

REPORT ON THE OFFICER-INVOLVED SHOOTING OF
OLIVER JOSE BARCENAS ON JUNE 9, 2018



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I. INTRODUCTION

The San Francisco District Attorney's Office (SFDA) has completed its review of the officer-involved shooting of Oliver Barcenas on June 9, 2018. The SFDA's review was conducted by the office's Independent Investigations Bureau (IIB) and focused exclusively on determining whether criminal charges relating to the officer's conduct are warranted. IIB's review did not examine collateral issues such as compliance with internal SFPD policies and procedures, training, or tactics, or issues related to civil liability. This report should not be interpreted as expressing opinions on such non-criminal matters.

In brief, on June 9, 2018, San Francisco Police Department (SFPD) Officers Joshua Cabillo (Star No. 1014) and Jonathan Sylvester (Star No. 837) decided to approach a group of four men, one of whom was Barcenas, because the men were standing on the street with open containers of alcohol. Moments after Officer Cabillo engaged them, Barcenas fled, prompting Officer Cabillo to pursue him. During the brief foot chase, Barcenas pulled out a gun with an extended magazine from his waistband. As Barcenas was withdrawing the weapon (see Figure 3, *infra*, showing Barcenas holding the gun in his right hand), Officer Cabillo, in fear for his safety and that of others in the crowded surroundings, fired his service pistol twice, striking Barcenas in the back. In his interview, Officer Cabillo stated he did not see Barcenas toss his gun before he fired his weapon. The incident – from foot pursuit to shots fired – was approximately eight seconds.

On December 11, 2018, Barcenas pleaded guilty to a federal felony firearms charge arising from this incident. In so pleading, he admitted that he “did knowingly possess a firearm and ammunition, specifically a Glock 30, .45 caliber handgun ... along with an extended magazine loaded with multiple rounds of ammunition.”

The District Attorney declines to pursue criminal charges against Officer Cabillo relating to his conduct in this matter because we cannot prove beyond a reasonable doubt that his actions were not reasonably taken in defense of himself and others.

II. FACTUAL SUMMARY

The incident began late on a weekend night in the North Beach neighborhood of San Francisco. This area, densely populated with restaurants and bars, is a popular nightlife spot on the weekends. On this night, an even greater number of people than usual were milling about because the Golden State Warriors had won the NBA championship earlier that evening. Officers Cabillo and Sylvester were in standard SFPD uniforms, patrolling North Beach in a marked police unit; Officer Sylvester was driving the car. At approximately 12:15 a.m. on Saturday morning, the officers saw Barcenas and three other men with an open container of alcohol on the corner of Grant Avenue and Vallejo Street and decided to approach them for this violation. *See* Fig. 1.

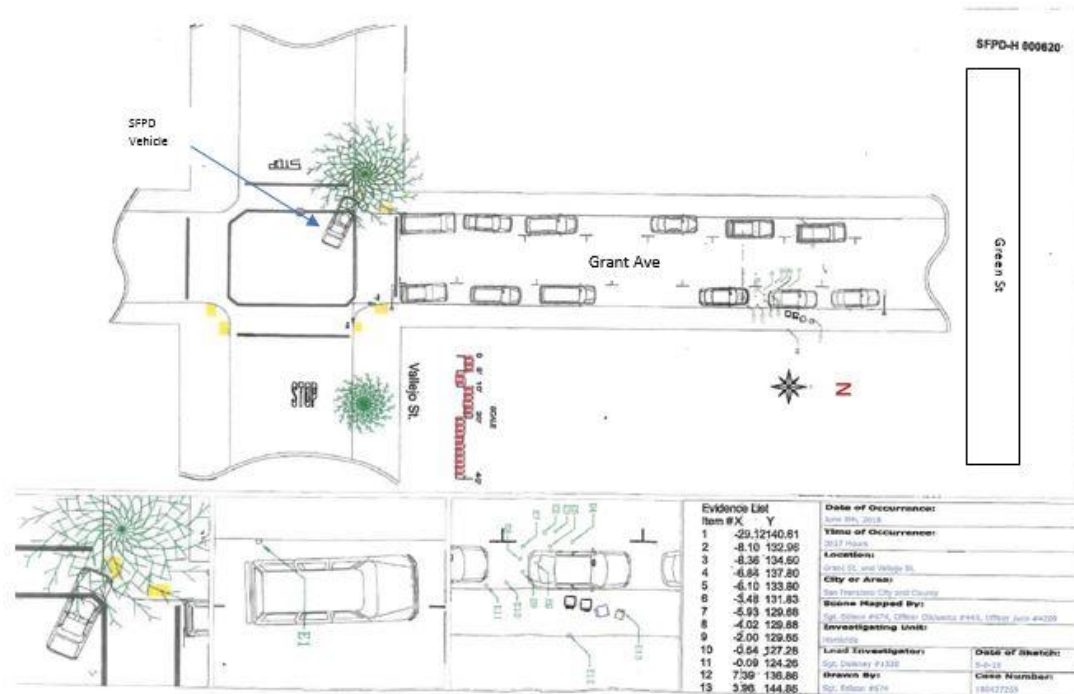


Fig. 1: Amended crime scene sketch.¹ Ofc. Cabillo encountered Barcenas on the northeast corner of Vallejo and Green Streets. The shooting occurred mid-way on Grant Avenue between Vallejo and Green Streets, on the east side of the street. (Source: *SFPD Crime Scene Investigations (CSI)*)

From there, the entire episode – from initial contact to shots fired – was less than a minute long and can be divided into two episodes: (a) the initial interaction, and (b) the foot pursuit.

A. Initial Interaction

The primary evidence for the initial interaction between Officer Cabillo and Barcenas comes from Officer Cabillo’s statement and his body-worn camera.² Officer Cabillo told investigators that after he and Officer Sylvester had observed a group of men, one of whom appeared to be holding a beer bottle, they decided to investigate further. Officer Cabillo told his partner to stop the car. He got out and activated his body-worn camera while Officer Sylvester parked the car. As Officer Cabillo approached the group, he saw that another individual had a champagne bottle in his hand. Barcenas held no containers of alcohol and stood in the street next to the man who was holding the beer bottle. As Officer Cabillo got closer, he saw that Barcenas

¹ IIB made minor, non-substantive changes to the original CSI sketch to correct errors and to more easily allow the reader to view the sketch.

² Officer Sylvester missed most of the initial interaction because he was parking the car. He was walking towards Officer Cabillo and Barcenas when he saw Barcenas run and Officer Cabillo chase after him.

had a “bulge” in his “front waistband area.” Barcenas was stepping back and trying to reposition himself to “hide” that “bulging area.” He believed that Barcenas was armed and paid close attention to Barcenas while he waited for his partner to park the car and join him. Barcenas then began to move as if he was going to “break away and leave,” so Officer Cabillo told the men that no one was going anywhere. Officer Cabillo kept his line of sight on Barcenas when Barcenas pivoted quickly to his right and ran north on Grant Avenue.

Officer Cabillo’s body-worn camera largely corroborates his account of this initial interaction. Officer Cabillo’s body-worn camera shows four men in the street, one of them holding what appears to be a beer bottle and another holding what appears to be a champagne bottle in the crook of his arm. Barcenas does not appear to be holding any open container of alcohol. Officer Cabillo approaches them and asks them where they think they are. One of them responds, “San Francisco,” while the man next to Barcenas asks the officer what they were doing that prompted the officer to approach them. Officer Cabillo tells them that they have open containers. During this encounter, Barcenas begins to shuffle, moving away from Officer Cabillo. *See Fig. 2.* Officer Cabillo immediately says, “Hold on man, you ain’t going nowhere.” Barcenas squares his body back towards Officer Cabillo, raising both arms. Officer Cabillo repeats, “Yeah, man, no one is going anywhere.” Barcenas then pivots quickly to his right and runs north on Grant Avenue towards Green Street.



Fig. 2: This screenshot shows the first time Barcenas (second from the left) turned to his right as if to shuffle away, causing Officer Cabillo to say, “No one is going anywhere.” A few seconds after this, Barcenas fled. (Source: *Officer Cabillo’s body-worn camera*)

B. Foot Pursuit

When Barcenas took off running, Officer Cabillo immediately followed. The foot pursuit was very short - about one-half of a block – and ended when Officer Cabillo shot Barcenas. The primary sources of evidence for this portion of the incident are: (1) Officer Cabillo’s statement; (2) his body-worn camera; (3) surveillance videos from nearby businesses; and (4) physical evidence collected from the scene.³

Officer Cabillo told investigators that as they were running, he saw Barcenas’s right hand reach to his front waistband. In response, Officer Cabillo unholstered his weapon and moved to Barcenas’s side to be able to see what Barcenas drew from his waistband. Officer Cabillo stated that when he saw a firearm with an extended magazine, he feared for his life and for the lives of others present.⁴ There were large groups of people spilling out of bars, and there was also a large group of people ahead of Barcenas. Officer Cabillo said his fear for their lives was magnified because Barcenas’s gun was “superior” to his – that is, Barcenas’s gun had an extended magazine and he could therefore shoot more rounds and faster than could Officer Cabillo. Although Officer Cabillo did not recall seeing Barcenas pointing the gun at anyone, he made the decision to shoot when he saw the gun in Barcenas’s hand because he did not want to “gamble” and because he believed Barcenas pulled out his gun to use it. Officer Cabillo fired his weapon -- he believed twice -- and stopped after seeing Barcenas fall down. (An examination of his gun confirmed that he fired twice.) Barcenas was struck in the lower back.

Video footage captured the event and largely corroborates Officer Cabillo’s narrative of the chase. Officer Cabillo’s body-worn camera shows him attempting to radio in the foot pursuit.⁵ He did not issue any verbal commands to Barcenas. The footage is blurry because Officer Cabillo was running, but the video captures jerky motions of Barcenas removing his jacket and of him moving his right arm/elbow consistent with him removing an object from his waistband. As he ran from Officer Cabillo, Barcenas dodged and ran past civilians. Approximately eight seconds after the chase began, Officer Cabillo fired his weapon.

Exterior surveillance videos from businesses on Grant Avenue also filmed the foot pursuit. One camera angle captures the front of Barcenas running up the street with a black object in his right hand that appears to be a gun. *See Fig. 3.*

³ Although Officer Sylvester joined the foot pursuit, he reported being distracted “a lot” during the chase because his radio had fallen and wrapped around his left leg, hindering his running. Throughout the short chase, he looked down at his radio multiple times and tried to reach down to grab it. Because of this, Officer Sylvester reported only seeing Barcenas taking off his jacket, hearing gunshots, and then seeing Barcenas fall. Although Officer Sylvester did not see Barcenas with a gun, he later saw a gun on the ground. Officer Sylvester did not draw his gun at any point during the chase.

⁴ Under California law, possessing a “large-capacity magazine” is prohibited. Cal. Penal Code § 32310. A “large-capacity magazine” is defined as “any ammunition feeding device with the capacity to accept more than 10 rounds.” Cal. Penal Code § 16740.

⁵ Although the body-worn camera captures the audio of Officer Cabillo attempting to radio the foot pursuit in, that information was not successfully transmitted to and transcribed by the dispatcher.



Fig. 3: Screenshot from a surveillance video showing Barcenas, after he had shed his jacket, running with a firearm in his right hand. (Source: *Moe's, 1322 Grant Avenue*)

Another business surveillance camera shows the back of Barcenas as he is running away. Although the images are a bit blurry since Barcenas is in motion, the video appears to capture Barcenas throwing a black object to his left into the street: it shows Barcenas's right arm and shoulder moving down and to the left, a dark-colored object falling from waist-height on the left side, and the dark-colored object sliding into the street by the left rear tire of a grey car. See Fig. 4.

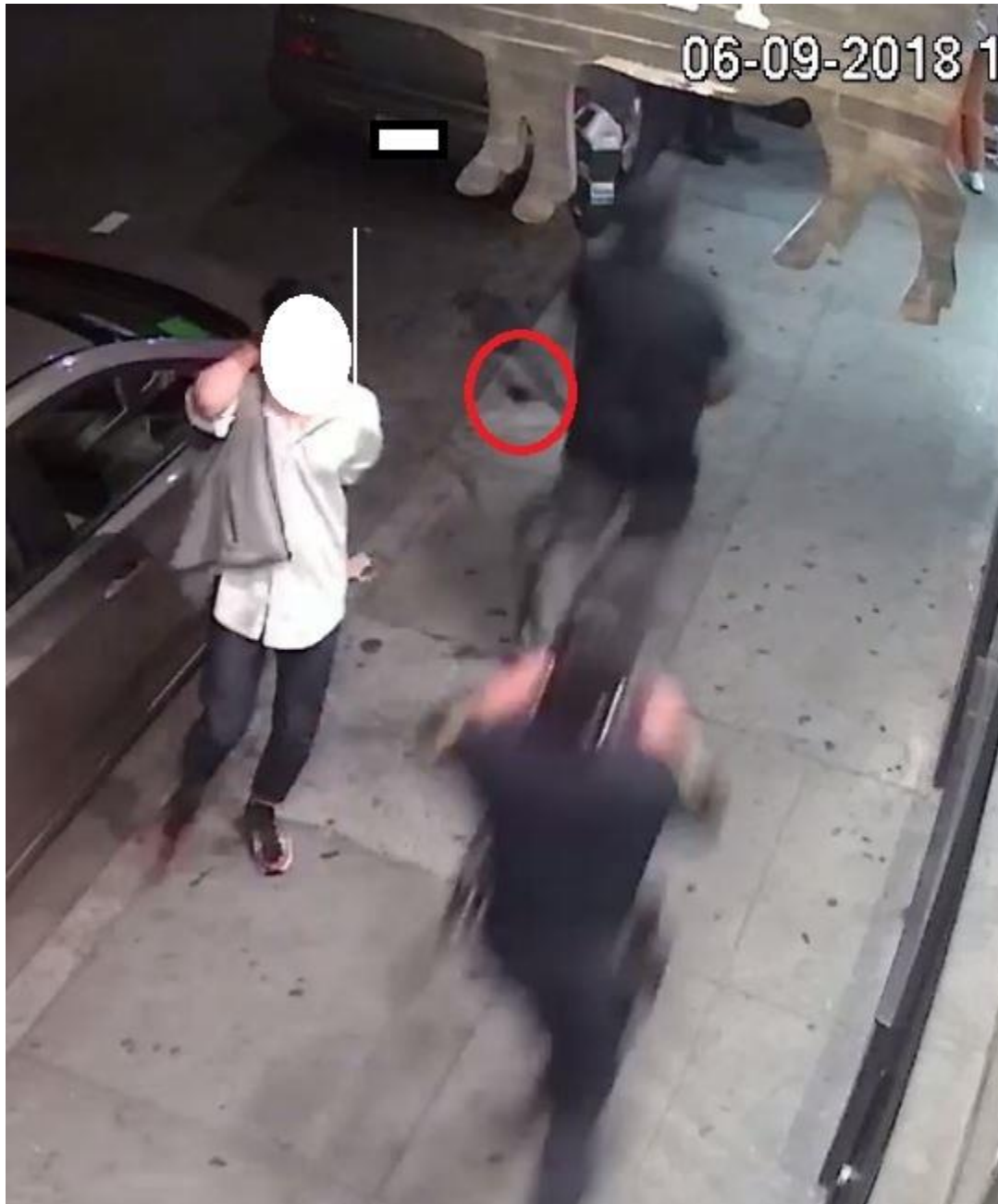


Fig. 4: This is a screenshot from a security camera. Barcenas is the individual in the black t-shirt closest to the parking meter. The black object, circled in red, fell from Barcenas's waist height and slid into the street by the rear left tire of the grey car. (Source: *Dip, 1318 Grant Avenue*)

SFPD crime scene investigators collected, among other things, a gun with an extended magazine and ammunition in the area around the left rear tire of the grey car depicted in the above screenshot. Officer Cabillo told investigators that he did not see Barcenas throw his gun and did not know how the weapon got to the ground. From the videos, it appears that Officer Cabillo fired his weapon milliseconds after Barcenas tossed the object.



Fig 5A: The firearm (Marker 2) and some of the ammunition collected from the scene. (Source: SFPD CSI)



Fig. 5B: Gun with extended magazine and some of the ammunition recovered from the scene. (Source: SFPD CSI)

The gun was submitted for DNA testing. The laboratory report concluded: “DNA results were obtained. No further conclusions can be made due to the limited DNA present.”

C. Barcenas's Plea

On August 30, 2018, Barcenas was charged with violating 18 U.S.C. § 922 (g)(1) – Felon in Possession of a Firearm and Ammunition. *See United States v. Oliver Barcenas* (N.D. Cal., 3:18-cr-406). On December 11, 2018, he pleaded guilty, admitting that on the night in question, he knowingly possessed a firearm with an extended magazine loaded with multiple rounds of ammunition. On March 6, 2019, he was sentenced to a term of 84 months imprisonment.

III. LEGAL STANDARD

The question presented is whether Officer Cabillo committed a criminal act in shooting Barcenas. In order to charge an officer with a crime, the prosecutor must be satisfied that the evidence will show beyond a reasonable doubt that no legal justifications existed for the officer's actions. Here, the relevant legal justification offered by Officer Cabillo is that he was acting in self-defense and/or in defense of others.

California law permits any individual to use deadly force “[w]hen resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person.” Cal. Pen. Code, § 197; *see also Kortum v. Alkire* (1977) 69 Cal. App. 3d 325, 333. Specifically, self-defense or defense of others serves as a complete defense to voluntary manslaughter and to assault with a deadly weapon so long as (1) the officer subjectively believed in the need to resort to force in order to avert a threat of imminent and great bodily injury, and (2) his perceptions and actions were objectively reasonable under the circumstances. *See People v. Humphrey* (1996) 13 Cal. 4th 1073, 1082; *People v. Viramontes* (2001) 93 Cal. App. 4th 1256, 1262.

The subjective prong of the self-defense standard examines the person's belief in the need to use force. The objective component of self-defense asks what a reasonable person would have done in the officer's position. The reasonable person is an abstract individual of ordinary mental and physical capacity who is as prudent and careful as any situation would require him to be. *People v. Humphrey* (1996) 13 Cal. 4th at 1083. In making the determination as to whether an officer's conduct was objectively reasonable, one must consider all the “facts and circumstances . . . in determining whether the defendant acted in a manner in which a reasonable man would act in protecting his own life or bodily safety.” *Id.* Self-defense law “grants a reasonable margin within which one may err on the side of his own safety, and so long as he is found to have done so reasonably, no abuse of the right of self-defense should be found to have occurred.” *People v. Ross* (2007) 155 Cal. App. 4th 1033, 1057.

IV. LEGAL ANALYSIS

In this case, Officer Cabillo stated that he believed that he and others were in imminent danger of suffering bodily injury because he saw Barcenas draw a firearm with an extended magazine from his waistband as Barcenas fled from police. Officer Cabillo stated that he believed that Barcenas pulled out that weapon to use it, and he feared for the public's safety because there were many people milling about celebrating the Warriors' championship.

The remaining question, then, is whether it was objectively reasonable for Officer Cabillo to believe that he and others were in imminent danger of great bodily injury and to use deadly

force as a response. As a preliminary matter, we cannot prove it was unreasonable for Officer Cabillo to believe that Barcenas had a weapon because surveillance video captured Barcenas running with an object that appeared to be a weapon; a gun with an extended magazine and ammunition was found in the street consistent with where Barcenas threw the object; and, importantly, Barcenas pleaded guilty to being a felon in possession – on the evening in question – of a firearm with an extended magazine and ammunition.

We next examine whether it was unreasonable for Officer Cabillo to fear for his safety and the safety of others when Barcenas never pointed his weapon at any person. Barcenas reported that he decided to shoot when he confirmed that Barcenas had a gun because he could not “gamble” with the public’s safety. Officers need not wait to confirm that a suspect is armed with a weapon “particularly where inaction could ... result[] in death or serious injury to the officer and others.” *McLenagan v. Karnes*, 27 F.3d 1002, 1008 (4th Cir. 1994). This means that an officer need not wait for a suspect to point a gun before using lethal force. An officer may “reasonably use deadly force when he or she confronts an armed suspect in close proximity whose actions indicate an intent to attack. In these circumstances, the Courts cannot ask an officer to hold fire in order to ascertain whether the suspect will, in fact, injure or murder the officer.” *Martinez v. County of Los Angeles* (1996) 47 Cal. App. 4th 334, 345 (quoting *Reynolds v. County of San Diego*, 858 F. Supp. 1064, 1072 (S.D. Cal. 1994)). We therefore cannot prove beyond a reasonable doubt that it was unreasonable for Officer Cabillo to shoot upon seeing Barcenas pull out a gun, rather than waiting for Cabillo to point his gun at someone.

Similarly, even though Barcenas discarded his gun (presumably because it was a crime for him to possess it), we cannot prove beyond a reasonable doubt that when Barcenas withdrew a gun, Officer Cabillo knew or should have known that Barcenas intended to discard the gun. In *Wilson v. Meeks* 52 F.3d 1547, 1553 (10th Cir. 1995), it was “undisputed” that an officer shot and killed a man who “brought his hand forward with [a] gun.” The decedent’s estate sued the officer, claiming that the decedent held his gun in a “surrender position.” *Id.* The court wholly rejected this argument, noting that the relevant legal question did not turn on whether the decedent was in fact surrendering: “*the inquiry here is not into [the decedent’s] state of mind or intentions, but whether, from an objective viewpoint and taking all factors into consideration, [the officer] reasonably feared for his life.*” Qualified immunity does not require that the police officer know what is in the heart or mind of his assailant. It requires that he react reasonably to a threat.” *Id.* at 1554-55 (emphasis added).

Lastly, we examine the fact that Officer Cabillo fired his weapon milliseconds *after* Barcenas threw his gun in the street. Officer Cabillo said that he did not see Barcenas throw the gun in the street and did not know how the gun got into the street. Barcenas’s movements in tossing the gun happened quickly, and even on the surveillance video, it requires careful scrutiny to detect an object drop from Barcenas’s left-hand side and skid into the street. We therefore cannot prove beyond a reasonable doubt that Officer Cabillo saw Barcenas throw the gun. Moreover, once allowances are made for reaction time (i.e., the time needed for Officer Cabillo to perceive and react to seeing Barcenas withdraw a gun), we cannot prove beyond a reasonable doubt that Officer Cabillo made the decision to shoot *after* seeing Barcenas toss his gun in the street.

Therefore, under the circumstances present here – i.e., because Barcenas was running away from law enforcement; because he was drawing a firearm with an extended magazine; and

because there were numerous civilians present – we cannot prove beyond a reasonable doubt that Officer Cabillo’s use of deadly force was not an objectively reasonable response.

V. CONCLUSION

For the reasons stated above, we conclude that we cannot prove beyond a reasonable doubt that Officer Cabillo was not justified in acting in self-defense or defense of others and did not act out of a belief in the need to protect himself and others. The District Attorney thus declines to file criminal charges in this matter.