



Brooke Jenkins
District Attorney

February 8, 2023

Honorable Rob Bonta
Attorney General
Office of the Attorney General
California Department of Justice

Dear Attorney General,

I write to the Department of Justice (“DOJ”) in its official capacity as having jurisdiction over all officer-involved shootings resulting in the death of an unarmed civilian. California Government Code section 12525.3(b)(1) (AB 1506). This notification concerns an officer involved shooting that occurred on December 1, 2017, in the City and County of San Francisco.

Our office has discovered an internal conflict in the case that impacts our ability to handle the matter of *People v. Christopher Samayoa*, Superior Court Case No. 20012531. We will first summarize the evidence in this case, then explain the new information creating a conflict.

THE CARJACKING AND OFFICER INVOLVED SHOOTING ON DECEMBER 1, 2017

This incident began when decedent, Keita O’Neil, and several accomplices carjacked a state lottery delivery van and robbed the 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 the carjacked van fled. A highspeed pursuit ensued.

Defendant officer Christopher Samayoa and his field training officer partner became the primary pursuit vehicle. Samayoa, a probationary officer on his fourth day in the field after recently graduating from the police academy, was in the passenger seat. The van speeded through residential neighborhoods and entered the Double Rock neighborhood. The pursuit vehicle followed close behind. With the police car directly behind it, the carjacked van quickly

sped onto a dead-end street at which point the driver, O'Neil, opened the driver-side door, abruptly exited the van while it was still in motion, and ran in the direction of the police car in which Samayoa and his partner sat. When interviewed, Samayoa said he prepared for a felony traffic stop, saw O'Neil open the door, rush toward him, and reach for his waistband. At that moment, Samayoa said he believed O'Neil was reaching for a gun and that he and his partner were in imminent danger of being killed or injured. Samayoa fired one shot that struck O'Neil in the upper chest killing him. Body Worn Camera ("BWC") video confirms that O'Neil exited the moving van and moved toward the officer's car approximately one second before the shot was fired.

Watchtower video footage in the area captured parts of this incident. That footage showed the pursuit and the carjacked van door opening while it made a right turn onto a dead-end street. O'Neil can be seen jumping from the van while it is still moving. The footage also depicted the patrol car still moving when the lethal shot was fired. The video showed the path of movement of O'Neil as being first straight toward the patrol car and then because all parties were still moving, alongside the patrol car.

Samayoa deployed his BWC video moments before the incident. Because the camera was positioned on his chest, the BWC video captured parts of the incident, but did not fully capture the events from Samayoa's perspective. Specifically, the BWC footage captured O'Neil jumping from the moving vehicle and running toward the patrol car, but that footage is largely obstructed by the windshield and "A" pillar of the patrol car in the critical moments before the shooting. The video is obstructed in such a way that O'Neil's hands cannot be seen at the point Samayoa says O'Neil would have reached behind and toward his waistband. Thus, there is no way to prove that Samayoa did not see O'Neil's hands reach behind his back in the way that Samayoa described.

THE EXPERT WITNESSES

At the time that this administration took over, there were five expert witness reports in the Samayoa casefile; two experts from the civil case filed by O'Neil's family; two experts hired by the prior administration related only to hand analysis opining on visibility of O'Neil's left hand in a particular frame of the BWC footage; and one expert retained by the defense in the pending criminal matter.

Standard expert witness testimony includes testimony regarding "perception reaction time"; the theory that perception happens first, and reaction necessarily happens after, which can explain that in very short time frames a reaction does not seem to be supported at the moment the reaction occurred. One of the human-factors-expert witnesses (biomechanical engineer/accident reconstruction) consulted in the civil litigation related to this matter completed a comprehensive study of the incident and offered support to the "perception reaction time" argument that Samayoa's reaction was a reasonable reaction. More specifically, the argument is that what Samayoa stated he had just perceived, although not completely captured on BWC because of the car's "A" pillar and the camera's positioning, made his reaction reasonable. That opinion is that Samayoa's decision to shoot, which necessarily preceded the actual pulling of the trigger, was made at a point in time (within .83 seconds) and from a distance (2.7 feet) when the totality of circumstances objectively and reasonably, suggested an imminent threat of death or great bodily

injury to Samayoa or his partner. There are no experts, retained or identified, by the prior administration that refute these perception reaction time arguments. This administration does not know of any expert who would opine to the contrary on these facts.

Also relevant to the perception/reaction time analysis is an officer's training. Human reaction time studies show that with visual reaction time, like auditory reaction time, there are two main components: (1) mental processing time-the time required to perceive, identify, and analyze stimulus to decide the appropriate motor response, and (2) movement time-the time required to perform the movement after selecting the motor response, while highly variable, reflect accuracy of response within fractionalized seconds and that such accuracy will increase or decrease with age, gender, training, adequate sleep, exercise, education, and so forth. To this point, it is anticipated the defense will introduce with the above "perception reaction time," opinion the fact of Samayoa's last live-action-tactical-training scenarios at the police academy. This scenario designed to inform officers-in-training about the dangers of vehicle stops, involved a traffic stop of a suspicious white van in a residential neighborhood from which two men abruptly jumped, then ran toward the police car with the officers still seated inside and the impact that training would have on the subjective prong for the lawful self-defense analysis. Of note, in that training scenario Samayoa was "shot" in the head by a paintball.

NOVEMBER 21, 2021, AND THE CHARGING OF MANSLAUGHTER

Almost, three years after the incident, Defendant 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). This charging occurred under the Chesa Boudin administration.

Boudin's administration, in choosing to proceed on a voluntary manslaughter charge and not murder, conceded that the defendant actually believed he was in "imminent danger of being killed or suffering great bodily injury; and ... actually believed that the immediate use of deadly force was necessary to defend against the danger." That administration only disputed whether that belief was reasonable under the circumstances because of a video re-enactment by Samayoa during his voluntary statement. (Power point drafted by Assistant District Attorney James Conger, dated 9/7/2022 citing CALCRIM 571, Imperfect Self-Defense.) That rationalization in the arrest warrant relied solely on an argument that it could be proven beyond a reasonable doubt that the decedent did not make a physical movement that could be reasonably interpreted as reaching for a firearm under all the circumstances known to the Samayoa at the time, or that Samayoa should have known there was in fact no weapon in the decedent's hands. But 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.

The arrest warrant was signed on November 21, 2020, nine days before the statute of limitations would have expired for these charges. The arrest warrant was signed by District Attorney Investigator (DAI) Jack Friedman who was not materially involved in the investigation of the case. The case has been proceeding since that time and is assigned to the managing

attorney of the Independent Investigations Bureau (IIB), who reports directly to District Attorney Brooke Jenkins.

The managing attorney of IIB, Darby Williams, in preparing the case learned that the lead investigator in the Samayoa case, District Attorney Investigator Dan Lundberg, made statements regarding the simulation training done by Samayoa, discussed above, that appeared to be exculpatory. The potentially exculpatory information was that when Lundberg saw the Samayoa simulation training he noticed that the simulation was eerily similar to what actually happened in the O'Neil case – Lundberg made that observation out loud to Homicide Unit inspectors. The training of an officer is relevant to assessing his reactions in the actual case. The fact that 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 simulation was similar to what had actually occurred would be used by the defense to show that Samayoa's reaction was reasonable given his training and experience. Therefore, to memorialize the statements Lundberg was overheard making, MA Williams directed IIB team members to have Lundberg memorialize his own statements/observations in a Memorandum of Investigation (MOI) for production to the defense, as required by *Brady*.

EVENTS AFTER DECEMBER 1, 2022 AND DA INSPECTORS LUNDBERG AND FRIEDMAN

The morning of December 1, 2022, Samayoa's counsel and the prosecution appeared in court and picked a late January preliminary hearing date. That afternoon DAI Jack Friedman, who signed the arrest warrant, sent me an email directly and requested to speak with me that day about the Samayoa case. The email said he "...was made aware of a serious internal issue that may negatively impact your decisions regarding the future of that case..." I then met with DAI Friedman who told me the following: the former lead investigator in the case was being ordered to write a memo regarding Friedman's arrest warrant and whether Friedman had talked to the lead investigator before drafting it. Friedman told me that Lundberg was the lead investigator. As background, Lundberg was on vacation when Chesa Boudin called Friedman and asked Friedman to write the warrant because the statute of limitations for manslaughter was approaching. Friedman told me he agreed to draft the warrant, but that he was not sure if he would sign it due to concerns about whether sufficient probable cause existed for the issuance of the warrant. Friedman next told me that after he wrote the warrant he decided to sign it - but did not explain why. Friedman was crying during this portion of the discussion so I tried to console him and told him I could understand the pressure he was under and the tough position in which he found himself. I advised Friedman that I would look into the matter. Friedman left me. I later learned that he sent the former lead investigator an email directing him to stop writing the memo. DAI Friedman then departed for a two-week vacation during which he sent me another email iterating concerns and a desire to discuss the matter further when he returned.

Separately, after the preliminary hearing had been set, DAI Dan Lundberg approached the managing attorney of IIB, Darby Williams. DAI Lundberg was the lead investigator of the Samayoa case from the date of the incident through the filing of the arrest warrant – although he did not draft or sign the arrest warrant. Unsolicited, Lundberg told her that he had information he needed to share related to the Samayoa case and wanted to release internal "demons." Lundberg also became emotional when he spoke, and Ms. Williams stopped the conversation.

As background, both Dan Lundberg and Jack Friedman were DAI assigned to the IIB unit when the Samayoa case occurred. Lundberg was the lead investigator on the Samayoa case from the date of the incident until the arrest warrant was signed. Friedman was involved only because he, along with the rest of DAI responded on the date of the incident, and then again when he handled the arrest warrant. While neither Lundberg and Friedman are in the IIB unit any longer, they both still work as District Attorney Investigators and Friedman has since been promoted to Lieutenant.

The law is clear that District Attorneys handling a case are imputed with knowing everything that the investigators know about a case and *Brady* obligations cannot be set aside with claims that investigators did not share information. The District Attorney's Office could not simply ignore the fact that the lead investigator and the investigator who signed the arrest warrant were both asking to discuss this case. There was also an apparent conflict regarding what DAI Lundberg had been asked to memorialize and what DAI Friedman was conveying that DAI Lundberg had been asked to do which needed to be reconciled. To memorialize the information and keep both myself and MA Darby Williams from being witnesses to even more information, someone had to be assigned to interview the parties.

Due to the very small group of investigators in the office, and the inability to wall off any investigation, investigators from the public integrity section of the City Attorney's Office assisted with interviews of Lundberg and Friedman. The Assistant Chief of the Specialized Units, Julius DeGuia, led the Friedman and Lundberg interviews, interviewed me, interviewed the managing attorney of IIB, and other related DAI.

It is the consensus of persons involved in the above investigation that this information revealed by DAI Lundberg and Friedman, and verified during interviews, constituted *Brady* information. The interviews were promptly turned over to Defense counsel. The following is a summary of the interviews:

DAI Lundberg confirmed that he was the lead investigator in the Samayoa case from the incident date. He worked the case in collaboration with former Assistant District Attorney (ADA) Ajean Cha assigned to IIB under District Attorney George Gascon. Once the investigation was complete and after a three-month Grand Jury investigation, both Lundberg and ADA Cha agreed the case was "not a fileable case." A PowerPoint was prepared and shown to two of George Gascon's assistant chiefs, Sharon Woo and Frank Carruba. Lundberg stated he heard afterwards that George Gascon discussed the case and did not direct anyone to proceed, and Gascon had decided not to run for office again and was leaving the decision to the next administration. When asked about Gascon punting the decision on Samayoa, Lundberg said he received that information from DAI Jeff Paillet and ADA Cha. Lundberg also shared that after Chesa Boudin was elected District Attorney, ADA James Conger was hired into the IIB Unit and assigned the Samayoa case. Lundberg said there was no new information discovered between the time ADA Cha completed her work and Conger's assignment. Conger spoke to Lundberg about the Samayoa case at length during which conversation Lundberg told Conger that he "had concerns about going forward with this case." Lundberg recounted Conger replied to the effect of, "Well, I've been asked to find a path." Conger's statement caused Lundberg to wonder if the investigation was objective or directed.

Lundberg also recounted a time when he, DAI Paillet and Conger were talking about the merits of the Samayoa case – Friedman was present for this conversation. Jeff Paillet asked what "time" Conger was looking to get from the case. Conger replied he was not looking for [jail] time, but rather looking "to change the way SFPD does things or policy or procedures." Lundberg recalled Paillet fired back, "That's not our role here. Our role is to create a case for prosecution and see it through, not change policy." Lundberg recalled the conversation then quickly changed topic.

Lundberg shared that he told Conger and others, that he would not draft an arrest-warrant for Samayoa in light of his determination that the case was "not fileable". Lundberg specifically told Friedman, his colleague, that he would not write an arrest warrant on the case and that he was prepared to lose his job over that position. Lundberg then went on vacation November 11, 2020. The day before Lundberg returned on vacation, November 20, Jack Friedman called and told Lundberg that he, Friedman, had written the warrant.

For context, IIB Managing Attorney Darby Williams was interviewed and shared that during a conversation with the homicide sergeant in the case, she learned Lundberg had made potentially exculpatory statements in a second SFPD voluntary interview with Samayoa. Williams asked the current IIB investigators to have Lundberg write a Memorandum of Investigation (MOI) regarding this statement and to determine if Lundberg's investigation was complete. Lundberg confirmed he was asked to write that MOI but was told by Friedman to stop writing the MOI.

As part of these recent revelations, Lundberg shared he possessed a copy of the PowerPoint former ADA Cha prepared and shared with Gascon's administration as part of her recommendation against charging.

DAI Jack Friedman when interviewed, shared that on Friday, November 13, 2020, he was called on his cell phone by then District Attorney Chesa Boudin, followed by a Zoom meeting with Boudin on Saturday, November 14, 2020. Friedman admitted that this call, directly from an elected DA, was unusual and had never happened before in his career. Friedman was not friends with Chesa Boudin and had never been called directly by him before. Chesa Boudin asked Friedman to write the arrest warrant on the Samayoa case. Friedman claims he then reviewed the entire casefile, drafted the arrest warrant, and included all exculpatory evidence to prepare the warrant within the five days that followed that meeting. Friedman claimed that he had no knowledge that anyone in DAI thought the case was not provable. Friedman said he did not talk to Lundberg or any other investigator in the case while preparing the arrest warrant. Friedman also admitted ADA Conger authored major portions of the arrest warrant including the legal analysis portion of the warrant and the portion including selected still frames from Samayoa's BWC as demonstrative evidence. Friedman then signed the arrest warrant on November 20, 2020, five days after Chesa Boudin called him and nine days before the statute of limitations expired on the charges selected by ADA Conger. Less than one month later, December 12, 2020, Friedman was promoted to Lieutenant of IIB by Chesa Boudin. Of note, Friedman, denied he told me about his plan to only write but not sign the warrant, and denied his prior statement regarding his belief in a lack of probable cause for it.

FORMER DA INVESTIGATOR JEFF PAILET

Jeff Paillet, a former Lieutenant of IIB from the date of the OIS until he was terminated by then District Attorney Chesa Boudin, was also interviewed while accompanied by his attorney. Paillet corroborated Lundberg's statement that ADA Cha concluded the Samayoa case was not prosecutable and created a PowerPoint presentation to that effect. Cha's conclusion that the case was not prosecutable was based on the fact that it could not be proven that Samayoa was unreasonable in believing O'Neil was armed. And there was no witness or evidence to undermine Samayoa's perception/statement of perception of the threat Samayoa believed O'Neil (decedent) presented. Paillet recalled ADA Cha gave the Power Point slides to Sharon Woo and Frank Carruba during George Gascon's administration. Paillet remembered the presentation was around October of 2018. Paillet said that Woo and Carruba agreed the case was not provable. Paillet recalled he was also told by Managing Attorney of IIB at that time, Andrew Lah, that DA Gascon said they were not moving forward and would let the next administration deal with the case. Paillet recalled also that Gascon did not direct anyone to move forward with charging the case, and there was no movement to charge the case, until ADA James Conger was assigned.

Paillet again corroborated Lundberg and remembered the conversation that occurred in the office shortly before he was "let go", around October 2020. Recently moved from the Brannan Street office, IIB Unit members were all in cubicles at the Rhode Island office. Paillet's cubicle was next to James Conger's. Also present were Dan Lundberg and Jack Friedman. The Samayoa case came up in conversation. Paillet commented that it appeared Conger was looking to file the case, and asked Conger how much time he was seeking for Samayoa. Conger responded that he was not looking for any jail time. Paillet then asked Conger why he was charging the case. Conger responded that there were lots of reasons including to change SFPD shooting policy so SFPD can't do this. Paillet thought this statement was off the wall and responded "James, that's not our job – that's [for] SFPD or the Police Commission. Our job is to determine if a crime occurred and if we can prove it." Paillet recalled this statement was a "conversation killer" and that Conger left shortly thereafter.

Paillet stated that on another occasion, Lundberg expressed concern to Paillet that Conger had just met with Boudin. Lundberg told Paillet about Conger's statement of "we need to find a path to prosecute." Paillet was troubled because "finding a path" was directional – stating in essence: you are trying to make the evidence fit what you want, instead of following the evidence, which is what they usually do. Paillet recalled he knew of no new or different evidence after the investigation concluded, to change the evaluation of the case.

Finally, Paillet offered to the interviewer that to review a case of this volume, which also includes transcripts from two separate Grand Jury investigations, and be able to sign under penalty of perjury that all exculpatory evidence was included, would take more than five days.

THE CURRENT POSTURE OF THE CASE

The investigator interviews were provided to the defense as potentially exculpatory information. On January 27, 2023, the preliminary hearing was continued at the request of the defense in large part because of this now shared information and reset for March 1, 2023. Defense counsel also served us with a Motion for Pretrial Discovery; Request for Evidentiary

Hearing on Defense Motion to Dismiss Due to Prosecutorial Misconduct ... and Selective and Invidious Prosecution of the Defendant, set to be heard on the same date as the preliminary hearing, March 1, 2023.

The defense has made a colorable claim of entitlement to the PowerPoint presentation in question prepared under George Gascon's administration. We are also gathering and evaluating what other materials might have to be produced to comply with our *Brady* obligation in light of all that we have recently learned. And while we understand that the current administration followed up on and disclosed *Brady* information, the reality is all this should have been provided to the defense years ago because the prosecution knew or should have known about all of the above. At the very least, this information is relevant to the *Murgia* motion – which the Defense filed.

To further complicate matters, the attorney handling the case, the IIB manager, is now a witness to statements by former lead investigator Lundberg, and I, the elected District Attorney to whom the IIB manager directly reports, am now a witness to statements by the signatory of the arrest warrant, Friedman. Lundberg's statements conflict with Friedman's, making it possible that I and the IIB manager may be called by the defense during the *Murgia* motion.

The aunt of the named victim, Keita O'Neil, spoke with me and asked that the Attorney General's Office take over this case noting the conflict that exists.

REQUEST FOR RECUSAL AND ASSUMPTION BY THE ATTORNEY GENERAL

The present administration of this office has reviewed the universe of facts of this case, including the applicable California and United States Constitutional law. While handling this case we have done our very best to view this case through the lens of the prior administration, assuming they in good faith believed the case could be proved, in order to proceed forward with this prosecution, despite the many evidentiary problems described above. But now the discovery of the obvious irregularities surrounding the handling of this case, the questions around the obtaining of an arrest warrant, and the lack of candor around this, have led us to believe the matter was in fact not filed in good faith. It appears that the case was filed for political reasons and not in the interests of justice. I cannot pursue this case out of political convenience. 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. Therefore, it is our intention to dismiss the charges made in this case, unless the Attorney General's Office decides to step in and take over the case.

This notification provides the DOJ with an opportunity to take over this matter before it is dismissed. Despite our assessment that we are unable to ethically proceed with this case we invite the Attorney General's Office, who is the foremost authority in this area, to review our decision in this case by taking over the prosecution. Our aim is to give the family and the community the opportunity of an independent review and the ultimate assurances that despite our internal conflicts and position, that the case can proceed as charged should you arrive at a different conclusion. To give your office an opportunity to assume the prosecution, we will defer any dismissal until March 1, 2023, the date set for preliminary hearing and the *Murgia* motion. We are submitting this request to you now, as we recognize that the Attorney General's Office

would have very little time to review or evaluate the case after a dismissal because the statute of limitations only has nine days left before it runs– an insufficient amount of time for almost anyone to review and make a decision on this matter.

A copy of the casefile will be provided to you upon request.

Sincerely,

Brooke Jenkins
District Attorney of San Francisco