or VA by name are made here for ease of reference.

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it. Officer Ortiz saw that officers were pointing their rifles at VA in the distance. Officer Ortiz approached Sergeant Passo, who confirmed that VA was indeed the subject of the call. Officer Ortiz initially went behind Officer Orozco, who was positioned at the passenger side of a patrol unit. However, Officer Ortiz realized that from this vantage point, too much of his body was exposed to VA. As such, Officer Ortiz moved to the rear of the same patrol unit, but on the driver's side.

From his position, Officer Ortiz saw VA standing by himself. Officer Ortiz could see VA's mid-torso to head, as a block wall obstructed his view of the rest of VA. Officer Ortiz saw a phone in VA's left hand; it appeared to Officer Ortiz that VA was talking to someone on the phone. VA held a gun in his right hand. Officer Ortiz heard dispatch announce that VA was saying he was not going to jail. Soon thereafter, Officer Ortiz saw VA throw his cell phone down and heard dispatch announce that VA disconnected the phone call.

After VA threw down his cell phone, Officer Ortiz noticed that VA began walking in a westerly direction and that there were two or three civilians also in the cemetery who were close to but moving away from VA. Officer Ortiz stated that he was concerned that VA might shoot the people in the cemetery. Officer Ortiz recalled losing sight of VA for approximately 10 to 15 seconds. Thereafter, VA came back into view and stopped at the southwest corner of a cemetery building. At that time, Officer Ortiz recalled that commands were issued to VA and loudspeaker announcements were made asking VA to drop his gun. Officer Ortiz said that VA did not drop his gun; VA just stood there in response. As Officer Ortiz continued to watch VA, Officer Ortiz saw VA raise his right hand and point his gun at Officer Ortiz. Officer Ortiz fired once at VA and saw VA fall immediately thereafter. Officer Ortiz stated that he believed VA would shoot at him if he didn't fire his weapon.

Shortly after VA fell to the ground, Officer Ortiz approached VA where he lay with other officers. In doing so, Officer Ortiz saw the gun that VA pointed at him on the ground. After, Officer Ortiz saw that VA was handcuffed and searched, Officer Ortiz placed his rifle on "safe" and stood-by with Sgt. Passo.

After Det. Sawyer concluded his interview with Officer Ortiz, the detective examined Officer Ortiz's rifle and found that it contained one round in the chamber and 28 rounds in the attached magazine. Officer Ortiz confirmed that prior to the shooting he loaded his rifle with 30 rounds. As such, the submitted evidence confirmed Officer Ortiz fired one round during the shooting incident.

**Additional Law Enforcement Personnel** were interviewed and/or prepared reports regarding their involvement in the investigation of the shooting of VA. Officers Corral and Orozco were the first to arrive at the 9<sup>th</sup> Street driveway in response to VA's report of having killed three people. Officer Chavez, Sergeant Passo and Officer Ortiz arrived behind Officers Corral and Orozco, in that order. Each arrived at the scene in a marked black and white SBPD patrol unit

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and each wore department-issued uniforms with distinctive SBPD patches and star badges.

Officer Corral was the first responding officer to arrive at Pioneer Cemetery, but he did notice Officer Orozco arrive behind him. Both officers approached the cemetery via its 9<sup>th</sup> Street driveway. Officer Corral indicated that it was Officer Orozco who pointed out to him where VA was standing in the cemetery and that VA matched the suspect's description as provided by the dispatch operator. Officer Corral saw that VA was holding a handgun outfitted with an extended magazine. Then, Officer Corral heard VA fire three to four rounds. Officer Corral was outside of his patrol unit at the time and the sound of VA's gunfire caused Officer Corral to immediately take cover behind a gold Chevy Silverado truck that was at the scene and parked immediately in front of Officer Corral's unit. From a distance of approximately 50 to 70 yards, Officer Corral then made multiple verbal commands to VA to drop his gun. Officer Corral was uncertain if VA could hear his commands. Despite giving VA more commands, VA did not drop his gun and continued to wave his gun in the air. Thereafter, Officer Corral noticed that there were bystanders in the cemetery walking towards VA. Officer Corral yelled at the bystanders to move away from VA. Sometime after that, Officer Corral recalled being advised that VA had begun walking west. Officer Corral lost sight of VA from his position, so he moved back to the passenger side of his patrol unit where Sergeant Passo was taking cover. Officer Corral opened his patrol unit's front passenger door and pointed his rifle out towards VA. Officer Corral stated that Sergeant Passo gave VA commands to drop his gun using the patrol unit public address system. Then, Officer Corral saw that VA faced Officer Corral and pointed his handgun directly at him. In response, Officer Corral recalled attempting to fire his rifle at VA and that his rifle made a "click" sound but did not fire. Officer Corral realized at that time that he did not chamber a round and by the time he was able to chamber a round and re-position himself to fire, that someone else had fired and VA was laying on the ground.

Prior to arriving at the scene, Officer Orozco learned from dispatch that a 13-year-old Hispanic male wearing a grey shirt and black pants was armed with a handgun and wanted police to kill him or he was going to kill police officers. Just as he arrived, Officer Orozco saw VA in the cemetery. While he was still inside of his patrol unit, Officer Orozco alerted dispatch that the subject was in the northeast corner of the cemetery. During his broadcast, Officer Orozco heard three gunshots come from VA. VA was holding a cell phone in his left hand and waving a semiautomatic pistol in the air with his right hand. Officer Orozco then heard a fourth gunshot from VA. Officer Orozco radioed for additional officers to respond to the cemetery with rifles. Thereafter, Officer Orozco recalled Officer Ortiz had arrived. Officer Orozco told Officer Ortiz to take a position behind his patrol unit. Then, Officer Orozco saw VA begin to walk in a westerly direction. As a result, Officer Orozco lost sight of VA, momentarily. When Officer Orozco saw VA again, Officer Orozco saw that VA was closer but could only see VA's head and shoulders. Officer Orozco then heard public address announcements being given, followed by the sound of a single gunshot. Officer Orozco then saw VA fall out of sight. Shortly thereafter, Officer Orozco learned that it was Officer Ortiz who fired the shot. Officer Orozco immediately moved forward with other officers who approached VA as he lay on the ground. As they approached, Officer Orozco saw VA's gun next to VA's feet. Officer Orozco saw Officer Chavez step on VA's gun to keep VA from getting to it, while VA was detained. After Officer

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Orozco determined where VA was injured, he requested a medical supply pouch and assisted in providing first aid until the fire department arrived.

Sergeant Passo recalled arriving at the cemetery within three minutes of hearing on the radio that four gunshots were fired at the cemetery. At the time, Sergeant Passo was the patrol shift supervisor. Other officers were already at the scene with their rifles out at the 9<sup>th</sup> Street (north) side and on the south side of the cemetery. Initially, Sergeant Passo saw two people at the northeast corner of the cemetery. Officer Orozco pointed out that VA was the subject of the call. Sergeant Passo was unable to see what, if anything, was in VA's hands at the time, because the sergeant's view was obstructed by a block wall. Then, Sergeant Passo saw VA walk toward a building at the north end of the cemetery, near the driveway. Sergeant Passo recognized that VA's position created a potential crossfire pattern between officers on the north side of the cemetery and the south side of the cemetery. Sergeant Passo alerted everyone to the crossfire hazard and broadcasted by radio that the officers on the north side would give all commands to keep the radio traffic clear. As Sergeant Passo began giving announcements over a patrol unit public address system, the officers on the south side of the cemetery moved locations. Sergeant Passo recalled telling VA to put his gun down and that officers were there to help him. When Sergeant Passo gave those commands, the sergeant saw that VA was facing north towards officers from the southwest corner of the cemetery building. Sergeant Passo recalled being startled when the gunshot rang out. At that time, Sergeant Passo saw Officer Corral manipulating his rifle. Sergeant Passo learned shortly thereafter that Officer Corral fired on an empty chamber, and that it was Officer Ortiz who fired the shot that was heard. Sergeant Passo moved forward and approached VA with the other officers. Sergeant Passo stated that he saw VA laying on the ground and VA's gun was near VA's feet. Sergeant Passo clarified that that this was the first time he saw VA's gun. Sergeant Passo had officers search VA and then administer medical aid.

Officer Chavez recalled arriving at the 9<sup>th</sup> Street entrance to the cemetery, getting out of his patrol unit and arming himself with his rifle. After moving forward, Officer Chavez saw VA acting erratically and yelling while under a tree at the northeast corner of the cemetery. Officer Chavez could not tell what VA was saying but did see that VA was holding a gun in his right hand. Officer Chavez saw two people in the cemetery were close to where VA was, but they appeared to be walking away from VA. When Officer Chavez saw VA start to move, Officer Chavez took cover behind a patrol unit. Officer Chavez did not have his rifle pointed at VA at the time, for officer safety reasons. Next, Officer Chavez heard Officer Corral and Sergeant Passo give VA orders to drop his gun. Officer Chavez recalled that VA did not drop his gun and instead raised his gun and pointed it towards officers. Then, Officer Chavez heard one gunshot and ducked down. Officer Chavez was not sure who shot their gun but when he looked up again, he saw that VA was on the ground. When he moved forward with the other officers, Officer Chavez learned that it was Officer Ortiz who fired the gunshot. Officer Chavez stated that he saw the gun that VA was holding at VA's feet, and that after VA was detained, he heard VA say that he was sorry.

Additional SBPD officers responded to Pioneer Cemetery from 7<sup>th</sup> Street (south), including Officers Cerritos, Manuel Valenzuela and Cole Henson, and Detective Jose Loera. Officers



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Cerritos, Valenzuela, and Henson were wearing SBPD uniforms including agency patches and badges. Officers Cerritos and Henson drove marked black and white SBPD patrol units to the scene. Detective Loera wore a vest marked with "POLICE" in large block letters to the front and back over plain clothes. These officers on the south end of the cemetery heard the initial broadcasts about the incident, including that there was an armed subject in the cemetery, who had killed three people, and would kill police if they did not kill him. It was also relayed to the officers on the south side of the cemetery that VA had already fired multiple times. The officers could see VA in the northeast corner of the cemetery, and there were civilians between VA and the officers to the south. Detective Loera described those civilians as being in the "line of fire." As such, Officer Cerritos made loudspeaker announcements asking the civilians to leave the area. Officer Cerritos also had his patrol unit's overhead emergency lights flashing. Officer Cerritos and other officers remained approximately 80 to 100 yards south of VA, while using Officer Cerritos's patrol unit as cover. The officers to the south watched VA move west from the northeast corner of the cemetery towards a cemetery building. Detective Loera estimated that VA was approximately 50 to 75 feet away from where officers on the north side of the cemetery were. VA's movement caused the officers to the south to have to reposition their patrol unit. At or around the time the officers to the south repositioned, Officer Valenzuela saw VA begin to raise his gun towards officers to the north. Officer Henson also saw VA raise his gun towards officers to the north. Then, the officers to the south heard a single gunshot and saw VA fall to the ground.

A SID Criminalist examined Officer Ortiz's shooting weapon. The Criminalist identified Officer Ortiz's weapon as a Colt, M4 Carbine model, 5.56 x 45 caliber semiautomatic rifle. After test firing it, the criminalist found that Officer Ortiz's weapon test-fired without malfunction and appeared to have no defects or modifications. Another SID Criminalist examined the gun that VA was holding at the time he was shot, as well as the gun recovered next to VA's backpack. It was determined that both of VA's guns were Polymer80, Inc. semiautomatic pistols, model PF940C, 9mm Luger caliber weapons, without serial numbers. The SID Criminalist found that both of VA's guns fired without malfunction.

**STATEMENTS BY CIVILIAN WITNESSES<sup>3</sup>**

Civilian witnesses who were in the cemetery or nearby before, during, and immediately after the shooting incident were interviewed by investigators.

Civilian 1 told investigators that he was in the cemetery when he saw uniformed officers in marked police units arrive. Thereafter, Civilian 1 heard four to five gunshots from the northeast corner of the cemetery, where VA was standing. Civilian 2 also saw the officers and heard the gunshots. Civilian 1 described VA as being approximately six feet tall, heavy set, and appearing to be Hispanic and 26 to 30 years old. Civilian 2 described VA as being five feet and eight inches or five feet and nine inches, having a medium build of about 195 pounds, and was a Hispanic

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<sup>3</sup> Every accessible civilian statement submitted was reviewed, though all are not mentioned here.

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male in his 30's. After the initial gunshots, Civilians 1 and 2 walked up to VA and saw VA was holding a 9mm pistol with an extended magazine in his right hand. Civilian 1 saw that VA was speaking with someone on his cell phone and was crying. Civilian 1 told investigators that he believed VA was depressed and was going to kill himself. Civilian 1 explained he first approached VA because he was worried about VA being killed. Civilian 2 described VA as being distraught. Civilians 1 and 2 then recalled that VA pointed his gun in the air and fired a shot. Civilian 1 estimated that he and Civilian 2 got as close as 10 feet away from VA. Civilian 2 estimated that it was five feet or less. VA told Civilians 1 and 2 to leave the area because the police were going to shoot him. In response, Civilians 1 and 2 told VA to put his gun down. Thereafter, Civilian 1 also heard officers give VA commands via loudspeaker to put his gun down. Civilians 1 and 2 then heard officers at the scene ordering them to get back. As a result, Civilians 1 and 2 walked away from VA. After Civilians 1 and 2 walked away from VA, each heard an additional gunshot, turned around and saw VA on the ground. Civilian 1 stated that he was unsure whether VA shot himself or was shot by officers. Civilian 2 believed that VA shot himself.

Civilian 3 was in her home next to the cemetery when she heard three gunshots outside. Civilian 3 looked out her window and saw a Hispanic male appearing to be about 20 years old with a black handgun [VA]. Civilian 3 saw VA fire one more gunshot into the air. Civilian 3 began recording the incident with her cell phone and called 9-1-1. Later, Civilian 3 saw officers near VA. (See *Submitted Media, Civilian Video, infra.*)

**SUBMITTED MEDIA**<sup>4</sup>

**Dispatch Recordings.** The case agent's submission included an audio recording of the 9-1-1 call that VA made prior to the incident. The submitted call recording is approximately 21 minutes and 13 seconds long. It did not include the date or time the recording was originally made. However, according to the call log provided by the case agent, it appears that VA called 9-1-1 on August 5, 2021, at approximately 1:52 p.m. The following is a summary of VA's call:

At the opening of the call, VA told the dispatch operator, "Uhh I just uh, killed three people at a cemetery." The operator attempted to get additional details of where the three people were killed, but VA was evasive. Instead, VA made repeated requests that videos on his cell phone be provided to VA's family. VA described himself as Hispanic, with a blue backpack, wearing a grey shirt, black pants, and black shoes. The operator then proceeded to ask whether VA had a weapon, but again, on this topic, VA was evasive:

Operator: Ok do you have any weapons on you?

VA: You guys can figure that out when you guys get here.

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<sup>4</sup> All submitted photographs and audio and video recordings were reviewed and considered in the context of the entire submission. Only selected portions of selected items are mentioned here. All referenced submitted video footage was reviewed at slowed speeds.

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Operator: Well can you tell me if you have any weapons on you?

VA: You guys will figure that out. Make sure those videos get to my family alright?

The operator continued to get VA's name, which VA provided. VA also told the operator that he was 13 years old. The operator repeated questions about the reported killings as follows, but VA again, did not provide additional details. The following exchange occurred:

Operator: Ok, well, well [REDACTED]...ok, they...can you just tell me. You said you killed 3 people. When did you do that?

VA: I'll be waiting for you guys.

Operator: Ok, yeah, I understand that, and now you're still sitting down inside the cemetery.

VA: Yeah, I'm still waiting right here for you guys.

Operator: Ok but [REDACTED], can you tell me when this happened?

VA: Just right now when I'm calling you guys.

Operator: But when did you kill these people?

VA: I don't know. You can figure that out when you get here. You know get CSI or whatever the fuck.

Operator: Well can you tell me when you did it?

VA: *[Still weeping]* Hey [REDACTED], you're going to be the last person I talk to, man.

Operator: No.

VA: How was your day? How was your day, [REDACTED]?

Operator: [REDACTED] why do you say that?

VA: Hey it must be real rough being a fucking operator huh [REDACTED]?

Operator: Ok [REDACTED] can you tell me, do you have any weapons on you?

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VA: I told you this, [REDACTED].

Operator: But you didn't you didn't answer you said they'll find out when they get there.

VA: Exactly, [REDACTED]. [*Weeping*] How was, how was your day, man?

Operator: I'm doing ok right now. So what I...What would make it better...is, can you...the officers are driving there, can you tell me do you have any weapons on you?

VA: Yes, and you're going to have to kill me.

Operator: Why are they going to have to kill you?

VA: I'll make sure of it.

Operator: What do you mean by that?

VA: If they don't kill me, I'm going to have to kill them.

Operator: Why would you say that?

VA: I'm just tired, [REDACTED]. I'm just tired man. [*weeping*]

Operator: Ok, [REDACTED].

VA: Can you promise me one thing, [REDACTED]?

Operator: What? What is that?

VA: Can you get those videos to my family?

Operator: Ok, well, yeah, they'll make sure, they'll make sure that happens ok?

VA: No, I need you to promise me.

Operator: Ok, well, I'm not the one coming, [REDACTED]. So, I've got other...I have officers driving there.

VA: So take it easy. You guys got to kill me. I want you guys to go back to your families. [*weeping*]

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Operator: Ok, [REDACTED], we're not going to come to hurt you, ok?

VA: I'm wearing a black air forces, black pants, a greyish shirt. I'm 5'9"...

Operator: Yeah you told me yeah, you have the greyish shirt and black pants on, ok?

VA: Yeah, I'm like 5'9"

Operator: Are you, are you still sitting down inside the cemetery?

VA: Yeah, how long do you think? Like two minutes? Or?

Operator: Well, they're driving there, I mean it's going to take them a few minutes to get there.

After additional conversation, VA asked the operator, "Can the uh, can uh the officers hear me?" To which, the operator said, "They are not there yet, so they can't hear you yet." VA then asked the operator, "But uh, but if you get to talk to them, can you tell them I'm sorry." Shortly thereafter, VA said to the operator, "Hey [REDACTED], man, I'm sorry I dragged you into this" and, "It must be a hard job."

VA and the operator continued to talk and VA reiterated, "I'm just tired, [REDACTED]" and wept. Shortly thereafter, VA told the operator that he could see officers had arrived. VA then told the operator that he'd never killed anyone before. Then, the sound of three gunshots could be heard and the following exchange occurred:

VA: I'm not shooting at them, I just want them to kill me, [REDACTED].

Operator: Vic...Did you did you just discharge, discharge a firearm?

VA: Yeah, I took a shot, [REDACTED].

VA: Kill me! [*weeping*]

Operator: [REDACTED], put the gun down.

VA: Kill me! [*weeping*] I'm tired of living, [REDACTED].

Operator: [REDACTED], don't do that.

VA: Do I hang up or what, [REDACTED] or I'm going to walk up to them and let them kill me. Tell me what to do, [REDACTED].

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Operator: █████, can you put the gun down?

VA: Kill me! [*screaming away from the phone.*]

Operator: █████,

VA: I'm coming for you so you have to kill me! [*screaming*]

Operator: █████, do not do that.

VA: [*weeping*] I'm sorry, █████. I have to man.

Operator: █████.

VA: Do I hang up now or what?

Operator: No, I don't want you to hang up. I want you to listen to me, ok?

VA: Ok I'm going to walk up to them, █████.

Operator: No, no, no. Ok. I want you to put the gun down, can you do that?

VA: No, █████, I can't.

Operator: Why can't you do that?

VA: I'm not going to jail, █████.

Operator: They're not going to take you to jail.

VA: [*chuckles*] █████, come on, █████. Be real with me, █████. Come on.

Operator: No, they're going to take you to get you some help.

VA: █████ be real with me, █████.

Operator: I, I am.

VA: I [*unintelligible*] at them.

Operator: No, You need to get some help that's what they're there to help you

VA: [*screaming*] Kill me, I'm going to walk out to you...Kill me!

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Operator: [REDACTED]

VA: Get out of here, go! Go! Go! Go that way, bro! Go!

Operator: [REDACTED]

VA: Kill me. [*weeping*] Will they make it fast officer? I mean operator?

Operator: [REDACTED], they are not there to hurt you.

VA: Will they make it fast?

Operator: [REDACTED], they are not there to hurt you. [*pause of silence*] [REDACTED], are you still there?

VA: [REDACTED], [REDACTED] tell me when they shoot me, will they make it quick?

Operator: No. [REDACTED].

VA: [REDACTED], be a human being. [REDACTED]. I know you're an operator but please just listen to me, [REDACTED]. Will they make it quick? [*unintelligible*]

Operator: [REDACTED], they are not there to hurt you.

VA: Yeah ok, imma walk up to them, [REDACTED].

Operator: No, I don't want you to do that. Can you put the gun down?

VA: You think it will hurt when they kill me?

Operator: [REDACTED], they are not there to hurt you.

VA: But I'm asking you a question, [REDACTED], I know...but...Will it hurt when they kill me?

Operator: [REDACTED], they are not there to hurt you.

VA: [REDACTED], please answer me this question. Please, this is what I'm asking from you. Will they make it quick when they kill me?

Operator: [REDACTED], they are not there to hurt you.

VA: I don't want to die, dude, but I know what's going to happen, I'm

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shooting...

Operator: Ok well, well then they are there to get you some help.

VA: Ok I'm going to walk up next to them now...

Operator: No, I don't want you walk up, ok? I want you to put the gun down. Can you do that?

VA: No man, they're going to fucking kill you. Get out of here, dog! No, get out of here dog. You have to get out of here, bro!

Operator: [REDACTED].

VA: [weeping] They're going to kill me man.

Operator: No there not there to kill you, they're there to help you.

VA: [gunshot] Kill me! Kill me!

Operator: [REDACTED].

Before the recording ended, it appeared that VA was speaking to a third party to get out of the area. Then, VA appeared to address to the operator once more, "Alright man, I'm going to have to walk up to them...you know, there's no other option, option. Alright off...Hello? Hello? Hello? Hello?"

The submitted call log indicated that VA's phone-call disconnected at 2:13 p.m. The log further indicated that the operator attempted to call VA back twice at 2:14 p.m. but was routed to VA's voicemail.

**Body Worn Camera Video Recording.** Many of the officers who responded to the cemetery before, during and after the shooting incident made recordings using body-worn video recording devices (BWC). Forty-six different BWC recordings were submitted by the case agent, each including a date and timestamp displayed upon the resulting videoframe. The date of the incident was consistent across all submitted recordings. However, there were variations in the noted time of the events recorded on that day indicating that the time was not synced across all BWC devices. No BWC video recording of VA getting shot was submitted. Several BWC recordings did capture *the sound* of the shooting incident. Officer Ortiz's BWC recording included audio and video of Officer Ortiz pulling the trigger to his rifle. It must be noted that the BWC footage cannot recreate what the wearing officer perceived by his combined senses. For example, Officer Ortiz wore his BWC mechanism at the center of his chest. The resulting footage was therefore subject to the limitations of the camera mechanism and the view resulting from being worn there



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at chest-level. With these parameters in mind and in the context of all other material submitted, the following is a combined summary of what was included in several BWC recordings:

Officer Corral was the first to arrive at the 9<sup>th</sup> Street driveway at approximately 2:06 p.m. Officer Corral drove south and parked along the west curb behind a light brown pickup truck. Officer Corral got out of his unit and walked forward toward the west side of the truck, then suddenly gunshots rang out. Officer Corral quickly ducked next to the truck. Officer Corral stood up next to the passenger cab of the truck and made the following radio announcement: "Edward-2, he just fired four rounds in the air." Officer Corral then yelled out several times to VA, "Hey, drop the gun!" Officer Corral radioed that VA had a cell phone in his left hand and a firearm in his right hand. Dispatch then responded that VA was screaming for officers to kill him. Officer Corral asked VA to drop his gun several more times and also said, "Hey, we don't want to hurt you." The dispatch operator then announced, "Units, subject is now saying he's not going to jail."

Officer Orozco was the second officer to arrive at the 9<sup>th</sup> Street driveway, behind Officer Corral. While still in his unit, Officer Orozco announced over the radio that he saw VA at the northeast corner of the cemetery. Officer Orozco stopped his patrol unit northeast of the rear of Officer Corral's patrol unit, immediately got out, moved to the passenger (west) side of his unit. Officer Corral told Officer Orozco to get his rifle, but Officer Orozco stated that he couldn't get to it. Officer Orozco then advised other officers that long rifles were needed because VA was "pretty far out."

Officer Chavez arrived at the scene after Officer Orozco. Officer Orozco motioned for Officer Chavez to pull to the east side of Officer Orozco's patrol unit. Officer Chavez parked his patrol unit canted in a southeast direction, northeast of the rear driver's side of Officer Orozco's patrol unit. Then, Officers Chavez and Orozco retrieved their rifles. Officer Corral next called to Officer Chavez to come forward (south). As Officer Chavez moved forward next to the beige truck, behind Officer Corral, Officer Orozco took a position next to the front passenger compartment of his unit and behind his opened patrol unit passenger door, with his rifle pointed towards VA.

At approximately 2:11 p.m., VA was heard firing another gunshot. Officer Corral was moving back (north) to the rear of his patrol unit to get his rifle as VA fired the shot. Officer Orozco radioed, "More shots fired" immediately thereafter and advised his partners, "everyone just keep your distance...wait for the armor for shield...he's got the gun in his right hand." Meanwhile, Officer Corral returned to the rear passenger (west) side of the truck. Officer Chavez remained on the west side of the truck cab. At this point, both Officers Corral and Chavez had rifles pointed out toward VA.

Sergeant Passo appeared at the scene after Officer Chavez and stopped his patrol unit facing south and positioned northeast of Officer Chavez's patrol unit, close to the east curb of the 9<sup>th</sup> Street driveway. Sergeant Passo first contacted Officer Orozco at the west side of Officer Orozco's patrol unit. Officer Orozco and Sergeant Passo discussed the

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bystanders that were near VA. Officer Orozco pointed out VA to Sergeant Passo and explained to the sergeant that VA was the person with the gun.

Officer Ortiz appeared to arrive at the scene on the heels of Sergeant Passo at approximately 2:12 p.m. Officer Ortiz parked his patrol unit facing south and positioned northwest of Sergeant Passo's patrol unit. Officer Ortiz got out of his patrol unit, retrieved his rifle from inside of the front compartment, then walked forward (south) to the west side of Officer Orozco's patrol unit, where Officer Orozco was poised with his rifle. Sergeant Passo stood behind Officer Orozco at that time. Although VA could not be seen in the video, Officer Ortiz pointed in a southeasterly direction and asked Officer Orozco, "Is that our guy?" Officer Ortiz immediately responded, "Yeah, he's got a gun in his right hand." Officer Orozco then advised Officer Ortiz, "Just get some good cover because he can probably get us from there. Just make sure you get some good cover." Thereafter, Officer Ortiz moved away from the west side of Officer Orozco's patrol unit, moved (north) to the rear, closed the rear lift gate, and took a position at the rear of the patrol unit.

At the approximate time that Officer Ortiz arrived at the 9<sup>th</sup> Street driveway, Officer Cerritos and other officers were already inside the cemetery, south of where Sergeant Passo and Officers Ortiz, Orozco, Chavez and Corral were. Officer Ortiz began moving his marked patrol unit with its flashing overhead emergency lights slowly north from the center of the cemetery to get closer to where VA stood. Officer Cerritos announced over the radio that his patrol unit and other officers on foot were moving towards the northeast corner. Officer Cerritos alerted the dispatch operator that there were "some bystanders" next to VA. Several officers could be heard shouting at bystanders to move towards Officer Cerritos's patrol unit and out of the way. Subsequently, at approximately 2:13 p.m., Officer Cerritos announced over his patrol unit loudspeaker, "Bystanders, get out of the park." The officers around Officer Cerritos conferred with each other that VA was in the corner of the cemetery and wearing grey. These officers took a position with a north-facing view of VA at the northeastern portion of the cemetery.

About a minute after Officer Cerritos made his loudspeaker announcement, dispatch announced that VA disconnected from his call. About six seconds later, Officer Corral said, "Hey, he's walking. He's walking. "As Officer Corral did so, both he and Officer Chavez retreated backwards (north) to the passenger (west) side of Officer Corral's patrol unit, where Sergeant Passo was standing. Thereafter, Officer Orozco radioed, "Hey, he's moving forward. He's moving westbound now. Getting closer." To the south, several officers around Officer Cerritos, resumed shouting at bystanders to "hurry up" and "get out of the way." Officer Cerritos also attempted to announce over the radio that VA was walking westbound towards the units on 9<sup>th</sup> Street. Officer Cerritos stated with urgency to the officers near him, "He still has the gun in his hand."

Officer Corral opened the front passenger (west) side door of his patrol unit and took a position outside and behind the opened door. Officer Corral stated, "Here he comes, he

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has a gun in his hand,” as VA could be seen in the distance standing west of the southwest corner of the cemetery maintenance building beyond the 9<sup>th</sup> Street driveway cemetery gate. Sergeant Passo yelled, “Go ahead and drop the gun.” Officer Corral then echoed the sergeant and yelled towards VA, “Hey, drop the gun!” Sergeant Passo moved north towards the rear of Officer Corral’s patrol unit and behind Officer Corral, then made a radio announcement advising the officers to the south that officers to the north would be making commands and would “take action” if necessary. Sergeant Passo asked that the officers to the south keep their weapons down to avoid crossfire.

Officer Corral called out to VA once more, “Come on, buddy,” before Sergeant Passo moved into the interior of the front passenger compartment of Officer Corral’s patrol unit to access the loudspeaker. Sergeant Passo announced, “Sir, we’d like to help you. We need you to set your gun down. So far, there’s no felonies.” Sergeant Passo continued, “Can you lower your weapon please and come towards us. Set your weapon on the ground and walk towards us.” About a second later, Officer Corral can be heard pulling the trigger of his rifle, then immediately squatting down. No gunfire followed the trigger pull. Officer Chavez stood northwest of Officer Corral and also appeared to react by ducking down. About a second after Officer Corral pulled the trigger of his weapon, Officer Ortiz fired his rifle from behind Officer Orozco’s patrol unit. Within seconds of Officer Ortiz firing his weapon, Sergeant Passo and Officers Chavez, Corral, Orozco and Ortiz conferred with each other as to who shot their weapon. After it was clarified amongst them that Officer Ortiz fired his weapon, the five of them moved south over the 9th Street driveway gate and towards where VA lay on the ground. The approaching officers saw that VA’s gun lay at VA’s feet. Officer Orozco asked another officer to step on the gun to hold it in position. As VA was being handcuffed and assessed for injury, he repeatedly said, “I’m sorry, officer.”

While checking VA, Officer Orozco asked VA who he shot. VA responded, “I didn’t shoot nobody” and “I just wanted you guys to kill me.” Additional officers arrived at the scene who administered first aid to VA. Approximately seven minutes after VA was shot, fire paramedics assumed medical care of VA. VA was transported away from the scene by ambulance soon thereafter.

**Civilian Video Recordings.** The submission included two videos recorded by Civilian 3, neither of which included video footage of the shooting incident. However, one of Civilian 3’s videos captured video footage of VA immediately prior to the time he was shot and audio footage of Officer Ortiz’s gunshot blast. The video’s filename suggests that it was recorded at 2:08 p.m. on the day of the shooting; this video is nine minutes and 13 seconds long. The video appeared to be shot from a location northeast of where VA was standing in the cemetery. Civilian 3 appeared to be inside of her home as she indicated to investigators. The prevalent sound appeared to be coming from the inside of Civilian 3’s home, though the sound of some of what was happening outside could occasionally be heard. The following is a summary of the video footage recorded by Civilian 3 of VA prior to the shooting incident:

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At the beginning of the video, VA could be seen with a grey t-shirt and a gun in his right hand. The view of VA's lower body was obstructed in this video by a wooden fence and a block wall. At about the 24 second mark [:24], Officer Corral could be heard saying, "Hey, drop the gun buddy." In response, VA extended his right hand with the gun in it, and could be heard to say, "Kill me or I'm gonna walk out to you! Kill me." VA appeared to be pointing the gun to the west as he made this statement but returned the gun to his side and pointed to the ground thereafter. Officer Corral could be heard to repeat, "Drop the gun."

At about [:40], two people in the cemetery south of VA came into view [Civilian 2 and an unidentified third person]. VA appeared to be waving them away and saying, "Go, go, go!" Sirens were also audible at the time. Civilian 2 continued to approach VA but moved out of the videoframe. A vehicle also came into view but appeared to drive south and away. Shortly thereafter, a male voice indoors with Civilian 3 called 9-1-1 to report a man with a gun.

At [2:20] an unidentified fourth person appeared to walk toward VA within the cemetery but promptly turned around and ran away in a southwesterly direction. Meanwhile, Civilian 3 took over the phone-call to 9-1-1. Then, at [3:17], just as another vehicle appeared to the south, VA pointed his gun in the air and fired a shot. At [4:15], Civilian 2 re-appeared even closer to VA, but continued to walk away from VA in a westerly direction as public address announcements seemed to be directing people to walk toward a marked unit that could not be seen in the video frame. Subsequently, Civilian 2 and two previously noted unidentified people could be seen walking in the cemetery in a southwesterly direction, and away from VA.

At [5:29] VA turned around towards the camera and tossed what appeared to be a cell phone to the ground, then yelled, "I'm coming to you!" and "You're going to have to kill me!" before walking slowly to the west. Civilian 3 moved the camera's view to the west as VA walked in that direction. VA had his gun in his right hand, but the camera view of him became obstructed by a palm tree before VA walked out of view behind a cemetery building. After VA walked out of view, Civilian 3 shifted the camera view to the north and back to the west. Sirens could be heard, but no patrol units appeared in the video frame when pointed west. The sound of a voice could be heard coming over a loudspeaker, but what was being said could not be discerned. Then, at [7:21] a single gunshot blast was heard. At approximately [8:04], a group of five uniformed officers could be seen climbing over the cemetery driveway gate before they also moved out of view behind the same cemetery building. Before the video ended, Officer Orozco could be seen to the south of the cemetery building, but what he was doing could not be determined from this video, nor was VA visible.

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**INCIDENT SCENE INVESTIGATION**

The incident scene investigation was managed by Detective Kim Hernandez with the assistance of Officer Martin and two forensic specialists. Officer Eric Campos recorded scene measurements. The incident occurred at the north end of the Pioneer Cemetery, located at 211 E. 9<sup>th</sup> Street in the City of San Bernardino. Detective Hernandez described the cemetery as being surrounded by a black wrought iron fence, foliage, bushes, and hedges. Although portions of the cemetery extended to Sierra Way to the west, the northeast corner of the cemetery was a peninsula abutted to a residential parking lot to the west. Multiple residences sat to the north of the northeast corner of the cemetery and a vacant field lay to its east. A driveway that extended south from 9<sup>th</sup> Street to the north side of the cemetery was bordered by private residences to the east and west. The driveway was approximately 175 feet long and 28 feet wide. A metal gate that blocked vehicle access extended across the south end of 9<sup>th</sup> Street driveway to the cemetery. After the incident, a chain that locked the 9<sup>th</sup> Street driveway gate was cut to permit access to emergency medical personnel. Detective Hernandez identified the cemetery building at that northeast corner of the cemetery as a maintenance building of painted brick, with a footprint of approximately 30 feet by 35 feet.

Detective Hernandez identified five black and white SBPD Ford Explorer patrol units lined along the west curb of the 9<sup>th</sup> St. driveway to the cemetery. Each patrol unit was parked facing south. The patrol units had been moved to this location after the shooting incident to allow emergency medical vehicles access to VA. Immediately south of the line of patrol units and closest to the driveway gate was a tan Chevy Silverado pickup truck that was also parked facing south. It did not appear that the Chevy Silverado was moved from the position it was in at the time of the shooting. The left front tire of the Chevy Silverado was approximated to be 106.5 feet northwest of where VA fell to the ground.

Detective Hernandez was advised that Officer Ortiz fired one shot in a southeast direction from approximately 50 yards (150 feet). The scene investigation revealed one HORNADY 5.56 NATO FCC (rifle FCC) on the ground on the 9<sup>th</sup> Street driveway, in front of the driver's side rear tire of the second patrol unit north of the Chevy truck. The rifle FCC was retrieved at a location approximately 150 feet north of where VA fell to the ground. Two smaller caliber FCC were also found in the 9<sup>th</sup> St. driveway, that did not appear to be related to the shooting incident. Detective Hernandez indicated that the FCCs located in the 9<sup>th</sup> St. driveway could have been moved from their original location due to the vehicles moving over the driveway after the shooting incident.

At the time VA's gun was recovered from the ground near to where he fell, VA's gun contained 24 live rounds, including a round in the gun's firing chamber. VA's blue backpack was found in the northeast corner of the cemetery, about 101 feet from where VA fell. The evidence field near to the backpack included four 9mm Luger caliber FCC. After microscopic analysis of those four FCC's, a SID Criminalist determined that each was fired from the gun VA held at the time he was shot. The backpack contained another Polymer80 9mm handgun and four 9mm handgun

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magazines. The second Polymer80 handgun was outfitted with a 30-round capacity magazine containing 24 live rounds. The four loose magazines in the backpack contained a total of 41 9mm rounds. The backpack contained an additional 88 loose live 9mm rounds. Two additional loose 9mm rounds were found in the grass, near to the blue backpack. In total, 179 live 9mm rounds were recovered from the scene.

**INJURED PARTY**

VA was 13 years old at the time of the shooting incident. VA received medical attention at the scene and was transported by ambulance to a local medical facility. Medical staff determined that VA was approximately five feet and nine inches tall and weighed 233 pounds at the time. VA's height, weight and body mass index were noted to be greater than the 99<sup>th</sup> percentile of males his age. VA was treated for a gunshot wound to the neck. The path of the wound was noted to have a front to back trajectory, with an entry at the right anterior (front) of the neck and an exit to the posterior (back) lateral (side) of the neck. VA underwent surgery to repair his soft tissue neck wound. VA's blood was drawn and tested on the day of the incident and found to contain less than .01% blood-alcohol-content and no illegal narcotics. While VA received medical treatment, VA denied suicidal ideation. VA was diagnosed with having experienced an episode of major depressive disorder, generalized anxiety disorder, and insomnia due to mental disorder.

VA declined to make a statement to investigators regarding the shooting incident. VA's sister and mother were interviewed by investigators on the day of the incident. VA's mother denied that VA had ever attempted suicide. VA's sister revealed that VA was living with her at the time and she had never seen VA with a gun. VA's sister dropped VA at school on the morning of the incident and when she returned in the afternoon to pick him up, she was told that VA had not been at school all day. VA's sister also denied that VA has ever had any violent tendencies and did not know where VA could have got a gun. VA's sister described VA as a "teddy bear" that never gets mad. VA's sister personally packed VA's blue backpack on the day of the incident and said it did not contain any firearms.

**APPLICABLE LEGAL PRINCIPLES**

To preface, the public "expects" a responding officer to investigate a 9-1-1 call, as part of the officer's proper exercise of his duties. (*People v. Brown* (2015) 61 Cal.4<sup>th</sup> 968, 981-982.) It is not unusual for police contact to begin with a 9-1-1 call for help and subsequently turn into a criminal investigation. Even where the basis of the police contact is a threatened suicide, responding officers must concern themselves with more than the safety of the suicidal person; "protection of the physical safety of the police officers and other third parties is paramount." (*Adams v. City of Fremont* (1998) 68 Cal.App.4<sup>th</sup> 243, 271.) A peace officer who responds to an emergency call and is faced with threat of harm while fulfilling his duties, need not retreat and

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maintains his right to self-defense. (Calif. Penal C. §§197, 835a.)<sup>5</sup> A peace officer is not deemed the aggressor in this instance. (Penal C. §835a(d).)

A subject who draws or exhibits a firearm with the intent to resist or prevent arrest or detention of himself by a peace officer commits a serious felony. (Penal C. §417.8, 1192.7(c)) A peace officer may use objectively reasonable force to effect an arrest, to prevent escape or to overcome resistance. (Penal C. §835a(b).) 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.) An arrestee has a duty to refrain from using force or any weapon to resist arrest, if he knows or should know that he is being arrested. (Penal C. §834a.) The force used by the officer to effectuate the arrest or detention can be justified if it satisfies the Constitutional test in *Graham v. Connor* (1989) 490 U.S. 386, 395. (*People v. Perry* (2019) 36 Cal. App. 5th 444, 469-470.)

**PENAL CODE SECTION 196.** Police officers may use *deadly* force in the course of their duties, under circumstances not available to members of the general public. Penal Code §196 states that homicide by a public officer is justifiable when it results from a use of force that “is in compliance with Section 835a.” Section 835a(c)(1) specifies a ***police officer is justified in using deadly force*** when he reasonably believes based upon the totality of the circumstances, that it is necessary “defend against an imminent threat of death or serious bodily injury to the officer or another.” The “[t]otality of the circumstances’ means all facts known to the peace officer at the time, including the conduct of the officer and the subject leading up to the use of deadly force.” (Penal C. §835a(e)(3).)

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

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

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

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<sup>5</sup> All references to code sections here pertain to the California Penal Code.

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

Although these principals did not appear in section 835a until 2020,<sup>6</sup> the courts have been defining the constitutional parameters of use of deadly force for many years. In 1985, the United States Supreme Court held that when a police officer has probable cause to believe that the suspect he is attempting to apprehend has “threatened infliction of serious physical harm” to the officer, using deadly force to prevent escape is not constitutionally unreasonable. (*Tennessee v. Garner, supra*, 471 U.S. at 11-12.) California courts have held that when a police officer’s actions are reasonable under the Fourth Amendment of our national Constitution, that state statutory requirements may also be satisfied. (*Martinez v. County of Los Angeles* (1996) 47 Cal.App.4th 334, 349; *Brown v. Grinder* (E.D. Cal., VAn. 22, 2019) 2019 WL 280296, at \*25.) There is also a vast body of case law that demonstrates *how* to undertake the analysis of what a reasonable use of force under the totality of the circumstances is. (See *Reasonableness* discussion, *infra*.) As such, California’s pre-2020 case law is still relevant here.

There is one additional pertinent factor in section 835a that did not appear before 2020: deadly force cannot be used against a person who only poses a danger to themselves. (Penal C. §835a(c)(2).)

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

- (1) that the use of force should be exercised judiciously and with respect for human rights and dignity; that every person has a right to be free from excessive uses of force;
- (2) that use of force should be used only when necessary to defend human life and peace officers shall use de-escalation techniques if it is reasonable, safe and feasible to do so;
- (3) that use of force incidents should be evaluated thoroughly with consideration of gravity and consequence, lawfulness and consistency with agency policies;<sup>7</sup>

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<sup>6</sup> Assem. Bill No. 392 (2018-2019 Reg. Sess.) was approved by the Governor on August 19, 2019. [Hereinafter “AB-392”] The statutory modifications included in AB-392 took effect on January 1, 2020.

<sup>7</sup> Penal C. §835a (a)(3) conflates a demand for thorough evaluation of a use of force incident with a dictate that it be done “in order to ensure that officers use force consistent with law and agency policies.” On its face, the section is clumsily worded. Nothing included in AB-392 plainly requires that a use of force also be in compliance with agency policies. A provision in the companion bill to AB-392—Senate Bill No. 230 [(2019-2020 Reg. Sess.) approved by the Governor, September 12, 2019] (Hereinafter “SB-230”), does explicitly state that “[a law enforcement agency’s



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- (4) that the evaluation of use of force is based upon a totality of the circumstances, from the perspective of a reasonable officer in the same situation; and
- (5) that those with disabilities may be affected in their ability to understand and comply with peace officer commands and suffer a greater instance of fatal encounters with law enforcement, therefore.

(Penal C. §835a(a).)

**IMMINENCE.** “Imminence is a critical component” of self-defense. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1094.) A person may resort to the use of deadly force in self-defense, or in defense of another, where there is a reasonable need to protect oneself or someone else from an apparent, *imminent* threat of death or great bodily injury. “An imminent peril is one that, from appearances, must be instantly dealt with.” (*In re Christian S.* (1994) 7 Cal.4th 768, 783.) The 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 in determining if a reasonable person would believe in the need to defend. (*Id.* at 1083.) In this regard, there is no duty to wait until an injury has been inflicted to be sure that deadly force is indeed appropriate. (*Scott v. Henrich, supra*, 39 F. 3d at 915.)

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

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

(Penal C. §835a(e)(2).)

In addition, police officers are not constitutionally required to use all feasible alternatives to avoid a situation where the use of deadly force is reasonable and justified. (*Martinez v. County of Los Angeles, supra*, 47 Cal.App.4th at 348.) When apprehending a violent suspect, police officers need not even choose the “most reasonable” action or the one that would likely cause the least amount of harm. (*Hayes v. County of San Diego* (2013) 57 Cal.4th 622, 632.) The court in *Scott* explained:

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use of force policies and training] may be considered as a factor in the totality of circumstances in determining whether the officer acted reasonably, but shall not be considered as imposing a legal duty on the officer to act in accordance with such policies and training.” (Sen. Bill No. 230 (2019-2020 Reg. Sess.) §1.) It is noteworthy, however, that this portion of SB-230 is uncodified, unlike the aforementioned portion of Penal C. §835a (a)(3).

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

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

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

The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on scene, rather than with the 20/20 vision of hindsight....The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.

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

The "reasonableness" test requires an analysis of "whether the officers' actions are 'objectively reasonable' considering 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 under which the force was applied. A person's right to self-defense is the same whether the danger is real or merely apparent. (*People v. Jackson* (1965) 233 Cal.App.2d 639.)

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

Whether the suspect posed an immediate threat to the safety of the officer or others has been touted as the "most important" *Graham* factor. (*Mattos v. Agarano* (9<sup>th</sup> Cir. 2011) 661 F.3d 433, 441-442.) An officer may reasonably use deadly force when he confronts an armed suspect in close proximity whose actions indicate an *intent* to attack. (*Mattos v. Agarano, supra*, 661 F.3d at 441-442.) The threatened use of a gun 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* (9<sup>th</sup> Cir. 1994) 858 F.Supp. 1064, 1071-72.) If a subject draws or exhibits a firearm to resist or prevent arrest or detention by an officer, it is not required that the subject point the

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firearm at the officer, or even draw the weapon in a rude, angry, or threatening manner for the subject's conduct to qualify as a serious felony being committed against that officer. (Penal C. §§245(d), 417.8; *People v. Raviart* (2001) 93 Cal.App.4<sup>th</sup> 258, 266, *People v. Pruett* (1997) 57 Cal.App.4<sup>th</sup> 77, 88.) Even when all other *Graham* factors weigh against an officer's use of force, a court may still find that the use of force was reasonable where the officer faced imminent harm. (*Estate of Strickland v. Nevada County* (9<sup>th</sup> Cir. 2023) 2023 WL 37372551.) 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.)

Lastly, 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. 7, *supra*.)

Another key guiding principle when undertaking this analysis is that courts do not engage in *Monday Morning Quarterbacking* and nor shall we. Our state appellate court has warned,

under *Graham* we must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes 'reasonable' action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.

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

**ANALYSIS**

This memorandum examines the use of deadly force by SBPD Officer Aaron Ortiz on August 5, 2021. As indicated above, there are legal bases that must be met before the right to self-defense ripens and the use of lethal force is justified. We draw our conclusion here based upon those principles and the required careful examination of the totality of the circumstances evidenced by the case agent's submission.

A use of force must be "reasonable" in order to be deemed lawful. When considered in the context of self-defense, whether the shooting officer was justified in using lethal force involves a two-part analysis: (1) did he subjectively and honestly believe he needed to protect himself or

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others from an apparent, imminent threat of death or great bodily injury; and (2) was his belief in the need to protect himself from an apparent, imminent threat of death or great bodily injury objectively reasonable.

**Subjective Belief of Imminent Need to Protect.** The subjective belief of Officer Ortiz is included here based upon the statements he made during his interview. (*See Officer Ortiz's statement, Law Enforcement, supra.*)

On the afternoon of the incident, Officer Ortiz was on duty and assigned to patrol areas of San Bernardino. He was wearing a department-issued police uniform and was operating a SBPD-marked black and white patrol car when he heard partner Officer Corral announce over the radio that a subject had fired four rounds. Officer Ortiz checked his patrol unit computer and learned that Officer Corral was at the Pioneer Cemetery. Officer Ortiz knew that transients frequented or camped at the cemetery and that there were numerous residences on the cemetery perimeter. As such, Officer Ortiz believed that Officer Corral and uninvolved civilians may be in danger.

Officer Ortiz assigned himself to respond to the cemetery. When Officer Ortiz arrived at the cemetery, he noticed that other uniformed officers had arrived ahead of him and were already pointing rifles in VA's direction. Officer Ortiz similarly retrieved his duty rifle, took a position behind another officer's patrol unit, and pointed his rifle at VA. At that time, Officer Ortiz saw that VA had a gun in his right hand and a cell phone in his left hand. Officer Ortiz heard dispatch announce that VA said that he was not going to jail. Officer Ortiz deduced that VA was communicating with dispatch. Next, Officer Ortiz saw VA throw his cell phone down. Soon thereafter, dispatch announced that VA disconnected the phone call.

After VA threw down the phone, Officer Ortiz saw VA walk in a westerly direction. At the time there were other civilians in the cemetery walking nearby but away from VA. Officer Ortiz stated that he was concerned that VA might shoot the people in the cemetery. VA walked out of Officer Ortiz's sight and behind a cemetery building for approximately 10 to 15 seconds before reappearing at the southwest corner of that building. Officer Ortiz heard commands issued to VA to drop his gun, which he saw VA ignore. Officer Ortiz then saw VA raise his right hand and point his gun at Officer Ortiz. Officer Ortiz fired once at VA and saw VA immediately fall to the ground. Officer Ortiz told investigators that he fired at VA because he believed VA would shoot him.

While there does not appear to be any video footage of VA pointing his gun at officers as Officer Ortiz relayed, the submission in total does support Officer Ortiz's statement that VA did so. For instance, during their interviews, Officers Corral and Chavez each stated that VA raised his firearm at them prior to the time Officer Ortiz fired his weapon. Officers Henson and Valenzuela, who were to the south of VA, saw VA point his handgun north. Officers Corral, Chavez and Ortiz each stood at a position north of VA at the time VA pointed his weapon north. Officer Corral was closest in proximity to VA at the time the shot was fired. Officer Corral was near the front of his patrol unit that was parked south of Officer Orozco's patrol unit. Officer Chavez was between Officer Corral and Officer Orozco's units. Officer Ortiz was at the rear of

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Officer Orozco's patrol unit. Additionally, Officers Corral, Chavez and Ortiz each appeared to react to VA's conduct within a second of each other. Officer Chavez ducked down at or around the time that Officer Corral pulled the trigger of his rifle<sup>8</sup> and right before Officer Ortiz fired his weapon. Officers Henson and Valenzuela also heard the gunfire after VA pointed his weapon. It is reasonable to conclude that Officers Corral, Chavez, Ortiz, Henson and Valenzuela each witnessed the same incidence of VA pointing his gun at officers.

The stated account of Officer Ortiz of the circumstances at play *prior* to and culminating with his use of lethal force is consistent with the submission as a whole. Furthermore, the submission supports Officer Ortiz's conclusion that VA was armed with a firearm and intended to shoot and injure or kill him. Based upon the foregoing, it is reasonable to conclude that Officer Ortiz bore an honest and subjective belief that he was under threat of imminent deadly harm or bodily injury at the time he used lethal force.

**Reasonable Belief of Imminent Need to Protect.** The use of lethal force is authorized by Penal Code section 835a(c)(1) when an officer has a "reasonable" belief of an imminent threat of death to a person. A definition of "reasonable" is not included within section 835a. Instead, the analytical framework for determining what is "reasonable" is included in *Graham* and its progeny. This analysis also overlaps with the second component to a self-defense claim: a finding that the involved shooting officer had an objectively reasonable belief of the need to use deadly force to protect himself from imminent threat of death or serious injury.

As in *Graham*, we first consider the severity of the crime at issue. Officers were initially called to the scene on VA's self-report that he killed three people. During that call the dispatcher attempted to cull details from VA about the reported killings, without success. The dispatcher later revealed his skepticism that VA had killed anyone at all. However, VA did demonstrate how emotionally distressed he was, that he was armed with a gun, and was prepared to fire that gun. Officers Corral and Orozco, and Civilians 1, 2 and 3 each saw and/or heard VA fire his gun in the cemetery. While it appeared that VA did not shoot *at* anyone and may have been firing into the air, it is reasonable to conclude that firing a gun into the air in the presence of other people is inherently dangerous. Firing into the air is also a crime. (Penal C. §246.3 [Discharging Firearm in Grossly Negligent Manner], *People v. Clem* (2000) 78 Cal.App.346, 352.) Negligent discharge of a firearm could be a misdemeanor or felony, either of which would not have been the most serious crime that VA committed.

Uniformed officers at the scene issued numerous commands to VA to disarm himself. The dispatch operator and civilians at the scene pleaded with VA to drop his gun. Yet, VA was not persuaded to disarm himself. Instead, VA advised the dispatcher that if officers didn't shoot him, that he would shoot at police officers. VA also relayed that he would not be going to jail, or in other words that he would not be taken alive. VA demonstrably cut off all other communication with dispatch by throwing down his cell phone; something the officers at the 9<sup>th</sup> Street driveway

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<sup>8</sup> Officer Corral pulled the trigger to his rifle, but the weapon did not expel a round because Officer Corral had not previously loaded a round into his rifle's firing chamber.

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saw and that was confirmed by the dispatch operator. The officers at the 9<sup>th</sup> Street driveway were aware that VA was closing the distance between them with a gun in hand. Despite additional requests that VA put his gun down, VA raised his firearm at five uniformed police officers taking cover behind patrol units at the 9<sup>th</sup> Street driveway. Drawing or exhibiting a firearm with the intent to prevent detention by a peace officer is a violation of Penal Code section 417.8, a “serious” strike felony pursuant to Penal Code section 1192.7(c). Raising a loaded firearm at an officer engaged in the performance of his duties is a violation of Penal Code section 245(d)(1)—a “serious” felony, that could also be the basis of a limited class of “violent” felonies pursuant to Penal Code section 667.5(c)(8). Furthermore, neither section 245(d)(1), nor 417.8 required that VA fire or even point a gun directly at any law enforcement officer. It was enough that VA armed himself with an operable and loaded firearm and wielded it such that VA *could have* immediately used it against Officer Ortiz or any of the other nearby officers engaged in their duties. VA did not point his gun at officers as an isolated event. VA’s prior threats, prior shooting in the presence of nearby civilians, approach towards officers and refusal to yield to the commands of multiple uniformed officers must be considered. As such, the severity of the crimes VA may have committed or was engaged in immediately prior to Officer Ortiz’s use of force weighs in favor of a finding that Officer Ortiz’s use of force was reasonable.

Resistance is another essential consideration in a *Graham* analysis. Officers were authorized to use reasonable force to effectuate VA’s detention as soon as they had a reasonable suspicion that VA committed a crime. The extended discussion that VA had with the dispatch operator in sum indicated VA’s intent *not* to surrender peacefully to officers. On one hand, VA told the dispatch operator that if the responding officers didn’t kill him, that VA was going to have to kill the officers. On the other, VA also told the dispatch operator that he never killed anyone and that he did want the police officers to go home to their families. VA’s *apparent* conduct was less conflicting, however. Prior to being shot, VA screamed at the officers at the scene, “I’m coming for you, so you have to kill me!” After VA fired his weapon and before VA’s call was disconnected, the dispatcher asked VA five separate times to put his gun down. Civilians 1 and 2 both reported asking VA to put his gun down. Officer Corral yelled towards VA and asked VA eight times to drop his gun. VA was not swayed. VA instead walked towards officers with his loaded gun in hand. Immediately prior to getting shot, Officer Corral again asked VA to drop his gun and Sergeant Passo announced over the loud speaker, “Sir, we’d like to help you. We need you to set your gun down. Lower your weapon and step towards us. Put your weapon on the ground and walk towards us.” VA refused all of those requests and raised his gun hand towards officers. In doing so, VA demonstrated an intent to arm himself with a lethal weapon and communicated his ability to use lethal force. Self-armament with a known loaded and operable semi-automatic firearm in the face of detainment by uniformed and armed peace officers is an extreme level of resistance. As such, the submission in total supports a finding that VA was engaged in active and extreme resistance at the time Officer Ortiz used lethal force. In the calculus of what was “reasonable” under *Graham*, VA’s resistance weighs in favor of a finding that Officer Ortiz’s use of force was reasonable.

Immediacy is the “most important” *Graham* factor. A qualifying imminent threat is one that would cause a reasonable person to believe that action was instantly required to avoid death or

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great bodily injury. Even before Officer Ortiz responded to the cemetery, he was informed the situation involved a person who reportedly killed three people, had a gun, and had already fired that gun multiple times in the presence of others. Multiple civilians and at least two uniformed officers were in VA's immediate vicinity at the time VA fired his gun in the cemetery. Officers inside the cemetery were actively evacuating bystanders because of the imminent danger that VA posed. VA plainly stated his intent: he advised the dispatcher that if the officers didn't kill him, that VA was going to have to kill them. The dispatcher relayed VA's statement to officers at the scene and Officer Ortiz heard it. Officer Ortiz also heard dispatch relay that VA stated he would *not* be taken to jail. After receiving this information, Officer Ortiz saw VA throw down his cell phone (effectively ending his communications with dispatch). Officer Ortiz lost sight of VA momentarily and when VA reappeared, VA was at the southwest corner of a cemetery maintenance building. Officer Ortiz saw and heard through radio communication that VA had his gun in hand at that position and saw that VA was now closer to where he and other officers were taking cover.

Officer Ortiz witnessed other officers continue to give VA commands to drop his gun despite the increased danger VA posed after moving closer. However, VA gave the officers on scene no indication that he intended to surrender or comply. VA first called 9-1-1 at approximately 1:51 p.m. and was on the line with the dispatch operator for more than 21 minutes. During that time, the dispatcher, multiple officers, and multiple civilians repeatedly asked VA to put down his gun. Despite the efforts of at least five different people, VA could not be persuaded to drop his gun. As such, when VA raised his gun and pointed it towards Sergeant Passo and Officers Corral, Chavez, Orozco and Ortiz, it was reasonable to conclude that VA meant to shoot. As discussed above, Officers Corral, Chavez and Ortiz each saw VA point his gun and reacted. Officers Henson and Valenzuela also saw VA point his gun towards the officers on the 9<sup>th</sup> Street driveway. Additionally, the trajectory of VA's gunshot wound with a front entry would tend to show that VA was facing Officer Ortiz at the time Officer Ortiz shot at VA. In sum, VA's conduct demonstrated that he had the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury to officers, including Officer Ortiz. Officer Ortiz reasonably believed that lethal force was instantly required to avoid his immediate death. Officer Ortiz was not required to wait until VA fired a round, or for he or another officer to be struck by VA's gunfire. As the law is comparatively generous to law enforcement in cases where potential danger or other exigent circumstances are present, the submission in total provides no compelling basis to second guess Officer Ortiz's choice to use lethal force upon VA.

**Hindsight.** In the evaluation of the question of necessity at the time shots were fired, it must be noted that the courts have employed a standard that is highly deferential and viewed from the vantage point of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. This standard allows for the fact that split-second judgments are being made under tense, uncertain and rapidly evolving circumstances. Here, it appears that VA did not actually fire his gun at officers after he pointed it at them. VA held a semi-automatic pistol loaded with a distinctive extended magazine; VA could have fired 24 rounds without reloading. The investigation submitted revealed no reason for Officer Ortiz to know that VA would *not* fire his gun at the time VA pointed it at officers. Here, the opposite is apparent: VA demonstrated that he

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could and would fire his gun. VA had already fired the same gun multiple times, with the last time being about four minutes prior to the time he pointed his gun at officers. Additionally, it appeared there was a vast discrepancy between VA's reported age and his apparent age. VA did reveal to the dispatch operator that he was 13 years old, but civilian witnesses perceived VA to be between 20 and 30 years old. It is not unreasonable that VA could be mistook for an adult: VA was approximately five feet and nine inches tall and weighed 233 pounds. In any event, even a child wielding a loaded firearm in the way VA did, posed a lethal threat to civilians and officers alike. Moreover, the scene investigation revealed that VA posed an even greater danger to others than the apparent possession of one firearm would suggest. It was discovered that VA possessed *two* loaded and operable firearms. VA's backpack contained the second firearm, additional loaded magazines, and loose ammunition. Had VA chosen to open fire at civilians and officers from his original location in the cemetery, VA instantly possessed weapons and ammunition which combined could have been used to fire more than 175 times at officers and innocent civilians. Ultimately, VA walked out of instant reach of his backpack to get closer to the officers on the 9th Street driveway. While it is still true that VA was out-manned, out-gunned, and facing trained law enforcement when he was shot, this does not change the analysis. Here, VA was emboldened to point a loaded firearm at multiple uniformed officers who were begging VA to put his weapon down. Ultimately, these matters in hindsight do not diminish the imminent danger perceived by Officer Ortiz prior to the time he used lethal force upon VA. Officer Ortiz had a legal right to fire his duty weapon as quickly as he could manage to avoid being imminently shot and killed by VA.

Based on the foregoing discussion, each of the primary *Graham* factors as applied support a finding that the use of lethal force by Officer Ortiz was reasonable. The "totality of the circumstances" discussed herein further support a finding that Officer Ortiz reasonably believed he was defending against an imminent threat of death or serious bodily injury to himself and others at the time he used lethal force. As such, the use of lethal force by Officer Ortiz was also justifiable under Penal Code sections 196 and 197.

**De-escalation.** Section 835a(a) does advise that lethal force be used only "when necessary to defend human life" and that safe and feasible de-escalation should be employed. Normally, the mere presence of multiple law enforcement vehicles, multiple uniformed and armed law enforcement officers and the issuance of verbal commands can serve as a de-escalation technique. One faced with such a law enforcement response might reasonably find there is no likely escape and choose to surrender. During VA's conversation with the dispatch operator, the dispatch operator regularly let VA know that the police were on the way. At one point during VA's call, VA did acknowledge that he saw the officers and told the dispatch operator that he would walk out towards them. There were at least five marked SBPD patrol units at the cemetery, both north and south of VA's position immediately prior to the time VA was shot. Loudspeaker announcements were made from two of those patrol units. The submission supports a reasonable conclusion that VA provoked the law enforcement response that took place. VA was not moved to comply or make any appreciable indication of a desire to disarm himself, let alone peaceably surrender himself, because he specifically intended for police to shoot him. Additionally, the presence of less than lethal tools would not have changed the lethal and



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immediate character of the threat that VA met Officer Ortiz with, as discussed *supra*. In sum, by firing his gun in the cemetery and proceeding to point his gun at officers, VA dictated a circumstance where there was no further feasible, safe or reasonable opportunity for Officer Ortiz or other officers to de-escalate the incident.

**Other Statutory Considerations.** The additional considerations included in §835a(a) also support a conclusion that the use of deadly force by Officer Ortiz was lawful.<sup>9</sup> First, the submission in total supports a conclusion that Officer Ortiz did not act excessively. Officer Ortiz fired at VA only after he saw that VA had a handgun pointed at him. VA's weapon was recovered in the location where VA originally fell. This would tend to show that VA remained in possession of his firearm until he fell and is consistent with the accounts of multiple officers who saw VA pointing his weapon before Officer Ortiz shot VA. Moreover, Officer Ortiz fired at VA once, after which VA fell. This would tend to indicate that Officer Ortiz was firing to respond to a singular perceived threat. Indeed, Officer Ortiz's rifle contained 29 more live rounds and possessed two additional magazines with 30 rounds included in each. Had the threat on his life or the lives of other people nearby continued, Officer Ortiz instantly possessed firepower to continue shooting. The submission shows that Officer Ortiz appreciated that there was no need to engage in a second volley because VA was on the ground and disarmed. The submitted evidence supports the conclusion that lethal force did not continue after the lethal threat ceased. As such, Officer Ortiz can be found to have well-appreciated the gravity and consequence of his use of lethal force, evidenced by the judicious way he employed lethal force in this instance.

Information submitted by the case agent did reveal that VA may have suffered from an episode of a mental disorder and had a small amount of alcohol in his system. There was nothing in the submission, however, that showed VA was prevented from understanding that he was being contacted by law enforcement or from complying with the commands that he was given. At a minimum, VA knew that officers had the capability of shooting and killing him. VA stated to the dispatcher that he intended for the police to kill him. VA was heard shouting repeatedly, "Kill me." It is apparent that VA understood what the police response would be to his conduct and that he intended to provoke that response. Despite denying suicidal ideation at the time he was treated, VA's conduct was consistent with one trying to commit suicide. However, any reasonable opportunity Officer Ortiz had to show deference to VA due to VA's acute mental condition was supplanted when VA pointed his gun at officers. Whatever may have been happening with VA physically and mentally, VA's conduct revealed that he was a danger to more than himself. Specifically, VA presented himself as an immediate lethal threat to Sergeant Passo, and Officers Corral, Chavez, Orozco and Ortiz.

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<sup>9</sup> This review is based on a totality of the circumstances from the perspective of a reasonable officer in the same situation. (Penal C. §§835a(a)(3)-(4).) However, this review does not undertake additional examination of whether agency use of force policies were violated because (1) no law requires it, and (2) the submitted materials do not indicate or otherwise suggest that any use of force policy was violated.

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**CONCLUSION**

Under the facts, circumstances and applicable law in this matter, the use of deadly force by Officer Aaron Ortiz was exercised in self-defense and in a reasonable manner. Accordingly, no criminal liability attaches in this incident based on each law enforcement officer's conduct.

**Submitted By:**

**San Bernardino County District Attorney's Office**

**303 West Third Street**

**San Bernardino, CA 92415**

**Dated: January 19, 2024**

