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September 4, 2019

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LETTER DECLINING PROSECUTION AFTER INVESTIGATION

RE: *Officer-Involved Shooting on February 19, 2018, by Austin Police Department Officers Benjamin Rogers, 7557, Deandre Wright, 7238, Khristof Oborski, 4498, Matthew Henion, 7072, Nicholas Gebhart, 7298, Rafael Rosales, 4421, and Robert Brady, 7594, causing death to Thomas Vincent Alvarez (DOB 06/24/1994)*

Dear Chief Manley:

The Office of the Travis County District Attorney has reviewed the Austin Police Department Special Investigation Unit (“APD SIU”) investigation of the above-referenced matter and concluded our independent review of the officer-involved shooting in which the above-named Austin Police Department Officers fired shots from their weapons that resulted in the death of Thomas Vincent Alvarez. This letter is to inform you of my decision to decline prosecution of criminal charges against all involved officers. My decision does not limit or address administrative action by the Austin Police Department, or other civil actions, where non-criminal issues may be reviewed and where different rules and lower levels of proof apply.

The District Attorney’s Office (“DA”) has reviewed the investigation of the Austin Police Department (“APD”) into this incident, and a copy of this letter will be posted on the DA website.¹

Based upon the evidence available and the applicable Texas law,² I am convinced that a jury following the law would not convict any of the named officers, because the evidence proves the use of force to be justified under Texas law. The following sets forth the facts determined during our review, identifies the applicable legal rules, and presents the analysis underlying my opinion.

¹ <https://www.traviscountytexas.gov/district-attorney/office-divisions/civil-rights>

² In arriving at this conclusion, I have relied upon the legal guidelines governing the use of force/deadly force in Texas as set forth in sections 9.32, 9.33 and 9.51 of the Texas Penal Code, the case authority construing that provision, and the United States Supreme Court case authority governing law enforcement use of force.

I. FACTS AND CIRCUMSTANCES LEADING TO AND SURROUNDING MR. ALVAREZ'S DEATH

Critical to our analysis is the determination of the facts and circumstances leading to and surrounding a shooting incident. In determining these facts and circumstances, we rely on the entire investigative file compiled by APD's Special Investigations Unit³ (SIU) whose primary responsibility is the independent investigation of all shooting incidents in which an APD officer is involved. In determining the credible facts and circumstances leading to and surrounding the shooting incident resulting in Mr. Alvarez's death, we reviewed the entirety of SIU's investigative file to arrive at what we believe is a credible and comprehensive understanding of those facts and circumstances.⁴

Our narration of the facts and circumstances of Mr. Alvarez's death is based on our review of supplements and the written and audio statements made by the officers directly involved in this incident, as well as other officers who were witnesses. Our narration of these facts and circumstances is also based on a review of the statements of those witnesses, audio and video recordings, audio- and text-recorded 911 calls, APD radio traffic recordings, evidence recovered and developed at the scene, and forensic analyses conducted on recovered evidentiary items. Below, we set forth the facts and circumstances surrounding Mr. Alvarez's death based on our review of the credible evidence and information developed in the SIU investigation, including the results of forensic examination, testing, and analyses.

A. The Initial Emergency 911 Call and Dispatch of Officers

On February 19, 2018, at 5:30p.m. Elizabeth Sanchez (6/26/96) called 911 from her home at 4812 Nuckols Crossing Road. Ms. Sanchez reported concern that her friend was on her way to the house, and that her friend was being followed "by someone that lives with us." She explained that she only knew the follower by his first name, Thomas, and that he had only recently moved in. Her concerns arose from the fact that she believed Thomas was using drugs, and had previously caused disturbances at the residence.

From the time-stamped, computer-generated records known as Computer Aided Dispatch ("CAD"):

Comments					Comments	
Date	Time	User	Type	Conf.		
2/19/2018	17:31:14	AP5220	Response			FEM REQ OFFCRS
2/19/2018	17:31:38	AP5220	Response			WAITING TO CONFIRM LOC
2/19/2018	17:32:09	AP5220	Response			STS HER ROOMMATE IS FOLLOWING HER FRIEND TO THIS LOC
2/19/2018	17:32:29	AP5220	Response			STS HES POSS ON DRUGS...
2/19/2018	17:32:53	AP5220	Response			COMP NOW STS THAT MALE JUST HAD PHY DIST WITH OTHER MALE ROOMMATE
2/19/2018	17:33:16	AP2668	Response			IS COMP WITH THEM? VEH DESC?
2/19/2018	17:33:26	AP5220	Response			***COMP NOW STS HE HAD ROOMMATES HOSTAGE... AND WOULDNT LET THEM LEAVE.... THEY HAD TO ESCAPE***
2/19/2018	17:33:29	AP5220	Response			[Notification] [AUSTIN PD]-Problem changed from Disturbance Other to -Disturbance HS by AUSTIN PD
2/19/2018	17:33:32	AP5220	Response			MALE ONSCENE

As Ms. Sanchez was making the call, she saw (and reported) the arrival of Thomas in a yellow taxi cab, which then parked in front of the house. She was unable to relay the cab number to the 911-call taker, and was unsure at that stage whether Thomas was armed at that moment, but stated "No weapons that we know of, but he most likely has a gun on him."

³ APD's Special Investigations Unit (SIU) has the primary responsibility for conducting all "criminal investigations involving all sworn peace officers alleged to have committed a criminal offense within the jurisdiction of the Austin Police Department." See <http://www.austintexas.gov/department/special-investigations>.

⁴ This letter will refer to various items reports and information gathered in the SIU investigation, and these items will be released in redacted form in a press release available simultaneously with the public dissemination of this declination letter.

Ms. Sanchez then reported that the police had arrived, and soon after that the 911 call captured sounds of a disturbance, which was reflected in the CAD:

2/19/2018	17:38:26	AP5220	Response	THE YELLOW CAB STILL ONSCENE
2/19/2018	17:38:48	AP8732	Response	Channel Marker Activated
2/19/2018	17:38:48	AP5220	Response	STS APD ONSCENE
2/19/2018	17:38:55	AP5220	Response	FEM SCREAMING STOP...
2/19/2018	17:39:00	AP5220	Response	YELLING STOP..
2/19/2018	17:39:11	AP5220	Response	HEARING MALE CURSING IN BACKGROUND

Ms. Sanchez later gave a recorded statement to police, in which she said: “I saw the cop car pull up, he stepped out of his car, he had the gun pointing at them, and I saw the... the taxi driver get out and he had his hands up. Thomas had put his hands up as well and I don’t know what, I just see like they screamed at him.” She said she was afraid that Thomas would make a “wrong move” and get shot by the police.

As reflected in the CAD, several police officers had been dispatched to the address:

Resources Assigned						
Unit	Primary Flag	Assigned	Disposition	Enroute	Staged	Arrived
F503	N	17:32:34	0 - Reassigned call	17:32:34		
F507	N	17:35:31	1 - Report Written	17:35:31		17:48:18
F680	N	17:37:10		17:37:10		

Those officers were Leonardo Cardenas, #6761, (Unit F503) who arrived at 6:07, Officer Erin Littig, #6798, and Robert Mattingly, #8564, (riding together in Unit F401), and Officer Eric Burnsed, #6033, (Unit F680).

B. Initial Contact with Thomas Alvarez

Leonardo Cardenas was the first officer to respond, dispatched to the scene on a “Disturbance Hotshot,” which means rapid response and driving with lights and sirens. Cardenas said that as he got close to the address, driving northbound on Nuckols Crossing, he saw a yellow cab with its lights on, and it was “parked on the west curb line facing south bound [sic] in front of 4812 Nuckols Crossing Road.”⁵ He drove up behind the cab and exited his vehicle, pointing his weapon because he believed the suspect inside the cab could be armed with a firearm.⁶

At that time, Officer Cardenas gave commands for the driver and passenger to show their hands, and while the driver complied, putting both hands out of his window, the passenger instead opened the front door and exited the vehicle. Officer Cardenas gave further instructions to the passenger, later identified as Thomas Alvarez, to get back into the car. He did not comply, instead reaching into the vehicle, at about the same time that the driver exited through the driver’s door. Alvarez then got back into the car, moved over to the driver’s side, and drove off.

Officer Cardenas’s Dash-Mounted Automated Video Camera (“DMAV”) captured this sequence of events.

⁵ See Statement of Leonardo Cardenas (“Cardenas Statement”), February 20, 2018.

⁶ Officer Cardenas said he specifically asked if the suspect was armed and was told, via the 911 caller, he “possibly” was. See Cardenas Statement at p.1.



Figure 1—DMAV screen capture depicting the front of Officer Cardenas's patrol unit, the taxi, and, circled on the right side of the image, Thomas Alvarez standing by the open passenger door.

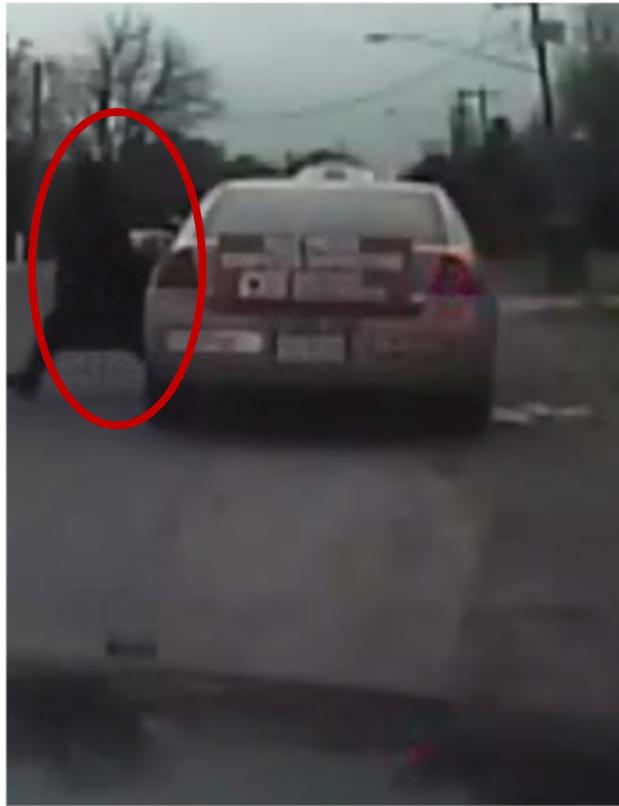


Figure 2—DMAV screen capture depicting the cab driver, Driss El Jazouli, exiting his taxi after Mr. Alvarez had climbed back into the passenger side.



Figure 3—DMAV screen capture depicting Mr. El Jazouli on the ground in front of Officer Cardenas's patrol unit (lower right), and Thomas Alvarez driving away in the taxi cab (upper left).

Mr. Alvarez drove away at 5:39:02p.m. Officer Cardenas stayed at that location to identify the cab driver, Driss El Jazouli, but he first advised police dispatch “a Hispanic male wearing a black hoodie sweater had taken the cab and turned eastbound on Stassney Lane.”⁷

C. Statement of Taxi Driver Driss El Jazouli

Mr. El Jazouli gave Austin Police video-recorded and written statements that same day, February 19, 2018. Mr. El Jazouli, who had been working for ten years as a contractor at Yellow Cab, was dispatched at around 5 p.m. that day to pick up a fare at 3300 Parker Lane, just east of I-35, where Thomas Alvarez was waiting.⁸ Mr. El Jazouli said he immediately “did not feel comfortable with the suspect riding in the back,” because of the way he was dressed and the way he approached the car, and so made him sit in the front passenger seat.

Once in the car, Mr. El Jazouli saw a bulge in Mr. Alvarez’s front left pocket, which he suspected might be a gun. He also saw Mr. Alvarez with three cell phones. Mr. Alvarez, he said, seemed not to know where he wanted to go.

I asked him where he wanted to go. The suspect told me to make turn and go the motel. I started to drive and I asked him for an address. The suspect did not give me an exact address and I asked him again. It seemed to me like the suspect wanted me to drive him around and had no real destination. I told the suspect to give me an address or location or get out my cab.

They continued to drive around central and east Austin, until at one point Mr. Alvarez spotted a dark green pickup truck that he recognized. He yelled and waved at the truck and told Mr. El Jazouli to follow it, which he did. In fact, he followed it all the way to Nuckols Crossing.

As we were driving the suspect takes his seatbelt off and I took off my seatbelt because he made me nervous because of the way he acting and he I believe he was on some type of drug. We arrived at 4812 Nuckols Crossing Rd. the truck pulls into the driveway.

Soon after, the police arrived and Mr. Alvarez “started to freak out.” When Officer Cardenas pointed his gun at them, Mr. El Jazouli says he complied so as not to get shot, but when Mr. Alvarez got out of the car and then back in, he told Mr. El Jazouli to “just drive, just drive.” It was at that point Mr. El Jazouli made the decision to get out of the vehicle, leaving Mr. Alvarez inside.

Officer Cardenas informed police dispatch that Mr. Alvarez had fled in the taxi, and patrol officers were alerted to be on the lookout for the cab, which was being tracked by the cab company, using GPS and updating APD as to its location. Officer Marcus Gonzalez, 8401, (Unit F402), first spotted Mr. Alvarez at the intersection of Boggy Creek Drive and South IH-35 service road, northbound. Officer Gonzalez got behind the cab and “activated my emergency lights in attempt to perform a felony car stop on the vehicle.”⁹

However, Mr. Alvarez continued driving, taking William Cannon Boulevard to South Pleasant Valley Road, and eventually turning westbound onto Edge Creek Drive. The cab slowed for a moment and Officer Gonzalez used the in-car microphone to give the driver, Mr. Alvarez, verbal commands to pull over and exit the vehicle. He did not do so, but instead resumed driving west on Edge Creek Drive before turning southbound onto Hidden Brook Court, and then circling around the cul-de-sac and back out towards Edge Creek Drive again. However, while attempting to exit the neighborhood, Mr. Alvarez was stopped by the sliding gate. Moments after he stopped, Mr. Alvarez opened the driver’s side door and officers immediately saw that he was holding a firearm.¹⁰

⁷ See Cardenas Statement.

⁸ See Sworn Statement of Driss El Jazouli (“El Jazouli Statement”), February 19, 2018.

⁹ See Sworn Statement of Marcus Gonzalez (“Gonzalez Statement”), February 19, 2018.

¹⁰ At this point, all of the DMAs of the responding officers captured numerous exclamations of officers seeing a gun, as well as continued and repeated commands for Mr. Alvarez to drop the gun.

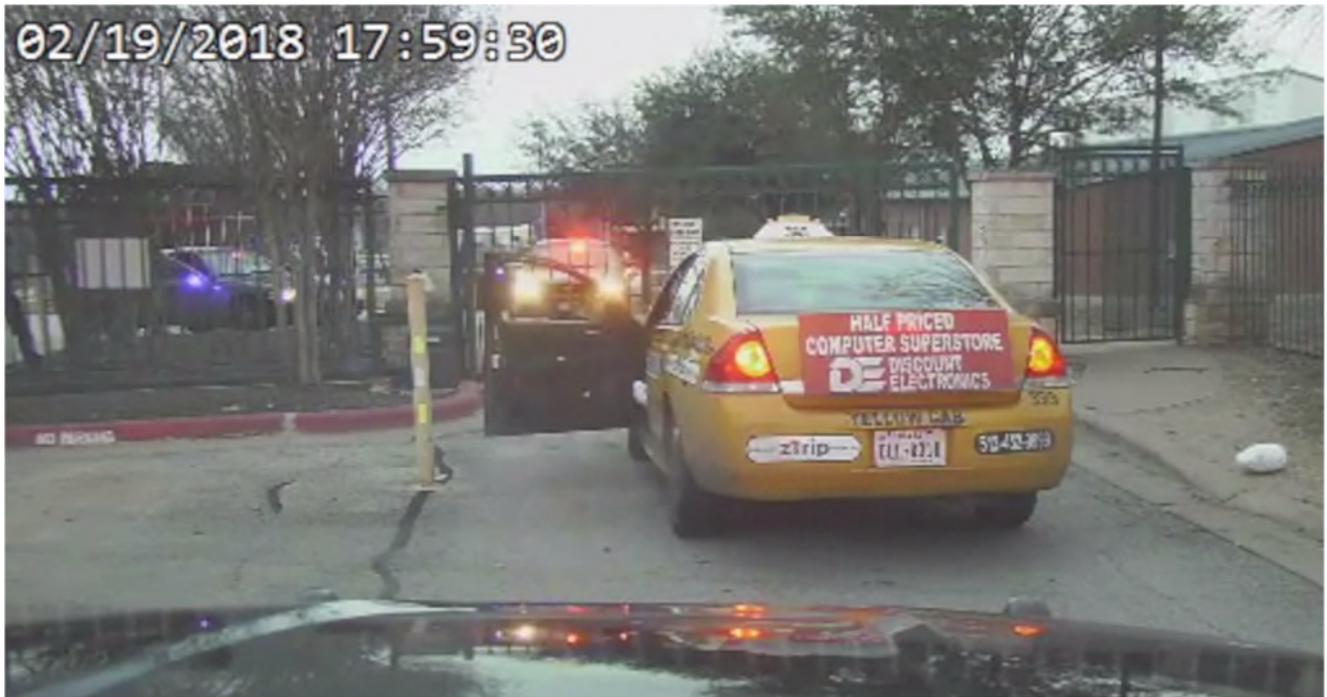


Figure 4—DMAV screen capture from the patrol unit of Officer Gonzalez, showing the stopped taxi cab and its open door.

Soon after stopping, Mr. Alvarez pointed the gun upwards out of the open door:



Figures 5 and 6—DMAV screen capture from the patrol unit of Officer Gonzalez, showing Mr. Alvarez brandishing the gun through the taxicab's open door.

Officer Gonzalez's patrol unit prevented Mr. Alvarez from backing up, and the community's gate, as well as the patrol units that had stopped directly opposite the taxi on the other side of the gate, effectively trapped Mr. Alvarez.



Figure 7—DMAR screen capture depicting Officers Keston Campbell, 7203, and Nicholas Gebhart, 7298, approaching taxi cab immediately after arriving at 4900 Edge Creek Drive.

Thirty-three seconds after opening the door, at 5:59:43p.m., Mr. Alvarez closed it. At that point, APD officers surrounded the taxi, and Corporal Eric Burnsed, 6033, a trained hostage negotiator, took on the responsibility of hailing Mr. Alvarez from a patrol car’s loud hailer system, attempting to get him to drop the weapon and surrender.¹¹

Multiple statements were given by police and civilian witnesses, and are addressed in the following section of this letter. However, given the importance of Corporal Burnsed’s role and his direct contact with Mr. Alvarez, his statement will be addressed here.

As noted previously, Eric Burnsed, a corporal/detective with APD for three years and an APD officer for ten years with hostage negotiating training and experience, took on the responsibility for negotiating with and talking to Mr. Alvarez.

Corporal Burnsed began that task by telling Mr. Alvarez to “put the firearm down, make his hands’ [sic] clear, and free of weapons.¹² Throughout his hailing Mr. Alvarez, Corporal Burnsed was able to see Mr. Alvarez, and that included being able to see a gun in his right hand and a cell phone in his left. He also heard Mr. Alvarez attempt “several times to scream something but there was too much ambient noise for me to make out what he was saying.”

¹¹ See Statement of Eric Burnsed (“Burnsed Statement”), February 19, 2018.

¹² See Burnsed Statement, p.2

To establish direct communication with Mr. Alvarez, Corporal Burnsed told him to call 911.

I advised the suspect to call 911 so we could get his telephone number and I could call his cell phone directly. I told the suspect if he understood to tap the brakes, which he did. When I followed up asking if he was on the phone with 911 he again tapped the brakes as if responding "yes". I took this as compliance but after a prolonged period with no updates from 911 it did not appear as if the suspect actually called 911. I contacted APD dispatch and asked if any 911 operators had received a phone call and they responded they were awaiting it but none had been received from the suspect.

It appeared to Corporal Burnsed that Mr. Alvarez was just stalling for time, so he obtained Mr. Alvarez's phone number from the original complainants. Mr. Alvarez answered, and wanted to know how Corporal Burnsed had his number. As they talked, the officer could tell that Mr. Alvarez's words were slurred and he was not coherent in his speech.

While on the phone I told the suspect to put the firearm down and that the incident was not a huge deal and the suspect told me, "they are going to take it from me." I advised him what he meant and he said "my gun".

Moments later, Mr. Alvarez hung up. Corporal Burnsed called him back and Mr. Alvarez answered, but hung up again when both men heard a hissing sound, (like "a tire was deflating") that Corporal Burnsed later said seemed to "rattle" Mr. Alvarez. Further attempts to call Mr. Alvarez went unanswered.

I therefore transitioned back to hailing the suspect from the patrol car's PA. While hailing the suspect he remained uncooperative. During this period the suspect took the pistol placing it in the window of the Taxi pointing in the direction of officers. He did this several times at one point he flagged (pointed to the weapon) both my team and I. From his position he could have easily shot any one of us. As I had the PA and no clean shot myself I got onto the radio and advised he was actively flagging officers with a pistol. It was at this time a volley of rounds were fired at the car.

Corporal Burnsed was able to see bullet holes in the car around the driver's door, but he also saw Mr. Alvarez still moving inside. The corporal began hailing Mr. Alvarez again, telling him to drop the gun and show his hands. He also advised Mr. Alvarez that if he was injured he should drop the gun and open the driver's side door. Mr. Alvarez did not do so, and Corporal Burnsed stated that he could still see "the flash of something in his right hand."

At about that time, APD's SWAT team arrived. Corporal Burnsed again hailed Mr. Alvarez and advised him that police would render aid if he put down his weapon. However, Mr. Alvarez instead waved the gun out of the window in the direction of police officers around him. As a result, officers fired a second volley, six seconds after the first volley, at 6:42:05p.m.

Soon after, SWAT took over and Corporal Burnsed moved back, away from the taxi and Mr. Alvarez. For six minutes, police continued to hail Mr. Alvarez but got no response. A third, and final, volley of shot was fired after officers observed movement and a gun. All three volleys were captured on multiple DMAVs, and by APD's helicopter, Air 1.

E. Summary of Timeline of Events

TIME (P.M.)	EVENT	SOURCE
5:30:59	Initial 911 call from Elizabeth Sanchez	CAD 180501270
5:33:43	Ms. Sanchez reports taxi cab's arrival	CAD 180501270
5:37:02	Ms. Sanchez advises 911 that suspect "might be carrying a gun"	CAD 180501270
5:38:18	Officer Cardenas arrives at Nuckols Crossing and stops behind parked taxi	Cardenas DMAV
5:39:02	Mr. Alvarez drives away in taxi cab	Cardenas DMAV
5:59:00	Mr. Alvarez comes to a stop at 4900 Edge Creek Drive	Gebhart/Campbell DMAV
6:41:56	First volley of shots fired	Gebhart/Campbell DMAV
6:42:05	Second volley of shots fired	Gebhart/Campbell DMAV
6:48:12	Third volley of shots fired	Gebhart/Campbell DMAV

F. Officers Who Fired Their Weapons ("Subject Officers")

NAME	WEAPON	FIRST VOLLEY	SECOND VOLLEY	THIRD VOLLEY
Benjamin Rogers	Rifle		✓	✓
Deandre Wright	Rifle	✓	✓	✓
Khristof Oborski	Rifle			✓
Matthew Henion	9mm pistol	✓		
Nicholas Gebhart	9mm pistol			✓
Rafael Rosales	Rifle			✓
Robert Brady	Rifle	✓	✓	✓

D. Path of Pursuit by Officer Marcus Gonzalez

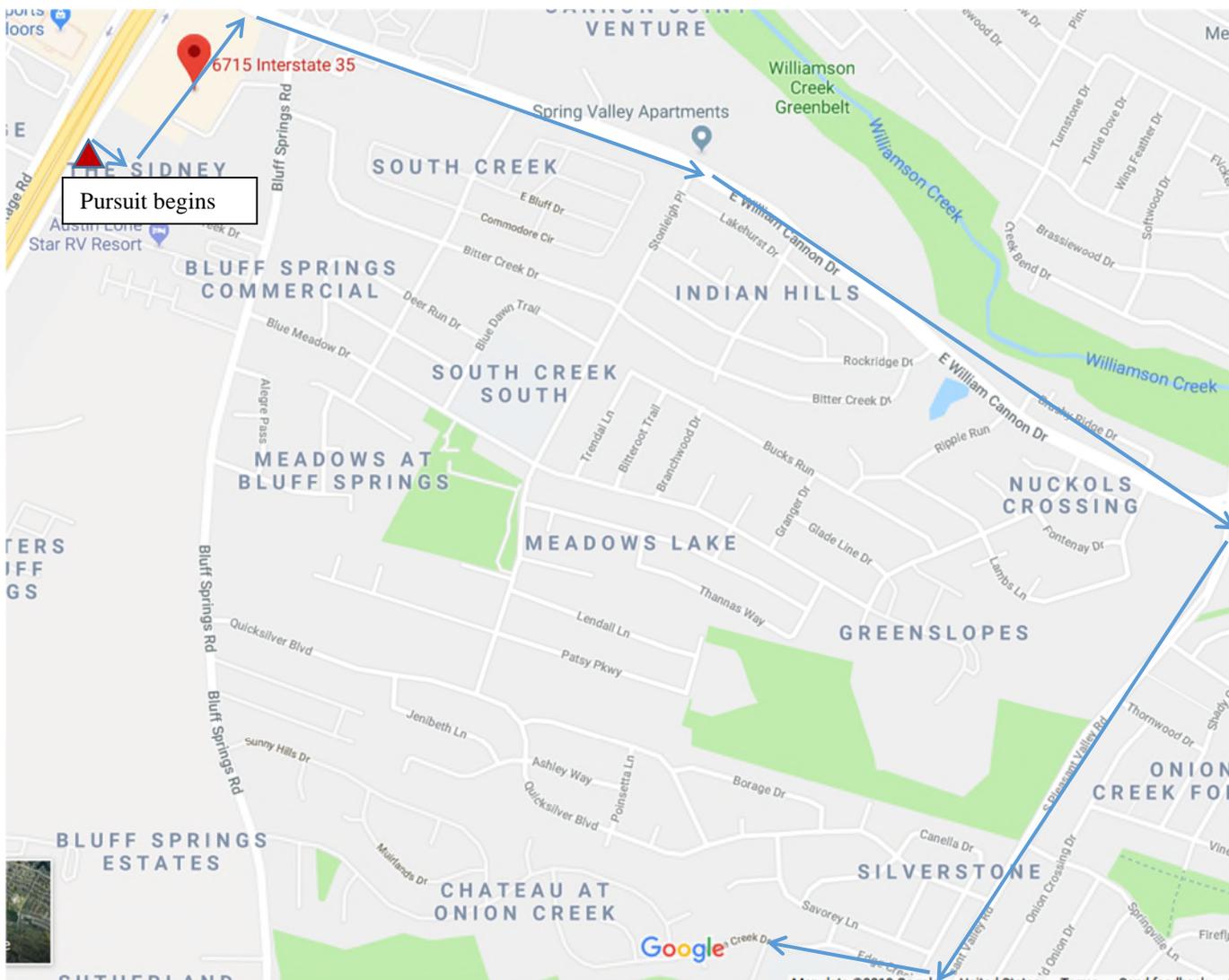


Figure 9—Map showing the path of Officer Gonzalez’s pursuit of Mr. Alvarez, from the frontage road of IH 35 toward scene of shooting.

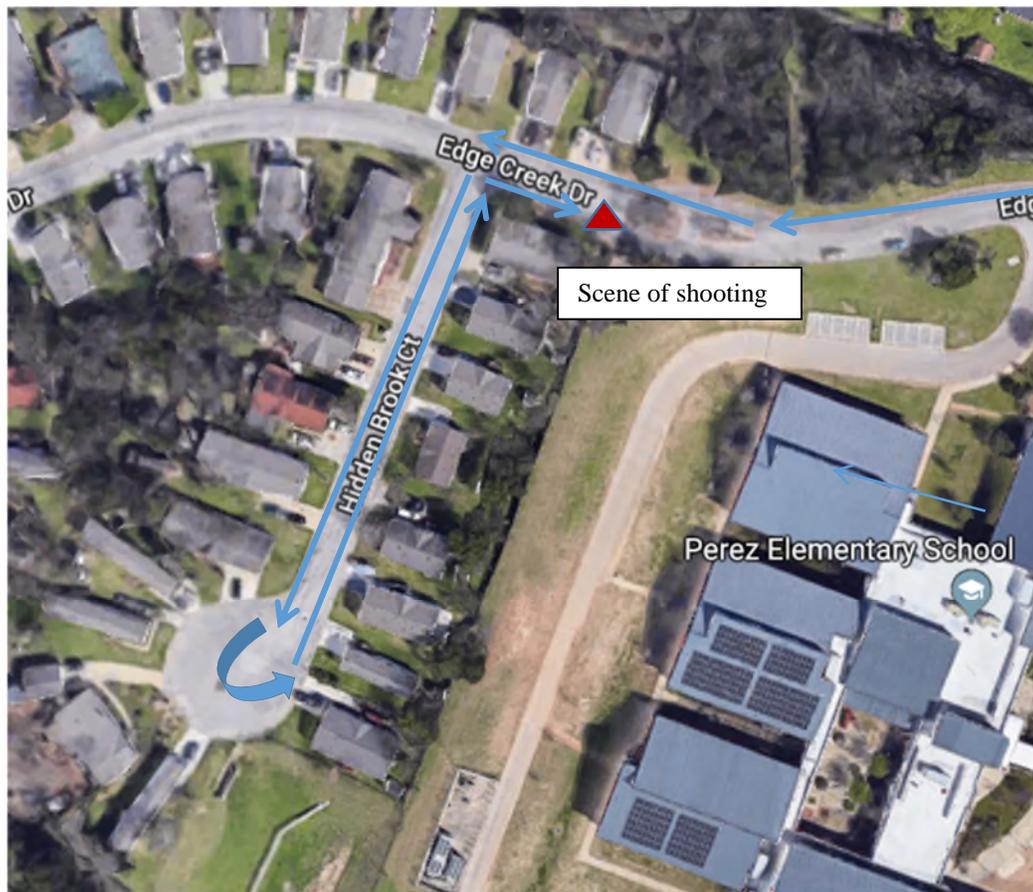


Figure 10—Map showing the end of the pursuit and scene of shooting.

II. POST-INCIDENT INVESTIGATION

A. Witness Statements

As part of their investigation, APD’s Special Investigations Unit took statements from multiple eye-witnesses at the scene of the shooting, most notably the police officers who fired their weapons (“subject officers”), other officers who witnessed events, and also some eye witnesses.

(i) Statements of Subject Officers

(a) Benjamin Rogers, 7557

On March 1, 2018, Officer Benjamin Rogers gave an interview to SIU detectives. Officer Rogers said he was an army veteran (from 2005-2011), and did see combat during that time. At the time of this incident, he was assigned to the David 600 shift (evening patrol), his call sign being David 610. He said he joined the pursuit at about the time the taxi turned into the HEB parking lot. He said he was aware that Mr. Alvarez was in possession of a firearm, and got further updates to that effect as the chase continued. He also explained his reason for going to the scene:

“I don’t know how many units are on scene with the suspect, what kind of, uh, officer manpower they have, but I know I’m close and I feel I have a responsibility to go help out fellow officers who surely

need more coverage on a suspect with a gun that's being violent and aggressive"¹³

Officer Rogers described his position at the scene, and what he did next: "I pull up on the east side of the gates. I see there's, uh, several officers, and a g- in negotiating stance, probably only about 10, 15 yards or so from the suspect with little to no cover. Uh, I decide to go ahead and grab my rifle, so I have a superior weapon to the suspect's instead of making it an even field for my protection, and for other officers' protection. Moreover, since I am still at my car, and I have my heavy vest, I decide to go ahead and throw it on for further protection for myself. Then I make my way over to the negotiation team which is, um, Officer (Chapman) was speaking with the suspect, and they all had pistols. Nobody else had a rifle over there yet, so I decide that I would be the best lethal coverage for them while they try to speak with the suspect since I had the armor and I had the highest power weapon with the best accuracy. So I provide cover for them for maybe a couple minutes until, uh, then I ask for a shield because there's not very good protection for those guys or for myself."¹⁴

From where he stood, Officer Rogers had a good view of Mr. Alvarez: "I - the - see the suspect. He is sitting right there in the driver's seat with a gun to his head, and it is obvious that the minorest of movement, he could point it at us and shoot any one of us. Especially with the large cluster of officers, it wouldn't be hard to hit one of us."¹⁵

Officer Rogers confirmed with SIU detectives the position and view that he had of the taxi.

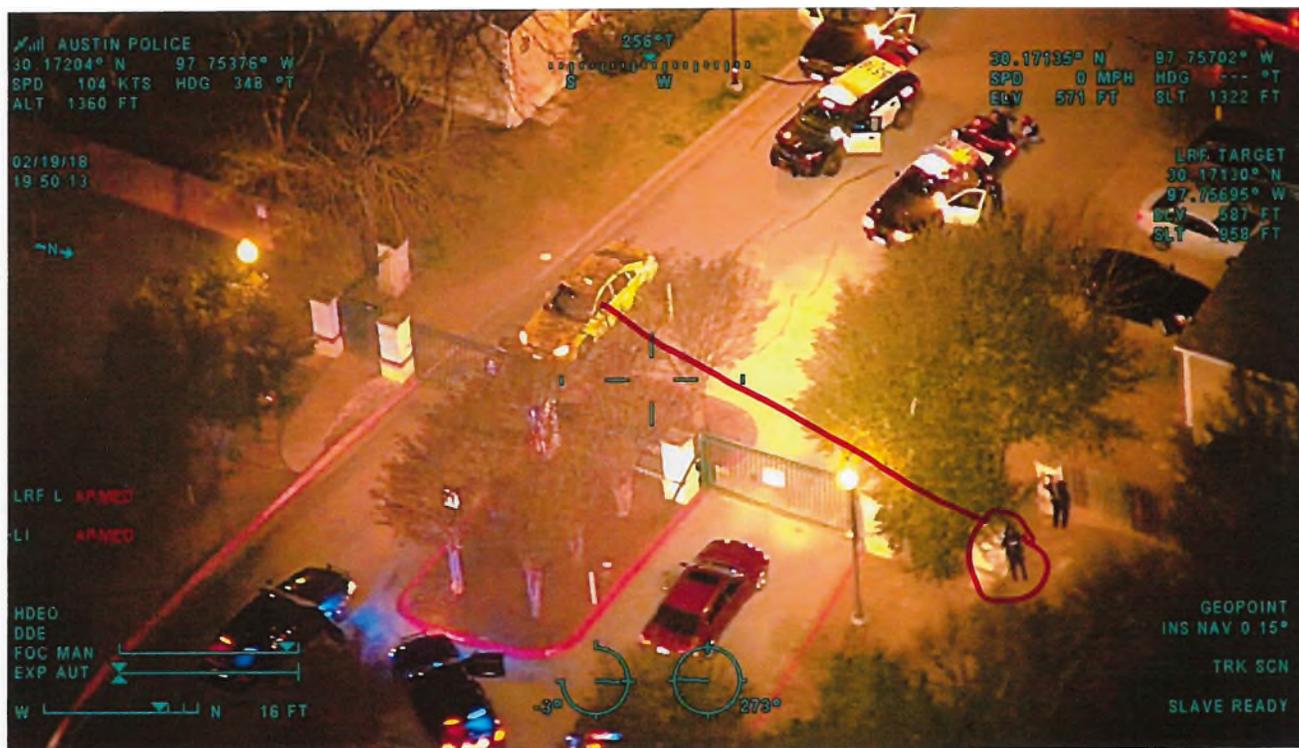


Figure 11 —Aerial view of shooting scene, showing position of Officer Rogers (circled).

¹³ See Sworn Statement of Benjamin Rogers ("Rogers Statement"), March 1, 2018, lines 466-470.

¹⁴ See Rogers Statement, lines 475-489.

¹⁵ See *id.*, lines 475-489.

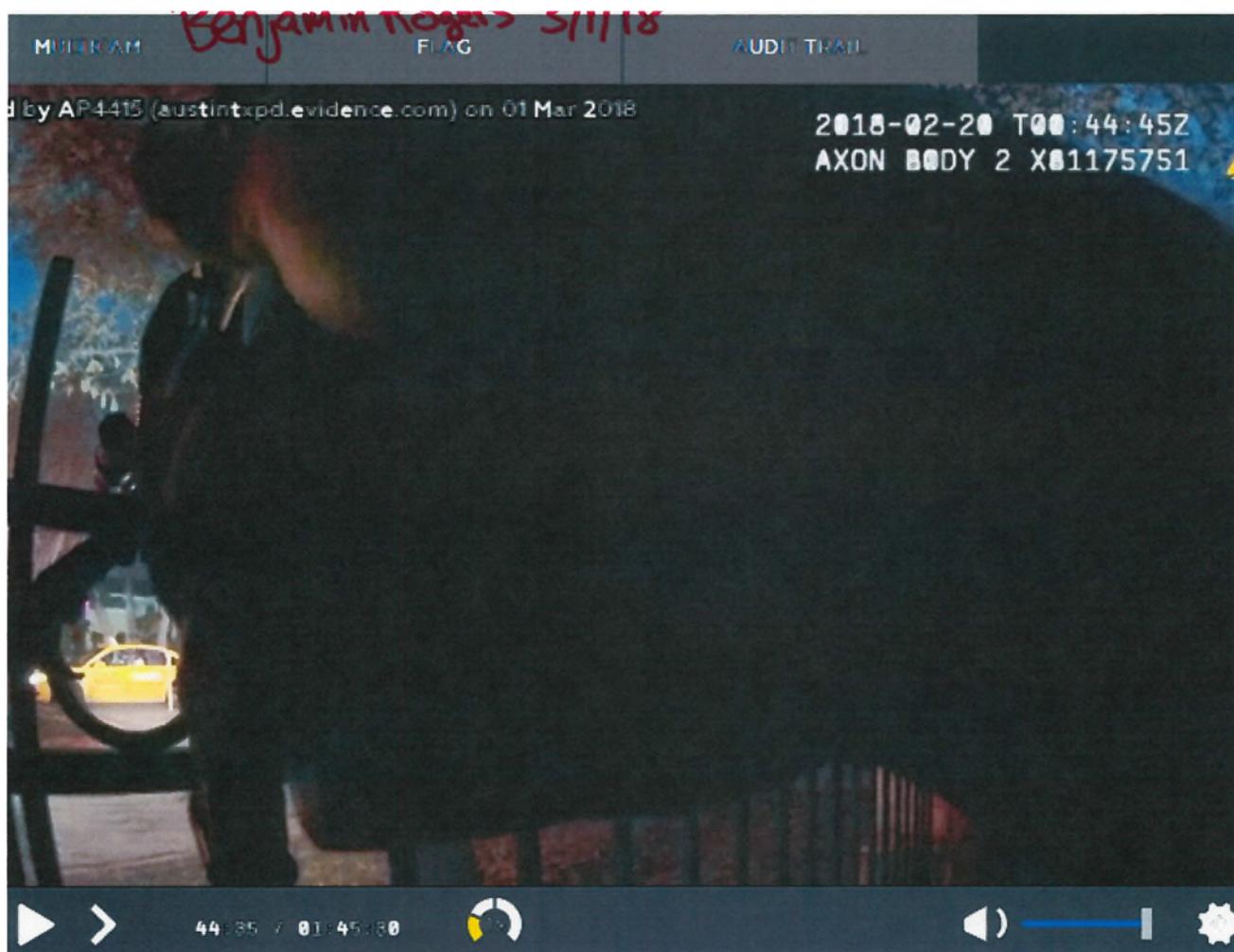


Figure 12 —View from bodycam of Officer Rogers, showing his view of taxi (lower left).

Officer Rogers described his position (one he shared with Officer Padalecki) this way: “So we’re at a - a 90-degree angle to the suspect. Um, we can see straight through the driver’s window. It is an iron gate with bars, but you can see through it well, especially when you are right up next to it. It is a - it’s a good position to rest your - your rifle on for an extended amount of time for good support.... It is almost the perfect height for both of us. We’re both about six feet tall.”¹⁶ He also made sure that it was a safe place to fire from “I see that the backdrop behind the vehicle is, like, a grass, um, kinda walkway for a long, long ways behind some mobile homes. So I know if - if there was a shooting situation that we’re not gonna be shootin’ into these residences from that point.”¹⁷

Officer Rogers explained that he and Officer Padalecki took turns in that position, five to ten-minute stints, so they would not get too tired constantly watching Mr. Alvarez. Officer Rogers also described the gun that Mr. Alvarez held: “I could tell it was a semiautomatic. Um, I think it was two-tone black and silver, but I can’t remember 100% for sure.”¹⁸ He described what he saw from that position: “So towards the beginning, he throws that phone out. This is to the best of my memory. I - I can’t remember for sure, but I think he’s on the phone again later. Um, they ask him to call 911. He gets on the phone. He doesn’t respond, but he’s on the phone for a while. Puts the phone down for - at several different

¹⁶ See Rogers Statement, lines 725-734.

¹⁷ *Id.* at lines 756-759.

¹⁸ See Rogers Statement, lines 578-579.

points he picks up a phone, puts it to his ear, and puts it down. Then he would go back and forth between the phone and the gun, the phone to his ear, gun to his head. In addition, for most of the daylight, uh, section, it was very clear what he had pointed at his head, or up to his ear. So as the sun goes down, it gets darker. Uh, we asked for the overhead lights to be turned down. Um, at one point I put my spotlight on him so I can see inside the vehicle better, which greatly enhanced my vision. And he's basically just doing that the whole time, the phone and gun back and forth to his head."¹⁹

Officer Rogers also saw Mr. Alvarez point the gun out of the window: "At one point he does bring the gun outside the vehicle and just quickly takes it, swings it outside the window, pointing it back towards the, uh, officers on the west side, and quickly draws it back in. Um, I think just a little bit before that, he had started getting more agitated, put the car in reverse, started backing up, like, he was gonna try to maybe maneuver out of there."²⁰

Officer Rogers described how Officer Padalecki was in the post position when, a little while later, the first volley of shots was fired. After that, he looked past Officer Padalecki at Mr. Alvarez: "it looks like he's trying to come back out the window to engage officers and, um, there's kind of a lull in the officers' gunfire as he's starting to come back towards the window with the gun. In addition, I feel like they probably can't see that he's coming back out the window with the gun because we have the best vantage point through that window. And as he's starting to point it towards me and (Padalecki), I feared that he might shoot at us next or turn it back over towards those officers and shoot at them either - again cause I don't know if he shot or not, or maybe return fire this time, putting them in further danger of being - reacting to his action. Therefore, I drew my rifle. I take aim at the suspect and I fire one round, and, uh, o- other officers start firing at about the same moment.... And the suspect this time, as I'm watching him, immediately falls back into the car, and the gun goes down or his - his hands go down where I can't see the gun anymore."²¹

Officer Rogers explained that his rifle had a department-issued red dot sight, which he aimed at Mr. Alvarez's head. And after he'd shot, Mr. Alvarez was "moaning and writhing" inside the car as the negotiator pleaded with him to put the gun away. "Finally he kinda sits back and gathers himself a little bit, just kinda comes to a - a resting pause seated inside the cab again. And I see the - the gun come back up in his right hand again, and he - he's kinda holding it to his head again like this. And he takes a big, deep breath and he turns his head over. His eyes get real big and he just, like, comes straight out towards us a third time, and, uh, comes out, I believe all the way out the window with it, uh, towards me and (Padalecki), and then towards the guys behind him again on the west side. And that's when the last, uh, volley of gunfire happened."²² Officer Rogers said that this second time, he fired four shots at Mr. Alvarez, and did so in fear that Mr. Alvarez was about to shoot at him, and his colleagues.

(b) Deandre Wright, 7238

On March 6, 2018, Officer Deandre Wright gave an interview to SIU detectives. He said he was armed that evening with his personally owned rifle, that is on a department-approved list and that he was permitted to carry for work. The sight on the gun have a red-dot in the optic that only the user (Officer Wright) can see, and no kind of laser.

Officer Wright said that on the date of the incident, he'd seen there was a "robbery hotshot call" near to

¹⁹ *Id.* at lines 858-870.

²⁰ *Id.* at lines 913-918.

²¹ *Id.* at lines 1026-1043.

²² *Id.* at lines 1204-1212.

where he was driving in his unmarked police vehicle.²³ He continued on his way to pick up another officer from the south substation, but once that was done he was driving north on Congress Avenue and made the decision to help, as a plain-clothes officer, to tail the vehicle and assist generally.²⁴ He heard over the radio where the suspect vehicle was headed, and made the decision to try to intercept it based on his knowledge of the area. At around that time the taxi came to a stop at its final location, and Officer Wright headed to that location. He stated that by that time he was aware that the suspect, Mr. Alvarez, was in possession of a firearm.²⁵

At the scene, Officer Wright took a position behind the taxi, and this was visible from the APD helicopter, Air 1.

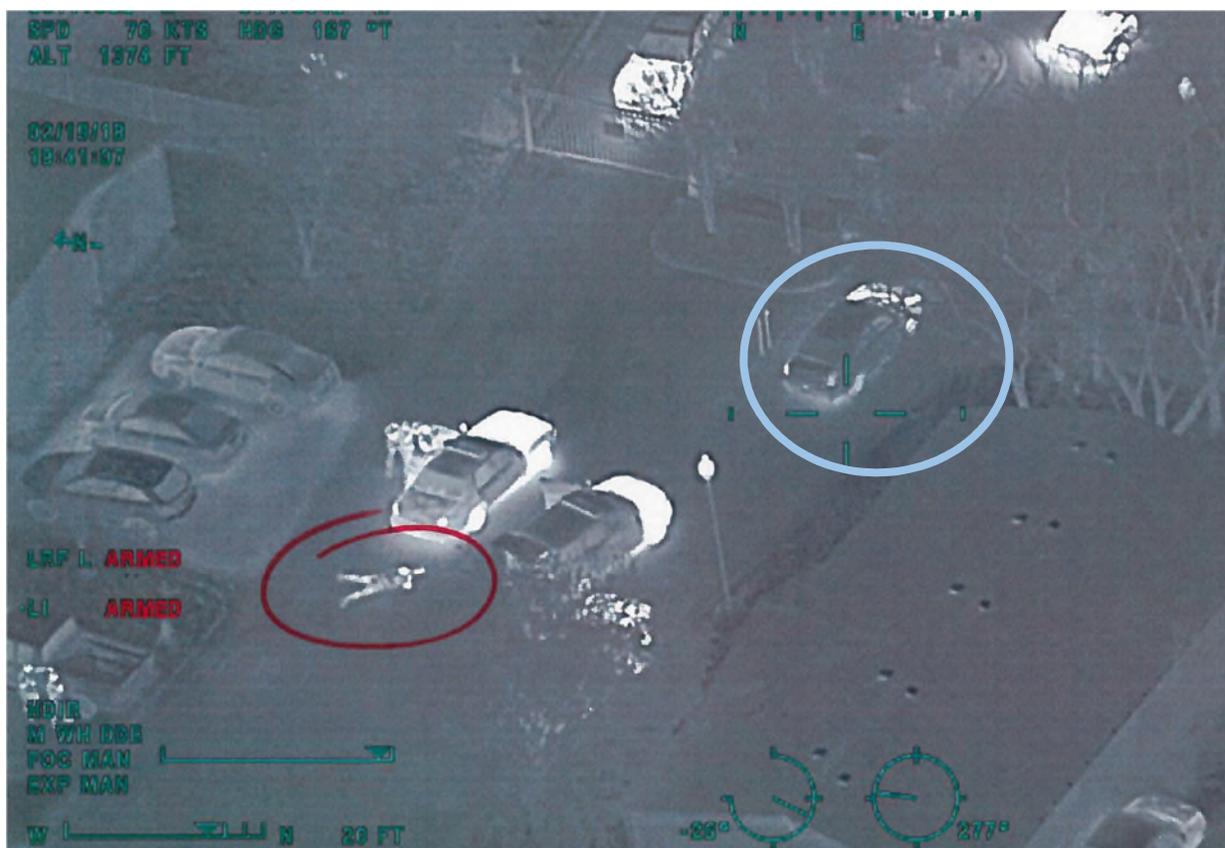


Figure 13 — Air 1 view showing position of Officer Wright (circled in red). The taxi containing Mr. Alvarez is circled in blue.

Another officer's bodycam demonstrates the view that Officer Wright had from that prone position.

²³ See Interview of Deandre Wright (“Wright Interview”) at 16:40 (this interview has not been transcribed, so quotations are taken directly from the recorded interview).

²⁴ *Id.* at 19:00.

²⁵ *Id.* at 21:55



Figure 14 — Bodycam showing position of Officer Wright (foreground). The taxi containing Mr. Alvarez is again circled in blue.

Officer Wright estimated that the distance between him and the taxi was approximately forty to fifty feet, and told SIU detectives he had been trained to shoot the rifle that he was using up to a range of fifty yards (150 feet). From that position, he saw Mr. Alvarez look back over his shoulder, and said the two of them made eye contact on several occasions. Additionally, Officer Wright was able to see for himself that Mr. Alvarez was holding a silver pistol, that he could see pressed to his own head.²⁶

In Officer Wright's opinion, as Mr. Alvarez was looking around and moving around inside the car, even putting the car in reverse and moving it a little, he (Mr. Alvarez) was evaluating his options, seeing if he could escape, thus potentially endangering the officers further "by ramming his vehicle out of there."²⁷ He said that after about forty-five minutes, Mr. Alvarez stuck his head and then his gun out of the driver's side window, and it struck Officer Wright that it happened so fast, no police officer responded to it, despite it being an "immediate and obvious threat."²⁸

²⁶ *Id.* at 32:37.

²⁷ *Id.* at 41:00.

²⁸ *Id.* at 59:10.

This moment was caught on video by APD's helicopter:



Figure 15 — Footage from Air 1 showing the taxi containing Mr. Alvarez, and Mr. Alvarez leaning out of the driver's side window brandishing his firearm.

Officer Wright saw this as an intentional provocation that would lead to a higher risk of danger, because of the lack of response. Mr. Alvarez would, in Officer Wright's mind, likely escalate the situation and so he became "hyper-aware" and "hyper-vigilant." Mr. Alvarez continued to move around in the car, and then he leaned his body toward the door with the gun in his hand. This was a "second presentation of a threat" and Officer Wright responded by "firing a quantity of bullets at his vehicle... at him." He did not recall exactly how many times he fired.²⁹ Mr. Alvarez continued moving and, a third time, moved the gun toward the door and Officer Wright fired his rifle again. He heard a "different caliber weapon" firing at the same time, and he wasn't sure whether he was hearing other officers firing, too, or whether Mr. Alvarez was firing back at officers.³⁰

After that, Officer Wright heard Mr. Alvarez screaming and yelling in pain inside the taxi, with his body moving "freely" inside the car. "I could see him coming up to the window and it appeared as though he... he's coming up to the window with the gun in his hand." Because Mr. Alvarez still presented a threat, and because Officer Wright still believed it possible Mr. Alvarez had already fired at officers, he told detectives: "I fired another quantity of bullets." At that point, his rifle went "dry" (i.e. ran out of ammunition) and soon after he retrieved new magazines for it, he was relieved by other officers and his involvement ended.³¹

²⁹ *Id.* at 1:03:10

³⁰ *Id.* at 1:05:10

³¹ *Id.* at 1:07:15

(c) Khristof Oborski, 4498

On the day of this incident, Officer Khristoff Oborski was a sixteen-year veteran of the Austin Police Department, and had been serving full time in its SWAT team for four years. He gave his interview to SIU detectives on February 26, 2018.³²

Officer Oborski had been at home when he got the call, and ran Code 3 (lights and sirens) to the scene. He was armed with a Colt M4 rifle, capable of shooting single shots, semi-automatic, or fully automatic, and carried four thirty-round magazines loaded with twenty-eight rounds. He was putting on his gear a short distance from, and out of view of, the scene, when he heard the first volley of shots.³³ He told detectives: “So my initial thought was that I need to get up there. I have a lot more training, better armour, and a lot more, um, a lot better weapon system. So my thought is that I need to get up there and - and help them as quick as I can.”³⁴

Officer Oborski did not receive a formal briefing but he had heard over the radio that the subject in the taxi was armed and had pointed his firearm at police.³⁵ He made his way to the officers covering the taxi, a group referred to as the “hasty react team,” or just the “hasty.” His intention was to follow normal procedures and relieve them, because he was better equipped and armed, but the second volley of shots also came before he could do so.³⁶ When he did get there, he saw bullet holes all over the taxi and a flat back tire, but because the vehicle appeared to be in reverse, “he still has access to a 3,000-pound weapon that he can move around and then as soon as he starts driving, then we have crazy cross fire situations going on. Therefore, the first action is to get that car immobilized. And it’s not.”³⁷

As a SWAT team member, Officer Oborski said he had more armor on than other officers, so he replaced one of them by the door of the police car. The broader plan was to replace officers who were less well protected and move the perimeter back; making it less likely that if Mr. Alvarez fired his weapon, anyone would get shot.³⁸ Officer Oborski described his line of sight, saying there was nothing between him and Mr. Alvarez except the frame of the taxi’s doorway. “[T]he only thing blocking my view of him is this A-pillar.... So obviously if his hands are down in his lap, I can’t see them. These are the seats and the, um, I’m not in any kind of an elevated position. I’m on an equal plane. So anything below the door I can’t see.” But he could see him moving about, and see his head and upper body.³⁹

³² See Statement of Khristof Oborski (“Oborski Statement”).

³³ See Oborski Statement at 514-515.

³⁴ *Id.* at 547-549.

³⁵ *Id.* at 708-709.

³⁶ *Id.* at 734.

³⁷ *Id.* at 768-771.

³⁸ *Id.* at 842-881.

³⁹ *Id.* at 936-957.



Figure 16 — Footage from Air 1 showing the taxi containing Mr. Alvarez (left), and Officer Oborski's position (circled in blue).

From the time he took up his position, to the time he fired his weapon, a rifle, was a “couple minutes, tops,” Officer Oborski estimated. “I remember him pointing a - a - a pretty big pistol. Um, it looked like he was in a position where he’s - he knows where we’re at. So he - it looks like he’s trying to take an aim at one of us. Um, I wish I could say that I had a conscious decision to engage him at that point. But I feel like it was - it was automatic. Um, as soon as I perceived that - that pistol, I - I started engaging him.”⁴⁰ His rifle was on fully automatic, and he fired two bursts at Mr. Alvarez. Officer Oborski elaborated his thought process, saying, “It looked like he was actively targeting one of us.”⁴¹

The next thing Officer Oborski did was to withdraw and reload; he then maintained lethal cover on Mr. Alvarez, though their next objective was to get him medical attention. He explained that he didn’t know Mr. Alvarez’s condition at that point, and medical help would be provided once an armored unit or robot was able to ensure a medic’s safety. In this case, it was APD’s armored vehicle, otherwise known as a Bearcat.⁴² The SWAT team eventually approached Mr. Alvarez in the car, used flex cuffs on his wrists until a medic pronounced him dead.⁴³

(d) Matthew Henion, 7072

Officer Mathew Henion gave SIU detectives a voluntary interview on February 28, 2018. Officer Henion was a six-year veteran with APD, working in Henry Sector for five years, and a more recent move to the organized crime, street narcotics unit. He has no prior military or law enforcement experience.⁴⁴

On the day of this incident, Officer Henion was riding with another officer, Greg Vickers, and was engaged in a routine traffic stop on William Cannon when he heard over the radio that a fellow officer

⁴⁰ *Id.* at 1191-1196.

⁴¹ *Id.* at 1244.

⁴² *Id.* at 1482-1483.

⁴³ *Id.* at 1531-1539.

⁴⁴ See Statement of Mathew Henion (“Henion Statement”) at 93-104.

had attempted a felony stop of the yellow taxi, and that the driver was armed and had sped off. They ended the traffic stop and responded to the last given location of the taxi.⁴⁵ Officer Henion spotted the yellow cab, all the while hearing on the radio that it was evading other officers, at the HEB parking lot, and he joined the pursuit, which terminated at the apartment complex.⁴⁶



Figure 17 — Footage from Air 1 showing the position of Officer Henion (circled in red, lower left of picture).

Officer Henion said, “So as I’m getting out I heard one of the patrol officers that had been in the pursuit start yelling ‘He’s got a gun. He’s got a gun.’ Um, and while I’m getting out I immediately could see it. Um, he pulled it up and it had an s--, it had a silver slide. He pulled it up and put it under his chin and then he put it up to his head. And then he turned it away from us and racked it and then put it back to his head.”⁴⁷ Officer Henion himself was armed with his department issue Smith and Wesson, 9mm, which was loaded with a 17-round magazine, with one more bullet in the gun’s chamber. He also carried two more magazines, each containing seventeen rounds.⁴⁸

Officer Henion took up a position behind a pillar, but considered it an “awful spot to be,” with just two other officers somewhere to his left. He could see directly through the gate into the car’s window, and was “just kind of dancing back and forth around these pillars trying to find some kind of a cover concealment”.⁴⁹ During that time, Officer Henion could hear Mr. Alvarez yelling at officers, “he was threatening that he was gonna kill himself. He wanted us to let him go. Um, he’s telling us to back up. Uh, stuff to that - that nature. I’m he’s just - he didn’t like the situation he was in and was, uh - was trying to get us to just let him go.”⁵⁰

⁴⁵ See Henion Statement, 267-284.

⁴⁶ *Id.* at 483-500.

⁴⁷ *Id.* at 623-628.

⁴⁸ *Id.* at 582-609.

⁴⁹ *Id.* at 687-705; see also Figure 15, red ‘X’ beside pillar.

⁵⁰ *Id.* at 793-796.

Officer Henion said he transitioned to a second, more withdrawn position at the behest of a senior officer, due to the exposed nature of the first position: “we just ended up moving all the way back to the, uh, passenger front door of this, uh - uh, this patrol car that was behind the civilian vehicle.”⁵¹ He moved one more time to the other side of the fence, where he took up a position providing lethal cover with his pistol from beside a police car (see Figure 16).

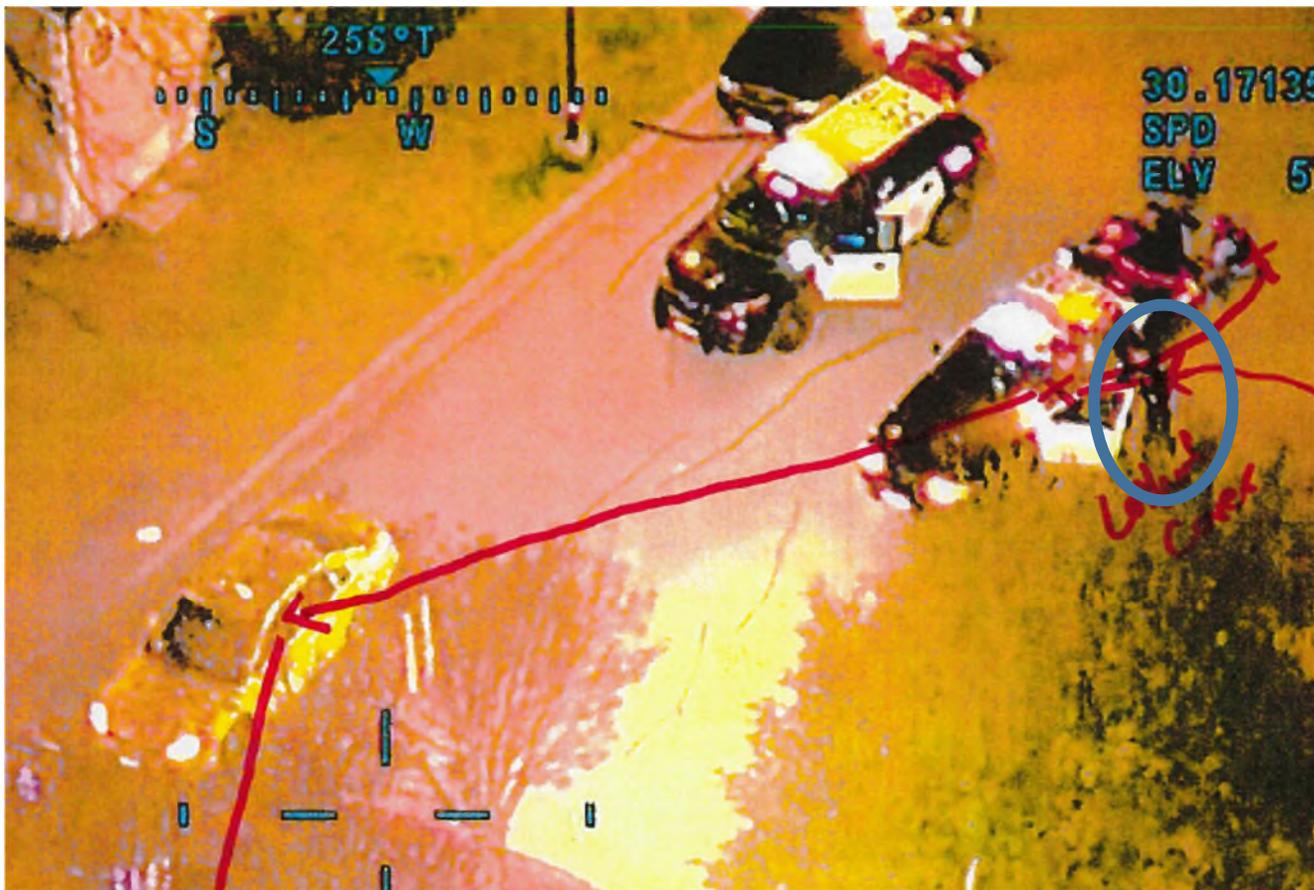


Figure 18 — Footage from Air 1 showing the third and final position of Officer Henion (circled in blue, right side of picture).

As well as seeing the gun in Mr. Alvarez’s hand, Officer Henion said Mr. Alvarez on several occasions put the car in reverse, making the officer believe he might try to ram his way out of there: “Then he got the bright idea of puttin’ it - uh, car in a reverse which, uh, really worried us. ‘Cause I - at the time - ‘cause I’m over here just keeping constant cover on this. So I didn’t know exactly where the other officers were - were set up. And I thought, “Hey if this guy slams into these patrol cars he could - he could possibly kill one of these guys.” So that’s was making me really nervous that he, um, kept puttin’ that, uh, car in reverse. And then, uh, he kept lookin’ out the window back at us.”⁵²

Officer Henion clarified for SIU detectives his state of mind at the time he first got out of the car: “I’m super nervous - super scared right there. ‘Cause, uh, one just to see the gun. Uh, that always, uh, scares me a bit. Um, and two, uh, I truly thought we - the sh- if we were gonna have to shoot that guy it was gonna happen right there. ‘Cause I thought he was gonna be pullin’ it on us. It wasn’t until he like - I mean he - it was really quick. I saw that gun. So we started kind of - I started punching out my gun. And he then put it to his head. And so you know right then I’m like really amped up and - and nervous, uh,

⁵¹ *Id.* at 913-915.

⁵² *Id.* at 1002-1008.

thinking that I'm gonna have to shoot this guy. And, um, you know the fact that he - he seemed nervous. And like you know he kept looking around. He didn't know - he was trapped. You know I know that that tends to make people do, uh, stupid things. So I really, um, initially thought we were gonna get into a shooting when I first got out of this car."⁵³

Officer Henion described the events leading up to the first volley of shots, saying Mr. Alvarez had pointed the gun out of the window at officers, which prompted in no reaction from the police, but then did it a second time: "then I started thinking "Okay he's kinda getting his courage up." I mean we're lucky he didn't fire at that time. 'Cause co- it could a - you know killed one of us. But, uh, I was like, "He's gaining courage or something to, uh - to do something stupid." So at that time and, uh, then next time he - he came up, um, he turns around and he points that gun back, uh - back towards me. And I could see like pretty much directly down the barrel and knew if he like fired that thing I was a - I was a dead man."⁵⁴

That's when other officers started shooting, Officer Henion and recalled Mr. Alvarez "kinda goes back," but then "comes back up with the gun and that's when I fire."⁵⁵ Officer Henion said he fired two or three rounds. At that time, Mr. Alvarez fell back into the car, and officers could hear that he was screaming, knew he was hit, but could only see one of his hands (which was empty), and moments later Officer Henion was relieved in that position by Officer Oborski.⁵⁶

(e) Nicholas Gebhart, 7298

Officer Nicholas Gebhart gave a voluntary interview to SIU detectives on March 6, 2018. On that date he had been with APD since November 30, 2012, giving him five years with the department. He started in Edward Sector, then when to street narcotics (in October 2016), where he was assigned at the time of his interview. He had no prior law enforcement or military experience.

On the night of the incident he was armed with his department issue Smith and Wesson 9mm pistol, loaded with a seventeen -round magazine with one round in the chamber, plus two extra magazines, each loaded with seventeen rounds.⁵⁷ He was "doubled-up" with Officer Keston Campbell, in a slick-top car fitted with lights and sirens.⁵⁸

Officer Gebhart said he and his partner were monitoring Frank Sector radio when they heard the hotshot call come out about the taxi, which involved a kidnapped person.⁵⁹ They didn't run lights and sirens until they spotted the taxi at William Cannon and I-35, on the east side, at which time they pursued the vehicle.⁶⁰ Soon after they decided to turn off lights and sirens and try to "parallel the pursuit" and be there if they needed more officers at the eventual take-down.⁶¹

They eventually stopped their car outside the gate, arriving at exactly at the same time as the taxi and directly opposite that vehicle, exited the vehicle, and moved to the brick-and-mortar pillar beside the gate.⁶²

⁵³ *Id.* at 1082-1094.

⁵⁴ *Id.* at 1229-1236.

⁵⁵ *Id.* at 1238-1239.

⁵⁶ *Id.* at 1239-1252.

⁵⁷ *See* Statement of Nicholas Gebhart ("Gebhart Statement") at 04:33. (Officer Gebhart's statement was recorded but not transcribed, therefore reference points will be to times on the recording.)

⁵⁸ *Id.* at 06:15.

⁵⁹ *Id.* at 08:50.

⁶⁰ *Id.* at 10:17.

⁶¹ *Id.* at 13:15.

⁶² *Id.* at 14:57.

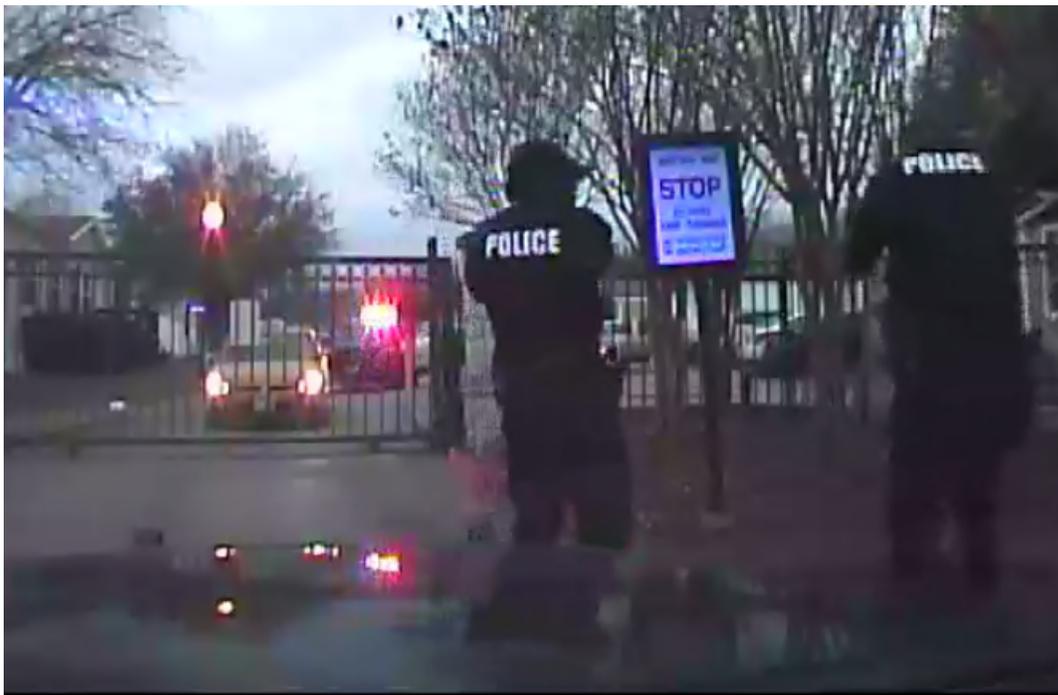


Figure 19 — Still taken from Officer Gebhart’s DMAV camera showing Officers Campbell (left) and Gebhart (right) seconds after their arrival on scene.

Officer Gebhart relayed to SIU detectives, and his DMAV clearly shows, first officers reacting to spotting the gun held by Mr. Alvarez, and then multiple calls for him to drop that gun. Officer Gebhart said: “While I’m at the post with Officer Campbell we’re giving him commands and I immediately see a gun in his hand and I was close enough, his window was down, to see directly into the car, and I saw that it was a semi-automatic handgun with a very distinct silver slide at the top of the gun. I think I yelled gun three or four times to let everybody know he has a gun.” He said he was five to eight yards away.⁶³

Officer Gebhart’s DMAV video also shows Mr. Alvarez opening his car door for about a minute, then closing it, driving the car forward a few feet, and stopping again.⁶⁴ Again from the DMAV, the tenor of the officers on scene changed, telling him they were there to help him, that “it’s just a car,” and that he needed to drop the gun for them to help him.⁶⁵ Officer Campbell tells Mr. Alvarez his name and attempts to learn that of Mr. Alvarez, asking him about family and telling him he has “lots of things to look forward to.”⁶⁶

Officer Gebhart described how Mr. Alvarez raised the gun to his own head, which told the officer Mr. Alvarez was escalating, and it showed “the highest level of threat,” because of how quickly Mr. Alvarez could have aimed at him.⁶⁷ Officer Gebhart didn’t shoot at that time because: “I wanted to give him every single opportunity I could to comply with us, because the last thing I would want to do was to... shoot someone before I was able to change their mind, and get them the help they needed, because clearly he needed help.”⁶⁸

⁶³ *Id.* at 16:20.

⁶⁴ See DMAV of Nicholas Gebhart (“Gebhart DMAV”) at 17:58-18:00.

⁶⁵ See Gebhart DMAV at 18:01.

⁶⁶ See Gebhart DMAV at 18:03.

⁶⁷ See Gebhart Statement at 17:40.

⁶⁸ *Id.* at 19:27.

Officer Gebhart remembered Mr. Alvarez responding to them telling him to drop the gun by saying, “I can’t.”⁶⁹ At one point he asked if he could make a phone call, and was moving around inside the car, but also racked a round in the pistol as he pointed it at the roof of the car.⁷⁰

As it began to get dark, Officer Gebhart and other police officers around him started to worry about losing visibility, and that fear grew when Mr. Alvarez put his gun out of the window. He had done so earlier, resting it on the window ledge, but this was different: “I do see him at one point put the gun out of the window very quickly, and then bring it back. I didn’t react to him putting that gun out the window but it was not in the same manner that it was when he had laid it down on the window seal that I had described before.”⁷¹ Officer Gebhart explained why this felt different: “Instead of almost his entire hand over the gun when he placed it out the window, he was completely gripping the gun. I could not see his finger, which made me believe that it was inside the trigger guard, also. And he pointed it out of the car.”⁷²

Soon after, he saw Mr. Alvarez’s arm come out of the window, and “a bunch of shots fired.” Officer Gebhart did not fire because he’d not seen the gun in his hand when his arm came out of the window, though he believe it had been in his hand.⁷³ After that volley, Officer Gebhart said, “I saw movement inside the car, and I still saw the silver of the gun in his hand after he had been shot, and I heard him yell also... like in anger more than agony.”⁷⁴ From Officer Gebhart’s perspective, the threat was not diminished, however. “Since they weren’t able to completely terminate the threat, I’m in overwhelming fear that even with all these people, we need more people to stop this guy, because it’s not happening... he’s not being stopped.”⁷⁵

Officer Gebhart could still see Mr. Alvarez moving around, and see, too, the gun in his hand because light kept reflecting off the silver slide. At this point the police were trying to get him to drop the gun so they could get him medical help. However, he doesn’t and, about five minutes after that second volley, Officer Gebhart describes what happened from his perspective: “I see him drop the gun from his head, directly out the window towards me, specifically, and the other officers there, and I hear a loud, like, a bang, and it seemed like a different caliber at the time... He dropped the gun, it goes out the window, and then I, at that time, thought he fired one round, and then I immediately respond with rounds because I had this like overwhelming emotion that my life was going to end right there.”⁷⁶

Officer Gebhart said he fired three shots at Mr. Alvarez to stop the threat, and Officer Brady also fired from right beside Officer Gebhart.⁷⁷ Mr. Alvarez then fell back in the car and Officer Gebhart concluded that the immediate threat of deadly force had ended.⁷⁸

(f) Rafael Rosales, 4421

On March 2, 2018, Officer Rafael Rosales gave a voluntary interview to SIU detectives. At that time, Officer Rosales had been with APD for more than seventeen years, working multiple patrol assignments before going to SWAT, where he had been for nine years and was a team leader.⁷⁹

⁶⁹ *Id.* at 20:00.

⁷⁰ *Id.* at 24:15.

⁷¹ *Id.* at 48:21.

⁷² *Id.* at 48:57.

⁷³ *Id.* at 50:20.

⁷⁴ *Id.* at 51:30.

⁷⁵ *Id.* at 53:56.

⁷⁶ *Id.* at 56:43.

⁷⁷ *Id.* at 58:20.

⁷⁸ *Id.* at 1:01:20.

⁷⁹ See Statement of Rafael Rosales (“Rosales Statement”) at 66-111.

On the day of this incident, he was notified by APD's paging system and he responded to the scene on his own, and found himself to be the first SWAT member there.⁸⁰ He consulted with officers on scene to find out what was happening, listened to the radio traffic and was about to relay information by radio to his SWAT colleagues when the first volley of shots was fired.⁸¹ He then retreated to his vehicle and "geared up," putting on his heavy bullet-proof vest, a helmet, and arming himself with his M4 rifle.⁸² He then made his way to the "hasty," where Officers Gebhart and Brady were, within sight of the taxi. "I could see a male subject sitting in the driver's seat, uh, moving back and forth. I could not see his hands. Uh, but I could see him continuing turning and moving. Um, my concern was that he would be able to turn and engage us and we wouldn't be able to see. Uh, so I made the decision to move from the hasty position to get a better angle, uh, into the vehicle."⁸³

His repositioning involved moving away from the hasty team, going between two trailers and, in part advancing on all fours, moving back alongside a trailer and aligning himself with the driver's side of the taxi, at a distance of about twenty yards (see Figure 20, below).⁸⁴ From that position, Officer Rosales had a better view into the taxi and saw, "the subject looks out, uh, sticks his head out the window. Um, turns back inside. Um, and then slowly kinda head comes out. Um, right hand comes out, um, and at first I can't identify what it is. And as he starts turning and it's illuminated I can see that it's a dark f-dark object that looks like a gun.... I wait a couple second and... I one hundred percent confirmed that it was a gun. And I took my shots."⁸⁵

Officer Rosales explained why he shot: "At that moment I was afraid that he was gonna shoot at the officers, uh, or shoot at me. Um, and at that moment, um, I feared for my life and for the life of the officers behind the - the, uh, the hasty position. So I decided to engage him.... I did feel like deadly force needed to be taken."⁸⁶

⁸⁰ See Rosales Statement at 504-507.

⁸¹ *Id.* at 568-575.

⁸² *Id.* at 595-600.

⁸³ *Id.* at 660-665.

⁸⁴ *Id.* at 755-777, and 861-864.

⁸⁵ *Id.* at 889-902.

⁸⁶ *Id.* at 926-943.

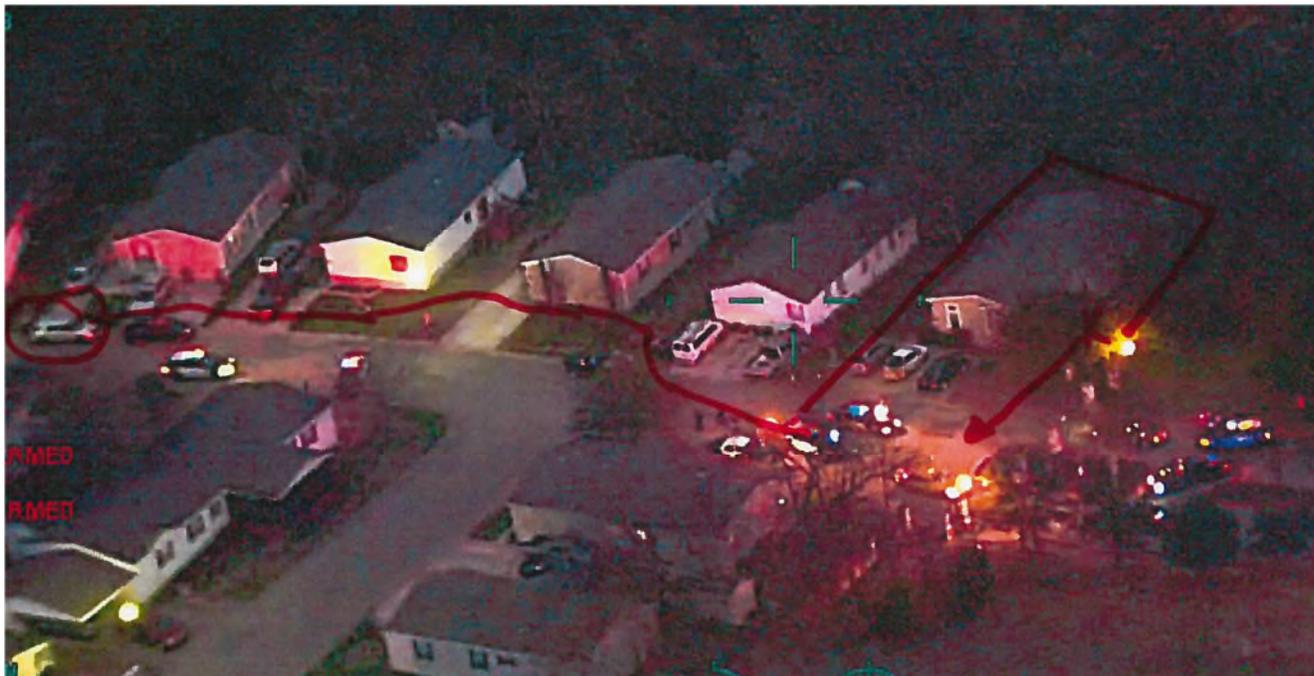


Figure 20 — Still taken from Air One footage showing Officer Rosales's route from his car to the taxi, and his eventual position level with the taxi.

Officer Rosales believed he'd fired five or six rounds, in semi-automatic mode.⁸⁷ Acting in the belief that Mr. Alvarez was dead, they moved up on foot behind an armored shield, and Officer Rosales deployed a “flash-bang” to see whether Mr. Alvarez would react, and if so a sniper would observe it from the Bearcat that had placed itself close to the front of the taxi. There was no movement from inside the vehicle.⁸⁸

(g) Robert Brady, 7594

On February 27, 2018, Officer Robert Brady gave a voluntary interview to SIU detectives. He said he had been a police officer with APD for almost four years, all of that time working patrol in Frank Sector.⁸⁹ Prior to that he had been in counter intelligence with the US Army, for approximately six years, and doing the same thing in the private sector for a further eight years.⁹⁰

On the night in question, he was on regular patrol and heard over the radio about the car-jacking of the taxi cab. He wasn't close to the initial incident but soon learned the taxi was, in fact, close to his location. His vehicle was one of several to arrive at the final destination, where he got out of the car and saw several civilians watching. He told them to move to safety, and then ran up to one of the patrol vehicles closer to the parked taxi.⁹¹

Officer Brady said: “[A]s I arrived on scene, the one position I saw that didn't appear to be filled was long cover on him from the, uh, from the front of the vehicle. So I got in front of the vehicle with just my pistol and just provided long cover while the Hasty React Team was behind one of the pillars, uh,

⁸⁷ *Id.* at 1239-1251.

⁸⁸ *Id.* at 1399-1423.

⁸⁹ See Statement of Robert Brady (“Brady Statement”) at 165-183.

⁹⁰ See Brady Statement at 191-198.

⁹¹ *Id.* at 464-483.

connected to the, uh, entrance exit gate.”⁹² He went on to explain what that meant: “we have Hasty React Team set up. And then much further down the street, we’ll have a Containment Team set up and maybe in the backyard as well. And - and everything else. But you’ll provide a long cover, uh, which is with a rifle typically.... that’ll have eyes directly on the front of the house, maybe using the neighbor’s house, the neighbor’s vehicles as cover or as concealment as - as appropriate.”⁹³

At this time, Officer Brady went back to his vehicle to retrieve his rifle, an AR-15, then retook his position about forty feet from the taxi, from where he had a good view of Mr. Alvarez moving around inside (the only obstruction being bars to the main gate), including when he put the gun to his own head.⁹⁴ Officer Brady stayed in that position for what he estimated to be about thirty minutes while officers attempted to negotiate with Mr. Alvarez, during which time he made eye contact with Officer Brady several times.⁹⁵

After about thirty minutes, Officer Brady was told by a corporal to reposition behind another patrol car, a position that gave him an even better view of the front driver’s side window of the taxi.

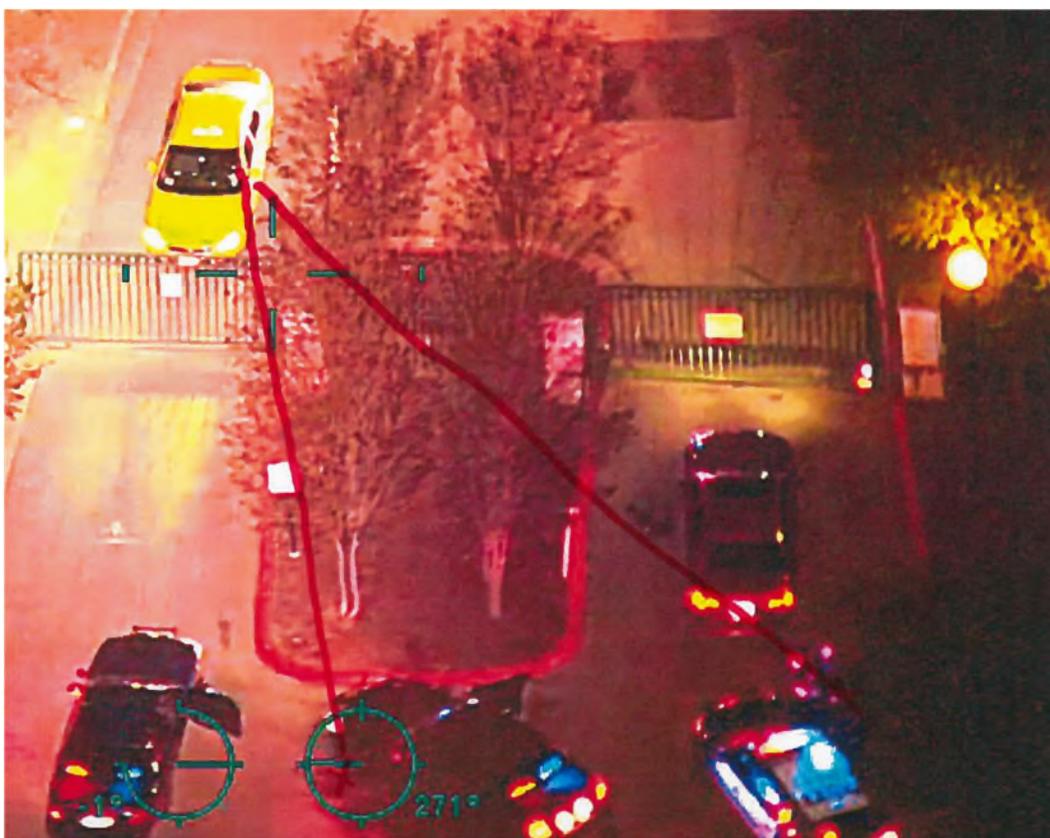


Figure 21 — Still taken from Air One footage showing the two positions, and lines of sight, occupied by Officer Brady.

Officer Brady described what happened after ten minutes in that position: “So from here, I can see him, uh, having the gun to his head and talking out the window and we can see him come out the window a few times with the gun to his head. Um, but at one point, I see the gun come out and he’s looking

⁹² *Id.* at 493-498.

⁹³ *Id.* at 525-536.

⁹⁴ *Id.* at 717-722.

⁹⁵ *Id.* at 994-1003.

backward. But I can't see if he's actively targeting officers or if he's just trying to lean out the window to kind of talk to officers."⁹⁶ And like the other officers at the scene, even when Mr. Alvarez pointed his gun at police, Officer Brady didn't fire: "so it's in my mind that he's pointing the gun out the window and it's entirely possible that it's in the general direction of them, but maybe not actively targeting them. Because if he's still communicating, uh, you know, there's no chance that he's learned gun safety the way we have and doesn't know to not laze people and not point his weapon at people. So there's, uh, so I gave him the benefit of the doubt, thinking he's pointing the gun out the window, but he's - he's turning his head out the window to possibly listen to other officers that are negotiating with him, which was Corporal Burnsed from this vehicle."⁹⁷

Soon after, though, Mr. Alvarez again pointed his firearm out of the window. "I saw him point the gun out the window. But from this point, like, I couldn't see if he was actually pointing backward at them or not. And then I heard Frank 690 say over the radio, uh, "He's actively targeting officers," or "He's pointing the gun at officers," or something along those lines. Um, but I heard Sarge (Marques) say that. And then I saw the weapon come out the window again. Um, and that's when, uh, that's when I took the shot once I saw it the cleanest. Uh, at that point, I believed that these officers back here were in imminent harm. Um, and that's when I decided to use deadly force."⁹⁸

Officer Brady said that he fired "three to four rounds," and then paused, but when Mr. Alvarez pointed the gun out of the window again several seconds later, he "fired another six rounds or so, six or seven."⁹⁹ Officer Brady said he believed his rounds hit their target, and after the shooting stopped he could hear Mr. Alvarez in the car, but that he still refused to comply by showing his hands.¹⁰⁰

Roughly ten minutes passed, with Corporal Burnsed continuing to try to negotiate with Mr. Alvarez to surrender, but he was not compliant and, in fact, pointed the gun out of the window towards officers one more time. Officer Brady said: "the next time I saw the gun come out of the window, uh, I fired again, uh, immediately. Um, there was no hesitation on my behalf that time. Um, other officers on scene said they saw him shoot. Uh, I did not personally see that. Um, there was too much smoke. I - I just - I didn't see him shoot."¹⁰¹ Officer Brady estimated that he fired twelve rounds this time, and he reiterated his belief that officers were in "imminent danger" and any of them could have been killed or seriously injured.¹⁰²

(ii) Statements of Eye-Witness Officers

(a) Eric Burnsed, 6033

As noted previously, Eric Burnsed, a corporal/detective with APD for three years and an APD officer for ten years with hostage negotiating training and experience, took on the responsibility for negotiating with and talking to Mr. Alvarez.

Corporal Burnsed began that task by telling Mr. Alvarez to "put the firearm down and make his hands' [sic] clear and free of weapons."¹⁰³ Corporal Burnsed got no cooperation, but was able to see Mr.

⁹⁶ *Id.* at 1205-1210.

⁹⁷ *Id.* at 1218-1227.

⁹⁸ *Id.* at 1279-1288.

⁹⁹ *Id.* at 1417-1419.

¹⁰⁰ *Id.* at 1444-1473.

¹⁰¹ *Id.* at 1687-1695.

¹⁰² *Id.* at 2463-2469.

¹⁰³ *See* Burnsed Statement at p.2

Alvarez, seeing also a gun in his right hand and a cell phone in his left. Additionally, as detailed above, Mr. Alvarez acknowledged having a gun in his possession and stated his unwillingness for police to take it away.¹⁰⁴

Corporal Burned summarized his observations for SUI detectives in his statement:

To clarify my position above. The second the suspect introduced the firearm by pointing it at his head he placed every officer in the react team in danger of being shot as the actions of the suspect would clearly beat the reactionary time of officers. The suspect had the ability to fire the pistol well before we could have responded. When the suspect later flagged officers again I felt the suspect needed to be shot as he was actively placing officers in immediate risk of being shot. I provided these updates to dispatch while the suspect was actively targeting officers to stress the exigency of the suspect's actions.

(b) Randy Stachewicz, 3666

Corporal Randy Stachewicz responded to the scene where the taxi had come to a halt after following the chase on the radio. He stationed himself beside Officer Benjamin Rogers, “and had a good view of the suspect occupying the driver’s seat of the yellow taxi. It appeared he had a gun up to his head.”¹⁰⁵ Corporal Stachewicz then switched positions, joining the hasty react team on the east side, and from there had only a partial view of Mr. Alvarez.¹⁰⁶

Corporal Stachewicz remained as the fourth or fifth person in this stack of officers, and did not have a view of Mr. Alvarez in the moments leading up to the first volley of shots.¹⁰⁷ However, after the volley he was able to see Mr. Alvarez moving in the car and heard information from the police radio to that effect, also.¹⁰⁸ It was only after the final volley that Mr. Alvarez stopped moving, and that the SWAT team moved up and made the scene safe. Corporal Stachewicz confirmed that he did not fire his weapon in this incident.¹⁰⁹

(c) Luis Brito, 8505

Officer Luis Brito was undergoing field training when he responded to the scene with his Field Training Officer, Kevin Olejar. After clearing civilians away from the scene, Officer Brito set up with a less-lethal shotgun, about 200 feet behind the taxi.¹¹⁰ From there, he could only see Mr. Alvarez when he (Mr. Alvarez) looked out of the driver’s door window, but Officer Brito said, “I distinctly remember him looking back, then leaning out further a second time. One time I saw the suspect flag officers with the barrel of the gun. I am not sure whether he was specifically targeting an officer but the barrel of the gun crossed toward the officers that were back by the police car. That is when shots were fired.”¹¹¹

Officer Brito said that after “about five-ten minutes the suspect again pointed his pistol out of the window in the direction of officers. This is when shots were fired again.”¹¹² He added that while he was not afraid for his own life, he was worried for the officers who were closer.¹¹³

¹⁰⁴ *Id.*

¹⁰⁵ *See* Statement of Randy Stachewicz (“Stachewicz Statement”) at p.2.

¹⁰⁶ *See* Stachewicz Statement at p.2.

¹⁰⁷ *See id.*

¹⁰⁸ *See id.*

¹⁰⁹ *See id.* at p.3.

¹¹⁰ *See* Statement of Luis Brito (“Brito Statement”) at p.2.

¹¹¹ *See* Brito Statement at p.2.

¹¹² *See id.*

¹¹³ *See id.*

(d) Keston Campbell, 7203

Officer Keston Campbell was on “high profile patrol in his drug involvement areas of Frank Sector” on February 19, 2018, when he heard over the radio about the car-jacking of the taxi, and that the suspect was in possession of a firearm.¹¹⁴ He was driving, but was partnered up with Officer Nicholas Gebhart, and while responding to the radio messages they spotted the taxi cab in the HEB parking lot at E. William Cannon Drive and South IH-35.¹¹⁵

They followed the officer chasing the taxi, and ended up at the gated community where the taxi stopped in front of the electronic gates, and Officer Campbell intentionally parked his vehicle in front of those exit gates to stop the suspect from escaping.¹¹⁶

Officer Campbell explained what happened next:¹¹⁷

Once the suspect stopped his vehicle and recognized that we were blocking his exit, we exited our unit, guns drawn. We shout commands at the suspect to drop his gun and exit his vehicle. I could clearly see the gun in right hand. The gun was a silver pistol with what I believed to be a black grip.

Officer Campbell began talking to the suspect, trying to get him to put the gun down and surrender, and did so for some time, until ordered to move to a safer location. At that time he joined a hasty react team along with Officers Brady, Gebhart, and one other.¹¹⁸

He described what happened:¹¹⁹

I overhead both verbally and on the radio that the suspect was pointing the gun at officers. I heard officers on the loud speaker commanding the suspect to stop pointing the gun at officers. Officers continued with the commands to stop pointing the gun at officers, until I heard the first volley of shots. The first volley of shots came from inside the fence. Once that volley stopped, I could see that the suspect was still moving. I also heard on the radio that he was still moving. The suspect was making noises that perhaps was moaning in pain. At this point, SWAT was on scene. While they were formulating their plan, I heard a single shot come from the cab, going out. I then heard a second volley of shots. The second volley of shots, I knew that Officer Gebhart and Officer Brady had shot.

(It appears that Officer Campbell in his recollection conflated the first and second volleys into just one, and what he refers to as “a second volley” was, in fact, the third and final one.)

(e) Casey Kazan, 8665

Officer Casey Kazan self-assigned to the stolen-cab call, but the pursuit had terminated by the time he arrived at the scene so he took his less-lethal shotgun and joined officers who were already staged on the Perez Elementary side of the gates.¹²⁰ From his position, he was able to see the suspect and the gun he had in his hand, and listened as other officers tried to get Mr. Alvarez to surrender.¹²¹ He did observe Mr. Alvarez back the car up a little, but he didn’t see him point his weapon at officers, although he heard at least one colleague say that Mr. Alvarez had done so.¹²²

¹¹⁴ See Statement of Keston Campbell (“Campbell Statement”) at p.1.

¹¹⁵ See Campbell Statement at p.1.

¹¹⁶ See id. at p.2.

¹¹⁷ See id.

¹¹⁸ See id.

¹¹⁹ See id.

¹²⁰ See Statement of Casey Kazan (“Kazan Statement”) at p.1.

¹²¹ See Kazan Statement at p.1.

¹²² See id. at p.2.

(f) Christopher Knodel, 7855

Officer Knodel was operating in a two-officer Unit with Officer Perry, 870, and after hearing about the pursuit they caught up with it where it ended, on the east side of Chateau Village, and they parked behind several other units.¹²³ Officer Knodel was able to see “A Hispanic male in the driver’s seat holding a black handgun to his head with his right hand.”¹²⁴

After setting out stop sticks on the eastbound side outside the gate, Officer Knodel drove around the mobile home park to lend assistance to the smaller number of officers on the westbound side of the gate, eventually parking thirty feet behind the yellow cab and in such a way that it would make it harder for the driver to flee in the taxi.¹²⁵

He described what he saw after that:¹²⁶

I saw the suspect point the black handgun out the driver’s side window. At this point, no shots were fired. The negotiator repeatedly told the suspect to put the gun down. Shortly after the first pointing of the gun out of the window, an officer said on the radio that they heard the suspect rack the gun. A few seconds later, another officer advised over the radio that he too heard the sound of the racking of the gun. A few moments went by and the suspect again pointed the gun out of the driver’s window. This time, I could see the muzzle of the gun and it was pointed somewhat in my direction. Several shots, approximately 7-8, were fired and I took cover. When the shots stopped, I poked my head out and I could see smoke coming from recent gunfire. I heard updates on the radio that the suspect was still moving. Several moments went by and I saw the suspect point the gun out the driver’s side window for a third time. Another volley of gunfire erupted, approximately 11-12 shots. I ducked for cover again. Once the shots stopped, I could see the driver window and the left rear passenger window were both broken out from the recent gunfire. I could see many bullet holes in the driver’s door of the yellow cab.

Once the scene was made safe, he started a crime scene log which he handed off to another officer before leaving the scene.

(a) Ballistics, and Firearm and Toolmark Evidence

APD crime-scene specialists attended the scene of the shooting, and began by photographing and video-taping the scene. Specialists collected all relevant firearm-related evidence and information. This included placing numbered markers, or “tents,” to show the locations of the various vehicles, shell casings, magazines, and projectile fragments. Altogether, fifty of these markers were put in place, and their locations were recorded by the Vehicular Crimes Unit (see Figure 23, 24 and 25, below).

¹²³ See Statement of Christopher Knodel (“Knodel Statement”) at p.1.

¹²⁴ See Knodel Statement at p.1.

¹²⁵ See *id.* at p.1.

¹²⁶ See *id.* at p.2.



Figure 22 — Diagram produced by Vehicular Homicide Unit showing placement of crime-scene tents. The items tented are identified by number in Appendix I to this letter.

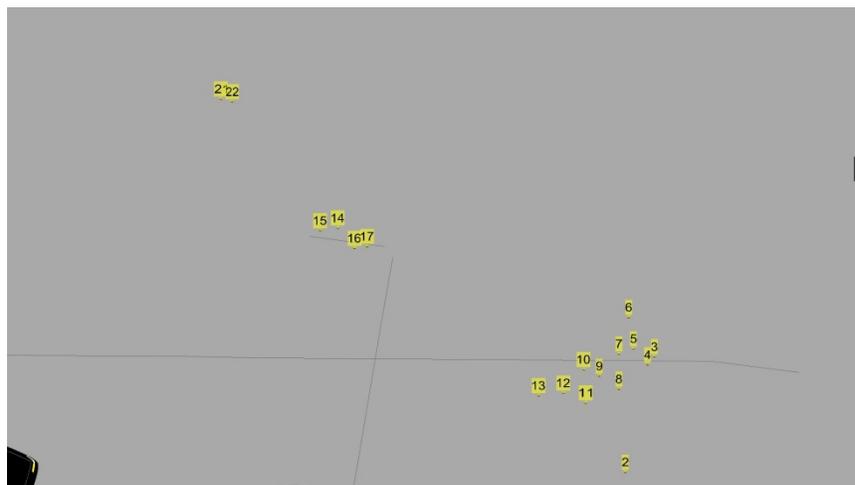


Figure 23 — Diagram produced by Vehicular Homicide Unit showing placement of crime-scene tents. The items tented are identified by number in Appendix I to this letter.

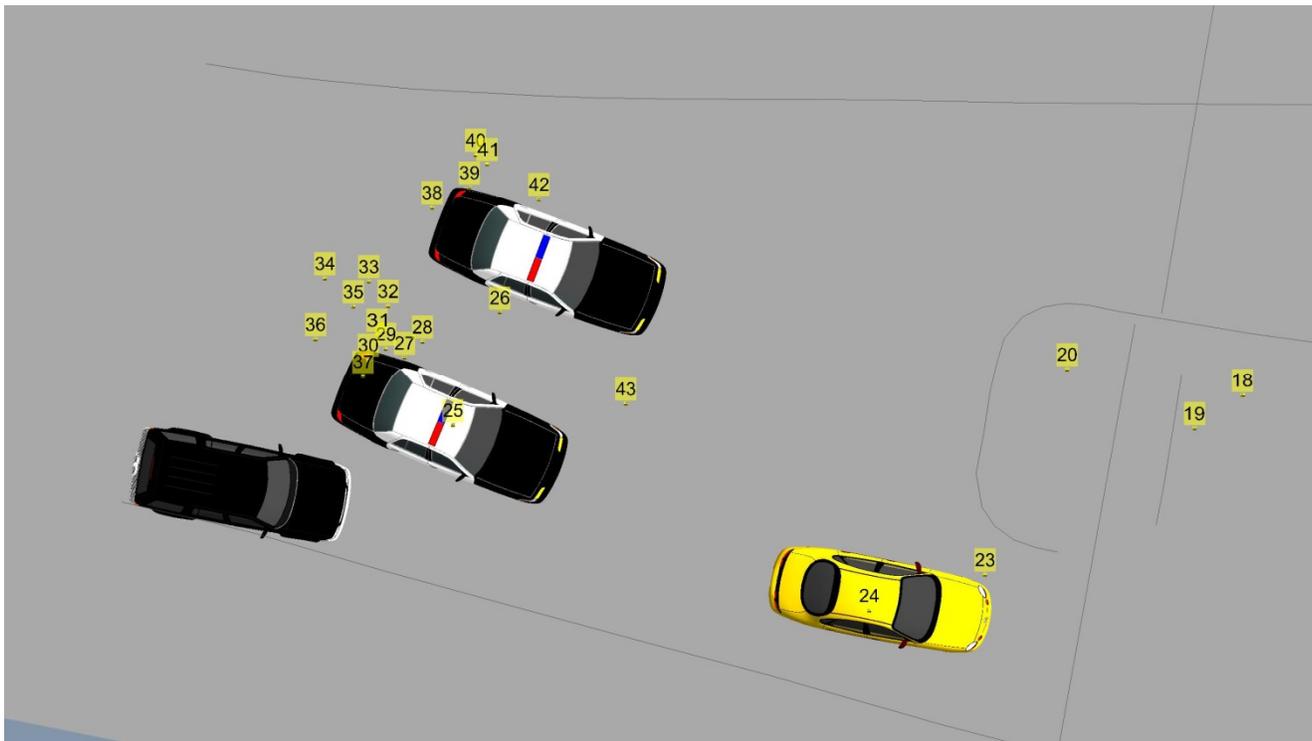


Figure 24 — Diagram produced by Vehicular Homicide Unit showing placement of crime-scene tents. The items tented are identified by number in Appendix I to this letter.

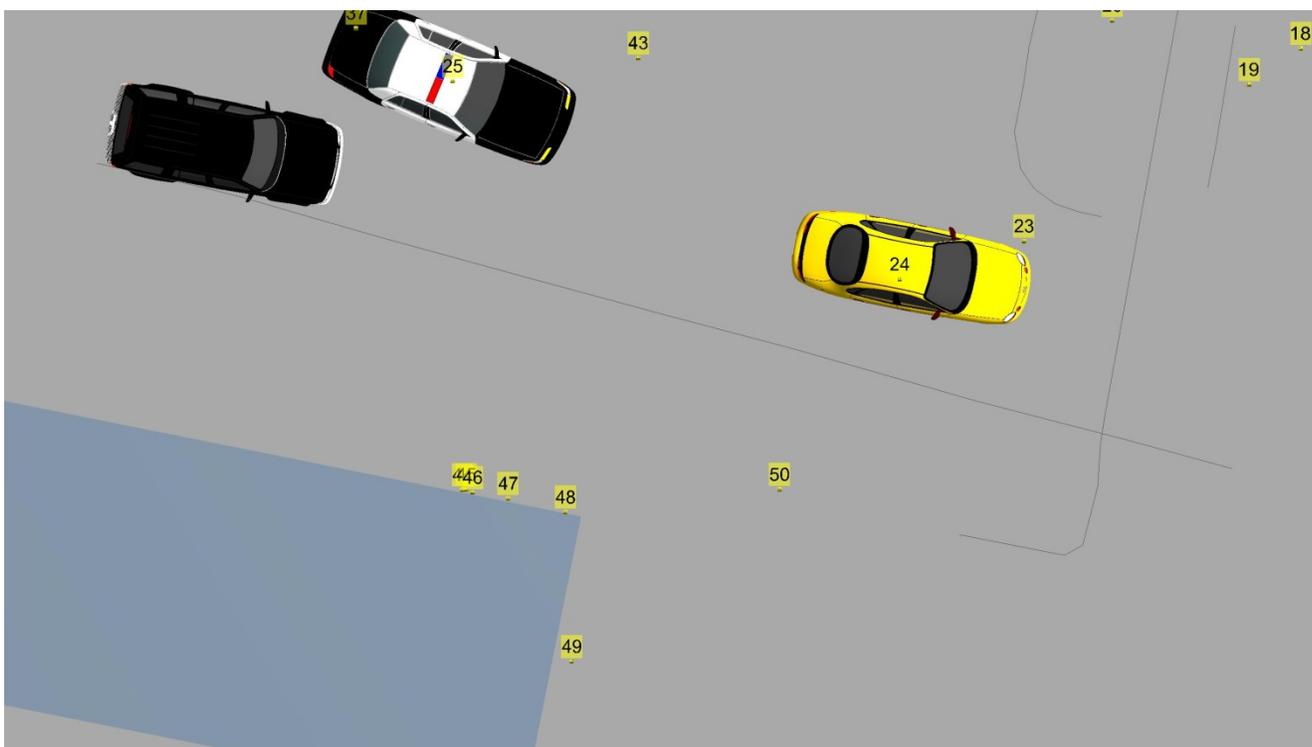


Figure 25 — Diagram produced by Vehicular Homicide Unit showing placement of crime-scene tents. The items tented are identified by number in Appendix I to this letter.

Crime Scene Specialist Daniela Fischer noted multiple defects to the taxi cab, including one in “the driver side roof,” as well as several cartridges and a spent shell casing on the driver’s side floor. These findings indicate that Mr. Alvarez fired his weapon while inside the taxi.¹²⁷



Figure 26 — Photograph of bullet hole in roof of taxi cab (circled).



Figure 27 — Interior of cab, photograph of crime scene rod through bullet hole in roof of taxi cab.

¹²⁷ See Laboratory Report, Crime Scene Section, # L 1801683 (“CSS Lab Report”) at p.4.

Consistent with that conclusion, CSS Fischer notes that: “On the front passenger side front floorboard, I observed a black and silver colored firearm.”¹²⁸ That firearm was identified at the scene as a Taurus PT 140 Pro CAL 40 Millennium semi-automatic pistol, and [a] gold colored fired cartridge casing was observed in the ejection port of the firearm.”¹²⁹



Figure 28 — Photograph of pistol located on floor of taxi cab (circled).

In order to get a good picture of the shots fired at Mr. Alvarez and the taxi, the crime scene Section used ballistic arrows to show the impact points and directions of the various shots (see Figures 29 and 30, below).

¹²⁸ See CSS Lab Report at p.4.

¹²⁹ *Id.* at p.13.



Figure 29 — Photograph of ballistic arrows showing bullet strike points and angles



Figure 30 — Photograph of ballistic arrows showing bullet strike points and angles.

Additionally, on the night of the shooting, APD firearm and toolmark examiner Steve Ashton collected each of the weapons used by police officers to fire at the taxi and Mr. Alvarez. He also spoke with the officers who were available and still on scene as to his normal practice for loading, and his actual loading/reloading that evening.¹³⁰ He then compared the number of bullets remaining in a clip or magazine with the capacity of that clip or magazine to establish how many shots each officer had fired.

Mr. Aston also test fired at APD's laboratory each of the weapons he had seized. He reported that each weapon was "found to be capable of discharging live rounds of ammunition," and each officer's weapon "functioned normally during the test."¹³¹ He noted, correctly, that the legal implications of these tests were that each weapon is a "firearm" as defined by Texas Penal Code Sec. 46.01 (10), and each is therefore a deadly weapon pursuant to Texas Penal Code Sec. 1.07 (a) (17).

Finally, APD Firearm and Toolmark Examiner Sarah Jordan test fired the weapon recovered beside Mr. Alvarez in the taxicab. She described that weapon as a Taurus make, Millennium model .40 caliber semi-automatic pistol, and said that, as with the officers' guns, Mr. Alvarez's weapon was "found to be capable of discharging live rounds of ammunition," and "functioned normally during the test."¹³² She also noted correctly that the legal implication of the tests was that Mr. Alvarez's weapon is a "firearm" as defined by Texas Penal Code Sec. 46.01 (10), and is therefore a deadly weapon pursuant to Texas Penal Code Sec. 1.07 (a) (17).

C. Medical Examiner's Findings

On February 20, 2018, the Travis County Medical Examiner conducted a postmortem examination (autopsy) on Thomas Alvarez. The examiner ruled "Homicide" as his manner of death and "Multiple gunshot wounds" as his cause of death.¹³³ As required by law, the medical examiner issued a death investigation report.¹³⁴ The medical examiner noted that Mr. Alvarez sustained:

- Between sixty and seventy "defects";
- Fifteen or sixteen penetrating or perforating gunshot wounds.¹³⁵

During the postmortem examination, seven items of evidentiary value related to the shooting incident were recovered, specifically projectiles of different calibers.

The medical examiner determined that Mr. Alvarez's penetrating and perforating gunshot wounds followed a path of travel that were all left to right, and that some were front-to-back, and some were back-to-front.

The medical examiner could not make a determination of relative range of fire distance from examination of the wounds. For each of the wounds, the medical examiner did not notice soot, stippling, tissue searing, or muzzle imprint, any of which would indicate either a contact wound, close, or intermediate range of fire.

¹³⁰ See Laboratory Report, Firearm and Toolmark Section, # L 1801683 LRN 4 ("FTS Lab Report 4").

¹³¹ See Laboratory Report, Firearm and Toolmark Section, # L 1801683 LRN 17 ("FTS Lab Report 17").

¹³² See Laboratory Report, Firearm and Toolmark Section, # L 1801683 LRN 17 ("FTS Lab Report 18").

¹³³ "Cause of death" refers to the condition that produced the victim's death while "manner of death" is an interpretive opinion that explains how the cause of death was caused. "Homicide" is one of several manners of death, which include accident, suicide, or natural causes. "Homicide" is not a legal denotation as to whether the act leading to the death is or is not criminal.

¹³⁴ Travis County Office of the Medical Examiner's Office, Medical Examiner Report No. 18-01011.

¹³⁵ A "penetrating" gunshot wound is one that enters but does not exit the body. A "perforating" gunshot wound is one that enters and exits the body. A single perforating gunshot can have multiple entry and exit points depending upon the trajectory of the bullet and the subject's body position when struck.

Finally, the medical examiner's toxicology testing on Mr. Alvarez's postmortem blood demonstrate the presence of amphetamines.

Evidence from at the autopsy and the medical examination corroborate the statements of officers on scene, and other evidence concerning the circumstances leading to and immediately following Mr. Alvarez's shooting.

IV. LEGAL ANALYSIS: REASONABLENESS OF THE OFFICERS' USE OF DEADLY FORCE

The use of deadly force without legal justification would constitute a criminal offense for which prosecution is warranted. In the case of an officer's use of deadly force, to constitute a prosecutable offense would require us to conclude that there are no legal justifications applicable to the credible investigative facts. Here, whether or not the officers' use of deadly force was reasonable depends on whether the investigative facts support the conclusion that a reasonable juror would determine that each officer's use of such force was justified in self-defense, defense of a third person, and/or to effectuate a legitimate law enforcement purpose. For the reasons outlined below, we conclude that a reasonable juror following the law would find the use of force to be justified for all seven officers.¹³⁶

A. Law Governing Use of Deadly Force

The Fourth Amendment and Texas statutory law govern our analysis of the reasonableness of all officers' use of deadly force in Mr. Alvarez's shooting death. Under the Fourth Amendment, a law enforcement officer's shooting of a person constitutes a "seizure" and, as a consequence, is subject to the amendment's requirement that it be reasonable¹³⁷ as that term has been construed by the United States Supreme Court.¹³⁸ The Supreme Court has directed that the inquiry is essentially one of objective reasonableness: the question is "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."¹³⁹

In conducting our analysis, we are to evaluate an officer's use of force based on the facts and circumstances then existing on the scene and determine "judged from the perspective of a reasonable officer on the scene," whether a reasonable officer would have used deadly force based on the facts and circumstances viewed from the perspective of the acting officer at the time the force was used.¹⁴⁰ This inquiry must make "allowance for the fact that police officers are often forced to make split-second judgments" and should not be based on the benefit of "the 20/20 vision of hindsight."¹⁴¹ In the context of the law enforcement use of deadly force, the basic requirement is that the use of deadly force be limited to situations in which it was immediately necessary.¹⁴²

¹³⁶ This legal analysis applies to all of the seven subject officers because their testimony demonstrates they saw and experienced almost identical sequence of events, therefore an individual legal analysis for each officer would be duplicative, and is unnecessary. Additionally, every subject officer articulated seeing Mr. Alvarez with the gun in his hand, and regarded Mr. Alvarez as a specific, imminent threat to themselves and their colleagues.

¹³⁷ "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..." U.S. CONST. AMEND. IV.

¹³⁸ U.S. CONST. AMEND. IV.

¹³⁹ *Graham v. Connor*, 490 U.S. 386, 396 (1989).

¹⁴⁰ *Id.* at 396-97.

¹⁴¹ Our inquiry must consider whether a reasonable officer in the circumstances that these officers encountered would have reasonably concluded they were in imminent danger from the gun that Mr. Alvarez was wielding.

¹⁴² *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985).

Texas law incorporates the Fourth Amendment's reasonableness standard in several statutes applicable to the facts and circumstances of Mr. Alvarez's shooting. Those statutes allow the use of deadly force in self-defense, in defense of third persons, and in order to effectuate a legitimate law enforcement purpose.¹⁴³

B. Texas Law Governing the Use of Deadly Force: Chapter 9 and the Reasonableness Standard

Chapter 9 of the Texas Penal Code provides three basic circumstances under which a law enforcement officer's use of deadly force is justified: in self-defense, in defense of a third person, or to effectuate a legitimate law enforcement purpose such as an arrest or search. We must evaluate the reasonableness of each officer's use of force for each shooting sequence.

1. Use of Deadly Force in Self-Defense: Texas Penal Code § 9.32

Section 9.32 of the Texas Penal Code describes the circumstances under which any person, law enforcement, may use deadly force in self-defense or not. It states:

- (a) A person is justified in using deadly force against another:
 - (1) if the actor would be justified in using force against the other...; and
 - (2) when and to the degree the actor reasonably believes the deadly force is immediately necessary:
 - 1. to protect the actor against the other's use or attempted use of unlawful deadly force; or
 - 2. to prevent the other's imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery.

Section 9.32 expressly predicates the authority to use deadly force on the condition that the actor first have been authorized to use non-deadly force under Section 9.31, which governs the use of non-deadly force. That section, which sets forth the basic reasonableness standard discussed earlier provides that:

- (a) ... [A] person is justified in using force against another when and to the degree, the actor reasonably believes the force is immediately necessary to protect the actor against the other's use or attempted use of unlawful force.

Only if the actor first satisfies Section 9.32's requirements controlling the use of non-deadly force can he or she be justified in the use of deadly force.

2. Use of Deadly Force in Defense of a Third Person: Texas Penal Code § 9.33

The use of deadly force to protect a third person calls for what might be best described as a surrogate analysis: the use of deadly force in defense of a third person is authorized if only if the actor is justified in the use of deadly force to defend him- or herself. As with Section 9.32, this justification is applicable to all persons, whether law enforcement or not. That section provides:

- (a) A person is justified in using force or deadly force against another to protect a third person if:
 - (1) under the circumstances as the actor reasonably believes them to be, the actor would be justified under Section 9.31 or 9.32 in using force or deadly force to protect himself against the unlawful force or unlawful deadly force he reasonably believes to be threatening the third person he seeks to protect.

¹⁴³ TEX. PEN. CODE §§ 9.32, 9.33, and 9.51 (c).

3. Use of Deadly Force to Effectuate a Legitimate Law Enforcement Purpose: Texas Penal Code § 9.51

The final justification applicable to the facts established here is found in Section 9.51, which governs all uses of force by a law enforcement officer while in the discharge of his or her duties. It is applicable only to law enforcement officers' use of force. Section 9.51 provides:

- (a) A peace officer...is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to make or assist in making an arrest..., if:
 - (1) the actor reasonably believes the arrest or search is lawful...; and
 - (2) before using force, the actor manifests his purpose to arrest or search and identifies himself as a peace officer or as one acting at a peace officer's direction, unless he reasonably believes his purpose and identity are already known or cannot be reasonably made known to the person to be arrested.

C. Analysis: The Facts and Circumstances of the Officers' Use of Deadly Force

We view the incident in which Mr. Alvarez was killed as part of an extended chain of events that began when the initial 911 call was made, and when Mr. Alvarez took over control of the taxi cab, and includes the subsequent pursuit, the stand-off at the gated mobile home park, his possession and exhibition of a gun, and the three volleys of shots fired by officers.

The officers' conduct in discharging their weapons¹⁴⁴ must be evaluated in terms of reasonableness under the above-cited statutes. I have concluded that on the credible facts established here that the officers' use of deadly force in Mr. Alvarez's shooting was not unreasonable under the applicable statutes. Specifically, I believe the officers were justified in doing so on the grounds of: (1) defense of self under § 9.32; (2) defense of third persons under § 9.33; and (3) in order to effect an arrest for an offense under § 9.51.

1. The Officers' Use of Deadly Force in Self-Defense Under § 9.32

The facts and circumstances known to the subject officers at the time they discharged their duty weapons must be considered.

The investigation established that prior to their arrival at the mobile home park, all seven officers were aware of the car-jacking of the taxi, the pursuit, and Mr. Alvarez's possession of a firearm. Each officer had taken up a position close enough to the stationary taxi cab to see that Mr. Alvarez was armed with a firearm, was refusing to comply with requests, pleas, and commands to give up possession of the weapon and surrender himself.

¹⁴⁴ Even if the officers' shots had not struck Mr. Alvarez, the discharge of their weapons in his direction constitutes use of deadly force and is otherwise a criminal offense if not statutorily justified. "The threat of force is justified when the use of force is justified. For purposes of this section, a threat to cause death or serious bodily injury by the production of a weapon or otherwise, as long as the actor's purpose is limited to creating an apprehension that he will use deadly force if necessary, does not constitute the use of deadly force. TEX. PEN. CODE § 9.04. Here, it is evident that each of the seven officers discharged his weapon and as such there was an actual use of force. *See e.g.*, TEX. PEN. CODE § 22.02 Aggravated Assault (use of a deadly weapon during the course of an assault). An "assault" occurs whenever a person "intentionally or knowingly threatens another with imminent bodily injury..." TEX. PEN. CODE § 22.01. As a use of deadly force, the discharge of a weapon is a threat to use deadly force which is justified only if reasonableness requirements as contemplated by the various justifications for use of deadly force contained chapter 9 of the Penal Code.

Moreover, the evidence clearly shows that Mr. Alvarez pointed his gun out of the driver's side window toward police officers on several occasions, only the first of which did officers not fire. However, when they did shoot at Mr. Alvarez, each officer stated they did so because they were in fear for their lives, and the lives of their colleagues

The officers were faced with circumstances in which the danger to them were evident and imminent: they were in a stand-off with a subject who had car-jacked an unarmed taxi driver, had led police on a vehicle pursuit, was refusing to comply with police commands, and, most importantly, was armed with a deadly weapon, a pistol.¹⁴⁵

Under these circumstances, I conclude that the officers “reasonably believe[d] [that] the [use of] force [was] immediately necessary to protect [themselves] against the other’s use or attempted use of unlawful force.”¹⁴⁶ There are no facts or circumstances under which Mr. Alvarez’s pointing his firearm toward the officers would render his actions a lawful threat of use of force. For these same reasons and under these circumstances, the provisions of Section 9.32 authorizing the officers’ use of deadly force in discharging his weapon at Mr. Alvarez are unquestionably established.¹⁴⁷

In fact, the investigation supported the officers’ statements because the gun was recovered, further demonstrating that the officers reasonably concluded that a danger existed. Under these circumstances, I conclude that the officers reasonably believed that their use of deadly force was immediately necessary to protect themselves and each other against Mr. Alvarez’s apparent use or attempted use of unlawful deadly force, or to prevent what they reasonably concluded was the imminent commission of murder if they did not discharge their weapons at him, and that a reasonable jury following the law would also so conclude.

2. Officers’ Use of Deadly Force in Defense of a Third Person Under § 9.33

For the reasons that justified the seven subject officers in their use of deadly force in self-defense, I conclude that they were also justified in using deadly force to protect others. Mr. Alvarez had already put the lives of police officers in danger, as well as multiple members of the public by driving at high speed and ignoring multiple stop signs and traffic lights. And by ignoring police pleas to give up his weapon and instead point it out of the window, it would have been reasonable for the seven officers to assume that not only their lives, but also the lives of their colleagues on scene, would be in jeopardy. In their own words:

- Benjamin Rogers: “as he’s starting to point it towards me and (Officer Padalecki), I feared that he might shoot at us next or turn it back over towards those officers and shoot at them.”
- Deandre Wright: Mr. Alvarez was an “immediate and obvious threat.”
- Khristof Oborski: “It looked like he was actively targeting one of us.”
- Mathew Henion: “I could see like pretty much directly down the barrel and knew if he like fired that thing I was a - I was a dead man.”

¹⁴⁵ See Penal Code, Section 1.07(a) (17) (A); see also *Gomez v. State*, 685 S.W.2d 333, 336 (Tex. Crim. App. 1985) (“a firearm is a deadly weapon per se”).

¹⁴⁶ TEX. PEN. CODE § 9.31 (a).

¹⁴⁷ Here, all of the non-exhaustive list of factors the Supreme Court noted in *Tennessee v. Garner*, the leading case on governing the reasonableness inquiry into a law enforcement officer’s use of deadly force are present: the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” *Tennessee v. Garner*, 471 U.S. at 10-12. Mr. Alvarez’s conduct involved the reasonably apparent danger of his commission of a violent felony while armed after evincing an intent to engage officers violently rather than submitting to an arrest.

- Nicholas Gebhart: “I had this like overwhelming emotion that my life was going to end right there.”
- Rafael Rosales: “[A]t that moment, um, I feared for my life and for the life of the officers behind the - the, uh, the hasty position.”
- Robert Brady: “I believed that these officers back here were in imminent harm. Um, and that’s when I decided to use deadly force.”

As noted earlier, Texas Penal Code § 9.33 regulates the use of force in defense of a third person. That section provides that “[a] person is justified in using force or deadly force against another to protect a third person if...under the circumstances as the actor reasonably believes them to be, the actor would be justified under Section 9.31 or 9.32 in using force or deadly force to protect himself against the unlawful force or unlawful deadly force he reasonably believes to be threatening the third person he seeks to protect...and...the actor reasonably believes that his intervention is immediately necessary to protect the third person.” Having concluded that the officers were justified in his use of deadly force in order to prevent Mr. Alvarez’s apparent use or threatened use of deadly force against them in self-defense, I further conclude that the officers use of deadly force was also justified in order to defend other officers on scene from the same apparent danger that they reasonably believed threatened them, and that a reasonable jury following the law would also so conclude.

3. Officers’ Use of Deadly Force to Effectuate a Legitimate Law Enforcement Purpose Under § 9.51

Finally, for the reasons that justified the seven subject officers’ use of deadly force to defend themselves and others, it is also reasonable for the officers to have concluded that Mr. Alvarez was engaged in the commission, imminent commission, and attempted commission of several violent criminal offenses. Under Texas law, a peace officer is authorized to arrest any person for any offense committed within his or her presence or view without a warrant.¹⁴⁸

Based on their observations, the officers had probable cause to believe, and were authorized to make Mr. Alvarez’s warrantless arrest for numerous offenses committed within their presence or view, or direct knowledge from other officers, including Aggravated Robbery,¹⁴⁹ Evading Arrest in a Motor Vehicle,¹⁵⁰ Aggravated Assault with a Deadly Weapon,¹⁵¹ and Assault on a Public Servant.¹⁵² The facts and circumstances of which the officers were aware at the time they discharged their weapons would have also satisfied the probable cause standard that would have allowed them to have taken Mr. Alvarez into custody and placed him under formal arrest: Mr. Alvarez had stolen a taxi cab at gunpoint, had led officers on an extended pursuit, was armed with a pistol, had pointed that pistol towards officers, and refused directions to put the weapon down. Specifically, I conclude that each officer formed the reasonable belief that his use of deadly force was “immediately necessary to make or assist in making” Mr. Alvarez’s arrest. Under these circumstances, it was reasonable for the officers to believe that a warrantless arrest of Mr. Alvarez was lawful.¹⁵³

For the reasons that justified Mr. Alvarez’s warrantless arrest, the facts and circumstances then existing also supported the officers belief that the use of deadly force to make his arrest her was immediately

¹⁴⁸ TEX. CODE CRIM. PROC. art. 14.01.

¹⁴⁹ TEX. PEN. CODE § 29.03 (the theft of the taxi cab using a deadly weapon).

¹⁵⁰ TEX. PEN. CODE § 38.04.

¹⁵¹ TEX. PEN. CODE § 22.02.

¹⁵² TEX. PEN. CODE § 22.01 (b) (1).

¹⁵³ There is no need to consider section 9.51 (a)’s second requirement because the officers’ identities were reasonably known to Mr. Alvarez under the circumstances; they were in full uniform, driving police vehicles, and Mr. Alvarez had seen most or all of them on scene, and during the chase.

necessary was reasonable because they also reasonably concluded that Mr. Alvarez posed a “substantial risk” that he “would cause death or serious bodily injury” to any number of officers if they attempted to arrest or detain him. Under these circumstances, I conclude that the officers use of deadly force to effect Mr. Alvarez’s arrest was justified under Texas Penal Code § 9.51 (a).

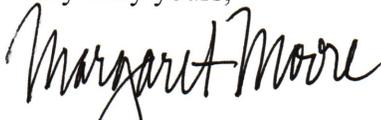
For these reasons, the seven subject officers’ use of deadly force in this shooting was objectively reasonable under Texas law, and a reasonable jury following the law would so conclude.

CONCLUSION

For these reasons, I have concluded that the filing of criminal charges against any of the seven subject officers is not supportable under Texas criminal law standards because the officers’ use of deadly force in this incident was justified under the circumstances. Consequently, charges will not be filed. We are closing our review and will take no further action in this matter.

We have released a public/press packet that includes videos, witness statements, officer statements, forensic reports, photos and an autopsy report. We have also attached the items and legal citations mentioned in the analysis. This decision will be posted on my Office’s website and will be accessible under ‘Thomas Alvarez’ and the date of the incident, February 19, 2018.¹⁵⁴

Very truly yours,



Margaret Moore

¹⁵⁴<https://www.traviscountytx.gov/district-attorney/office-divisions/civil-rights>

APPENDIX I

The following excerpt from the Crime Scene Report of Daniela Fischer describes the items next to which evidence tents were placed (see Figures 22 through 25).

1. A red 2002 four door BMW 745LI with Texas license plate: JYX0637 located along the south curb of Edge Creek Drive.
2. A silver colored fired cartridge casing located on the north side of Edge Creek Drive, and west of the Austin Police Department Swat Tactical rescue vehicle.
3. A silver colored fired cartridge casing located on the grass, north of the Austin Police Department Swat Tactical rescue vehicle.
4. A silver colored fired cartridge casing located on the north side of Edge Creek Drive, and north of the Austin Police Department Swat Tactical rescue vehicle.
5. Three silver colored fired cartridge casings located on the grass north of the Austin Police Department Swat Tactical rescue vehicle.
6. A silver colored fired cartridge casing located on the grass northwest of the Austin Police Department Swat Tactical rescue vehicle.
7. A silver colored fired cartridge casing located on the grass northwest of the Austin Police Department Swat Tactical rescue vehicle.
8. A black "SMITH & WESSON" magazine located on the north side of Edge Creek Drive northwest of the Austin Police Department Swat Tactical rescue vehicle.
9. A black "PMAG" magazine and a silver and bronze colored cartridge casing located on the north side of Edge Creek Drive and northwest of Austin Police Department Swat Tactical rescue vehicle.
10. A silver fired cartridge casing located on the north side of Edge Creek Drive and northwest of the Austin Police Department Swat Tactical rescue vehicle.
11. Six silver colored fired cartridge casings located on the north side of Edge Creek Drive and northwest of the Austin Police Department Swat Tactical rescue vehicle.
12. Five silver colored fired cartridge casings located on the north side of Edge Creek Drive and northwest of the Austin Police Department Swat Tactical rescue vehicle.
13. Seven silver colored fired cartridge casings located on the north side of Edge Creek Drive and northwest of the Austin Police Department Swat Tactical rescue vehicle.
14. A silver colored fired cartridge casing located on the ground north of the north fence.
15. Two silver colored fired cartridge casings located on the ground northwest of the north fence.
16. Two silver colored fired cartridge casings located on the ground south of the north fence.
17. Defect on the north fence.
18. A bronze colored projectile fragment located on the ground in the center median, and southeast of the entrance gate.
19. A defect on the fence located between the entrance and exit gate.
20. A bronze colored projectile fragment located in the branches of the northwest tree.
21. Seven silver colored fired cartridge casings located on the grass on the east side of 4904 Edge Creek Drive.
22. A silver colored fired cartridge casing located in the flower pot on the east side of 4904 Edge Creek Drive.
23. A black cellular phone located on the ground north of the yellow cab's driver side front quarter panel.
24. Yellow " located on the
25. Defect located on the front windshield of Austin Police Department patrol vehicle number: 5516.
26. A silver colored fired cartridge casing located on the ground south of passenger side rear door of Austin Police Department Patrol vehicle number: 1798.
27. Four silver colored fired cartridge casings located on the ground near the driver side rear tire of Austin Police Department Patrol vehicle number 5516.

28. A silver colored fired cartridge casing located on the ground north of the driver side rear tire of Austin Police Department Patrol vehicle number 5516.
29. Five silver colored fired cartridge casings located on the ground northwest of the driver side rear tire of Austin Police Department Patrol vehicle number 5516.
30. Seven silver colored fired cartridge casings located on the ground west of Austin Police Department Patrol vehicle number 5516 driver side rear quarter panel.
31. Four silver colored fired cartridge casings located on the ground north of Austin Police Department Patrol vehicle number 5516 driver side rear quarter panel.
32. Three silver colored fired cartridge casings located on the ground north Austin Police Department Patrol vehicle number 5516 driver side rear quarter panel.
33. Four silver colored fired cartridge casings located on the ground southwest of Austin Police Department Patrol vehicle number: 1798 passenger side rear quarter panel.
34. Two silver colored fired cartridge casings located on the ground southwest of Austin Police Department Patrol vehicle number: 1798 passenger side rear quarter panel.
35. Two silver colored fired cartridge casings located on the ground northwest of Austin Police Department Patrol vehicle number: 5516 driver side rear quarter panel.
36. Two silver colored fired cartridge casings located on the ground west of Austin Police Department Patrol vehicle number 5516 rear cargo area.
37. Three silver colored fired cartridge casings located on the ground south of Austin Police Department Patrol vehicle number 5516 driver side rear tire.
38. A black "PMAG" magazine located on the ground west of Austin Police Department Patrol vehicle number: 1798 driver side rear tire.
39. Two silver colored fired cartridge casings located on the ground north of Austin Police Department Patrol vehicle number: 1798 driver side rear quarter panel.
40. A silver colored fired cartridge casing located on the ground north of Austin Police Department Patrol vehicle number: 1798 driver side rear quarter panel.
41. A silver colored fired cartridge casing located on the ground north of Austin Police Department Patrol vehicle number: 1798 driver side rear quarter panel.
42. A silver colored fired cartridge casing located on the ground north of Austin Police Department Patrol vehicle number: 1798 driver side rear door.
43. Bronze colored projectile located on the ground southeast of Austin Police Department Patrol vehicle number: 1798 and northeast of Austin Police Department Patrol vehicle number: 5516.
44. Defect located on the north side of 4901 Edge Creek Drive.
45. Defect located on the north side of 4901 Edge Creek Drive.
46. Defect located on the north side of 4901 Edge Creek Drive.
47. Defect located on the north side of 4901 Edge Creek Drive.
48. Defect located on the north side of 4901 Edge Creek Drive.
49. Defect located on the north side of 4901 Edge Creek Drive.
50. Bronze colored projectile located on the ground on the northeast of 4901 Edge Creek Drive and north of the yellow cab.