

**REPORT ON THE FATAL SHOOTING OF**

**ROBERTO RIVERA, JR. ON**

**SEPTEMBER 8, 2024**



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## **I. PREAMBLE**

The summary of this incident was prepared after a review of materials submitted by the San Jose Police Department and the Santa Clara County District Attorney's Bureau of Investigation (BOI). The submissions included: reports of the responding police officers; reports summarizing interviews of the involved officers and witnesses; interview recordings; body-worn camera (BWC) footage; photographs and video; medical examiner's reports; and 911/police radio communications. This review is mandated by the Officer-Involved Incident Guidelines, which were revised by the Santa Clara County Police Chiefs' Association on September 9, 2021.

## **II. SYNOPSIS**

On September 8, 2024, at 9:21 p.m., Roberto Rivera, Jr., walked into a taqueria at the back of a strip mall on Senter Road in San Jose with a loaded semiautomatic handgun and fired multiple rounds into the ceiling. He then walked out of the restaurant and into the parking lot, approached a nearby truck, and shot the driver in the neck. Rivera next walked toward Senter Road but stopped halfway in front of a 7-11 store as four San Jose police cars pulled up short of the driveway. Facing six armed officers to his left and right, all of whom had guns pointed at him, Rivera aimed his gun to the sky and yelled, "Shoot me!" The officers refused and ordered Rivera to drop his gun. For the next 20 seconds, the officers pleaded with Rivera to surrender. Instead, he slowly lowered his gun and pointed it directly at two officers who had re-positioned themselves behind a car to Rivera's right. At that moment, four officers to Rivera's left believed he intended to shoot and kill their fellow officers, so they discharged multiple rounds from their department-issued firearms, killing Rivera.

### III. SUMMARY OF FACTS

On September 8, 2024, at approximately 9:21 p.m., Roberto Rivera, Jr., went to Catracho Restaurant in San Jose, CA. The restaurant is located at the rear of a small strip mall that runs east-west at 4278 Senter Road. Only a handful of patrons and staff were in the restaurant at that time. Rivera walked to the middle of the restaurant and announced that “everyone here is about to get U-Visas<sup>1</sup>,” after which he reached into his waistband and drew a chrome .45 caliber semiautomatic handgun with his right hand. After firing multiple rounds into the ceiling, Rivera exited the restaurant.

As Rivera was leaving Catracho Restaurant, John Doe was playing loud music in the parking lot while seated in the driver’s seat of his truck. At approximately 9:25 p.m., Rivera approached the passenger side of Doe’s truck and fired one round into the right front fender. The two men briefly exchanged heated words, after which Rivera fired a single shot into the cab of Doe’s truck, striking him in the neck. Rivera then walked back toward the restaurant and Doe exited his truck holding his neck. A friend of Doe then transported him to a nearby hospital where he was treated for the gunshot wound and survived. Once Doe was gone, Rivera wandered back into the middle of the parking lot and slowly made his way on foot back to his silver truck, which was parked facing northbound in front of the 7-11 located halfway between the restaurant and Senter Road. As he did so, witnesses described Rivera as “shooting randomly” and striking the windows of nearby businesses.

Upon Rivera reaching his truck, four marked SJPD patrol SUVs, and one unmarked sedan, pulled up at the mouth of the strip-mall driveway with lights and sirens activated. The

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<sup>1</sup>A U-visa is a nonimmigrant visa for victims of certain crimes who have experienced mental or physical abuse. It allows victims to live and work in the United States for up to four years.

officers were responding to multiple reports and 911 calls of an active shooter at 4278 Senter Road.

One of the responding officers, Officer Victor Figueroa, parked his police issue SUV to the north of the driveway, to Rivera's right as Rivera faced Senter Road. Officer Kyle Burchfiel, Figueroa's Field Training Officer, was riding in the passenger seat. Immediately upon stopping, Officer Burchfiel exited the SUV, took cover behind the passenger side door, and aimed his department issued handgun at Rivera. Officer Figueroa exited the driver's seat, took cover behind the driver's side door, and aimed his department issued handgun at Rivera. Officer Burchfiel yelled at Rivera, "Let me see your hands, drop the gun!" Rivera, holding the chrome semiautomatic pistol in his right hand, looked directly at Officer Burchfiel, pounded his chest with his left hand and yelled, "Shoot me!" Officer Burchfiel responded, "No! We don't want to shoot you," before taking cover behind the rear of the vehicle with Officer Figueroa.

At the same time Officers Figueroa and Burchfiel arrived, three other units also arrived at the south end of the strip mall driveway, to Rivera's left as he faced Senter Road. Officer Cesar Fernandez's SUV was the closest to Rivera. Upon arrival, he exited his vehicle with a tactical rifle, positioned himself behind the front left front quarter panel of his SUV, and aimed his weapon at Rivera.

Officer Brett Vranich, driving an unmarked police car southbound on Senter Road, passed behind Officer Burchfiel's SUV and parked behind Officer Fernandez's SUV. He exited the driver's seat, drew his department issued handgun, moved a few steps to his left, and took a position aiming at Rivera from behind the right rear quarter panel of Fernandez's patrol vehicle. Officer Jesse Gifford was riding in the rear of Officer Vranich's SUV. When it stopped, he exited on the right side of the car, circled around the trunk, took a position by the driver's

doorframe of Fernandez's SUV, and aimed his pistol at Rivera. Officer Barron Kim, who was seated in the front passenger seat of the unmarked car, exited and retrieved his tactical rifle.<sup>2</sup>

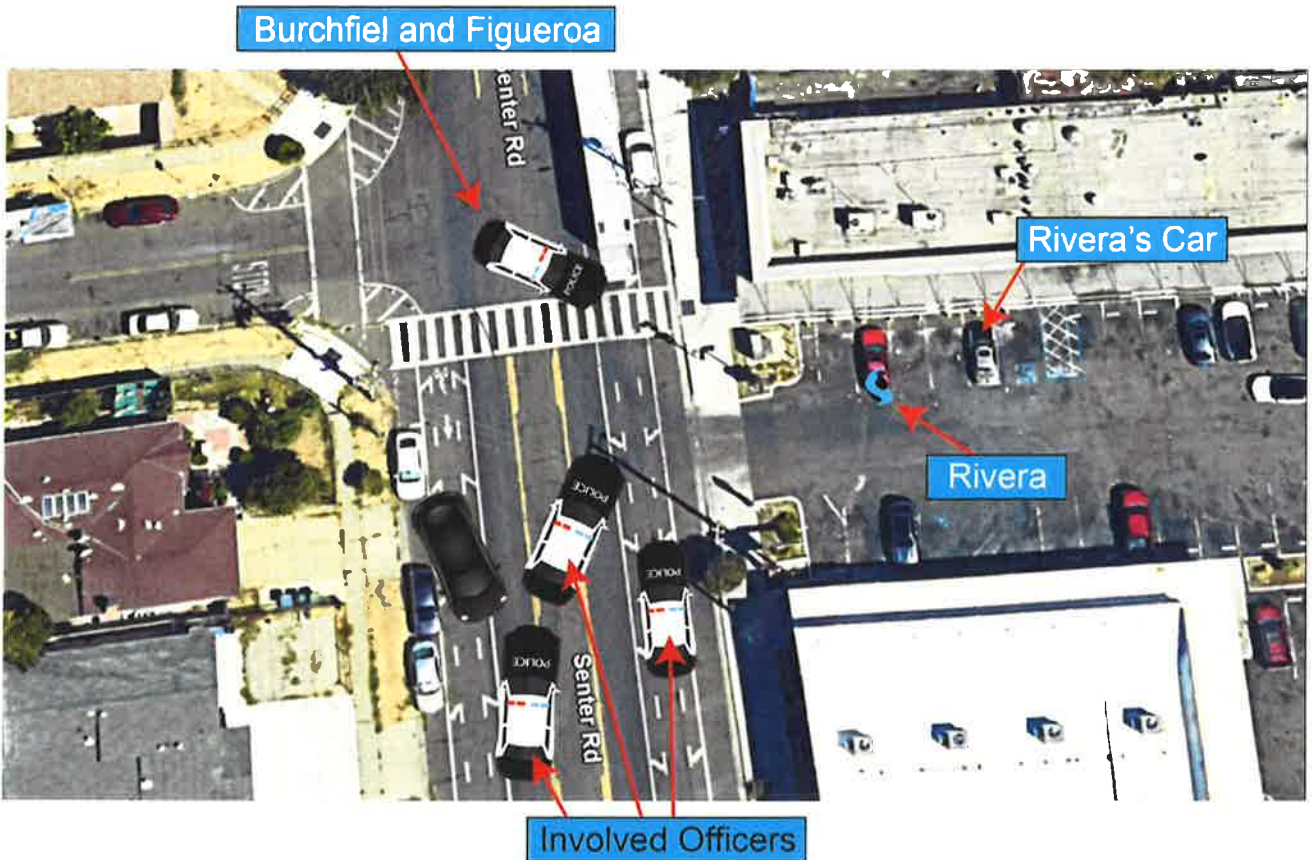
Officer Juan-Carlos Jerez was riding as a front passenger in an SUV driven by Officer Nelly Mateos. Officer Mateos arrived driving northbound and pulled in behind Officer Fernandez's SUV, just to the south of the strip mall driveway. Upon arrival, Officer Mateos stayed behind the wheel of the patrol car in case it needed to be moved to provide additional cover. Officer Jerez exited the vehicle, circled around behind it and then took a position behind the hood of Officer Fernandez's SUV, between Officer Fernandez and Officer Vranich. There, he aimed his pistol at Rivera.

As Officers Fernandez, Jerez, Gifford and Vranich aimed their guns at Rivera from the south side of the driveway, they could see Rivera holding his chrome pistol toward the sky with his right hand, pounding his chest with his free hand, and yelling at the officers, "Shoot me!" After approximately 20 seconds of the officers yelling for him to drop his gun, Rivera began counting out loud. Rivera shouted "One!" as he held his gun in the air. Rivera then shouted "Two!" as he lowered his extended right arm and aimed his gun toward Officers Burchfiel and Figueroa.<sup>3</sup> The relative positions of Rivera and the responding officers are depicted in the aerial photograph below.

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<sup>2</sup> Officer Kim later told investigators that he attempted to take a kneeling position to the left of Officer Fernandez, but the shooting concluded before he could get there.

<sup>3</sup> The moment is difficult to see in still images, but easily identifiable in the video summary released by the San Jose Police Department.



Seeing Rivera take aim at him, Officer Burchfiel ducked behind his patrol SUV. Believing Rivera intended to shoot and kill Officer Burchfiel and/or Officer Figueroa, Officers Fernandez, Jerez, Gifford and Vranich fired their weapons simultaneously at Rivera. All gunfire ceased when Rivera fell to the ground. Officer Fernandez, however, saw Rivera rolling on the ground. Fearing Rivera was reaching to re-arm himself with his gun, Officer Fernandez fired “two or three” additional shots and ceased firing once Rivera stopped moving.

As Rivera lay on his back in the parking lot, officers could see the chrome .45 on the ground within arm’s reach of him. Concerned that Rivera might still be capable of opening fire when officers approached to handcuff him and begin first aid, the officers sent in Officer Dunn’s canine partner to separate Rivera from the firearm.

Officer Dunn unleashed his canine and sent it in alone to grab Rivera and pull him away from the gun. However, the canine immediately latched onto Rivera's throat. Officer Dunn ordered the canine to release Rivera, and it complied. Officer Dunn again ordered the canine to re-latch onto Rivera, hoping it would grab his arm or leg so he could be pulled away from the gun, but the canine again grabbed Rivera on the neck. At that moment, multiple officers approached Rivera and recovered the gun. Officer Dunn, again, ordered the canine to release Rivera and it complied. Rivera was placed in handcuffs, after which emergency medical services arrived to treat him. He was transported to Valley Medical Center where he was later pronounced deceased.

Officers Fernandez, Jerez, Gifford and Vranich were transported separately to SJPD headquarters where they were sequestered pending interviews by detectives.

#### **IV. WITNESS STATEMENTS**

Investigators documented statements from multiple police officers and civilian witnesses. Summaries of the most pertinent statements are included below.

##### **A. OFFICER CESAR FERNANDEZ**

SJPD Sergeant Joel Martinez and District Attorney Investigator Nate Wandruff interviewed Officer Cesar Fernandez on September 13, 2024, at SJPD. The interview audio was recorded, but video was not at the request of his attorney.

Officer Fernandez has been an officer with SJPD for seven years leading up to this incident and was aware of SJPD's use of force policy. On the day of the incident, he was assigned to the police canine ("K9") unit wearing a standard department-issued police utility uniform with an SJPD badge patch visible on his tactical vest. He has attended several SJPD MERGE (aka SWAT) trainings and is qualified to use a .223 caliber tactical rifle.



On the evening of September 8, 2024, at approximately 9:30 p.m., Officer Fernandez heard over dispatch that there was a male firing a gun in the 7-11 parking lot at 4278 Senter Road. He also heard that someone had been shot. He immediately attached himself to the call and drove straight there with other officers following.

Officer Fernandez's recitation of the events was consistent with the BWC video that fully and accurately captured the incident, which was incorporated into the Summary of Facts above. The officer's responses to questions about his state of mind are documented below.

When asked why he chose to fire his weapon, Officer Fernandez stated that after Rivera refused commands to drop the gun, he observed Rivera lower his arm as if he were going to shoot other officers. Believing Rivera intended to kill his fellow officers, Officer Fernandez fired two rounds from his tactical rifle, then he saw Rivera fall to the ground. Officer Fernandez was asked why he fired again at Rivera after he was on the ground. Officer Fernandez stated that Rivera began to roll on the ground. Believing Rivera was attempting to reach for his gun, Officer Fernandez fired "two or three" more rounds from his rifle to incapacitate Rivera. Once Rivera stopped moving, Officer Fernandez ceased firing. Officer Fernandez explained that it would not have been appropriate to use non-lethal force against a suspect using a firearm. Officer Fernandez did not want to send in his dog because he did not want it to get shot by Rivera.

## **B. OFFICER JUAN-CARLOS JEREZ**

SJPD Sergeant Joel Martinez and District Attorney Investigator Nate Wandruff interviewed Officer Juan-Carlos Jerez on September 12, 2024, at SJPD. The interview audio was recorded, but video was not at the request of his attorney.

Officer Jerez has been an officer with SJPD for three years leading up to this incident after being an officer with the New York Police Department for four years. He was aware of SJPD's use of force policy. On the day of the incident, he was working patrol and wearing a standard department-issued police utility uniform with an SJPD badge patch visible on his left breast.

On the evening of September 8, 2024, at approximately 9:30 p.m., Officer Jerez heard over dispatch that a male was firing a gun at 4278 Senter Road. He believed it was an active shooter incident because he heard over the radio that shots had been fired and someone was possibly hit.

Officer Jerez's recitation of the events was consistent with the BWC video that fully and accurately captured the incident, which was incorporated into the Summary of Facts above. The officer's responses to questions about his state of mind are documented below.

When asked why he fired his pistol, Officer Jerez stated that he observed Rivera holding the gun toward the air in "ready position," but then began a "countdown" and aimed his weapon in the direction of Officer Burchfiel. Out of fear for his own life, the lives of his fellow officers and the public, Officer Jerez fired approximately five shots from his department-issued pistol to incapacitate Rivera. When asked if he considered using non-lethal force, the officer explained that he has never been trained to respond to a lethal force threat, such as that posed by Rivera, with non-lethal force.

### **C. OFFICER JESSE GIFFORD**

SJPD Officer Hans Jorgensen and District Attorney Investigator Nate Wandruff interviewed Officer Jesse Gifford on September 12, 2024, at SJPD. The interview audio was recorded, but video was not at the request of his attorney.

Officer Gifford has been an officer with SJPD for just over three years leading up to this incident. He was aware of SJPD's use of force policy. On the day of the incident, he was working in an unmarked police vehicle as a member of the Violent Crime Enforcement Team ("VCET") and wearing a standard department-issued police utility uniform with an SJPD badge patch visible on the left breast of his tactical vest.

On the evening of September 8, 2024, at approximately 9:30 p.m., Officer Gifford was in an unmarked vehicle with Officers Vranich and Kim. He heard dispatch announce a priority firearms discharge event on Senter Road. While enroute, they were notified that someone had been shot.

Officer Gifford's recitation of the events was consistent with the BWC video that fully and accurately captured the incident, which was incorporated into the Summary of Facts above. The officer's responses to questions about his state of mind are documented below.

When asked why he fired his weapon, Officer Gifford stated that Rivera refused commands to drop his gun and pointed it in the direction of Officer Burchfiel's SUV. The officer explained that he believed Rivera was going to shoot and kill Officer Burchfiel. In response, Gifford fired what he believed was one round from his department-issued pistol. Officer Gifford stated that he did not think less-lethal force would have been effective against a suspect firing a gun. Officer Gifford explained that he has never been trained to respond with lethal force using non-lethal force.

#### **D. OFFICER BRETT VRANICH**

SJPD Officer Hans Jorgensen and District Attorney Investigator Nate Wandruff interviewed Officer Brett Vranich on September 12, 2024, at SJPD. The interview audio was recorded, but video was not at the request of his attorney.

Officer Vranich has been an officer with SJPD since 2019. He was aware of SJPD's use of force policy. On the day of the incident, he was working in an unmarked police vehicle as a member of the Violent Crime Enforcement Team ("VCET") and wearing a standard department-issued police utility uniform with an SJPD badge patch visible on the left breast of his tactical vest.

On the evening of September 8, 2024, at approximately 9:30 p.m., Officer Vranich was in an unmarked vehicle with Officers Gifford and Kim. Officer Kim advised that there was a "Priority One – Firearms Discharge" call for service near the intersection of Senter Road and Coyote Road. While enroute, he heard dispatch announce that a suspect, whose vehicle was parked in front of a 7-11, had shot and injured another person.

Officer Vranich's recitation of the events was consistent with the BWC video that fully and accurately captured the incident, which was incorporated into the Summary of Facts above. The officer's responses to questions about his state of mind are documented below.

When asked why he fired his weapon, Officer Vranich stated he became concerned that officers might need to use lethal force on Rivera because he was refusing commands to surrender or engage the officer in a dialogue. Officer Vranich explained that when a suspect refuses to even engage in a dialogue, de-escalation is nearly impossible. When Officer Vranich saw Rivera extend his right hand holding the gun toward Officer Burchfiel, he believed Rivera intended to shoot. To defend his fellow police officers, Vranich fired one or two rounds from his department-issued pistol.

#### **E. OFFICER KYLE BURCHFIEL**

Hours after the incident on September 9, 2024, at 3:20 a.m., Officer Burchfiel generated a report summarizing his experiences during the incident. Officer Burchfiel is an officer with

SJPD. On the day of the incident, he was assigned as a Field Training Officer, supervising Officer Figueroa.

On the evening of September 8, 2024, at approximately 9:30 p.m., Officer Burchfiel heard over dispatch that a male was firing a gun at 4278 Senter Road. Officers Burchfiel and Figueroa reported to the scene in their marked patrol SUV. Officer Figueroa was driving, and Officer Burchfiel was in the front passenger seat. Upon arrival, Officer Burchfiel instructed Officer Figueroa to park so that the front of his patrol vehicle directly faced the suspect. Officer Figueroa exited the driver's side of the patrol vehicle. Officer Burchfiel exited the passenger side and stood behind the passenger door, facing Rivera. Officer Figueroa commanded Rivera to show his hands. Rivera raised his hands, revealing a silver handgun in his right hand. Rivera then began walking toward Officer Burchfiel while shouting at the officers to shoot him and hitting his chest with his left hand. As Rivera approached them, Officer Burchfiel and Officer Figueroa re-positioned themselves to the back of the patrol vehicle for better cover.

As Officer Burchfiel stood behind the patrol vehicle, he commanded Rivera to drop the gun. Instead, Officer Burchfiel saw Rivera lower the gun and point it in his direction. As Rivera lowered the gun toward Officer Burchfiel, the officer heard multiple gunshots and saw Rivera get hit multiple times and drop to the ground.

#### **F. RIVERA FAMILY**

Multiple members of Rivera's family were contacted by SJPD officers the night of the shooting. Rivera's family members disclosed that Rivera was suffering from depression due to his mother receiving end-of-life hospice care. They also told officers that Rivera's depression increased when drinking alcohol. At approximately 9:00 p.m., Rivera sent several group text messages to his relatives saying they "would not see him again," to take care of his youngest

sister, and to take his truck. Worried that Rivera was suicidal, the family attempted to contact him by phone, but he did not respond. Family members then went to his home to find him, but he was not there. While at Rivera's home, one close relative heard "pops" in the distance that he believed were fireworks. This relative contacted the police after he came upon the aftermath of the shooting in the 7-11 parking lot on his way home along Senter Drive.

## **V. EVIDENCE**

### **A. CRIME SCENE**

SJPD Crime Scene Unit ("CSU") responded and collected evidence. CSU collected Rivera's .45 caliber semiautomatic handgun. It was loaded with two rounds of ammunition, one in the magazine and one in the chamber.

CSU identified five (5) spent .223 casings from Officer Fernandez's tactical rifle. CSU also collected 12 spent 9mm casings consistent with those used by SJPD. CSU found 11 spent .45 caliber casings, which were the same brand as the round in the chamber of Rivera's pistol, scattered throughout the parking lot. CSU collected three additional .45 caliber casings, also the same brand as the round in the chamber of Rivera's pistol, from the interior of Catracho Restaurant.

### **B. AUTOPSY**

Medical Examiner Susan Parson, M.D., conducted an autopsy on Rivera's body on September 9, 2024. Dr. Parson determined Rivera's cause of death to be homicide from nine gunshot wounds that penetrated his heart, aorta, both lungs and liver. The toxicology analysis was positive for methamphetamine and his blood alcohol level was .18%, more than two times the legal limit to drive. Dr. Parson also noted several additional injuries caused by the canine

that did not cause death, including a fractured hyoid bone and lacerations to the carotid artery and jugular vein.

### **C. BODY-WORN CAMERA VIDEO AND 911 COMMUNICATION**

The SJPD Crime Scene Unit collected surveillance video from around the strip mall and BWC video of the incident from all officers that were present. The videos were carefully reviewed and incorporated into the Summary of Facts above.

## **VI. LEGAL ANALYSIS**

### **A. RELEVANT LEGAL PRINCIPLES**

This review was conducted pursuant to the joint protocol between this office and all Santa Clara County law enforcement agencies, which calls upon the District Attorney to conduct an independent assessment of the circumstances surrounding the use of deadly force.

Possible criminal charges against the involved officers in this case include Murder (Penal Code § 187), Manslaughter (Penal Code § 192), and Assault with a Deadly Weapon (Penal Code § 245). To convict an officer of any of these charges, however, it would be necessary to prove beyond a reasonable doubt that no legal justification existed for the officer's actions. (*People v. Banks* (1976) 67 Cal.App.3d 379, 383–384.) Several justifications may apply in any given case. The justifications pertinent to this case are self-defense and defense of others. (See Penal Code § 835a.)

California Penal Code section 835a(a)(1) states that “the authority to use physical force, conferred on peace officers by this section, is a serious responsibility that shall be exercised judiciously and with respect for human rights and dignity and for the sanctity of every human life . . . [E]very person has a right to be free from excessive use of force by officers acting under color of law.” Section 835a(a)(3) recognizes that “the decision by a peace officer to use force

shall be evaluated carefully and thoroughly, in a manner that reflects the gravity of that authority and the serious consequences of the use of force by peace officers, in order to ensure that officers use force consistent with law and agency policies.”

California Penal Code section 835a(c)(1)(A) permits officers to use deadly force when necessary to protect themselves and others from the “imminent threat of death or serious bodily injury.” Under section 835a(e)(2), the threat of death or serious bodily injury is imminent if, “based on the totality of the circumstances, a reasonable officer in the same situation would believe that a person has the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury to the peace officer or another person . . . An imminent harm is not merely a fear of future harm, no matter how great the fear and no matter how great the likelihood of the harm, but is one that, from appearances, must be instantly confronted and addressed.”

The relevant criminal jury instruction is set forth in Judicial Council of California Criminal Jury Instruction No. 507 (2020, “Justifiable Homicide: By Peace Officer”). The instruction states that a peace officer kills, or attempts to kill, in lawful self-defense or defense of another if he or she: “[r]easonably believed, based on the totality of the circumstances, that the force was necessary to defend against an imminent threat of death or serious bodily injury to the defendant [officer] or another person.” (CALCRIM No. 507.)<sup>4</sup>

When determining whether the use of force was lawful, section 835a(a)(2) requires the consideration of “other available resources and techniques if reasonably safe and feasible to an

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<sup>4</sup> CALCRIM 507 differs from the homicide self-defense instruction for non-officers in CALCRIM 505. CALCRIM 507 is missing the third element from 505 requiring that the killer “use no more force than reasonably necessary.” Until there is further clarification as to whether this change was an oversight by the Judicial Council in crafting 507 or intentional by the legislature, the DA’s Office will assume for purposes of this report that officers using more force than reasonably necessary in self-defense is unlawful.



objectively reasonable officer.” Section 835a(a)(4), however, states that “the decision by a peace officer to use force shall be evaluated from the perspective of a reasonable officer in the same situation, based on the totality of the circumstances known to or perceived by the officer at the time, rather than with the benefit of hindsight, and that the totality of the circumstances shall account for occasions when officers may be forced to make quick judgments about using force.”

Section 835a(a)(3) requires the District Attorney’s Office to evaluate use of force cases “carefully and thoroughly, in a manner that reflects the gravity of that authority and the serious consequences of the use of force by peace officers in order to ensure that officers use force consistent with law and agency policies.”

A person may resort to the use of deadly force in self-defense or defense of another when there is a reasonable need to protect oneself or someone else from an apparent, imminent threat of death or great bodily injury. Self-defense requires subjective honesty and objective reasonableness. (*People v. Aris* (1989) 215 Cal.App.3d 1178, 1186.) Additionally, “[i]mminence is a critical component of both prongs of self-defense.” (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1094.) Notably, the trial court’s clarifying instruction made in *Aris* that “[a]n imminent peril is one that, from appearances, must be instantly dealt with” was later approved by the California Supreme Court. (*Aris* 215 Cal.App.3d at 1187; See *In re Christian S.* (1994) Cal.4th 768, 783.)

In the related context of cases alleging excessive force by police, the test of reasonableness as to an officer’s use of deadly force is an objective one, viewed from the vantage point of a reasonable officer on the scene, rather than with the 20/20 hindsight vision. (*Graham v. Conner* (1989) 490 U.S. 386, 396.) It is also highly deferential to the police officer’s need to protect himself and others. The calculus of reasonableness must embody allowance for the fact

that “police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.” (*Id.* at 396–397.)

An officer’s right to self-defense is the same whether the danger is real or merely apparent. (*People v. Jackson* (1965) 233 Cal.App.2d 639, 642.) If the officer’s beliefs were reasonable, the danger does not need to have existed. (CALCRIM No. 505.) What constitutes “reasonable” self-defense or defense of others is controlled by the circumstances. (*Ibid.*) The question is whether action was instantly required to avoid death or great bodily injury. In this regard, there is no duty to wait until an injury has been inflicted to be sure that deadly force is indeed appropriate. In *People v. Reed*, a robber pointed a gun at his victim and a deputy sheriff was called to the scene of the robbery. (*People v. Reed* (1969) 270 Cal.App.2d 37, 41.) Before the robber could get off a shot, the deputy fired his weapon, wounding the robber. (*Id.* at 42.) The appellate court remarked that “[s]uch aggressive actions required immediate reaction unless an officer is to be held to the unreasonable requirement that an armed robber be given the courtesy of the first shot.” (*Id.* at 45.) Further, under Penal Code section 835(d), there is no requirement that a police officer retreat even if safety could have been achieved by retreating. (See also CALCRIM No. 505.)

## **B. THE SHOOTING OFFICERS ACTED LAWFULLY**

Article V, section 5.02(b)(iii)(1) of the District Attorney’s Office Policy and Procedure Manual states that a criminal complaint cannot be issued against a suspect unless there is sufficient evidence to prove the offense beyond a reasonable doubt. To convict any of the officers involved in the shooting of Rivera, the prosecution bears the burden of overcoming the presumption of innocence and disproving at least one of the three elements of self-defense, or

defense of others beyond a reasonable doubt. In this case, there is overwhelming evidence that all four officers acted in lawful defense of others.

Here, the BWC and surveillance video indisputably shows that Rivera: 1) posed an imminent threat of death or great bodily injury to Officer Burchfiel; 2) that the use of lethal force was necessary; and 3) the amount of force used was reasonable. Just minutes before the police arrived, Rivera fired multiple rounds from his gun inside the Catracho Restaurant and shot a man in the neck, creating an active shooter incident. He refused repeated commands by multiple police officers to drop his gun and surrender. Instead, he held his gun in the air with one hand while pounding his chest with the other, challenging the officers to “Shoot me!” After realizing that the officers were not going to shoot him upon request, an agitated Rivera began a loud countdown as he extended his .45 caliber pistol in Officer Burchfiel’s direction.

At that moment, lethal force was necessary, being the only option available to Officers Fernandez, Jerez, Gifford and Vranich to save Officers Burchfiel and Figueroa. Delaying their response or giving Rivera “the courtesy of the first shot” could have resulted in either officer’s death, or allowed Rivera to retreat to safety, reload, and shoot more people. That Officer Burchfiel did not discharge his weapon in self-defense does not alter the necessity of the involved officers to discharge their firearms in his defense. Under these rapidly revolving circumstances, the involved officers had a different and potentially better vantage point of Rivera than Officer Burchfiel, and they immediately discharged their firearms as Rivera extended his pistol in Burchfiel’s direction. Nor is the analysis different because Officers Burchfiel and Figueroa were positioned behind their vehicle as the apparent danger remained imminent. Last, the officers used no more force than was necessary, holding their fire once Rivera no longer presented a lethal threat.

### C. DEPARTMENT POLICY

SJPD policies were considered among the totality of circumstances in evaluating the three elements of self-defense. In 2019, the California Legislature declared in SB 230 that police training and policies “may be considered as a factor in the totality of circumstances in determining whether the officer acted reasonably.” “[T]he decision by a peace officer to use force shall be evaluated carefully and thoroughly, in a manner that reflects the gravity of that authority and the serious consequences of the use of force by peace officers, in order to ensure that officers use force consistent with law and agency policies.” (Penal Code § 835a(a)(3).) “The policies and training may be considered as a factor in the totality of circumstances in determining whether the officer acted reasonably.” (Sen. Bill No. 230 (2019-2020 Reg. Sess.) § 1(g).) That said, agency policies “shall not be considered as imposing a legal duty on the officer to act in accordance with such policies and training.” (*Ibid.*) Penal Code section 835a(c)(1)(B)) states: “When feasible, officers shall, prior to the use of deadly force, make reasonable efforts to identify themselves as a peace officer and to warn that deadly force may be used, unless the officer has objectively reasonable grounds to believe the person is aware of those facts.” At the time of this incident, SJPD had incorporated Penal Code section 835a into Policy L 2601, et seq. (Deadly Force).

In this case, the BWC video shows that the actions of all four officers were within departmental policy as required by Penal Code section 835a. The four police cars with lights and sirens made it obvious to Rivera that these were San Jose Police Department officers responding to the strip mall. His actions in Catracho by firing into the ceiling and telling the patrons they were all about to get “U-Visas” clearly demonstrated that Rivera was not just expecting a police response but inviting it. The officers also attempted to de-escalate the encounter by yelling at

Rivera to drop the gun for a full 20 seconds before he took aim in the direction of Officer Burchfiel. Although the officers did not warn Rivera that lethal force would be used, there were objectively reasonable grounds to believe he was aware of that fact because he specifically demanded that the officers shoot him. Further, the officers had no time to make such an express warning under the exigent circumstances of this case, as they chose to yell for Rivera to surrender and drop his gun.

#### **D. USE OF THE POLICE CANINE**

BWC video of the canine biting Rivera's neck is alarming. Based on the autopsy report, the injuries the canine inflicted on Rivera were of a nature that would unquestionably cause serious bodily injury or death. The use of the canine in this case, however, is beyond the scope of this report for three reasons.

First, although Rivera's neck suffered serious injuries from the dog bites, they did not cause his death. The medical examiner's report makes clear that Rivera did not die from the dog bite but of multiple gunshot wounds that penetrated his lungs, heart, liver and aorta. Second, Officer Dunn did not intend for his canine to grab Rivera's throat. The goal of using the canine was to grab Rivera's leg or arm, allowing Officer Dunn to then use the rope attached to the dog to pull Rivera away from the gun. When the canine bit Rivera's neck, Officer Dunn immediately ordered it to release Rivera in the hopes it would grab an appendage. Unfortunately, the canine again attached to Rivera's neck, after which Officer Dunn, again, ordered it to release Rivera after the gun was secured. Third, the video shows that Officer Dunn utilized the canine in a departmentally approved manner for which he was trained and authorized to act by the San Jose Police Department (Policy L 2623). Specifically, the deployment of the canine was within departmental policy because of the threat Rivera continued to pose to the officers being in such

close proximity to his gun after he went to the ground. That said, the use of the canine in this case requires careful internal review among appropriate personnel within the San Jose Police Department.

## VII. CONCLUSION

Roberto Rivera was unquestionably suffering a mental health crisis when he confronted the San Jose Police in the 7-11 parking lot. His deteriorating mental state, however, does nothing to mitigate the lethal threat he posed to the citizens in the Senter Road strip mall or the San Jose Police Officers who responded to the report of an active shooter. Rivera's suicidal text messages to family members, refusal to drop his gun, and deliberate motion pointing his firearm in the direction of Officers Burchfiel and Figueroa, make clear his intent that night was to commit "suicide by cop." Officers Fernandez, Jerez, Gifford and Vranich had no other choice but to employ lethal force in defense of their fellow officers. Under the facts of this case and the applicable law, the officers reasonably believed they needed to use deadly force, and such force was necessary and reasonable under the circumstances. Consequently, no criminal liability attaches to them.

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Respectfully submitted,

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