

**Officer Involved Shooting of Dave Cruz
Los Angeles Police Department**

**Officer Michael Miller, #36332
Officer Tomas Escalera, #34921
Officer John Pastora, #36239
Officer Joseph Lona, #42768**

J.S.I.D. File #17-0210



JACKIE LACEY

District Attorney

Justice System Integrity Division

November 25, 2019

MEMORANDUM

TO: COMMANDER ROBERT E. MARINO
Los Angeles Police Department
Force Investigation Division
100 W. First Street, Suite 431
Los Angeles, California 90012

FROM: JUSTICE SYSTEM INTEGRITY DIVISION
Los Angeles County District Attorney's Office

SUBJECT: Officer Involved Shooting of Dave Cruz
J.S.I.D. File #17-0210
L.A.P.D. File #F027-17

DATE: November 25, 2019

The Justice System Integrity Division of the Los Angeles County District Attorney's Office has completed its review of the April 22, 2017, non-fatal shooting of Dave Cruz by Los Angeles Police Department (LAPD) Officers Michael Miller, Tomas Escalera, John Pastora and Joseph Lona. It is our conclusion that the officers acted in lawful self-defense and defense of others.

The District Attorney's Command Center was notified of the shooting on April 22, 2017, at 8:26 a.m. The District Attorney Response Team responded and was given a briefing and a walk-through of the scene.

The following analysis is based on police reports, audio recordings, photographs, body worn video, surveillance and cellphone video and medical records submitted to this office by the LAPD Force Investigation Division. Officers Miller, Escalera, Pastora and Lona's compelled statements were not considered as part of this analysis.

FACTUAL ANALYSIS

On April 22, 2017, at approximately 6:12 a.m., a person identifying himself as Carlos Diaz, called the non-emergency line of the LAPD Communications Division. Diaz stated that a man had just pointed a gun at him on Rayen Street near the intersection of Burnet Avenue in the City of Los Angeles. Diaz said the man was also armed with a knife and walking toward Sepulveda Avenue. Diaz described the suspect as a male Hispanic wearing a black sweater and gray pants.

Uniformed LAPD Officers Michael Miller and Louis Sherry were the first officers to arrive on Rayen Street. They observed a man, later identified as Dave Cruz, matching the suspect description on the north sidewalk. Miller stopped the vehicle and the officers exited. Cruz had a knife protruding from his right pants pocket. Miller and Sherry drew their service weapons and

ordered Cruz to the ground. Cruz remained standing, pointed to his right pants pocket and said that he had a knife.¹



Still photograph taken from Miller's body worn camera showing the knife in Cruz' pocket.

Cruz continued to ignore repeated orders to turn around and place his hands on his head. Sherry requested additional units respond to the scene. Sherry holstered his service weapon and removed his Taser as the responding officers arrived. Uniformed LAPD Officers Yousef Brady and Judith Zuniga armed themselves with less than lethal beanbag shotguns.

Miller repeatedly asked Cruz to turn toward the fence and surrender. Cruz placed his hands above his shoulders and on his head, but he refused to turn around. Miller engaged Cruz in conversation in an attempt to gain his compliance. Uniformed LAPD Officer John Cooke also tried speaking with Cruz. Cruz stated he was scared and nervous. The officers told Cruz they did not want to hurt him, they only wanted him to comply so they could detain him. The officers told Cruz that carrying a knife was legal and he may not be arrested, they just needed him to turn around. Cruz asked to call his mother several times. The officers promised Cruz could call his mother once he complied with their orders.

Approximately six minutes into the standoff, Cruz told the officers that he had a gun. Cooke advised the officers near him that he observed the gun in his waistband.² Cruz was warned that if

¹ In a subsequent interview with Cruz' mother, investigators played the call "Carlos Diaz" made to the police and she identified the caller as Cruz.

² Cooke told investigators he observed what appeared to be the rear sights of a pistol in Cruz' front waistband.

he did not turn around, he would be tased and shot with a beanbag shotgun. Cruz threatened to shoot the officers if he was shot with the Taser or beanbag.

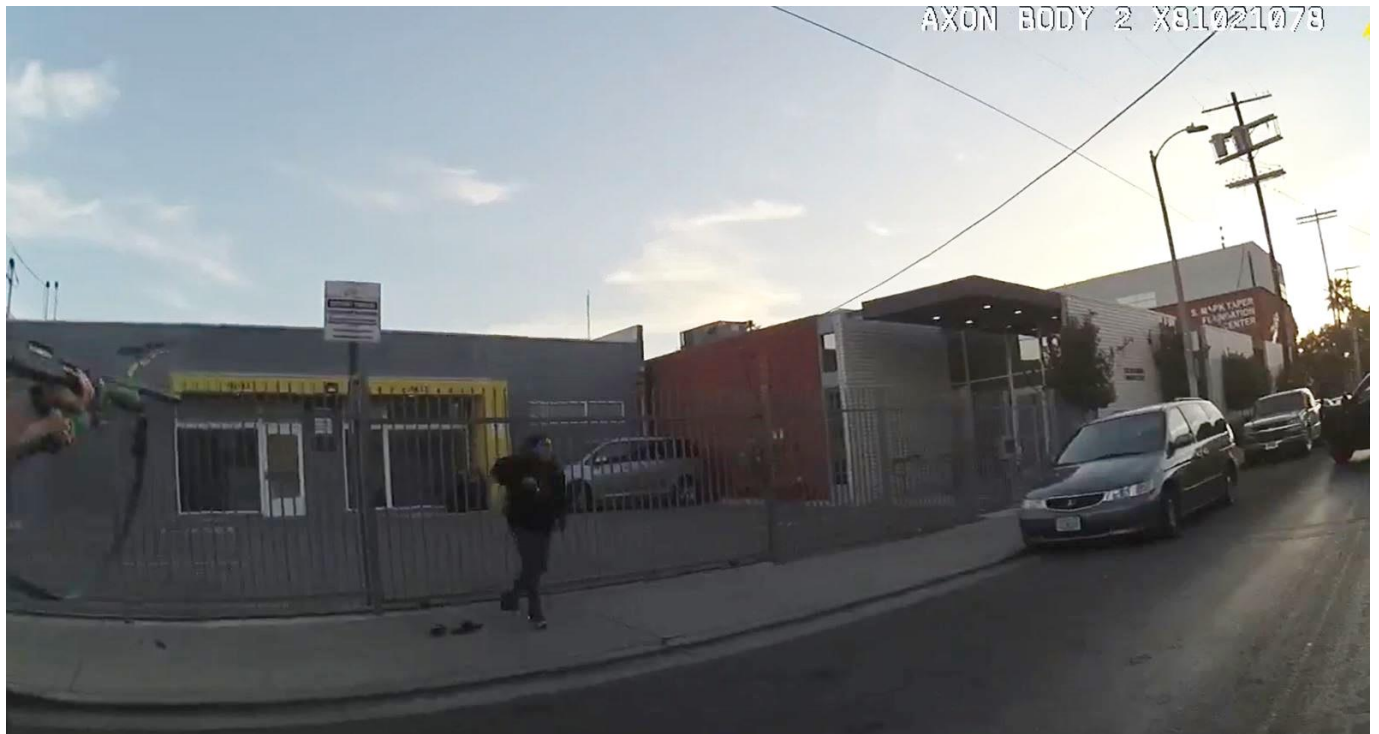
A few minutes later, Cruz told the officers that he had a BB gun, not a real firearm. LAPD Sergeant Jerold Wert told Cruz that he needed to turn around and face the fence so they could detain him and verify that the gun was not real. Cruz refused to comply.

Officers continued their attempts to get Cruz to turn away from them so they could take him into custody. Cruz was told to turn around dozens of times, by multiple officers. Sixteen minutes into the standoff, Cruz made a quarter turn to his right, facing west, with his right side to the fence.

Officers urged Cruz to keep turning toward the fence. Instead of complying, Cruz turned back around. At that time, Wert walked toward several officers positioned in front of Cruz and to his left. Wert was going to advise these officers that the beanbag shotgun was about to be deployed. Cruz tracked Wert's path as he walked toward the officers. Cruz reached into his front waistband and took several steps toward the street. Cruz then pulled what appeared to be a black handgun from his waist area and continued toward the street. Cruz pointed the handgun toward Wert and LAPD Officer Tomas Escalera, who was standing to the rear of his police vehicle. At that time, Miller, Escalera, and LAPD Officers John Pastora and Joseph Lona fired their service weapons at Cruz. Simultaneously, Brady fired two rounds from his beanbag shotgun, and Zuniga fired one round from her beanbag shotgun. Sherry also activated his Taser.



Cruz looking toward Wert, moments before drawing his weapon. Escalera is behind his unit to the right.



Cruz removing the gun while walking toward the street.



Cruz pointing the gun toward Wert and Escalera.



View of Cruz pointing his weapon from Miller's body worn camera.

Cruz fell to the ground after being hit by gunfire. The handgun fell to the top of his left shoulder. The weapon was a BB gun. Officers approached Cruz, removed the BB gun and knife and took him into custody. Cruz was transported to the hospital and treated for gunshot wounds to the upper torso, neck and face. Cruz survived his injuries.

Recovered Weapons



Replica BB Gun



Eight-inch Kitchen Knife

Statement of Wilfredo C.

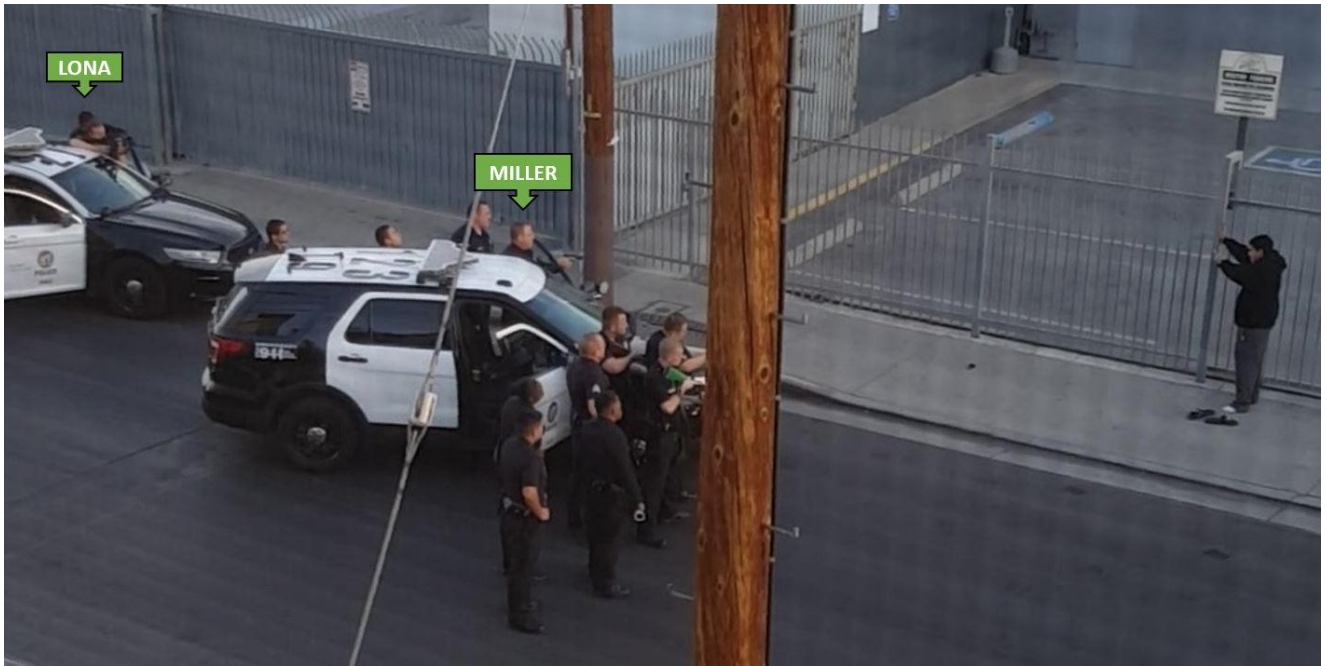
Wilfredo C. was awakened by loud yelling outside his second-floor apartment. Wilfredo C. went to his living room window overlooking Rayen Street and observed officers giving commands to Cruz. Cruz was standing on the sidewalk across the street. Officers ordered Cruz to stop, put his hands up and turn around multiple times. Initially, there was one patrol car and two officers. A short time later, six to seven additional patrol vehicles and twelve to fourteen officers arrived to the scene.

Cruz had his hands raised above his head and was facing the officers. Officers repeatedly ordered Cruz to turn around in English and Spanish. Cruz refused to turn away from the officers.

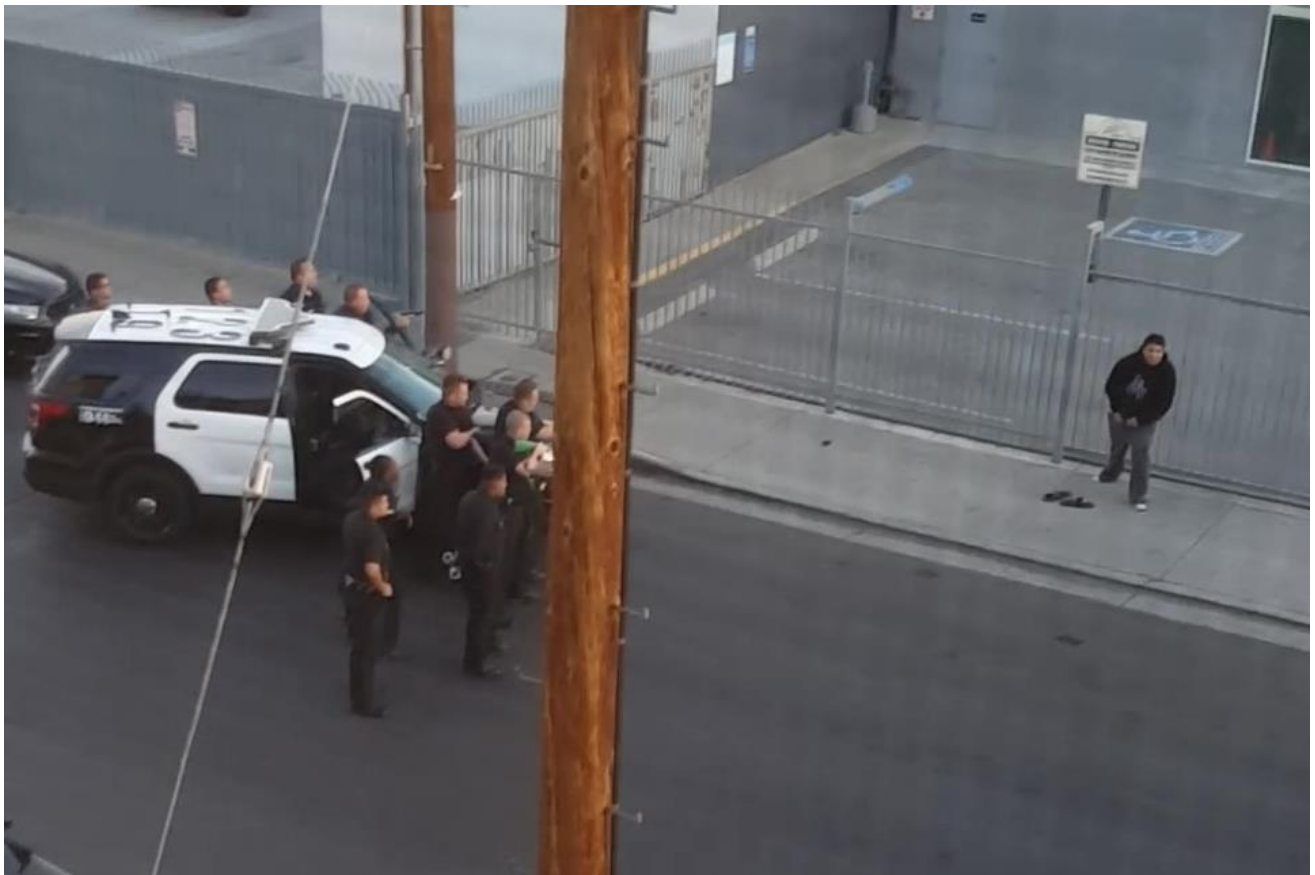
Officers continued to speak with Cruz for the next 20 to 25 minutes, attempting to get him to surrender. Cruz ignored the officers. Instead, Cruz drew a handgun from his waist with his right hand, turned toward officers standing to his left and fired two shots.³ The officers to his left and to his front returned fire. Cruz fell to the ground onto his left side with the gun still in his right hand. Cruz released the gun then rolled onto his back.

Wilfredo C. videotaped the police standoff with his cellphone. The following are still shots taken from the video:

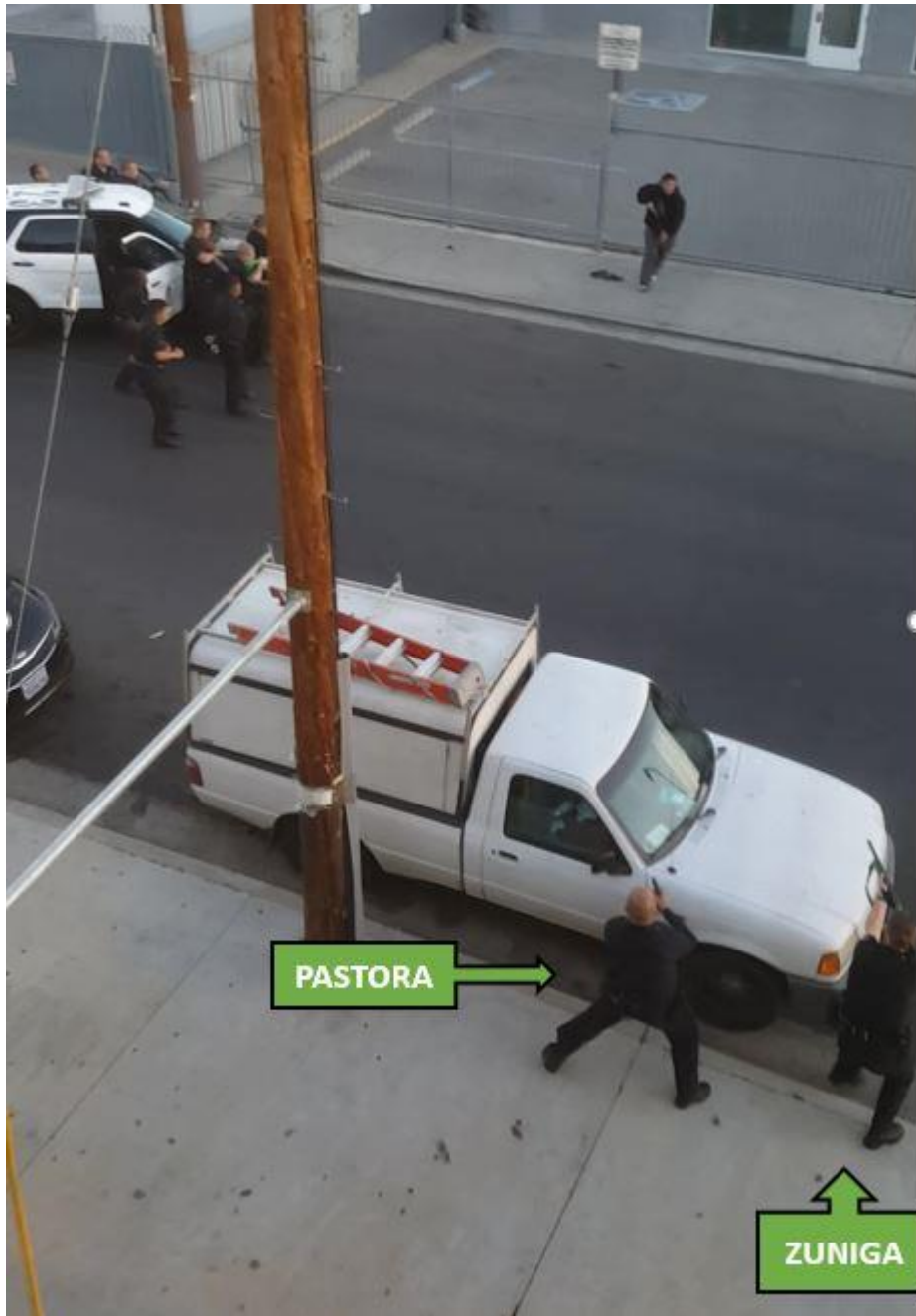
³ Investigators determined that Cruz did not fire his weapon.



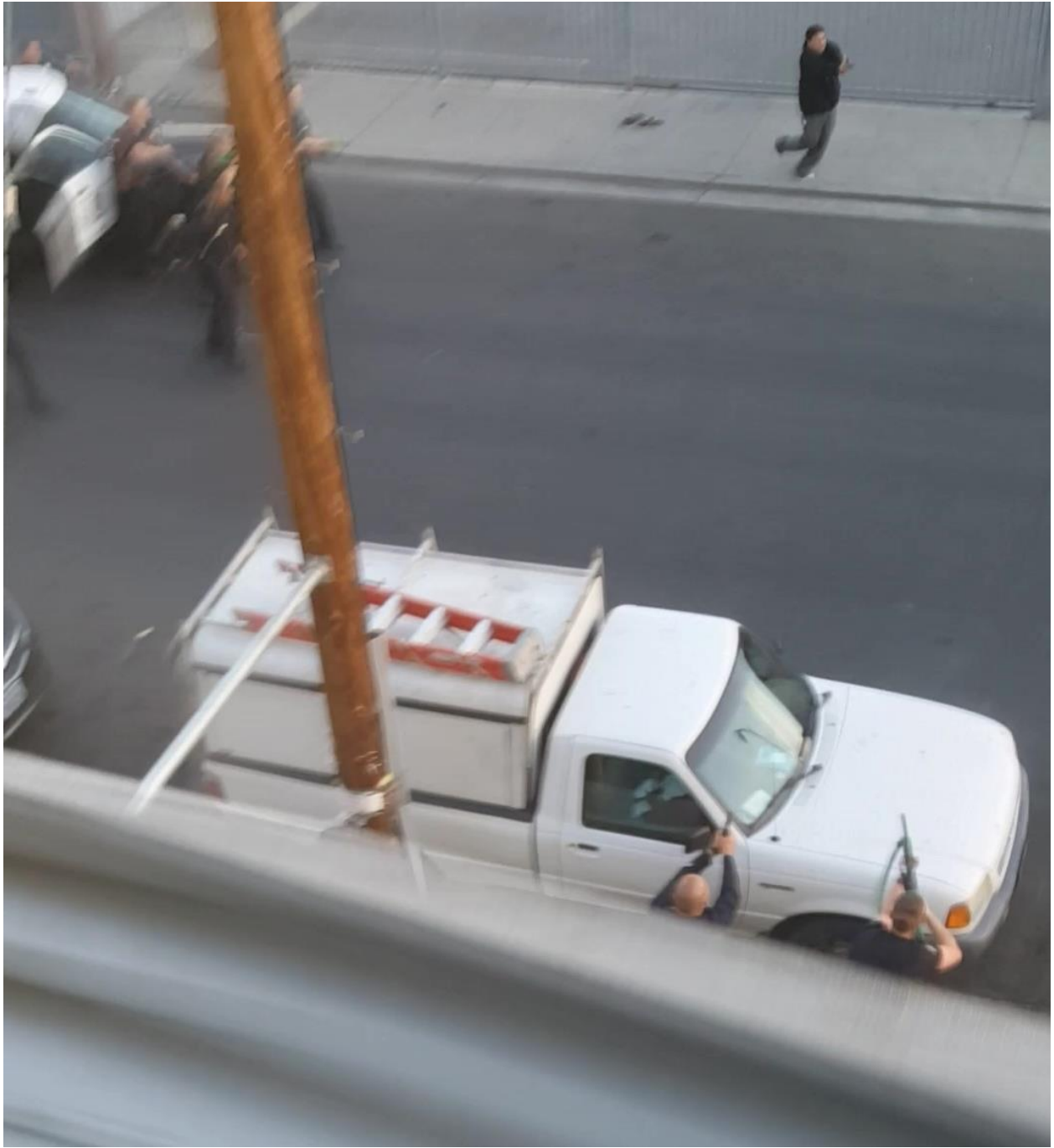
Cruz after making a quarter turn to the west.



Cruz reaching for his weapon.



Cruz drawing his weapon.



Cruz pointing the weapon toward Wert and Escalera.

Statement of Dave Cruz

On May 31, 2017, investigators interviewed Cruz at Providence Holy Cross Medical Center after he waived his Miranda rights. Cruz armed himself with a BB gun because he was depressed and having suicidal thoughts. Initially, he said that he did not remember calling the police. He later admitted making the call.

The police arrived and began talking to him. Cruz realized that the police were trying to help him and were not going to shoot him. Cruz pulled the BB gun from his front waistband hoping that it would cause him to be shot and killed.

LEGAL ANALYSIS

A police officer may use reasonable force to effect an arrest, prevent escape, or overcome resistance of a person the officer believes has committed a crime. Penal Code section 835a. An officer “may use all the force that appears to him to be necessary to overcome all resistance, even to the taking of life; [an officer is justified in taking a life if] the resistance [is] such as appears to the officer likely to inflict great bodily injury upon himself or those acting with him.” *People v. Mehserle* (2012) 206 Cal.App.4th 1125, 1146.

A killing of a suspect by a law enforcement officer is lawful if it was: (1) committed while performing a legal duty; (2) the killing was necessary to accomplish that duty; and (3) the officer had probable cause to believe that (a) the decedent posed a threat of serious physical harm to the officer or others, or (b) that the decedent had committed a forcible and atrocious crime. CALCRIM No. 507, Penal Code section 196. A forcible and atrocious crime is one which threatens death or serious bodily harm. *Kortum v. Alkire* (1977) 69 Cal.App.3d 325, 333.

An officer has “probable cause” in this context when he knows facts which would “persuade someone of reasonable caution that the other person is going to cause serious physical harm to another.” CALCRIM No. 507. When acting under Penal Code section 196, the officer may use only so much force as a reasonable person would find necessary under the circumstances. *Mehserle* at 1147. And he may only resort to deadly force when the resistance of the person being taken into custody “appears to the officer likely to inflict great bodily injury on himself or those acting with him.” *Mehserle* at 1146; quoting *People v. Bond* (1910) 13 Cal.App. 175, 189-190.

Actual danger is not necessary to justify the use of force in self-defense. If one is confronted by the appearance of danger which one believes, and a reasonable person in the same position would believe, would result in death or great bodily injury, one may act upon these circumstances. The right to self defense is the same whether the danger is real or apparent. *People v. Toledo* (1948) 85 Cal.App.2d 577, 580.

The test of whether the officer’s actions were objectively reasonable is “highly deferential to the police officer’s need to protect himself and others.” *Munoz v. City of Union City* (2004) 120 Cal. App.4th 1077, 1102.

CONCLUSION

The evidence examined shows that on April 22, 2017, Cruz was depressed and suicidal and wanted to die at the hands of the police. Cruz armed himself with a BB gun that appeared to be a real semiautomatic handgun. He then called the police and falsely reported that someone had pointed a gun at him and was armed with a knife. He provided the police with a suspect description that matched himself, gave his location, then waited for officers to arrive.

Cruz told officers he had a knife. He then told them he was armed with a gun. Cruz threatened to shoot the police if they tried to tase or strike him with beanbags. Although he later told the officers it was a BB gun, the officers were not going to take him at his word. Cruz began to realize that his plan was not working. The officers were trying to help him rather than shoot him. Cruz decided to escalate the situation, drew his weapon and pointed it toward Wert and Escalera.

The fact that Cruz was armed with a replica gun does not affect the analysis in this case. The *Toledo* court held that if a reasonable person in the same position as the officers, would believe that they were in imminent peril of death or great bodily injury, they may act upon those circumstances, regardless of whether there was actual danger. The BB gun was designed to resemble a real firearm. By his own words, Cruz wanted the officers to believe the gun was real. His sole objective that morning was to elicit a deadly response from the police. Under the circumstances, it was reasonable for the officers to fear that they, and their partners, were in imminent danger of being shot and killed, or seriously injured, by Cruz when he drew and pointed his weapon. The law does not require the officers to wait to see whether Cruz' weapon fired actual bullets.

We conclude that Officer Tomas Escalera acted in lawful self-defense, and Officers Michael Miller, John Pastora and Joseph Lona acted in lawful defense of others, when they used deadly force against Dave Cruz. We are therefore closing our file and will take no further action in this matter.