

**REPORT ON THE FATAL SHOOTING OF
DAVID LOPEZ ON
SEPTEMBER 8, 2021**



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I. PREAMBLE

The summary of this incident was prepared after a review of materials submitted by the Gilroy Police Department and Santa Clara County District Attorney's Bureau of Investigation. The submissions included: reports of the responding police officers; reports summarizing interviews of the involved officers and witnesses; recordings of interviews; body-worn camera footage; dashboard camera video; photographs; Medical Examiner's reports; and 911/police radio communications. This review is mandated by the Officer-Involved Incident Guidelines adopted by the Santa Clara County Police Chiefs' Association on November 12, 2020.

II. SYNOPSIS

In the early morning hours of September 8, 2021, David Lopez, 40, wanted for attempted murder with a firearm committed just one week earlier, lured Gilroy Police Department Officer Catalina Fraide to the local U.S. Post Office at Fourth Avenue and Egleberry Street under the pretense that he wished to turn himself in to the authorities. When Officer Fraide pulled up to the post office in her patrol car, Lopez ambushed her, firing twice in her direction. Both shots missed the officer, but one bullet lodged in the passenger side window frame. After the first two shots, Lopez's gun malfunctioned so he tossed it aside and retrieved a second firearm. After Officer Fraide returned fire, Lopez attempted to fire the second gun at Officer Fraide from behind the cover of a large cement pillar, but the gun did not discharge because it was unloaded. Lopez retreated behind a cement pillar and appeared as if he was attempting to reload the second gun. Officer Fraide, believing Lopez would kill her if he had the chance to reload, returned fire and hit Lopez in the head with a single bullet, killing him.

III. SUMMARY OF FACTS

At 2:00 p.m. on Tuesday, August 31, 2021, John Doe¹ was inside his truck parked in front of his residence in Gilroy. As he was installing a new stereo system, David Lopez pulled up in a Nissan sedan next to Doe. Lopez asked Doe if he wanted to go look for a man who had assaulted Doe several months earlier. Doe said no, explaining that the issue was “over and done with.” Lopez then pulled out a handgun and fired multiple shots at Doe through the driver’s door and windshield of the truck. Lopez shot Doe once in the shoulder and four times in the legs before Lopez fled in his car. When interviewed by Gilroy Police Department detectives, Doe immediately identified Lopez as the one who shot him. On September 1, 2021, the Santa Clara County Superior Court issued a no-bail warrant for Lopez’s arrest.

At 2:30 a.m. on Wednesday, September 8, 2021, Lopez called 911 and spoke to a Gilroy Police Department dispatcher. Lopez identified himself and said he was at the U.S. Post Office in Gilroy at the intersection of Fourth Avenue and Eigleberry Street. Lopez claimed he wanted to turn himself in. The dispatcher asked Lopez if he was armed, and Lopez assured him that he was not. Lopez then hung up.

Officer Catalina Fraide was the closest patrol unit and started driving toward the post office. She was wearing a standard department-issued blue uniform with cloth GPD patches on both sleeves as well as her metal badge on the front. Officer Fraide was alone, driving a marked black and white Chevy Tahoe SUV patrol vehicle with clear GPD markings on both sides and an emergency light bar on the roof. Gilroy PD Sergeant Kenneth Ellsworth and Officer Robert Basuino also responded to the call but were further away. While en route, dispatch updated the

¹ Due to John Doe’s statement that the shooting was gang-related, his name has been redacted for his safety.

responding officers that a person associated with the attempted murder of John Doe on August 31, 2021, was at the post office.

The 911 dispatcher called Lopez back while units were approaching the building. Lopez answered, and the dispatcher's supervisor instructed him to keep Lopez on the line as officers attempted to take him into custody. The dispatcher asked Lopez again if he was armed. He responded, "I wouldn't be calling you if I was armed."

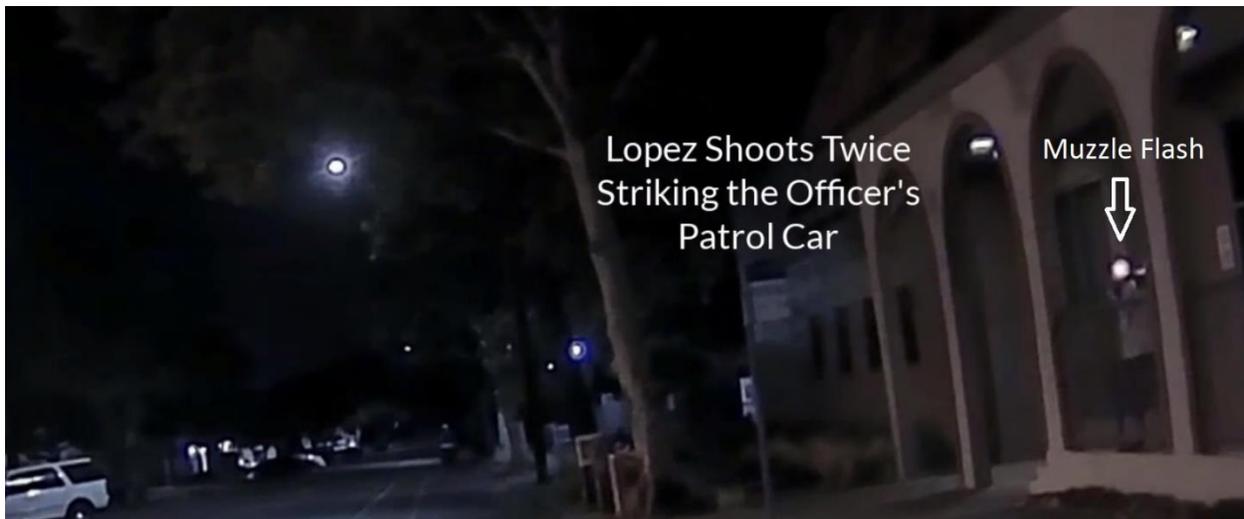
As that conversation was taking place, Officer Fraide was approaching Fourth Avenue, driving southbound on Egleberry Street. She turned off her vehicle lights so she could look for Lopez without allowing him to see her first. She pulled into the southbound lane along the west sidewalk of Egleberry Street and stopped just north of Fourth Avenue. From there, she saw Lopez standing on the well-lit elevated walkway adjacent to the sidewalk along the west side of the post office. He was wearing a white shirt and appeared to be smoking a cigarette. Below is an image taken from Officer Fraide's dashcam showing David Lopez outside the Post Office.



Sergeant Ellsworth told the Gilroy PD dispatcher to tell Lopez to lay down on the ground so that officers could safely take him into custody. Officer Fraide misunderstood Sergeant Ellsworth's instruction and mistakenly believed he wanted her to tell Lopez to lay down on the ground.

As Officer Fraide drove slowly across Fourth Avenue southbound toward the post office, she announced over her public address system that Lopez needed to “get down on the ground.” Officer Fraide’s headlights and emergency light bar were not activated as she approached the Post Office, but her patrol vehicle was clearly marked as a police car and well illuminated by street and sidewalk lighting.

As her car crossed the intersection, Lopez was facing Officer Fraide’s patrol vehicle; as she pulled up to the post office, however, Lopez turned his back to her and took a few steps south behind one of the cement pillars lining the elevated walkway. As he passed the pillar, Lopez reached into his right pants pocket and swung his body around counterclockwise toward Officer Fraide, using both hands to raise a 9mm semiautomatic handgun. At that moment, Lopez “locked eyes” with Officer Fraide. Lopez aimed the gun directly at her and fired two rounds in quick succession. Below is an image taken from Officer Fraide’s dashcam showing the muzzle flash of Lopez’s 9mm handgun firing at the officer’s patrol car as she approached the Post Office telling him to lay down on the ground.



After those two shots, Lopez ducked behind the pillar again, reached his gun around it with one hand, and attempted to fire another round at Officer Fraide, but the gun malfunctioned.

The spent shell casing from his second shot got jammed in the ejection port, a malfunction known as “stovepiping.” Such a malfunction prevents the gun from being fired until the spent shell is removed. Below is a photograph of the 9mm handgun Lopez fired twice at Officer Fraide, showing a spent shell casing stuck in the ejection port (“stovepiping”), preventing the weapon from being fired.



Of the two bullets that discharged, one missed Officer Fraide’s vehicle but the other lodged in the front right windshield pillar of her patrol vehicle.² Officer Fraide would later state that she felt the bullet’s impact with her car and was “terrified.”

Fearing for her life, Officer Fraide opened her patrol car door, quickly stepped out, and drew her department-issued Glock 21 .45 caliber semiautomatic firearm. Officer Fraide called out on her radio that shots were fired. As Officer Fraide exited her vehicle, Lopez realized his gun malfunctioned. Rather than fix the malfunction, Lopez tossed the 9mm handgun over the

² The round that missed Officer Fraide’s patrol vehicle was later recovered, having penetrated the exterior of an apartment building approximately one block north on Egleberry Street.

walkway railing into a planter box below and drew a .40 caliber semiautomatic handgun from his shorts.

Officer Fraide exited her car so fast that she did not have time to bring her patrol vehicle to a complete stop. Concerned she might lose her cover from Lopez, Officer Fraide extended one leg into the still-rolling patrol vehicle and applied the parking brake. As she did that, Lopez stepped out from behind the pillar and holding the second gun with both hands, aimed at Officer Fraide and attempted to fire again, but the gun did not discharge

Once Officer Fraide applied the parking brake, the vehicle came to a stop. As that happened, Lopez quickly moved behind the pillar at the top of the stairway on the south end of the elevated walkway. Officer Fraide then fired three shots at Lopez from the side and rear of her patrol vehicle. All three shots missed Lopez and struck the cement pillars along the post office sidewalk. Officer Fraide announced over her radio that she returned fire.

As Officer Fraide fired her gun, Lopez reached around the pillar with his right hand holding his gun. The dashcam video appears to show Lopez attempted to exchange fire with Officer Fraide three times with his .40 caliber handgun. That gun, however, was later determined to be unloaded. The image below was taken from Officer Fraide's dashcam showing Lopez reaching around a pillar and attempting to fire his unloaded .40 caliber handgun at the officer while she was taking cover behind the trunk area of her patrol vehicle.



As Lopez hid behind the cement pillar and Officer Fraide took cover behind her patrol car, an unknown sedan approached northbound on Egleberry Street toward Officer Fraide. The sedan's driver-side window was down, and the car was moving slowly in her direction. Officer Fraide, not knowing if the driver was an innocent bystander or Lopez's accomplice, turned her focus to the sedan and pointed her firearm at it until it passed.

While Officer Fraide was watching the passing sedan, Sergeant Ellsworth's patrol car began approaching northbound on Egleberry Street. Although unseen to Officer Fraide, her dashcam recorded Lopez reaching out from behind the pillar, pointing his gun at Sergeant Ellsworth's vehicle, and moving his arm as if he were attempting to fire it. Lopez then dropped back behind the pillar. Below is an image from Officer Fraide's dashcam showing Lopez aiming his unloaded .40 caliber handgun at Sergeant Ellsworth as he drove northbound on Egleberry toward the post office.



After the sedan drove past without incident, Officer Fraide then moved back to the front driver's side door of her patrol car, aiming her gun toward Lopez from the V-shaped space between the driver's door and the driver's side windshield. Lopez's hands were not visible to Officer Fraide, but she saw that they were in front of him as if he were manipulating something. Worried that Lopez was attempting to reload, Officer Fraide fired twice at the small portion of Lopez that was visible from behind the pillar, striking him in the head. Lopez immediately fell

onto his back over the walkway steps and dropped his gun between his legs. Below is an image from Officer Fraide's dashcam showing Lopez hunkered down behind the pillar an instant before the officer fired the shot that killed him.



Once additional units arrived, officers slowly approached Lopez, who was lying immobile on his back on the post office steps. He was handcuffed for officer safety and first aid was initiated. Lopez was eventually transported via Life Flight to Valley Medical Center, where he was later pronounced deceased. The Medical Examiner's Office determined Lopez died from a single gunshot wound to the head.

IV. STATEMENT OF OFFICER CATALINA FRAIDE

No civilians witnessed the incident. Officer Fraide assisted in the cuffing of Lopez. After advising her superiors that she was not injured, Officer Fraide was transported to GPD and sequestered pending the completion of the OII investigation that night. Due to the late hour, however, Gilroy PD command staff permitted her to go home and scheduled her interview for the morning of September 9.

Officer Catalina Fraide was interviewed by Gilroy PD Detective Christopher Silva and District Attorney Senior Investigator Nate Wandruff on Thursday, September 9. Officer Fraide's attorney was also present. The interview was audio recorded but not video recorded at the request of her attorney.

Officer Fraide has been a police officer with the City of Gilroy for two years. At the time of the incident, she was assigned to the patrol division working the graveyard shift. Officer Fraide was wearing the standard blue GPD uniform with the agency's patch on both shoulders. She was also wearing a metal GPD badge and nametag on the front of her uniform. She was armed with a department-issued Glock 21 .45 caliber semiautomatic handgun with 14 rounds of ammunition (13 in the magazine and one in the chamber). Her duty belt also held extra ammunition, OC spray, handcuffs, radio, baton, and a Taser. Her patrol vehicle is a black and white Chevy Tahoe with the GPD logo on the front doors and a red and blue emergency light bar on the roof.

Officer Fraide's recollection of the events surrounding the shooting was detailed in the Statement of Facts above and consistent with the dashcam and BWC videos. Her personal perceptions surrounding the shooting are described below.

When Officer Fraide started her shift on September 7, 2021, she was aware David Lopez was wanted for attempted murder involving a firearm. She also told investigators she was aware Lopez was gang affiliated and had a history of violence.

At approximately 2:30 a.m., a call came in that an intoxicated person claiming to be “Gabe Lopez” was at the U.S. Post Office at the intersection of Fourth Avenue and Egleberry Street in Gilroy and wanted to turn himself in. Officer Fraide responded to the area thinking that the subject was possibly David Lopez. She was aware David Lopez was wanted for attempted murder due to a department-wide “be on the lookout” email sent earlier that week.

She approached with her headlights and emergency lights off because she did not want the subject to see her while she surveyed the area. From across Fourth Avenue, she could see the male standing on the raised post office sidewalk in a white shirt smoking a cigarette. She said the person appeared calm. When she began driving toward the post office, she immediately recognized the man as David Lopez.

As she approached the east sidewalk of the post office and slowed her car, Lopez “locked eyes” with her and began firing at her. She explained to investigators that she felt the impact of the gunfire on the police car and was “terrified.” She exited her vehicle and recalled firing two quick shots at Lopez before activating the parking brake and taking cover behind the trunk area of her patrol vehicle. Officer Fraide believed she fired two more shots and then switched her attention to a sedan that was driving northbound on Egleberry Street in a “nonchalant” manner. She was concerned that the driver might be associated with Lopez and intended to shoot her. She aimed her gun at that car until it safely passed and then moved to the front driver’s side door of her patrol car.

From between the driver's door and the driver's side window, she could see Lopez behind a cement pillar. He did not appear to be injured and was manipulating something in front of his body, leading the officer to believe Lopez was attempting to reload his gun. At that moment, Officer Fraide said she thought Lopez "was going to pop up and murder me." To protect herself and the other officers whom she believed would also be responding to the scene, she fired twice at Lopez, whose head was briefly exposed behind the pillar. Lopez immediately fell to the ground on the steps to the elevated sidewalk next to the post office.

Officer Fraide was asked if she considered non-lethal options in dealing with Lopez. She explained that she had no opportunity to use de-escalation techniques because she was immediately under fire when she arrived. Although Officer Fraide had a Taser in her possession, she explained to investigators that such a less-than-lethal option would not be feasible against an active shooter.

V. EVIDENCE

A. AUTOPSY

Lopez's autopsy was conducted on September 9, 2021, by Assistant Medical Examiner Mehdi Koolae of the Santa Clara County Medical Examiner's Office. He determined the cause of death was a single gunshot wound to the head. The bullet entered Lopez's forehead and exited the right side of the head toward the back. Dr. Koolae determined the bullet's path was front to back, left to right, and slightly upward. There were no other injuries. Lopez's toxicology screen was positive for methamphetamine and amphetamine.

B. CRIME SCENE

Gilroy Police processed the shooting scene and collected five .45 caliber shell casings from around Officer Fraide's patrol vehicle. The police also located the 9mm semiautomatic

handgun Lopez discarded in the planter box after firing two shots at Officer Fraide. One spent 9mm shell casing was found near Lopez and a second 9mm shell casing was found “stovepiped” in the ejection port of that gun. The magazine was empty, but one round was chambered in the weapon.

Near Lopez’s body, officers recovered the .40 caliber semiautomatic handgun he attempted to fire at Officer Fraide and Sergeant Ellsworth, loaded with an empty magazine. In Lopez’s pants pocket, police found four 9mm rounds of live ammunition.

C. BODY-WORN CAMERAS

The BWC videos of Officer Fraide and Sergeant Ellsworth were downloaded, collected, and reviewed. Officer Fraide’s BWC did not activate until after she moved behind her patrol vehicle, capturing only her third, fourth, and fifth shots. Sergeant Ellsworth’s BWC was recording when he arrived at the scene and recorded the handcuffing and lifesaving efforts by GPD after the shooting.

D. DASHCAM VIDEO

Dashcam video was recovered from Officer Fraide’s patrol car and captured Officer Fraide’s approach and the shooting. There was no audio.

E. GILROY PD VIDEO SUMMARY

The Gilroy Police Department prepared a video that synchronized the BWC video, the dashcam video, and Lopez’s 911 calls. This video was posted on YouTube by the department on October 7, 2021, and can be seen on the Gilroy PD YouTube page or at this link:

<https://youtu.be/pab6FgmyCE0>

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. This review does not examine issues such as ways to improve training or tactics or possible civil liability. Accordingly, such a review should not be interpreted as expressing an opinion on those matters.

Possible criminal charges against an officer involved in a fatal shooting include murder (Penal Code section 187) and manslaughter (Penal Code section 192). To convict an officer of a homicide charge, 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, and they are set forth in Penal Code sections 196, 197, and 835a. The justification pertinent to this case is the use of force by a police officer in self-defense, which is found in Penal Code sections 197 and 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." (Cal. Pen. Code Sec. 835a.) California Penal Code section 835a(c)(1)(A) states that police officers may 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.” (Cal. Pen. Sec. 835a(e)(2).)

The relevant criminal jury instruction is set forth in Judicial Council of California Criminal Jury Instruction No. 505 (2019) (“Justifiable Homicide: Self-Defense or Defense of Another”). The instruction states that a person kills, or attempts to kill, in lawful self-defense or defense of another if all the following are true:

1. The person reasonably believed he or she, or someone else, was in imminent danger of being killed or seriously injured;
2. The immediate use of force was necessary to defend against the danger; and
3. The person used no more force than reasonably necessary to defend against the danger.

(CALCRIM No. 505.)

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 objectively reasonable officer.” Section 835a(a)(4), however, states that:

[T]he 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 the use of force “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 where there is a reasonable need to protect oneself from an apparent, imminent threat of death or great bodily injury. Self-defense requires both 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.) In *Aris*, the trial court’s clarifying instruction to the jury on the subject was to the point and later cited with approval by the California Supreme Court: “[a]n imminent peril is one that, from appearances, must be instantly dealt with.” (*In re Christian S.* (1994) 7 Cal.4th 768, 783.)

In the related context of cases alleging excessive force by police, the test of reasonableness of an officer’s use of deadly force is an objective one, viewed from the vantage of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. (*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 the 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.) If the officer’s beliefs were reasonable, the danger does not need to have actually existed. (CALCRIM No. 505.) What constitutes “reasonable” self-defense is controlled by the circumstances. 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 one case, a robber pointed a gun at his victim and a deputy sheriff was called to the scene of the robbery. Before the robber could get off a shot, the deputy fired his weapon, wounding the robber. 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.” (*People v. Reed* (1969) 270 Cal.App.2d 37, 45.) Further, under Penal Code section 835a(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. OFFICER FRAIDE ACTED IN LAWFUL SELF DEFENSE

This report evaluates the use of deadly force in the fatal shooting of David Lopez on September 8, 2021. I have carefully examined the recorded statements of the involved officer, the report of the law enforcement officer who witnessed the shooting, body-worn camera video, dashcam video, relevant audio and video recordings, as well as the other materials described herein. Based on the evidence, Officer Catalina Fraide acted in lawful self-defense.

There is overwhelming evidence to conclude Officer Fraide actually and reasonably believed she was in imminent danger of being killed by Lopez, that shooting him was necessary to protect against that danger, and that the amount of force she used was reasonable. Lopez lured the police to the U.S. Post Office, lied to the dispatcher about being armed with a firearm, and ambushed Officer Fraide after she arrived. He fired twice at her patrol car while she was still inside pulling up to the curb. When his gun malfunctioned, he armed himself with a second gun and attempted to fire at Officer Fraide. After Officer Fraide fired three shots at Lopez, he refused to surrender and unknown to Officer Fraide, attempted to shoot Sergeant Ellsworth with the unloaded gun. When Officer Fraide saw Lopez hunkered down behind the cement pillar

manipulating his gun as if he were reloading or attempting to fix a malfunction, she reasonably concluded that Lopez was still intent on killing her. In that split second, Officer Fraide had no choice but to take action to defend herself from the lethal threat posed by Lopez as an active shooter. She hit Lopez once in the head, immediately stopping the threat.

Under the totality of circumstances, any reasonable officer in the same situation would be expected to respond in the same manner as Officer Fraide to defend against the danger posed by Lopez. Consequently, her actions were in lawful self-defense.

C. GILROY POLICE DEPARTMENT USE OF FORCE POLICY

The Gilroy Police Department's Use of Force Policy was updated in 2020 to reflect the requirements of the newly enacted Penal Code section 835a. The Department's policies were reviewed and considered in the course of this investigation as required by section 835a. The departmental policy allows officers to use deadly force if done in self-defense of the officer or others. As discussed above, the officer's use of force was in lawful self-defense under California law and is consistent with those provisions of the Gilroy Police Department Use of Force Policy, as required by Penal Code section 835a(3).

Gilroy Police Department Policy 300.4 mirrors Penal Code section 835a(c)(1)(B), requiring that prior to the use of deadly force, officers shall "where feasible. . . 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.*" (Emphasis added). In this case, although Officer Fraide did not explicitly announce herself as a peace officer or warn Lopez that she might use deadly force, she had no time to do so and had objectively reasonable grounds to believe Lopez was aware of those facts.

Lopez called 911 to say he wanted to surrender himself to GPD. Officer Fraide pulled up to the post office in a marked patrol vehicle and instructed Lopez to lay on the ground over her vehicle's PA system. She was dressed in a standard police uniform and only fired her gun after Lopez shot at her twice while she was pulling up in her police car. Under the circumstances, Officer Fraide had objectively reasonable grounds to believe Lopez knew she was a law enforcement officer and that she would likely use lethal force in response to being shot.

VII. CONCLUSION

Officer Catalina Fraide's disciplined response to a live-fire ambush by a violent felon intent on killing police officers is a credit to her training, professionalism, and courage. Under the facts of this case and the applicable law, Officer Fraide reasonably believed she needed to use deadly force to protect herself from being killed by David Lopez, and such force was necessary and reasonable under the circumstances. Consequently, no criminal liability attaches to her. Officer Fraide's actions were both lawful and justified.

Dated: 5/27/2022

Respectfully submitted,

ROBERT BAKER
Deputy District Attorney

DocuSigned by:
Jeff Rosen
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JEFFREY F. ROSEN
District Attorney