



State of California
Office of the Attorney General

ROB BONTA
ATTORNEY GENERAL

May 18, 2023

VIA EMAIL

Honorable Brooke Jenkins
District Attorney
City and County of San Francisco
350 Rhode Island Street, North Building
Suite 400 North
San Francisco, CA 94103

RE: *People v. Christopher Samayoa*; San Francisco Superior Court case No. 20012531

Dear District Attorney Jenkins:

On December 1, 2017, San Francisco Police Department Officer Christopher Samayoa fatally shot Keita O’Neil at the Alice Griffith (“Double Rock”) housing development in the City of San Francisco. The San Francisco District Attorney’s Office (“DA”) reviewed the officer-involved shooting (“OIS”) for potential criminal charges.

On November 21, 2021, under District Attorney Chesa Boudin, Officer Samayoa was charged by arrest warrant with violations of Penal Code section 192(a) (voluntary manslaughter), 192(b) (involuntary manslaughter), 245(b) (assault with a semiautomatic firearm), 149 (assault under color of authority), 246.3(a) (negligent discharge of a firearm resulting in death) and sentencing enhancements pursuant to 12022.5(a) (personal use of a firearm). Officer Samayoa was arraigned on the charges and the matter was ultimately set for preliminary hearing. Thereafter, DA Boudin was the subject of a recall election, and you took office as District Attorney. After further review of the evidence, your office filed a motion to dismiss the charges against Officer Samayoa because, as set forth in your February 8, 2023, letter to the Attorney General which was appended to the motion to dismiss, you stated, “[i]t appears that the case was filed for political reasons and not in the interests of justice... Given the conflicts that have arisen, the evidentiary problems, and the complete lack of good faith surrounding the filing of this matter, we cannot ethically proceed with this prosecution.” The matter was set for dismissal on March 1, 2023, in the San Francisco Superior Court before Judge Loretta M. Giorgi.

Honorable Brooke Jenkins
District Attorney
City and County of San Francisco
March 18, 2023
Page 2

Your February 8 letter to the Attorney General's Office (AGO) requested our review of this matter, and our intervention if the Attorney General believed that the matter should be prosecuted. On the same day the AGO also received a letter from Mr. O'Neil's aunt, Ms. April Green, through her attorney Brian Ford, requesting this office assume prosecution of the case.

On February 28, 2023, the AGO responded to Mr. Ford's letter and sent you a courtesy copy. The letter explained that we would review the matter to determine whether your decision to dismiss the charges against Officer Samayoa was an abuse of discretion. The court has stayed the dismissal of the Samayoa case in order to allow this office to review, and, if appropriate, to assume prosecution of the Samayoa case.

The DA's files pertaining to this matter were received by this office, and we have thoroughly reviewed the materials and evidence. The AGO reviewed all memoranda and presentations evaluating the shooting contained in the DA's file prepared by deputy district attorneys under DAs Gascon, Boudin, and Jenkins. We also reviewed crime scene photographs, autopsy findings, witness interviews, expert witnesses' reports and reconstructions, body worn and surveillance videos, training materials including videos from Officer Samayoa's police academy training, all of which had been obtained by the DA's office. Additional interviews of former San Francisco District Attorney personnel were conducted, and their files were obtained and reviewed. Motions, depositions, and experts' reports from the civil suit filed by Mr. O'Neil's family against the City of San Francisco were also reviewed.

After conducting this comprehensive and thorough review and considering the applicable laws, we conclude that based on all of the evidence available at this time, and considering all likely defenses, the charges against Officer Samayoa cannot be proven beyond a reasonable doubt. We conclude, therefore, that the decision to dismiss the case against Officer Samayoa is not an abuse of discretion.

I. FACTUAL SUMMARY

On December 1, 2017, decedent, Keita O'Neil, and several accomplices carjacked a white California Lottery van and robbed the elderly female driver, injuring her in the process. San Francisco police officers alerted to the incident saw the carjacked van soon after the incident and attempted to initiate a stop, but Mr. O'Neil fled in the carjacked white California Lottery van and led officers on a high-speed pursuit. As reported by SFPD Officer Moriyama, an officer who was one of the first police officers to join the pursuit, the carjacked van was traveling over 80 miles per hour in the far-right emergency lane of the southbound I-280 freeway. The vehicle made an abrupt lane change from the emergency lane to the southbound 101 freeway and continued driving southbound of the 101 freeway making abrupt lane changes. After exiting the freeway, the carjacked van continued to be pursued by officers in what SFPD Officer Cunningham described as a "high-speed pursuit."

Honorable Brooke Jenkins
District Attorney
City and County of San Francisco
March 18, 2023
Page 3

Defendant Officer Christopher Samayoa and his Field Training Officer Edric Talusan became the primary pursuit vehicle. Officer Samayoa, a probationary officer on his fourth day in the field after recently graduating from the police academy, was in the passenger seat, while Officer Talusan drove the police car. The carjacked van sped through residential neighborhoods and entered the Double Rock housing development with the officers following closely behind. With the police car directly behind it, the carjacked white van sideswiped a parked car and then sped onto a dead-end street. Mr. O'Neil opened the driver-side door and abruptly exited the carjacked white California Lottery van while it was still in motion. Although there was an open gate in front of his vehicle, alternate paths, Mr. O'Neil ran toward the back of the carjacked van, directly towards Officers Talusan and Samayoa's police car. Mr. O'Neil closed the distance between the carjacked van and Officer Samayoa's patrol car in less than a second. Officer Samayoa reported seeing Mr. O'Neil reach for his waistband believing that Mr. O'Neil was reaching for a gun. Officer Samayoa stated his belief was that he and his partner, and other responding officers, were in imminent danger of being killed or injured. Officer Samayoa fired one shot from inside the police vehicle, striking Mr. O'Neil in the neck and killing him.

II. EVIDENCE

Video Evidence

Officer Talusan did not activate his BWC until after the shooting had occurred.

Watch Tower video footage in the area captured parts of this incident. That footage showed the pursuit and the carjacked van's driver door opening while the van made a right turn onto a dead-end street. Mr. O'Neil can be seen jumping from the van while it is still moving. The footage also depicted the patrol car coming to a stop when the lethal shot was fired. The video showed the path of movement of Mr. O'Neil as being first straight toward the patrol car and then because all parties were still moving, alongside the passenger side of the patrol car. Mr. O'Neil was 2.7 feet away from Officer Samayoa, directly outside the front passenger-side window of the patrol car, when he was shot.

Officer Samayoa's BWC was positioned on his chest. The BWC video captured parts of the incident but did not fully capture the events from Officer Samayoa's perspective. Specifically, Officer Samayoa's BWC footage captured Mr. O'Neil jumping from the moving California Lottery van and running toward the patrol car, but that footage is largely obstructed by the windshield and "A" pillar (the sloping pillar which supports the windshield) of the patrol car in the critical moments before the shooting. The video is obstructed in such a way that Mr. O'Neil's hands cannot be seen at the point Officer Samayoa reported observing Mr. O'Neil reaching behind and toward his waistband. Thus, the video neither confirms nor refutes Officer Samayoa's report that he saw Mr. O'Neil reach behind his back.

Honorable Brooke Jenkins
District Attorney
City and County of San Francisco
March 18, 2023
Page 4

SFPD Officer Statements

Officer Christopher Samayoa

Officer Samayoa provided a recorded statement on the day following the OIS. During this interview, conducted by SFPD Homicide Detectives Mark Hutchings and Scott Warnke, Officer Samayoa watched the body worn and security video of the OIS, provided a statement, and reenacted portions of the OIS. Thereafter, Officer Samayoa was asked to and did identify himself in a video which was taken during one of his academy training sessions, discussed below. In summary, Officer Samayoa stated that on the day of the OIS, he was on his fourth day as a police officer, assigned to Field Training Officer Edric Talusan. Both officers were at their assigned station, in the Bayview area of the City of San Francisco, prior to the start of their shifts. Both officers were in uniform and were not yet on duty. Officer Samayoa was preparing a patrol car for their use, as the car that they were normally assigned was undergoing repairs, when Officer Talusan heard a call that there had been a carjacking. Officer Samayoa had never responded to a carjacking call and had been tasked only with writing simple police reports during his first three days on duty.

As set forth in Officer Samayoa's December 2, 2017, interview, he saw officers rushing from the station "in kind of a panic." Officer Talusan asked a supervisor for permission to respond to the call even though he and Officer Samayoa were not yet on duty. They were given permission, and Officer Talusan ordered Officer Samayoa to prepare a different patrol car for their use. Officer Samayoa complied. The car that he and Officer Talusan wound up using had a problem with the passenger door, which did not open readily. The officers could not access the patrol car's computer-aided dispatch system (CAD), which was only available to officers during their normal shifts, and the officers had to rely on the patrol car's radio and their car-to-car radios, both of which broadcast different streams of information. While CAD logs reflect that there was an update to the carjacking call stating that there were "no weapons seen" during the carjacking, neither officer had access to this information because they had not yet started their assigned shift and CAD terminals can only be accessed while officers are on duty. This update was also broadcast over the patrol cars' radio systems. A review of radio transmissions for this incident shows that Officer Samayoa was not yet in the patrol car when this information was broadcast. Officer Samayoa stated that he believed that carjacking was a dangerous crime in which suspects are frequently armed.

During the pursuit, he and Officer Talusan left the police station with their "code 3" lights and sirens activated. Officer Samayoa described his Field Training Officer's driving during the pursuit as "dangerous." As they entered the Double Rock housing development, Officer Talusan told him to be prepared for a "foot bail" (a foot pursuit). These were the only instructions he had been provided by Officer Talusan during the pursuit. He tried to open the patrol car's passenger door but could not because it stuck. BWC video shows Officer Samayoa attempting to open the patrol car's passenger door during this timeframe; he later stated that he was unable to because the door stuck, a fact confirmed by examination of the patrol car after the

Honorable Brooke Jenkins
District Attorney
City and County of San Francisco
March 18, 2023
Page 5

OIS. The pursuit ended when Mr. O’Neil rounded a corner in the carjacked van at a high rate of speed, opened the van door and ran towards the officers’ patrol car while the van was still moving.

Mr. O’Neil closed the distance between himself and the officers in less than a second. Officer Samayoa observed Mr. O’Neil’s left hand reach behind him. Believing Mr. O’Neil was reaching for a gun and would shoot the officers, Officer Samayoa shot once from inside the patrol vehicle, killing Mr. O’Neil.

Officer Samayoa recounted that he had participated in a field training exercise several weeks before he graduated from the police academy. He reviewed a video of this live-action-tactical-training scenario at the police academy with interviewers. The training was designed to inform officers-in-training about the dangers of vehicle stops. This training involved officers driving a patrol car in a residential neighborhood and conducting a “routine” traffic stop of a white van. As Officer Samayoa pulled his patrol car behind the white van and activated the patrol car’s light bar, two men abruptly jumped from the white van, ran toward the police car with the officers still seated inside, and fired at officers. During his training, Officer Samayoa was shot in the head with simulated ammunition.

Officer Edric Talusan

Officer Talusan has provided testimony under oath on several occasions. He had been a police officer for approximately 11 years at the time of the OIS. He testified before the grand jury on October 22, 2018, that he was inside the Bayview police station when he heard the call of a carjacking. Officer Samayoa was getting their patrol car ready for their shift. They were not yet on duty. Officer Talusan testified that his initial intention was to respond to the location of the carjacking victim to have Officer Samayoa take a report from her. He asked his sergeant for approval to respond to the victim’s location even though they were not yet on duty and the sergeant approved. When they were in their patrol car, he heard the radio calls of an ongoing pursuit, and decided to engage in the attempt to apprehend the carjacking suspect because his car was in the vicinity of the pursuit. Officer Talusan stated that when he first spotted the incident van, it was traveling at a high speed, at times traveling against the direction of traffic and was actively being pursued by another police vehicle. The pursuit ended in the Double Rock housing development. During the termination of the pursuit, Mr. O’Neil sideswiped a parked vehicle with the carjacked van, and as he rounded a corner into a dead-end street he opened the driver’s side door. Officer Talusan rounded the corner right behind Mr. O’Neil. While the van was still moving, Mr. O’Neil exited the van and ran towards the officers’ patrol car despite having a path to flee away from the officers.

This is his testimony on October 22, 2018:

Officer Talusan: Then he started running towards our vehicle.

Honorable Brooke Jenkins
District Attorney
City and County of San Francisco
March 18, 2023
Page 6

SF Deputy District Attorney Cha: Were you...And is that in the direction of the pedestrian gate or away from the direction of the pedestrian gate?

Officer Talusan: No, which is what shocked me. Because typically suspects run away from us. I don't think I have ever had a suspect run towards us. So it was shocking when, instead of turning right and going towards the front of his car towards the pedestrian gate, instead started to turn left and started – well, he didn't turn left because he was facing us already – but he started running towards our car.
(10/22/18 GJT, p. 669, ln. 23 – p. 670, ln. 4).

Officer Talusan testified in his January 7, 2021, deposition in the civil case that he did not draw his gun when he saw Mr. O'Neil get out of the carjacked van and run towards the patrol car:

Q: Why not?

Officer Talusan: Because I didn't -- still in control of the vehicle. I had both hands on the steering wheel. I could not get my hand on my gun.

Q: Okay. If you had been in the passenger seat --strike that. Did you instruct your recruit to pull out his gun?

Officer Talusan: I did not.

Q: Why not?

Officer Talusan: Like I said, it's -- we are reacting to what the subject does. I -- my field of view is different from his field of view, so he may see something I might not see. So I expect him to react to what he sees, what he perceives as a threat.
(1/7/21 Talusan Deposition Transcript, p. 70, lns. 1-15.)

Officer Talusan further testified that he saw Mr. O'Neil exit the carjacked van and that Mr. O'Neil's hands were by his waist at that time, however, after that Mr. O'Neil was a "blur" as Officer Talusan's focus was on driving the patrol car (GJT p. 674). He stated that he heard a noise as Mr. O'Neil ran into the side of the patrol car closest to Officer Samayoa:

SF Deputy District Attorney Cha: And now you mention you heard him hit your car, an audible bang. Did you actually see him run into your car?

Officer Talusan: Yes.

SF Deputy District Attorney Cha: Okay. What part of his body hit what part of the car?

Officer Talusan: The front. It looked like the front right of the car – in respect, he could have hit the mirror as well as he was running by – but towards our right front, the passenger side of the car.

(10/22/18 GJT p. 670, lns. 17-24.)

In fact, Mr. O'Neil impacted the mirror on that side of the patrol car. Officer Talusan did not realize that Officer Samayoa had drawn his gun until after the OIS occurred. After the OIS, Officer Talusan took Officer Samayoa's gun from him and had him sit in their patrol car; he described both he and Officer Samayoa as being "in shock."

Honorable Brooke Jenkins
District Attorney
City and County of San Francisco
March 18, 2023
Page 7

SF Deputy District Attorney Cha: How about Samayoa. Did he say anything?

Officer Talusan: I don't believe so.

SF Deputy District Attorney Cha: So from the point that he fires, even at this point you don't recall him saying anything.

Officer Talusan: No.

SF Deputy District Attorney Cha: How did he appear?

Officer Talusan: In shock. Deer in headlights. Eyes wide. He just appeared to be standing there looking at the, looking at the suspect.

SF Deputy District Attorney Cha: Were you concerned about him?

Officer Talusan: Yes.

(10/22/18 GJT p. 678, lns. 8-17).

Officer Natasha Valderrama

Officer Natasha Valderrama was assigned to Bayview Station. She had been a police officer for three years and was assigned to Bayview Station for approximately one year. Officer Valderrama was one of the officers involved in the pursuit of the carjacked van, and her patrol car was behind Officer Samayoa's as they entered Double Rock. Her grand jury testimony was that Officer Samayoa's response was reasonable, given the situation he was in: "Considering the crime, considering it is not like it is some small phone theft, it is a carjacking. He hurt an older woman to steal her car. He robbed her. He's a violent felon and a carjacking like that they usually have weapons. So if I see someone running at me and you have literally seconds to make a decision and they could possibly have a weapon running at me, I'm going to defend myself the best way I can." (9/25/18 GJT p. 353).

SF District Attorney Investigator Jack Lundberg

San Francisco District Attorney Inspector (DAI) Jack Lundberg was the primary investigator assigned to the O'Neil shooting. He was interviewed by SFDA investigators on January 1, 2023. A review of that interview and his chronological log of his investigation shows that he responded to the OIS on December 1, 2017, and was responsible for the investigation until another investigator took over nearly two years later. His response to the incident included viewing the scene of the OIS on December 1, 2017, being briefed on what had occurred during the carjacking and the basic facts of the OIS, viewing Watch Tower security video, and assigning other DAIs to assist him by attempting to locate and interview civilian witnesses to the shooting; however, DAI Lundberg had primary responsibility for the investigation and was present for most of the significant interviews.

During his investigation, he saw the Samayoa simulation training video during which Officer Samayoa was driving a patrol car in a residential neighborhood and conducting a "routine" traffic stop on a white van. After running the van's plates and learning that its registration was expired, Officer Samayoa activated his patrol car's lights in an effort to pull the van over. The van slowed and its occupants ran towards the patrol car. The driver of the van pulled a gun and

Honorable Brooke Jenkins
District Attorney
City and County of San Francisco
March 18, 2023
Page 8

shot Officer Samayoa in the head with simulated ammunition (paintballs were used instead of live rounds). Seeing this, DAI Lundberg told San Francisco Police Department homicide investigators who were conducting a separate investigation into the shooting that the simulation was eerily similar to what actually happened in the O'Neil case. Officer Samayoa participated in this training weeks prior to the OIS (a review of the training video shows that the training took place 21 days prior to the OIS). An officer's training is legally relevant to assessing his reactions in the actual case. In this case, Officer Samayoa's very recent training demonstrated that a failure to act when a suspect jumps from a van and runs towards the officer can result in deadly consequences for the officer. This supports the reasonableness of the officer's belief that it was necessary to shoot Mr. O'Neil in self-defense. Based on his investigation, DAI Lundberg determined that there was no probable cause to charge Officer Samayoa with a crime. He shared his conclusions with the Gascon administration and participated in the discussion of the case between DDA Cha and the Gascon administration.

SFPD Homicide Detective Mark Hutchings

San Francisco Police Department Homicide Detective Mark Hutchings, responsible for investigating the shooting of Mr. O'Neil, viewed a video Officer Samayoa's simulation training with the officer and his attorney. Detective Hutchings described the training simulation in an October 28, 2022, interview with SFDA investigators as follows:

So the training video is essentially what happened to [Officer Samayoa] out on the street [during the OIS]. One of the declarant's statements was another DAI, I believe it was Dan Lundberg, who said 'I can't tell the difference between the training video and his BWC, that's what Lundberg said to me. So what the training video was, it was actually a scenario. The officer, the recruit officers were not told what to expect. They kind of knew something was up, but they didn't know exactly what to expect. They have helmets on, which is unusual, so they know, you know, they're going to be attacked. There officers were in a marked police car and they were driving around a training facility. I don't know which one it was. It might have been Treasure Island or some abandoned neighborhood. And they were, a radio broadcast came out of a suspicious white van, and the van descriptor, with the license plate was presented to the officers as they were driving around, and lo and behold the white van is in front of them. And it's an innocuous traffic stop, on like a fix-it ticket or bad registration or something just mundane, and the officers pull up behind the vehicle in a ...mundane thing. They're not even exposed to armed and dangerous, you know, be on your toes, these guys are going to jump out and kill you. Well, whatever happens, the van stops and two subjects jump out of the vehicle, run immediately at the car and they start shooting simulated ammunition the car (10/28/22 Hutchings interview, p. 35, lns. 11-36.)

Hutchings determined that Officer Samayoa's simulation training was strikingly similar to the events which led to Mr. O'Neil's death:

Honorable Brooke Jenkins
District Attorney
City and County of San Francisco
March 18, 2023
Page 9

[G]oing back to the incident where he discharged his firearm at Keita O'Neil, it just became more understandable, it became reasonable for him to behave the way he behaved out on the street, after being exposed to his training. So for me, the reasonable officer standard based on his training was consistent with his behavior out on the street. For better or for worse, it made sense.

(10/28/22 Hutchings interview transcript, p. 37, lns. 16 -22.)

Detective Hutchings concluded that there was no probable cause to charge officer Samayoa with a crime in light of the officer's training and experience. This determination was made during the Gascon administration.

Expert Witnesses

There were five expert witness reports in the Samayoa case file. These included reports prepared for the criminal case as well as reports prepared for the civil litigation.

Greg Stutchman, a forensic analyst, and principal in Stutchman Forensic Laboratory prepared a frame-by-frame analysis of Officer Samayoa's BWC video for the plaintiffs in the O'Neil civil case. His analysis did not include conclusions; he simply broke the BWC video down into a series of individual photographs, or frames.

Four frames from Stutchman's analysis, representing the 0.12 seconds before Mr. O'Neil was shot, were sent to **Dr. Roee E. Rubinstein**, a board-certified hand surgeon for analysis. These frames were sent to Dr. Rubenstein on November 19, 2020, by DAI Jack Friedman, who worked on the criminal prosecution during the Boudin administration for a determination as to which of Mr. O'Neil's hands was visible in the four frames. Dr. Rubinstein concluded that Mr. O'Neil's left hand was visible in the frames immediately prior to the patrol car window's shattering

Dr. Eric Rossetter, PhD, a mechanical engineer, analyzed the videos and physical evidence to determine the path of both vehicles and the timing leading up to the OIS. He was hired by the defense in the civil suit, and prepared a report dated February 10, 2021, in which he determined that from the time Mr. O'Neil exited the carjacked van until he was shot was 0.83 seconds. As described in greater detail in his report, Dr. Rossetter's analysis includes synchronizing video data, analyzing the positions and speeds of the vehicles and of Mr. O'Neil after he exited the van, and presenting a view from the passenger seat. The resulting analysis provides timing information and the corresponding view of a passenger of approximately Officer Samayoa's height while seated in the police vehicle. This timing and the officer's view are significant to both the criminal prosecution and to the civil case, as the Boudin administration and the plaintiffs in the civil case contended that the time available to the officer was not sufficient for him to have perceived a threat, formulated the decision to shoot and to have shot Mr. O'Neil. Thus, the time available to the officer, and what he was able to see from his vantage point, were of great import. Dr. Rossetter's analysis shows that at approximately 0.83 seconds prior to the gunshot, the brake

Honorable Brooke Jenkins
District Attorney
City and County of San Francisco
March 18, 2023
Page 10

lights of the van are extinguished. In the 0.83 seconds from the brake lights turning off to the shot, the distance between Officer Samayoa and Mr. O'Neil went from 16.1 feet to 2.7 feet.

Dr. Rossetter's analysis shows that the Bodycam View does not accurately depict what would be visible to an officer seated in the passenger seat. While Officer Samayoa's BWC shows very little of the events immediately prior to the shooting because the BWC view is blocked by the patrol car's "A" pillar, based on eye position, rather than bodycam view, Officer Samayoa would have had visual information of the van door opening, the van door remaining open through the right turn it made, and Mr. O'Neil exiting the vehicle while the vehicle was still in motion. Officer Samayoa would have a clear view of the driver door opening on the van. He would also be able to clearly see Mr. O'Neil exit the van and move toward the police vehicle during the entire 0.83 seconds from O'Neil's brake release to the shot being fired. Mr. O'Neil came in contact with the passenger side mirror of the patrol car as he ran. Dr. Rossetter's analysis is significant because it shows that the officer had far more information available to him than that depicted in the BWC view.

Dr. Rossetter's analysis also shows that at 9.6 seconds into Officer Samayoa's BWC recording, the carjacked van's door starts to open. One second later, at 10.6 seconds, the carjacked van impacts a parked car, and its driver's door is fully open. At 11.3 seconds, Officer Samayoa's firearm is first visible in his BWC. At 13.2 seconds, the carjacked van's rear brake light turns on and then off. Officer Samayoa places both hands on his firearm after Mr. O'Neil has exited the van and is at the rear of his van, as shown from the Watch Tower surveillance video, frame 414, at 13.8 seconds.

Bryan Chiles, who worked for Axon, the manufacturer of the officers' BWCs, was consulted by the Boudin administration to determine whether Officer Samayoa had been able to access the recording of his BWC's view of the OIS prior to it being shown to him on the day of his interview. Chiles determined that, while there was an anomaly in the BWC audit trail, Officer Samayoa did not access the BWC recording prior to his interview on December 2, 2017.

Dr. Tate Kubose, PhD, conducted a human factors analysis of the OIS. Standard expert witness testimony in OIS matters includes testimony regarding "perception reaction time," i.e., the theory that perception happens first, and reaction necessarily happens after, which can explain why, in very short time frames, a reaction may not seem to be supported at the moment the reaction occurred. Dr. Kubose authored a February 16, 2021, report concerning the Samayoa case as part of the civil lawsuit. He was hired by the defense to conduct a human factors analysis of Officer Samayoa's actions leading up to the OIS. Dr. Kubose conducted his analysis after reviewing the case file, depositions, BWC footage, interview videos of the involved officers, statements of officers involved in the pursuit, and the time and motion analysis conducted by Dr. Eric Rossetter. His analysis shows that considering "perception reaction time," Officer Samayoa's reaction was reasonable based on what he had just perceived. Dr. Kubose explained that Officer Samayoa's decision to shoot, which necessarily preceded the actual pulling of the trigger, was made at a point in time (within 0.83 seconds) and from a distance when the totality of

Honorable Brooke Jenkins
District Attorney
City and County of San Francisco
March 18, 2023
Page 11

circumstances objectively and reasonably suggested an imminent threat of death or great bodily injury to Officer Samayoa, his partner, or other responding officers. Dr. Kubose concluded that Officer Samayoa had sufficient time to accommodate the mental and physical processes of identifying a hazard, deciding to fire, and firing a shot. He concluded:

- Throughout the course of events, Officer Samayoa was presented with a variety of information that was consistent with the incident situation having the potential to present a high level of danger to himself or others.
- There is evidence that Officer Samayoa perceived and assessed Mr. O’Neil’s actions prior to deciding to fire.
- 0.83 seconds is a sufficient timeframe to accommodate the mental and physical processes of identifying a hazard, deciding to fire, and firing a shot.

A sixth expert, **Jason Fries**, a forensic analyst and CEO of 3-D Forensics, was consulted by the SFDA. He was retained during the Gascon administration but did not prepare an analysis until the Boudin administration was in office. He prepared a number of visual analyses, but never prepared a report. Mr. Fries conducted an analysis, a portion of which attempted to recreate Officer Samayoa’s view of Mr. O’Neil as he ran from the carjacked van towards the officer. Slides 6 through 17 of this portion of Mr. Fries’ analysis shows that from Officer Samayoa’s view, Mr. O’Neil’s left hand could have reached behind his back as he exited the carjacked van and ran towards Officer Samayoa.

III. APPLICABLE LEGAL PRINCIPLES

The law which applies to our analysis in this case is that which was in effect at the time of the OIS – December 1, 2017. The law and jury instructions concerning the fleeing felon doctrine and the standards for officers’ use of deadly force in self-defense have been substantially changed since 2017. These changes have had the effect of expanding criminal liability for officers such that conduct that was previously lawful is now unlawful under the new standards imposed in 2020 by amendments to California Penal Code section 835a.

As stated in *People v. Delgado* (2006) 140 Cal.App.4th 1157, laws which are later amended to prohibit conduct which was previously lawful, violate the constitution’s prohibition against ex post facto laws:

A. Ex Post Facto Principles

Both the federal and state constitutions prohibit ex post facto laws. (U.S. Const., art. I, § 10; Cal. Const., art. I, § 9; *Collins v. Youngblood* (1990) 497 U.S. 37, 41, 110 S.Ct. 2715, 111 L.Ed.2d 30 (*Collins*); *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 288, 279 Cal.Rptr. 592, 807 P.2d 434 (*Tapia*).)

We interpret the state ex post facto clause no differently than its federal counterpart. (*People v. Snook* (1997) 16 Cal.4th 1210, 1220, 69 Cal. Rptr.2d 615, 947 P.2d 808.)

The traditional understanding of the ex post facto clause was expressed in *Beazell v. Ohio* (1925) 269 U.S. 167, 169-170, 46 S.Ct. 68, 70 L.Ed. 216, as follows: “It is settled . . . that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with [a] crime of any defense available according to law at the time when the act committed, is prohibited as ex post facto.” (Italics omitted; see *Tapia, supra*, 53 Cal.3d at pp. 293-294, 279 Cal.Rptr. 592, 807 P.2d 434; *People v. McVickers* (1992) 4 Cal.4th 81, 84, 13 Cal.Rptr.2d 850, 840 P.2d 955.) This formulation conforms with the seminal decision in *Calder v. Bull* (1798) 3 U.S. (3 Dall) 385, 386, 1 L.Ed. 648, and was reaffirmed in *Collins, supra*, 497 U.S. at pp. 42-43, 110 S.Ct. 2715. The court in *Collins* further refined the scope of the prohibition established by the ex post facto clause as follows: “Legislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts.” (*Id.* at p. 43, 110 S.Ct. 2715.) “Under *Collins* . . . the ex post facto clause prohibits not a just a burden but a more burdensome punishment.” (*People v. McVickers, supra*, 4 Cal.4th at p. 84, 13 Cal.Rptr.2d 850, 840 P.2d 955.) Thus, after *Collins*, the relevant inquiry is not whether the law results in a disadvantage to the person affected by it but whether it increases the penalty by which the crime is punished. (*California Dept. of Corrections v. Morales* (1995) 514 U.S. 499, 506-507, fn. 3, 115 S.Ct. 1597, 131 L.Ed.2d 588 (*Morales*); *People v. McVickers, supra*, 4 Cal.4th at p. 84, 13 Cal.Rptr.2d 850, 840 P.2d 955.)

The standard for determining whether a law violates the ex post facto clause has two components, “a law must be retrospective — that is, ‘it must apply to events occurring before its enactment’ — and it ‘must disadvantage the offender affected by it’ . . . by altering the definition of criminal conduct or increasing the punishment for the crime” (*Lynce v. Mathis* (1997) 519 U.S. 433, 441, 117 S.Ct. 891, 137 L.Ed.2d 63.)

(*Id.* at pp. 1163-1164, fn. omitted.)

A. The law of homicide

Homicide is the killing of one human being by another. (*People v. Beltran* (2013) 56 Cal.4th 935, 941.) There are two types of criminal homicide, murder and manslaughter.

Murder

Murder is the unlawful killing of a human being with malice aforethought. (Pen. Code, § 187, subd. (a).) Murder is divided into first and second degrees. A willful, deliberate, and premeditated killing is murder of the first degree. (Pen. Code, § 189; *People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1332.)

Second degree murder is the unlawful killing of a human being with malice aforethought but without the additional elements of willfulness, premeditation, and deliberation that would support a conviction of first degree murder. (*People v. Knoller* (2007) 41 Cal.4th 139, 151.) The

malice required for second degree murder may be express or implied. (Pen. Code, § 188; *Hernandez, supra*, 183 Cal.App.4th at p. 1332.) Malice is express when there is an “intent to kill.” (Pen. Code, § 188; *People v. Delgado* (2017) 2 Cal.5th 544, 571.) Malice is implied “when the killing results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his [or her] conduct endangers the life of another and who acts with conscious disregard for life.” (*People v. Dellinger* (1989) 49 Cal.3d 1212, 1215.)

A homicide may also be reduced to second degree murder if premeditation and deliberation are negated by heat of passion arising from subjective provocation. If the provocation precludes a person from deliberating or premeditating, even if it would not cause an average person to experience deadly passion, the crime is second degree murder. (*People v. Padilla* (2002) 103 Cal.App.4th 675, 678.)

Voluntary Manslaughter

Manslaughter is an unlawful killing without malice. (Pen. Code, § 192; *People v. Thomas* (2012) 53 Cal.4th 771, 813.) Several factors may preclude the formation of malice and reduce a killing that would otherwise be murder to voluntary manslaughter including: (1) heat of passion, and (2) imperfect self-defense. (*People v. Moye* (2009) 47 Cal.4th 537, 549.)

Imperfect self-defense is the killing of another human being under the actual but unreasonable belief that the killer was in imminent danger of death or great bodily injury and that the use of deadly force is necessary to defend against that danger. Such a killing is deemed to be without malice and thus cannot be murder. (*People v. Cruz* (2008) 44 Cal.4th 636, 664.) The doctrine of imperfect self-defense cannot be invoked, however, by a person whose own wrongful conduct (for example, a physical assault or commission of a felony) created the circumstances in which the adversary’s attack is legally justified. (*People v. Booker* (2011) 51 Cal.4th 141, 182.)

Self-Defense

A homicide is justified and lawful if committed in self-defense. Self-defense is a complete defense to a homicide charge, and if found, the killing is not criminal. (*People v. Sotelo-Urena* (2016) 4 Cal.App.5th 732, 744.) When a person is charged with a homicide-related crime and claims self-defense, the prosecution must prove beyond a reasonable doubt that the homicide was not committed in self-defense. (*People v. Winkler* (2020) 56 Cal.App.5th 1102, 1167.)

Penal Code sections 196 et. seq. set forth the law of self-defense in homicide cases. Specifically, Penal Code section 197 lists the circumstances where homicide is justifiable, which includes self-defense or the defense of others. (Pen. Code, § 197, subd. (1).) Self-defense arises when a person actually and reasonably believes in the necessity of defending against imminent danger of death or great bodily injury. (*People v. Randle* (2005) 35 Cal.4th 987, 994, overruled on other grounds by *People v. Chun* (2009) 45 Cal.4th 1172.) There is both a subjective and objective component to a self-defense claim. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.)

Honorable Brooke Jenkins
District Attorney
City and County of San Francisco
March 18, 2023
Page 14

The subjective element of self-defense requires that a person actually believes in the need to defend against imminent peril or great bodily injury. (*People v. Viramontes* (2001) 93 Cal.App.4th 1256, 1262.) The objective element also requires that the person's belief be objectively reasonable. In assessing the objective element, the trier of fact must consider what would appear to be necessary to a reasonable person in a similar situation with similar knowledge by assuming the point of view of a reasonable person in the position of the accused. (*People v. Brady* (2018) 22 Cal.App.5th 1008, 1014, citing *Humphrey, supra*, 13 Cal.4th at pp. 1082-1083.)

When considering the objective reasonableness of a person's belief, it is worth noting that reasonableness is assessed in terms of a person of ordinary and normal mental and physical capacity. A person's individual background is not the standpoint from where reasonableness is considered. (*Brady, supra*, 22 Cal.App.5th at pp. 1014-1015.) However, a jury may take into account the knowledge a person had, which might increase his or her ability to accurately predict the risk of impending violence. (*Id.* at p. 1017.) For example, knowledge of another person's prior threatening or violent conduct or reputation for dangerousness may provide evidence to support a reasonable belief in imminent harm. (*People v. Bates* (2019) 35 Cal.App.5th 1, 9-10.) In evaluating the objective reasonableness of an officer's use of deadly force, California law requires consideration of all the circumstances that were known or appeared to the officer as well as consideration for what a reasonable person in a similar situation with similar knowledge would have believed. (*Humphrey, supra*, 13 Cal.4th at pp. 1082-1083; see *Munoz v. City of Union City* (2004) 120 Cal.App.4th 1077, 1102 [the test of objective reasonableness is "highly deferential to the police officer's need to protect himself [or herself] and others"], disapproved on other grounds by *Hayes v. County of San Diego* (2013) 57 Cal.4th 622.)

Another aspect of self-defense is the assessment of whether the danger was imminent. Mere fear that a danger will become imminent is not sufficient. (*People v. Lopez* (2011) 199 Cal.App.4th 1297, 1305.) Fear of future harm, regardless of how great the fear or likelihood of the harm, will not suffice. (*In re Christian S.* (1994) 7 Cal.4th 768, 783.) Imminent peril has been defined as appearing to a person as "immediate and present and not prospective or even in the near future. An imminent peril is one that, from appearances, must be instantly dealt with." (*Lopez, supra*, 199 Cal.App.4th at p. 1306, quoting *People v. Aris* (1989) 215 Cal.App.3d 1178, 1187.)

The amount of force used by a person is also something that must be found to be reasonable by the trier of fact. "[O]nly that force which is necessary to repel an attack may be used in self-defense; force which exceeds the necessity is not justified." (*People v. Hardin* (2000) 85 Cal.App.4th 625, 629, quoting *People v. Clark* (1982) 130 Cal.App.3d 371, 380.) In a related vein, "deadly force or force likely to cause great bodily injury may be used only to repel an attack which is in itself deadly or likely to cause great bodily injury." (*Hardin, supra*, 85 Cal.App.4th at pp. 629-630.) Even if an individual was in actual and reasonable belief of imminent danger, the use of force may not exceed what is reasonably necessary to repel the attack. (*Ibid.*)

Apprehension of a Fleeing Felon

A homicide is also justifiable and not unlawful when committed by lawful ways and means to apprehend any dangerous person who has committed a felony. A dangerous person is one who has committed a “forcible and atrocious” felony (CALJIC 5.25, 2017 ed.), citing *Tennessee v. Garner*, *supra*. Robbery is a “forcible and atrocious” felony (CALJIC 5.16, 2017 ed.). Carjacking is the taking of a motor vehicle involving the elements of robbery (CALJIC 9.46, 2017 ed.). However, a peace officer may not use deadly force to prevent the escape of a fleeing felon if the suspect poses no immediate threat to the officer and no threat to others. (*Tennessee v. Garner* (1985) 471 U.S. 1, 11; see former Pen. Code, 835a.) This law has been substantially changed by the revisions to Penal Code section 835a which became effective on January 1, 2020.

Burden of Proof

A prosecutor bears the burden of proving a criminal defendant’s guilt beyond a reasonable doubt. (Pen. Code, § 1096.) Where an investigation is complete and all of the evidence is available for review, prosecutors should file charges only if they believe there is sufficient admissible evidence to prove the charges beyond a reasonable doubt at trial. (See, e.g., Nat. Dist. Attys. Assn., National Prosecution Standards (3d ed. 2009) Part IV, § 2 pp. 52-53; United States Department of Justice Manual § 9-27.220; Melilli, Prosecutorial Discretion in an Adversary System (1992) B.Y.U. L.Rev. 669, 684-685 [surveying ethical standards used in the exercise of charging discretion by prosecutors]; accord, *People v. Catlin* (2001) 26 Cal.4th 81, 109 [“A prosecutor abides by elementary standards of fair play and decency by refusing to seek indictments until he or she is completely satisfied the defendant should be prosecuted and the office of the prosecutor will be able to promptly establish guilt beyond a reasonable doubt,” quotation and internal quotation marks omitted]; *People v. Spicer* (2015) 235 Cal.App.4th 1359, 1374 [explaining that a prosecutor may have probable cause to charge a crime but reasonably decline to do so if they believe there is a lack of sufficient evidence to prove the charge beyond a reasonable doubt at trial]; cf. Rules Prof. Conduct, Rule 3.8(a) [prosecutor should not initiate or continue prosecution of charge that is not supported by probable cause].)

B. The law governing abuse-of-discretion review

By constitutional mandate, the Attorney General is the chief law enforcement officer of the state and has a duty to see that the laws of the state are uniformly and adequately enforced. The Attorney General is empowered to prosecute crimes occurring within the state whenever he determines that “any law ... is not being adequately enforced in any county” (Cal. Const., art. V, § 13) by its elected district attorney.

The district attorney is the public prosecutor, an elected county officer, and is vested with the power to charge persons within that jurisdiction with criminal offenses. (Gov. Code, §§ 24009, 26500-26501.) The district attorney is not required to file all possible criminal cases but is vested with substantial discretion in selecting which cases to charge and at what level. (*People v.*

Andrews (1998) 65 Cal.App.4th 1098, 1102.) A prosecutor’s “charging decisions are rarely simple,” and must consider “tangible and intangible factors,” including the strengths and weaknesses of a case. (*Town of Newton v. Rumery* (1987) 480 U.S. 386, 396.) The district attorney’s discretionary powers are “significant,” and “he is accountable to the electorate at the ballot box for his performance in prosecuting crime within the county.” (*People ex rel. Younger v. Superior Court* (1978) 86 Cal.App.3d 180, 203.)

Discretion is commonly described as having been abused when exercised in a fashion which is “arbitrary, capricious[,] or [in a] patently absurd manner that resulted in a manifest miscarriage of justice.” (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125, quoting *People v. Jordan* (1986) 42 Cal.3d 308, 316.) Situations “presenting facts on which reasonable minds may differ” do not “establish[] an abuse of discretion.” (*People v. Moya* (1986) 184 Cal.App.3d 1307, 1313, fn. 2; accord, *People v. Escobar* (2000) 82 Cal.App.4th 1085, 1097; *Cadilla v. Board of Medical Examiners* (1972) 26 Cal.App.3d 961, 968 [“fact that reasonable minds may differ will fortify the conclusion that there was no abuse of discretion”].)

IV. ANALYSIS

Part of the AGO’s analysis must be a consideration of the defenses likely to be raised by the person to be charged with a crime, just as it must also be a part of the DA’s analysis. And in this case, there is no question that Officer Samayoa would argue that he acted in self-defense and to apprehend a fleeing felon. It is the prosecution’s affirmative burden to disprove these defenses beyond a reasonable doubt. Whether the DA’s decision to dismiss charges was arbitrary, capricious, or patently absurd, therefore, must take into account the strength of these defenses.

Here, if believed by a jury, Officer Samayoa’s recorded statements satisfy the elements of self-defense. Officer Samayoa stated that he was on his fourth day as a police officer, assigned to Field Training Officer Edric Talusan. Both officers were at their assigned station, in the Bayview area of the City of San Francisco, prior to the start of their shifts. Both officers were in uniform and were not yet on duty. Officer Samayoa was preparing a patrol car for their use, as the car that they were normally assigned was undergoing repairs, when Officer Talusan heard a call over his radio that there had been a carjacking. Officer Samayoa had never responded to a carjacking call and had been tasked only with writing simple police reports during his first three days on duty.

Officer Samayoa saw officers rushing from the station. Officer Talusan asked a supervisor for permission to respond to the call even though he and Officer Samayoa were not yet on duty. They were given permission, and Officer Talusan ordered Officer Samayoa to prepare a different patrol car for their use. Officer Samayoa complied. The car that he and Officer Talusan wound up using had a problem with the passenger door, which did not open readily. Additionally, the officers could not access the patrol car’s computer-aided dispatch system (CAD) because it was only available to officers during their normal shifts. While the CAD logs reflect that there was a broadcast from the dispatcher stating, “no weapons seen,” during the carjacking, Officers

Honorable Brooke Jenkins
District Attorney
City and County of San Francisco
March 18, 2023
Page 17

Samayoa and Talusan did not hear this broadcast because they did not have access to the CAD. The only radio access they had was the patrol car's radio and their car-to-car radios, both of which broadcast differing streams of information. The officers knew that there had been a carjacking because Officer Talusan heard this call before he and Officer Samayoa left the station. They had the vehicle description of the carjacked white van, and updates about the direction the vehicle took as it fled from officers during the pursuit. They had heard no broadcast information about whether or not weapons were seen. Officer Samayoa stated that he believed that carjacking was a dangerous crime in which suspects are frequently armed.

Officer Talusan's testimony largely corroborated Officer Samayoa's statements. He confirmed that, Mr. O'Neil exited the van while it was still moving, and he ran towards the officers' patrol car despite having an alternate path to flee away from the officers.

As noted by Dr. Kubose, in addition to information consistent with an increasing level of danger, there was also a lack of information consistent with Mr. O'Neil intending to surrender peacefully and/or without resistance. For instance, during the vehicle pursuit, Mr. O'Neil did not abide by traffic laws and did not come to a stop in a slow, controlled manner. In contrast to exiting a moving vehicle, actions such as stopping and remaining seated in the vehicle to await further instructions or exiting the vehicle slowly with hands above the head would be consistent with an intent to surrender; Mr. O'Neil did neither of these. Dr. Rossetter's analysis indicates that after exiting the vehicle, Mr. O'Neil was crouched, rather than upright, which in Dr. Kubose's analysis is "more consistent with aggression than surrender."

Officer Talusan testified that he saw Mr. O'Neil exit the carjacked van, but then Mr. O'Neil was a "blur" as Officer Talusan's focus was on driving the patrol car; he did not realize that Officer Samayoa had drawn his gun until after the OIS occurred. Mr. O'Neil closed the distance between himself and the officers in less than a second. Officer Samayoa observed Mr. O'Neil's left hand reach behind him. Believing Mr. O'Neil was reaching for a gun and would shoot the officers, Officer Samayoa attempted to open his passenger side door and shot once through the passenger window, killing Mr. O'Neil.

Dr. Kubose's expert opinion regarding perception reaction time shows that the 0.83 seconds, between the time Mr. O'Neil exited the carjacked van and the time he was shot, was adequate time for Officer Samayoa to perceive, evaluate and respond to the threat. These circumstances, if believed by a jury, could reasonably create a fear of imminent death or serious bodily harm.

It has been suggested that it could be proven beyond a reasonable doubt that Mr. O'Neil did not make a physical movement that could be reasonably interpreted as reaching for a firearm under all the circumstances, including those not known to Officer Samayoa at the time. Alternatively, another theory is that Officer Samayoa should have known there was in fact no weapon in the decedent's hands.

Honorable Brooke Jenkins
District Attorney
City and County of San Francisco
March 18, 2023
Page 18

Both arguments rely on 20/20 hindsight which by law is impermissible, i.e., one cannot simply state that because there ultimately was no gun the force was therefore unreasonable. (*Graham v. Connor* (1989) 490 U.S. 386, 396-397; Cf. *Cruz v. City of Anaheim* (9th Cir. 2014) 765 F.3d 1076 [in ruling on a summary judgment motion, all justifiable inferences are drawn in favor of the non-moving party to determine whether there is a triable issue of material fact, to a standard of preponderance of the evidence].) The question is what the officer knew at the time force was used, and whether the officer's conduct, in light of his training and experience, was a reasonable response. In this case, we have reviewed testimony of the San Francisco Police Department Officer Natasha Valderrama, who participated in the pursuit of Mr. O'Neil and whose experience level was most similar to Officer Samayoa's; she testified that she would have shot Mr. O'Neil had she been in Officer Samayoa's position. Similarly, as to Officer Samayoa's training and experience, DAI Lundberg, a peace officer trained in use of force, and specially trained in the investigation and evaluation of cases involving use of force, noted that the training simulation Officer Samayoa went through just twenty-one days before this incident were strikingly similar. Combined, these facts tend to show that Officer Samayoa's reaction was reasonable given his training and experience.

Officer Samayoa stated in his December 2, 2017, interview by SFPD Homicide Detectives, that he saw Mr. O'Neil's left arm reach behind him as he ran directly towards the officer's position in the patrol car:

Q: So he's -- the-the -- it-it appears that he's getting ready to get out of the car?

Officer Samayoa: Yes.

Q: Okay. Um, and when the van stops and he gets out of the car, did you s-- did you ever see both of his hands as he got out of the van? Or do you -- do you have a-a recollection of seeing both hands?

Officer Samayoa: Um, uh, yes.

Q: Okay.

Officer Samayoa: Yeah.

Q: And then you were w-- as you're sitting in the passenger seat, uh, uh, i-- and he's approaching you, at what -- can you just sh-show us what he was doing with his left hand again?

Officer Samayoa: So he was running. And then it looked like he was about to, like, grab a-a gun, you know, this motion. And based off how I've been trained in my experience, is someone about to grab a concealable or a gun they have on their waist and shoot it as they're running.

Q: And then how long would it take him to do that?

Officer Samayoa: I mean, I don't know his-his draw time, but very little time it takes to draw a weapon and-and fire off.

(12/2/17 Samayoa interview, pp. 42-43).

Mr. O'Neil was less than three feet away from the officer when he was shot. Officer Samayoa's BWC was positioned on his chest, as a result the vantage point the camera captures is from chest

Honorable Brooke Jenkins
District Attorney
City and County of San Francisco
March 18, 2023
Page 19

level and not eye level. Additionally, the BWC video captured parts of the incident but did not fully capture the events from Officer Samayoa's eye level perspective. Specifically, Officer Samayoa's BWC footage captured Mr. O'Neil jumping from the moving California Lottery van and running toward the patrol car, but that footage is largely obstructed by the windshield and "A" pillar (the sloping pillar which supports the windshield) of the patrol car in the critical moments before the shooting. The video is obstructed in such a way that Mr. O'Neil's hands cannot be seen at the point Officer Samayoa testified he observed Mr. O'Neil reaching behind and toward his waistband. Thus, there is no way to prove that Officer Samayoa did not see Mr. O'Neil's hands reach behind his back in the way that Officer Samayoa described.

The evidence also shows that neither Officer Samayoa nor his partner had access to the CAD terminal in their patrol car, and thus did not receive the 10:35:19 update noting that there were "no weapons seen" by the victim during the carjacking. Similarly, neither officer heard that information broadcast over the patrol car's radio. Officer Talusan testified that he was in the station when the carjacking call went out. Officer Samayoa was preparing a patrol car for their use. Officer Talusan asked his sergeant's permission to respond to the call even though he and Officer Samayoa had not yet started their shift. Evidence from dispatch logs shows that at 10:37:24 Officer Talusan broadcast over the hand held radio, "Samayoa, meet me at the car," which shows that Officer Samayoa was not yet in the patrol car at the time of the "no weapons seen" broadcast. Furthermore, "no weapons seen," does not mean that a suspect is not armed.

Since the time charges were filed in November of 2020, two expert analyses of the evidence have been obtained which support a claim of self-defense. The first, Dr. Kubose's analysis, has been set forth above. As noted, Dr. Kubose concluded that Officer Samayoa perceived and assessed Mr. O'Neil's actions prior to deciding to fire, and that 0.83 seconds is a sufficient timeframe to accommodate the mental and physical processes of identifying a hazard, deciding to fire, and firing a shot. The second, Jason Fries's analysis of the available video evidence recreating Officer Samayoa's view of the events leading up to the OIS, shows Mr. O'Neil's left hand could have moved behind his back as he ran towards the officer. These experts' opinions support a defense that the officer's actions in shooting Mr. O'Neil were subjectively and objectively reasonable, given the facts known to the officer at the time he saw Mr. O'Neil's hand move behind his back.

The facts known to Officer Samayoa at the time of the shooting also support a fleeing felon defense. Officer Samayoa knew that Mr. O'Neil was fleeing in the carjacked van. Carjacking is a violent felony, and under the 2017 law would have been a "forcible and atrocious" crime. Mr. O'Neil led officers on a high-speed pursuit. He gave no indication of his intent to surrender either during the pursuit or at its termination. When he jumped from the still-moving van, he did not run away from the police officers, but instead ran directly at the officers' patrol car. As perceived by Officer Samayoa, Mr. O'Neil's actions were aggressive and indicated no intent to surrender peacefully. The officer believed, as stated above, that Mr. O'Neil was reaching behind him to retrieve a firearm. Under these circumstances, we cannot prove that Officer Samayoa's

Honorable Brooke Jenkins
District Attorney
City and County of San Francisco
March 18, 2023
Page 20

use of force by shooting Mr. O'Neil to stop his flight was not necessary, given the facts known by the officer.

The fact that Officer Samayoa drew his weapon during the last three seconds of the pursuit, to some, may indicate that he planned to shoot Mr. O'Neil even before Mr. O'Neil exited the carjacked van. Dr. Rosseter's analysis shows that at 9.6 seconds into Officer Samayoa's BWC recording, the carjacked van's door starts to open. One second later, at 10.6 seconds, the carjacked van impacts a parked car, and its driver's door is fully open. At 11.3 seconds, Officer Samayoa's firearm is first visible in his BWC. At 13.2 seconds, the carjacked van's rear brake light turns on and then off. Officer Samayoa places both hands on his firearm after Mr. O'Neil has exited the van and is at the rear of his van, as shown from the Watch Tower surveillance video, frame 414, at 13.8 seconds. Officer Samayoa's retrieving his firearm and readying it occurred after Mr. O'Neil had collided the carjacked van with another vehicle and had fully opened the driver's door. Officer Samayoa was pursuing a vehicle taken in a carjacking, a violent felony. He stated he believed that carjacking is a violent felony in which suspects are frequently armed. The law in effect at the time of the incident allowed him to use necessary force to stop Mr. O'Neil's flight. It would be reasonable for an officer to display a firearm when apprehending a violent felon. Officers are charged with the duty to apprehend felons; in that respect, their responsibilities differ from those of civilians, and they may use force when necessary to do so. Here, it was only when Mr. O'Neil exited out of the moving van and ran directly at the officers, having made a gesture that the officer perceived as reaching for a weapon, that Officer Samayoa put both of his hands on his gun and fired one time, striking Mr. O'Neil.

To support the prosecution of Officer Samayoa, on November 19, 2020, a portion of the frame-by-frame analysis of Officer Samayoa's BWV was sent by DAI Friedman to hand surgeon Dr. Roe E. Rubenstein, M.D. for expert analysis. The four selected frames sent to Dr. Rubenstein represented the last 0.12 seconds before the patrol car window was shattered by the bullet. Dr. Rubenstein concluded that Mr. O'Neil's left hand was shown in the four frames. In his November 19, 2020, email to Dr. Rubenstein, DAI Friedman noted: "Please take a look at this series of photos (they are in chronological order, and all were taken within a fraction of a second of each other), and, if you are able, identify whether the hand or the individual outside of the car (not the person holding the gun) that is partially visible is the right or left hand?" This statement underscores the problem with this area of inquiry. The professional opinion of a hand surgeon was needed to determine whether Mr. O'Neil's left hand was visible in several of the frames. A human responding to a perceived life-threatening event in a stressful situation would not be able to discern these facts in 0.12 seconds. This analysis applies the sort of 20-20 hindsight which *Graham v. Connor* prohibits.

Perception reaction time studies show that once a decision is made to shoot, it takes the average officer approximately 0.25 seconds to perceive that the threat has ceased and to stop firing. (See, *Officer Reaction-Response Time Delay At The End Of A Shot Series*, Ernest J. Tobin, and Martin L. Fackler MD, Wound Ballistics Consultant, Wound Ballistic Review, Journal of the

Honorable Brooke Jenkins
District Attorney
City and County of San Francisco
March 18, 2023
Page 21

International Wound Ballistics Association, Vol. 5, Issue 2 (Fall 2001), pg. 11.) This is consistent with the SFPD Police Academy training materials contained in the DA's files. Even if Officer Samayoa had seen Mr. O'Neil's left hand come from behind his back, he would not have had time to reevaluate his decision to shoot and react to this information as the frame-by-frame analysis shows that Mr. O'Neil's left hand appears only in the 0.12 seconds before Mr. O'Neil was shot. Had the officer perceived this, he would not have been able to perceive that the threat had ceased and to stop firing. Considering all of the available evidence, it cannot be proven beyond a reasonable doubt that Officer Samayoa did not actually and reasonably believe self-defense was necessary.

V. CONCLUSION

The available evidence shows that the charges against Officer Samayoa cannot be proved beyond a reasonable doubt. Therefore, your decision to dismiss the charges against Officer Samayoa was not an abuse of discretion. Accordingly, we decline to take over the prosecution of this matter.

Sincerely,



ROB BONTA
Attorney General

cc: Brian A. Ford, Esq.
Julia Fox, Esq.
Hon. Loretta Georgi