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July 18, 2008

Gerald Whitman  
Chief of Police  
Denver Police Department  
1331 Cherokee Street  
Denver, CO 80204

RE: Investigation of the shooting death of Mark Tabullo, 7/13/85, and wounding of Andres Junior Castillo, 7/23/81, by Sergeant Vince Lombardi, #89-31, and Officer Jason Simmons, #04038, on June 22, 2008, in the 1800 block of Market Street, Denver, Colorado.

Dear Chief Whitman:

The investigation and legal analysis of the shooting death of Mark Tabullo and wounding of Andres Junior Castillo have been completed, and I conclude that under applicable Colorado law no criminal charges are fileable against Sergeant Vince Lombardi or Officer Jason Simmons. My decision, based on criminal-law standards, does not limit administrative action by the Denver Police Department where non-criminal issues can be reviewed or civil actions where less-stringent laws, rules and legal levels of proof apply. A description of the procedure used in the investigation of this officer-involved shooting and the applicable Colorado law is attached to this letter.

## STATEMENT OF FACTS

Because criminal charges are pending against Andres Junior Castillo, we will provide the basic facts of this officer-involved shooting in summary form. We will not use specific statements of the officers and witnesses.

On June 22, 2008, at 1:51 a.m., Denver officers reported an officer-involved shooting in the parking lot in the 1800 block of Market Street. Denver Police Department Gang Unit and District Six officers were patrolling the lower-downtown area ("LoDo") to control the crowds leaving the numerous night clubs in the area. Increased saturation of officers is intended to prevent violence and property destruction and to intervene quickly if such acts occur. Hundreds of people flow into the streets and parking lots at this time and according to officers—problems are not uncommon.

Denver Police Department radio transmissions alerted officers that potential fights were brewing in the block-long parking lot in the 1800 block of Market Street. Officers

observed a number of individuals yelling and jumping up and down as others were removing their shirts. This is a common occurrence associated with an imminent fight. Then gunshots rang out.

Sergeant Vince Lombardi and Officer Jason Simmons were at the location when the gunfire began. These two Gang Unit officers, who were working separate cars, responded immediately on foot directly to the vicinity of the gunfight.<sup>1</sup> Scores of uninvolved citizens, as well as all officers in the area, were at great risk. Sergeant Lombardi and Officer Simmons saw an African-American male with a handgun and a Hispanic male with a shotgun engaged in a gunfight. Witnesses had seen the Hispanic male get the weapon out of the trunk of his car. The Hispanic male, later identified as Andres Junior Castillo (“Castillo”), swung the pistol-grip, 12 Gage, Mossberg shotgun around to his right and fired a blast at the uniformed officers. The shotgun blast tore through the stomach area of the shirt of Officer Simmons who was approximately 15 to 20 feet from Castillo. He could hear the shot go past his head and body. The officers, who were positioned next to one another, returned fire at Castillo, just as he fired a second blast from the shotgun. Castillo was struck by the officers’ shots. After being shot, he turned to face Mark Tabullo (“Tabullo”), who was standing next to him. Tabullo took the shotgun from Castillo. Rather than dropping the weapon, Tabullo aimed the shotgun at the officers from the hip. Sergeant Lombardi and Officer Simmons rapidly fired additional shots at Tabullo. Tabullo fell to the parking lot pavement and dropped the shotgun near his feet. All of the shots were fired in a very brief time frame. Both officers indicated they fired to defend themselves and to protect all the citizens in the area.



Additional officers were already responding to the scene and arrived immediately. After being shot, Castillo had moved between his car and a red car parked perpendicular to the back right quarter panel of his car. Castillo was ordered to the ground by Officer Simmons and taken into custody approximately 30 feet from where he was shot. Tabullo fell in the vicinity of the rear of Castillo’s car—the location where each had been shot. The pistol-grip shotgun wielded by the two when they were shot lay nearby on the pavement. Paramedics responded and transported Castillo and Tabullo to Denver Health Medical Center. Both underwent surgery. Castillo survived his wounds; Tabullo was pronounced dead by Dr. C. Cotheren at 4:27 a.m.



The African-American male who was engaged in the gunfight with Castillo escaped and has not been identified at this time. Denver Police Department Crime

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<sup>1</sup> See attached photographs.

Laboratory investigators recovered six (6) spent 9mm shell casings at the scene from the vicinity where the African-American male was firing. Five (5) spent shotgun shells and six (6) shotgun shell waddings were recovered from locations Castillo fired while engaged in the gunfight with the African-American male and then the officers. An additional spent shotgun shell was still in the pistol-grip shotgun. This is consistent with the weapon's six-round capacity. The spent shotgun shell in the weapon is from the final shot fired at the officers by Castillo. Tabullo was not able to fire the shotgun because no live rounds remained in the weapon when he took it from Castillo. Eleven (11) .45 caliber spent shell casings were recovered from the location where Sergeant Lombardi and Officer Simmons fired their shots at the two assailants.<sup>2</sup> Eight (8) of these shell casings were identified to Sergeant Lombardi's service pistol and three (3) to Officer Simmons' service pistol.

Officer Simmons fired his .45 caliber, Glock, model 21, semi-automatic pistol. His weapon has a magazine capacity of 13 rounds. At the time of the shooting he was carrying his weapon with the magazine fully loaded and an additional round in the chamber. When the weapon was unloaded by Denver Police Department Crime Laboratory personnel after the shooting there were ten (10) live rounds in the magazine and one (1) live round in the chamber. Officer Simmons fired three (3) shots in this incident.

Sergeant Vince Lombardi fired his .45 caliber, H & K, model USP, semi-automatic pistol. His weapon has a magazine capacity of 12 rounds. At the time of the shooting he was carry his weapon with the magazine fully loaded and an additional round in the chamber. When the weapon was unloaded by Denver Police Department Crime Laboratory personnel after the shooting there were four (4) live rounds in the magazine and one (1) live round in the chamber. Sergeant Lombardi fired eight (8) shots in this incident.

Castillo and Tabullo were armed with a 12 Gage, Mossberg, model 500A, pistol-grip shotgun. This weapon has a magazine capacity of six (6) rounds. When recovered at the scene and later examined at the Denver Police Department Crime Laboratory, the magazine was empty and one spent shotgun shell was in the chamber.

On June 22, 2008, at 10:00 a.m., Dr. John Carver performed an autopsy on the body of Tabullo. In his autopsy report, he stated: "The cause of death is multiple gunshot wounds." He identified three (3) perforating gunshot wounds to the right shoulder, left lower leg, and right lower leg—back to front; two (2) penetrating gunshot wounds to the left lower abdomen and left back; and two (2) superficial gunshot wounds to the left-lower abdomen (graze wounds that did not penetrate the body and "right versus left direction undetermined"). Dr. Carver recovered one bullet from the penetrating gunshot wound to the left back. The bullet from the wound to the left-lower abdomen was recovered at surgery in the tissue of the stomach area. These two (2) .45 caliber bullets were identified by the Denver Police Department Crime Laboratory Firearms Examiner as having been fired from Officer Simmons' Glock service pistol. The three

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<sup>2</sup> See attached photographs.

(3) perforating (wounds with an entry & exit—no bullet in the body) gunshot wounds and the two (2) superficial gunshot wounds (gaze wounds) cannot be identified to a firearm.

Due to statutory confidentiality of medical information, we do not have access to information concerning Castillo's injuries and treatment. While we would prefer to have this information, it is not required in order to make our decision in this case.

At least five innocent bystanders were struck by pellets from the shotgun blasts fired by Castillo. The victims' wounds were not life threatening. Castillo's shotgun blasts also caused damage to a number of vehicles, including one which had its windows blown out.<sup>3</sup>

Felony charges of Criminal Attempt to Commit Murder in the First Degree (2 counts), Assault in the First Degree (2 counts), and Assault in the Second Degree (5 counts) are pending against Andres Castillo.

### LEGAL ANALYSIS

Criminal liability is established in Colorado only if it is proved beyond a reasonable doubt that someone has committed all of the elements of an offense defined by Colorado statute, and it is proved beyond a reasonable doubt that the offense was committed without any statutorily-recognized justification or excuse. While knowingly or intentionally shooting another human being and causing injury or death is generally prohibited as assault or homicide in Colorado, the Criminal Code specifies certain circumstances in which the use of physical force or deadly physical force by a peace officer is justified. As the evidence establishes that Mark Tabullo and Andres Junior Castillo were shot by Sergeant Vince Lombardi and Officer Jason Simmons, the determination of whether their conduct was criminal is primarily a question of legal justification.

Section 18-1-707(2) of the Colorado Revised Statutes defines the circumstances under which a peace officer can use deadly physical force in Colorado. In pertinent part, the statute reads as follows:

- (2) A peace officer is justified in using deadly physical force upon another person ... only when **he reasonably believes** that it is necessary:
- (a) **To defend himself or a third person** from what he reasonably believes to be the use or imminent use of deadly physical force; or
  - (b) **To effect the arrest or to prevent the escape** from custody of a person whom he reasonably believes:
    - 1. Has committed or attempted to commit a felony involving the use or threatened use of a deadly weapon; or**

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<sup>3</sup> See attached photographs.

2. **Is attempting to escape by the use of a deadly weapon; or**
3. **Otherwise indicates, except through a motor vehicle violation, that he is likely to endanger human life or to inflict serious bodily injury to another unless apprehended without delay.**

Section 18-1-901(2)(e) of the Colorado Revised Statutes defines the term “Deadly weapon” as follows:

(2)(e) “Deadly Weapon” means any of the following which in the manner it is used or intended to be used is capable of producing death or serious bodily injury: **(I) A firearm, whether loaded or unloaded;** (II) A knife; (III) A bludgeon; or (IV) Any other weapon, device, instrument, material, or substance, whether animate or inanimate.

Also pertinent to the facts and circumstances of this case is Section 18-3-202 (1)(e), Assault in the first degree, of the Colorado Revised Statutes, which reads as follows:

- (1) A person commits the crime of assault in the first degree if:
  - (e) With intent to cause serious bodily injury upon the person of a peace officer or firefighter, he or she threatens with a deadly weapon a peace officer or firefighter engaged in the performance of his or her duties, and the offender knows or reasonably should know that the victim is a peace officer or firefighter acting in the performance of his or her duties.

In reference to the pertinent section of the “Assault in the first degree” statute in which the victim is a peace officer, in *People v. Prante*, 177 Colo. 243, 493 P.2d 1083 (1972), the Colorado Supreme Court stated:

“The General Assembly recognizes that peace officers are placed in a position of great risk and responsibility, so to invoke a special punishment for an assault upon a peace officer acting in the scope of his official duties is neither arbitrary, capricious, nor unreasonable.”

Officers are entitled to rely on the doctrine of “apparent necessity” so long as the conditions and circumstances are such that a person would reasonably believe, erroneously or not, that action was necessary. See, *People v. La Voie*, 155 Colo. 551, 395 P.2d 1001 (1964), *People v. Silva*, 987 p.2d 909 (Colo. App. 1999). It is immaterial whether the suspect was actually trying to injure the officers or another, so long as a reasonable person, under like conditions and circumstances, would believe the appearances were sufficient to require the action taken.

It is fundamental that the law of self-defense, which is emphatically a law of necessity, involves the question of one’s right to act upon appearances, even though such appearances may prove to have been

deceptive; also the question of whether the danger is actual or only apparent, and as well the fact that danger is not necessary, in order to justify one in acting in self-defense. Apparent necessity, if well grounded and of such a character as to appeal to a reasonable person, under like conditions and circumstances, as being sufficient to require action, justifies the application of the doctrine of self-defense to the same extent as actual or real necessity. *Young v. People*, 107 P.274, (Colo. 1910).

The test for justifiable self defense or defense of others requires that, given the totality of the circumstances, a person reasonably believed that he or another person was being subjected to the use or imminent use of unlawful physical force or deadly physical force and that he used a degree of force that he reasonably believed to be necessary to protect himself or another person.

Therefore, the question presented in this case is whether, at the instant Sergeant Lombardi and Officers Simmons fired the shots that killed Tabullo and wounded Castillo, **they reasonably believed that Tabullo and Castillo were directing or were about to direct deadly physical force against them or another person or were attempting to escape by the use of a deadly weapon or were likely to endanger human life or to inflict serious bodily injury to another unless apprehended without delay.** In order to establish criminal responsibility for an officer knowingly or intentionally causing death or injury to another, the state must prove beyond a reasonable doubt that the officer doing the shooting either did not really believe in the existence of these requisite circumstances, or, if he did hold such belief, that belief was, in light of all available facts, unreasonable.

## CONCLUSION

When someone brings a fully loaded, pistol-grip shotgun to LoDo, in our city, it is reasonable to conclude they are not there to enter a skeet-shooting contest. When the weapon is indiscriminately fired repeatedly in a crowded parking lot, in our city, endangering the lives of scores of our citizens, the assailant should expect to be shot. In our city, it is unacceptable for our police officers and citizens to be endangered by these life-threatening acts of violence by criminals and we are thankful our officers respond professionally and courageously in time of need to protect our city and our citizens. Denver's message to criminals is: Don't come to our city with firearms and bad intentions.

When they heard the shots being fired, Sergeant Lombardi and Officer Simmons immediately ran directly to the location of greatest danger, while citizens were running away and running for cover. The officers put themselves in harm's way to protect the scores of citizens in the immediate vicinity of the gunfight. The criminal actions of Castillo in firing at the officers and Tabullo taking possession of the shotgun and aiming it at the officers, left the officers no option but to fire to protect themselves and all others in the area. The officers were not only justified to use deadly physical force to defend themselves and others under the facts of this case, they were also justified under the other sections of the statute which authorize them to use deadly physical force to prevent the

assailants' escape or prevent the assailants from "endangering human life unless apprehended without delay."

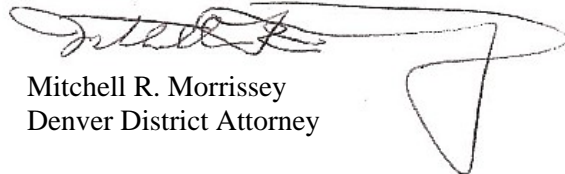
Under the specific facts of this case, we could not prove beyond a reasonable doubt that it was unreasonable for Sergeant Lombardi and Officer Simmons to fire the shots that caused Tabullo's death and Castillo's injury. Therefore, no criminal charges are fileable against either officer for his conduct in this incident.

The attached document entitled *Officer-Involved Shooting Protocol 2008* is incorporated by this reference. The following pertinent statement is in that document: "*In most officer-involved shootings the filing decision and release of the brief decision letter will occur within two-to-three weeks of the incident, unless circumstances of a case require more time. This more compressed time frame will allow the Denver Police Department administrative investigation to move forward more quickly.*" In accordance with the protocol, the administrative and tactical aspects of the event will be addressed by the Manager of Safety and Chief of Police in their review and administrative decision letter.

We will open our Officer-Involved Shooting file in this case for in-person review at our office at the conclusion of the prosecution of Castillo for his conduct in this case.

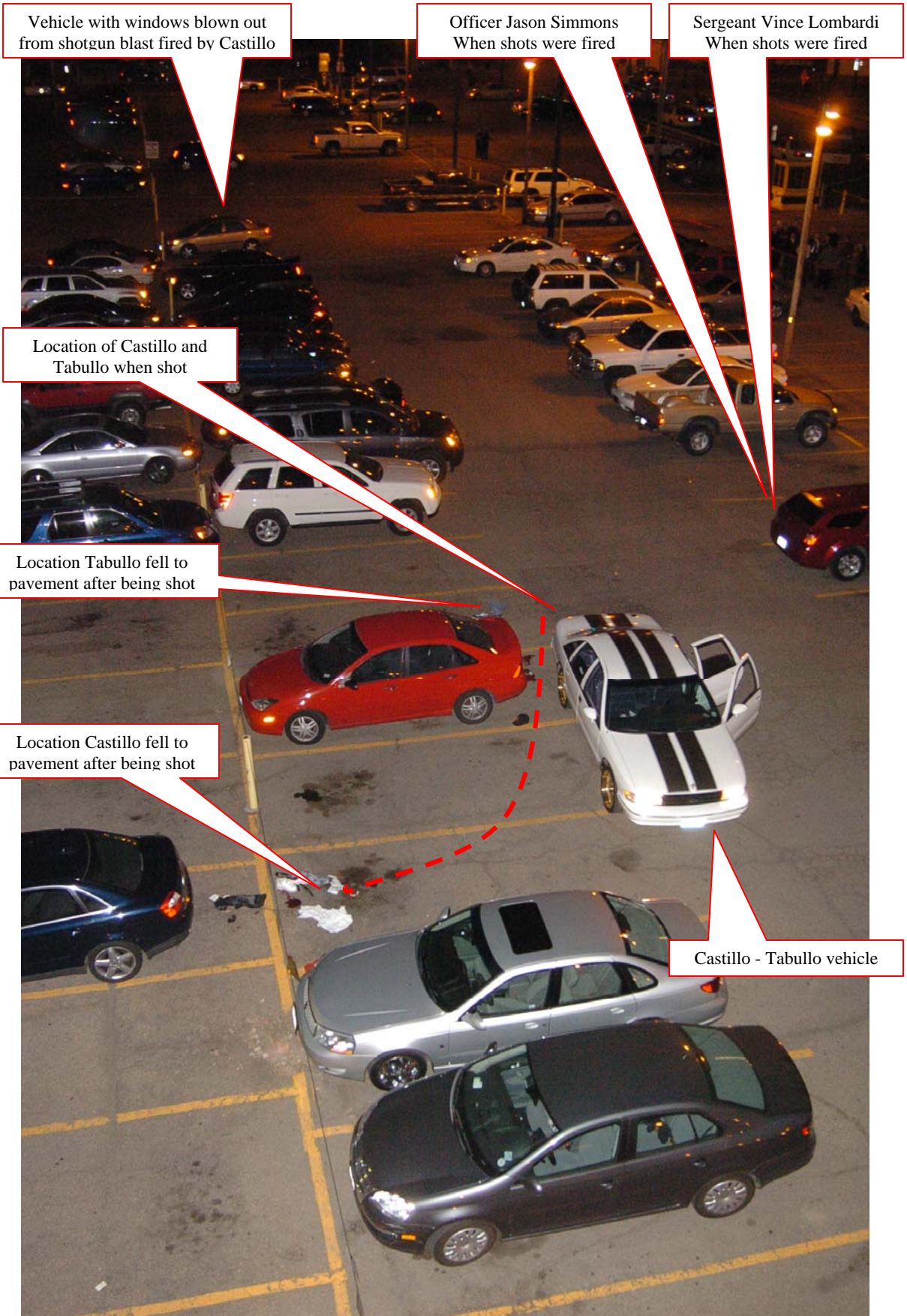
The Denver Police Department is the custodian of records related to this case. As in every case we handle, any interested party may seek judicial review of our decision under C.R.S. 16-5-209.

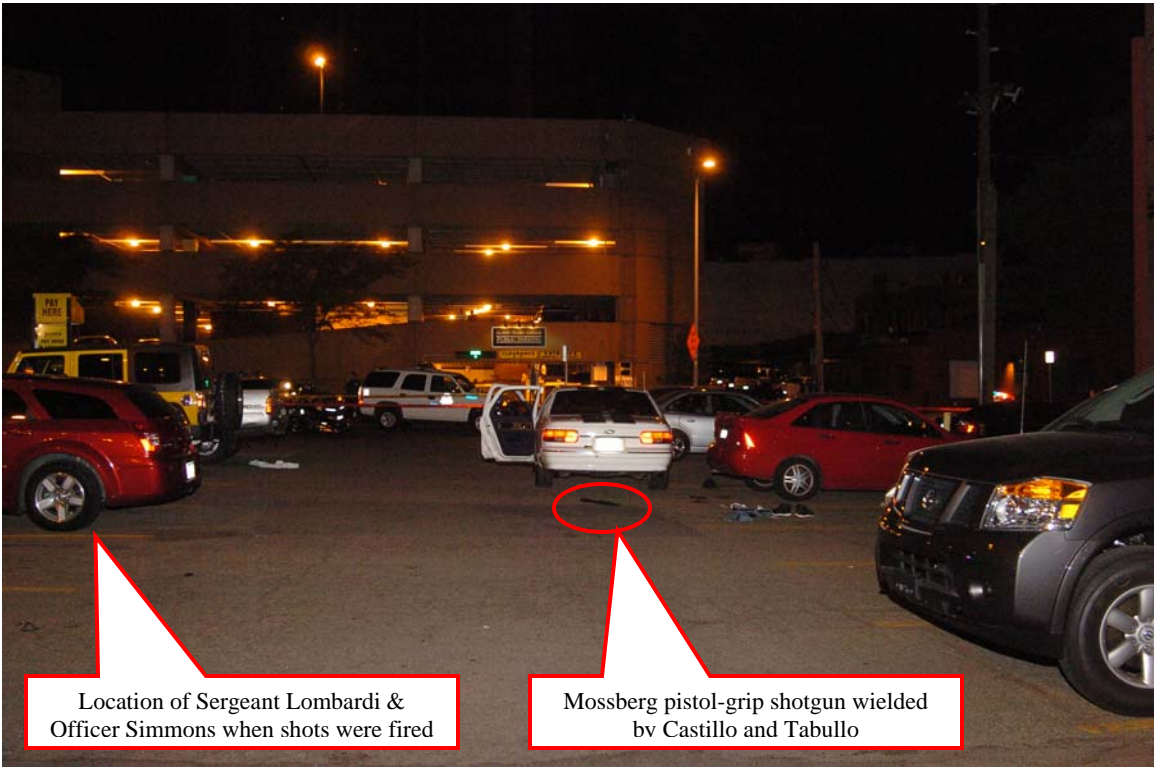
Very truly yours,



Mitchell R. Morrissey  
Denver District Attorney

cc: Sergeant Vince Lombardi; Officer Jason Simmons; David Bruno, Attorney at Law; John W. Hickenlooper, Mayor; All City Council Members; Alvin J. LaCabe, Jr., Manager of Safety; Mel Thompson, Deputy Manager of Safety; Mary Malatesta, Deputy Manager of Safety; David Fine, Denver City Attorney; John Lamb, Deputy Chief; Michael Battista, Deputy Chief; Tracie Keesee, Division Chief; Dave Fisher, Division Chief; David Quinones, Division Chief; Mary Beth Klee, Division Chief; Gregory LaBerge, Crime Lab Commander; Joe Montoya, Captain; Jon Priest, Lieutenant, Homicide; Kathleen Bancroft, Lieutenant; Sergeant James Kukuris, Homicide; Detective Bruce Gibbs, Homicide; Detective Troy Bisgard, Homicide; John Burbach, Commander, Civil Liability Bureau; Chuck Lepley, First Assistant District Attorney; Lamar Sims, Chief Deputy District Attorney; Doug Jackson, Chief Deputy District Attorney; Henry R. Reeve, General Counsel, Deputy District Attorney; Justice William Erickson, Chair, The Erickson Commission; Richard Rosenthal, Office of the Independent Monitor.





Location of Sergeant Lombardi & Officer Simmons when shots were fired

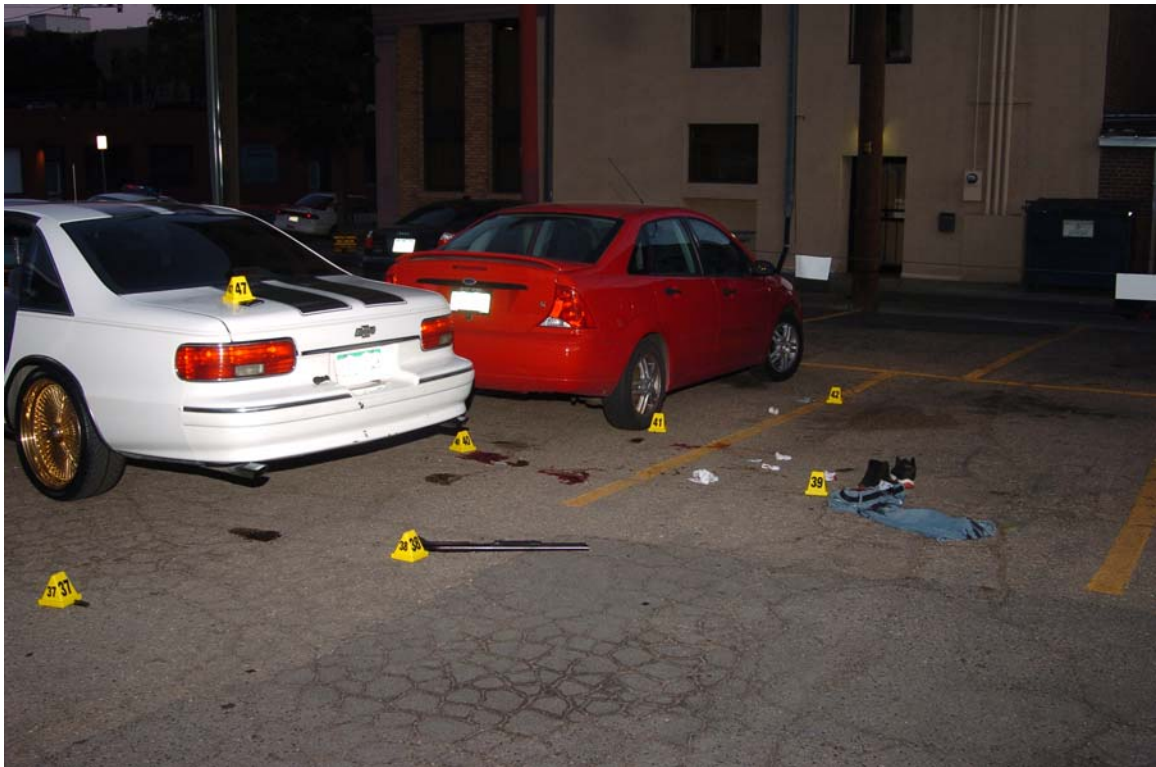
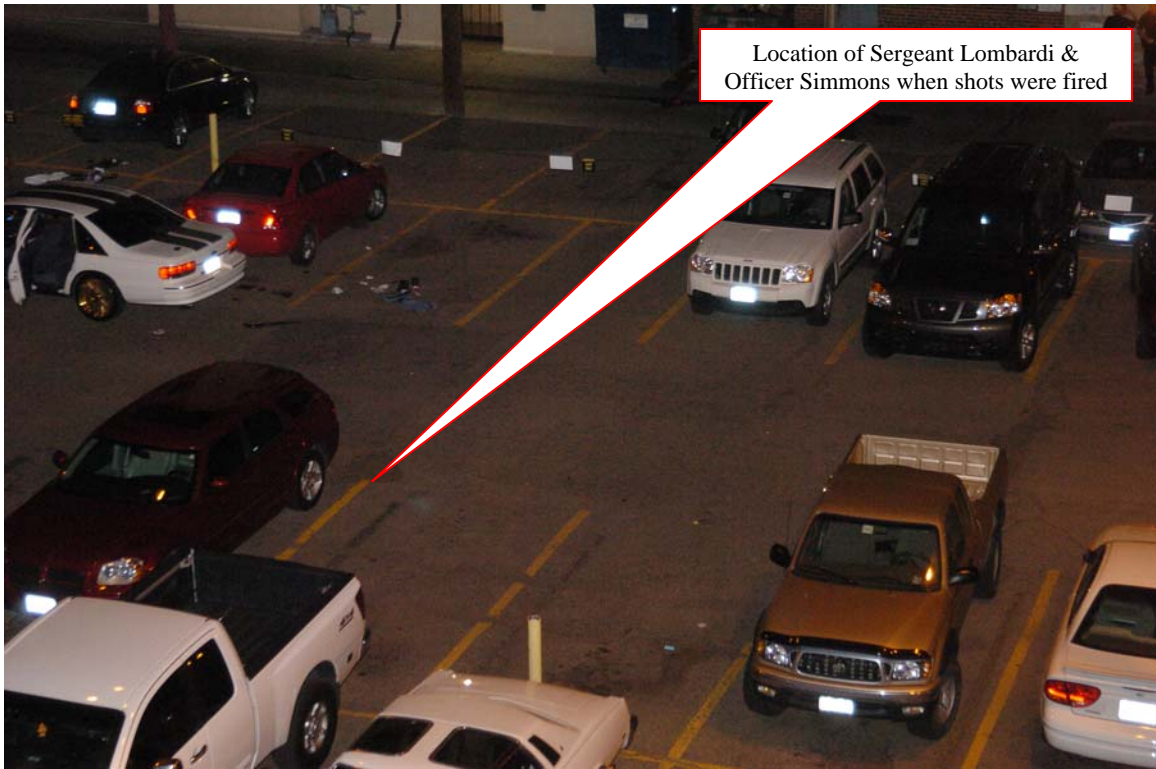
Mossberg pistol-grip shotgun wielded by Castillo and Tabullo



Location Tabullo fell to pavement after being shot



Location Castillo fell to pavement after being shot







**12 Gage Mossberg, model 500A,  
pistol-grip shotgun wielded by  
Castillo and Tabullo**



