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March 3, 2004

State of Colorado

OFFICE OF THE DISTRICT ATTORNEY
DENVER

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

**RE: Investigation of the shooting of Raymond Martinez,
DOB 12/27/61, DPD # 260817, by Officer Joshua
Vasconcellos, 01056, on November 28, 2003, at 2550 Irving
Street, Denver, Colorado.**

Dear Chief Whitman:

The investigation and legal analysis of the shooting of Raymond Martinez have been completed, and I conclude that under applicable Colorado law no criminal charges are fileable against Officer Vasconcellos. My decision, based on criminal-law standards, does not limit administrative action by the Denver Police Department where non-criminal issues can be reviewed and redressed, 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 shooting by a peace officer and the applicable Colorado law is attached to this letter. The complete file of the investigation will be open to the public for in-person review at our office, upon final resolution of the criminal case filed against Martinez. Any interested party is welcome to review the investigation and my decision in greater detail.

SYNOPSIS

Shortly before 2:00 p.m. on November 28, 2003, two men, one wearing a sweatshirt with a hood pulled over his head and a bandanna covering much of his face, entered a small foyer and started to enter the Colorado United Credit Union, located at 2550 Irving Street. Denver Police Officer Joshua Vasconcellos, 01056, who was in uniform, was working at the Credit Union in an off-duty capacity. He was seated at his post near the front door when he saw the two men enter and then saw the first party pull a handgun from his waist area. The man started to raise his gun in Officer Vasconcellos's direction, and Officer Vasconcellos stood, drew his service pistol and fired three times at the masked intruder. That assailant, later identified as Raymond Martinez, turned and with the other party, ran to a waiting vehicle. Witnesses saw the vehicle, which was in the alley behind the Credit Union, depart at a high rate of speed. Several of these witnesses provided descriptions of this

car to arriving officers. At about 2:15 p.m., Denver police officers stopped a vehicle on the Colfax viaduct matching the description given by witnesses. Three individuals were in the vehicle: Tomas Martinez, 3/2/79, Jeremy Apodaca, 9/25/75 (“Apodaca”), and Raymond Martinez, 12/27/61 (“Martinez”).¹ When Martinez was removed from the vehicle, officers noted an apparent gunshot wound to his right leg. Officers immediately requested an ambulance and Martinez was taken to Denver Health Medical Center. Martinez was treated for his wounds and thereafter released to the custody of the Denver Sheriff’s Department.

STATEMENT OF INVESTIGATION

This investigation involves the shooting and wounding of Raymond Martinez by uniformed Denver Police Officer Joshua Vasconcellos, 01056, who was working in an off-duty capacity at the St. Dominic’s Branch of the Colorado United Credit Union, 2550 Irving Street (the “Credit Union”). At approximately 1:50 p.m.,² two men, one armed with a handgun, started to enter the Credit Union. Officer Vasconcellos was seated in a cubicle type office area near the front door.³ He saw the first man enter and noted that he had a bandanna over his face and was wearing a sweatshirt with a hood pulled up over his head. He then saw the man pull out a black handgun and begin to raise it. Officer Vasconcellos immediately drew his service pistol and fired three shots in rapid succession. He did not have time to verbally challenge the gunman. The gunman, and the person behind him, immediately turned and fled the Credit Union. Officer Vasconcellos saw no indication that the rounds he fired struck either party.

Officer Vasconcellos was dressed in full blue Denver Police Department uniform. He was armed with a .45 caliber Sig Sauer, model P220, semi-automatic pistol. This weapon has a magazine capacity of eight rounds and may be carried with an additional round in the chamber. At the time of the incident, Officer Vasconcellos’s weapon was fully loaded with DPD-issued ammunition. Following the incident and in compliance with the protocols established for officer-involved shootings, the weapon was given to Denver police crime lab personnel for appropriate testing.

Martinez was taken to Denver Health Medical Center. He was treated for a “through and through” wound to his right thigh. As his record of treatment is confidential, we are able to state only that Martinez received a gun-shot wound that was successfully treated by the medical staff at Denver Health Medical Center.

The primary scene is the lobby of the Credit Union. The outside door of the building opens to the west. There is a small foyer or “sally port” that is entered after passing through that door. Immediately to the left or north is the doorway into the lobby of the Credit Union (the “lobby door.”) To the right or south is a door into a lounge area (the “lounge door”).⁴

¹ Martinez is Tomas Martinez’s uncle.

² The police dispatch records show that the first 9-1-1 call to Denver police was received at 1:51:51 p.m.

³ A diagram depicting the relevant areas inside the Credit Union is attached as **Appendix 1**.

⁴ See Appendix 1.

Investigators at the scene recovered three spent .45 caliber shell casings in the Credit Union lobby. They also recovered a live .45 caliber cartridge. (This is consistent with Officer Vasconcellos's statement to investigators that, after he fired two or three shots, his pistol malfunctioned and he had to "clear" the malfunction.) In the lobby, investigators noted a bullet hole in the fiber board part of the partition wall that separated the cubicle in which Officer Vasconcellos was positioned from the doorway into the lobby. They also documented possible bullet strikes to the upper-glass part of that partition. At the lobby door, investigators documented a bullet strike to the west side of the door jamb, 4'6" above the floor. A bullet or large bullet fragment was removed from the door jamb. Another bullet strike was noted to the west side of the lounge door, 1'11" above the floor. A bullet or large bullet fragment was recovered from the floor just below this bullet strike. Evidence of a third bullet strike was found near the top of the lounge door, 6'7" above the floor. The projectile that caused this strike was determined to have passed through the lounge door, bounced or "ricocheted" off some plastic blinds and the front window, struck the wood on the southwest corner of the lounge area and came to rest on a window sill. Bullets or large bullet fragments were recovered at or near each of the bullet strikes discussed above.⁵

When Officer Vasconcellos's pistol was examined by firearms examiners it was found to contain five live rounds. Officer Vasconcellos fired three times and the three shell casings recovered at the scene were positively identified to Officer Vasconcellos's pistol. Three spent bullets were recovered at the crime scene. Firearms examiners positively identified these three bullets as "having been fired from" Officer Vasconcellos's weapon. The live cartridge recovered at the crime scene was consistent with the make and caliber of Officer Vasconcellos's ammunition.

Investigators requested further forensic analysis of the bullets recovered at the scene, specifically, a comparison of any trace evidence recovered from the bullets to the trousers worn by and recovered from Martinez. Each of the three bullets was found to have wood fibers "lodged" in the spent rounds. More importantly, the bullet recovered from the base of the lounge door

disclosed the presence of an agglomeration approximately 2.1x0.72mm in size, of blue dyed and clear cotton fibers of the type contained in denim fabrics. These fibers were found to be consistent in microscopic characteristics with the fibers taken as controls from around the apparent bullet hole area of the blue jeans (Ex.1), belonging to suspect Raymond Fred Martinez.

There were numerous individuals inside that Credit Union at the time Martinez and his accomplice entered. However, as a result of the lobby's floor plan, none were in a position to see the confrontation between Martinez and Officer Vasconcellos. Written statements were obtained from each of these witnesses and four of them also provided video-taped statements (one of these witnesses was Natasha Funk, 10/29/58, who was in the lounge or "break room" and who was hit but not injured by some particles dislodged by the bullet which entered the room). Other witnesses were identified who were outside the Credit Union and either heard shots or had their attention directed to the car in

⁵ Scene investigators used string to document the likely trajectories of Officer Vasconcellos's bullets. Photos of the interior of the credit union are attached as **Appendix 2**.

which the suspects fled the area. Written statements were obtained from these individuals. Four of these witnesses, Jennifer Duncan, 9/21/65, Susan Duncan, 8/7/30 (Jennifer Duncan's mother), Amy Hudson, 4/30/65, and Joseph Torres, 4/24/50, also provided video-taped statements to investigators.

Numerous officers responded to the robbery call, and others were involved in the stop and apprehension of Martinez, Tomas Martinez and Jeremy Apodaca. Written statements were obtained from all of these officers. One supervisor, Sergeant Mark Novotny, 85005, spoke with Officer Vasconcellos immediately upon arrival so that he would be able to brief investigators as to relevant areas for inspection. Officer Vasconcellos advised Sergeant Novotny that he was unsure how many shots he had fired and Sergeant Novotny took his firearm and inspected the magazine. Although he replaced the magazine and did not alter the condition of the weapon, his actions are not contemplated by the protocol to be followed in officer involved shootings; therefore, a video-taped statement was taken from Sergeant Novotny.

Following the shooting, and in accordance with protocol, Officer Vasconcellos was separated from the other witnesses and was transported downtown by an un-involved supervisor. He was given an opportunity to speak to his attorney and given an opportunity to provide a video-taped statement concerning his role in the incident. He provided such a statement.

In addition to these statements, investigators determined that the Credit Union's security system included a surveillance camera which was trained on the lobby door. Investigators obtained the surveillance tape and were able to view that part of the incident occurring at the door (although Officer Vasconcellos cannot be seen on the tape; Martinez is clearly visible).

There is no dispute regarding the incident. Officer Vasconcellos's statement is corroborated by the physical evidence and the video surveillance tape.

Officer Vasconcellos told investigators that he had only recently been hired to provide security at the Credit Union. He stated that "a couple of weeks ago [the Credit Union] had a robbery and they requested they have police officers work there." On the day in question, he had arrived at the Credit Union at about 9:00 a.m. and the day had been largely uneventful until

Right up until the point where I heard the door open and I saw a gentleman walking in the door. And he had a bandanna over his face and all you could see out was his eyes.

INVESTIGATOR: M-huh.

VASCONCELLOS: And his sweatshirt pulled up over his head.

Officer Vasconcellos was sure of the first subject in the doorway his attention was focused on him. He stated that he was "fairly certain there was another individual behind him" but he could not describe that person. He was alarmed, first because of the manner in which the man was dressed and, further, he recalled that

a month ago during roll call we had a robbery bulletin passed around, no suspect [named in the bulletin]. And, uh it had the same description as this person with the hooded sweatshirt pulled over his head and the bandanna.

INVESTIGATOR: M-huh

VASCONCELLOS: So I immediately stood up and to get a further investigation. When I stood up, the suspect then reached down towards his waistband and was in the process of retrieving a black color semi-automatic handgun.

INVESTIGATOR: M-huh.

VASCONCELLOS: . . from his waistband. And he had it to about here [Demonstrating]. I didn't have time to announce Denver Police, I just had time to react and to and stop the threat. I was in fear for my life and I was in fear for the lives of the other people I was at the bank with.

INVESTIGATOR: M—huh.

VASCONCELLOS: So I discharged my firearm in order to stop the threat.

Officer Vasconcellos told the investigators that he fired “two to three” times and that his weapon then malfunctioned.⁶ He ducked low to a position of cover, cleared the malfunction, and looked around the partition from a different position to see whether the suspects were still there. When he looked, they were gone.

The surveillance video shows Martinez enter the Credit Union and begin to raise a handgun. One can see what appears to be a cloud emerge from the area in which Officer Vasconcellos was standing; this image reflects the particles and glass dislodged by Officer Vasconcellos's bullets.⁷ Martinez is then seen turning and fleeing the Credit Union.

As previously noted, none of the individuals inside the Credit Union actually saw Martinez enter the lobby or the subsequent shooting. The written statement provided by Ms. Ruth Cordova, 10/5/61, typifies what was seen or heard by those inside the Credit Union.⁸ Ms. Cordova wrote:

[I was] Standing at window waiting to get my money when I heard loud pop. I looked around and there were more popping [sic] sounds. I saw the officer on one knee pointing his gun toward the front door saying [for] us to get down. It took me a few min. to realize what was going on.

⁶ Officers are trained that, in the event of a weapon malfunction, they should firmly “tap” the base of the magazine to assure that it is properly seated, tilt the weapon to the right to allow any obstructions to fall free, and manipulate the slide, clearing the chamber of any partially ejected shell casing or misfired round. It is this action that would account for the live cartridge investigators found at the scene.

⁷ Two still photos taken from the surveillance video camera that captures this moment are attached as **Appendix 3**.

⁸ See also, for example, the written statements of Hallie Gallegos, 6/22/57 (“I was doing a transaction with a member and I heard 3 gunshots. I never saw anyone. . . .”); Ricardo Gutierrez, 9/1/84 (My mother and I came to the bank to cash our checks. I had finished and was waiting for my mother to finish when I heard a few shots fired from the street. I heard the glass shatter and saw smoke. Someone said “get down!” so I did . . .”); and Ernest Mackey, 1/28/61 (“Walk into bank, about 1:50 p.m. to cash check. About four shots and I hit the floor. I didn't see anyone. . .”).

In response to follow-up questions written by an officer, Ms. Cordova clarified that she did not see anyone enter the bank and while she only saw the officer “it was possible someone was shooting at the officer [--] it was noisy.”

Witnesses outside the Credit Union did, however, see a suspicious vehicle leave the area at the time of the incident. Ms. Jennifer Duncan, who lives at 25th and Hooker, stated that at about 1:55 p.m., she saw a white, four-door, vehicle, which she believed might have been a Ford model, drive out of the alley between Hooker and Irving Street at a high rate of speed. She stated that there were “3 to 4 Hispanic males between 18 – 26 [years old]” in the vehicle, adding “definitely [sic] 3 males.” Ms. Duncan’s mother, Susan Duncan, provided similar information, stating that she, too, saw “3 or 4 Hispanic teenagers” in the car. She added that the “car had a temporary tag on left side of rear window.”

In his written statement, Mr. Joseph Torres, stated that he saw a “mid-sized 4 door white car speed out of alley between Hooker St. & Irving St. in the 2500 block.” He wrote that the car turned east, ran a stop sign and then turned to the south, still traveling at a high rate of speed, adding that the car was “occupied by at least two & possibly three white males.” He also noted that there was a temporary license plate displayed in the back window on the driver’s side.

Another witness who saw the car leave and noted the temporary license plate was Amy Hudson. The pertinent part of Ms. Hudson’s written statement is as follows:

As I was walking outside my front door at 25** Irving St., I heard three shots and saw two men running out the front door of the credit union next door. The shots fired at the same time the two guys were running out the front door. The two ran to the corner of 26th and ran east. I ran in my house and to the back porch and I saw a white car speeding up the alley (that runs behind Irving Street from 26th Avenue). The car had no plates, just a temporary paper place in the rear window. It was a small older car, four door hatchback, I think.

These and other witnesses advised arriving officers what they had seen. Officers at the scene provided this information to all Denver officers by police radio. At about 2:11 p.m., Denver police officers Jamie Akens, 90025, and Danny Perez, 95032, saw a car matching the description of the suspect vehicle in the area of 11th Avenue and Knox Street. The officers began following the vehicle and advised the dispatcher of their need for additional “covering” officers. The officers followed the suspect vehicle, which was ultimately determined to be a 1997 Oldsmobile Achieva (the “Oldsmobile”), to Irving Street and then eastbound on Colfax Avenue. Other officers responded and the Oldsmobile was stopped on the West Colfax Avenue viaduct. Officers arrested Martinez, Apodaca and Tomas Martinez. The three were taken into custody. When Martinez was removed from the vehicle, officers noted an apparent gun-shot wound to his right leg. The officers immediately requested an ambulance and Martinez was taken to Denver Health Medical Center.

Witnesses Jennifer and Susan Duncan, Amy Hudson and Joseph Torres were brought by investigators to the location where the suspect vehicle had been stopped. Mr. Torrez, Ms. Jennifer

Duncan and Ms. Susan Duncan identified the Oldsmobile as the same car each had seen leaving the alley behind the Credit Union. Ms. Hudson told investigators that “everything matches perfect except the license plate . . . I thought it was located higher up in the window.”

On December 2, 2003, investigators obtained a search warrant for the Oldsmobile. No evidence was identified or seized in the search of the vehicle. Charges of First Degree Assault to a Peace Officer (F-3); Criminal Attempt to Commit Aggravated Robbery (F-4); Felony Menacing (F5); and Conspiracy to Commit Aggravated Robbery (F-3) are currently pending in Denver District Court against Raymond Martinez and Tomas Martinez.

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 and wounding another person is generally prohibited as assault in Colorado, the Criminal Code specifies certain circumstances in which the use of physical force and deadly physical force is justified. As the evidence establishes that Raymond Martinez was shot by Officer Vasconcellos, the determination whether his 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
 - 2. Is attempting to escape by the use of a deadly weapon.

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.

Colorado law does not require an officer to retreat from an attack rather than resorting to physical force. **A peace officer is expected to take appropriate action to handle a situation and is authorized to use the reasonable and appropriate force necessary to overcome resistance.** The degree of force required may be different in different situations. (*Boykin v. People*, 22 Colo. 496, 45 P. 419). This, of course, does not mean that an officer cannot retreat, if he or she chooses to do so.

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.”

Therefore, the question presented in this case is whether, at the instant Officer Vasconcellos fired the shots that caused Martinez’s injury, he reasonably believed, either that Martinez had directed or was about to direct deadly physical force toward him or a third person, that he had committed or attempted to commit a felony involving the use or threatened use of a deadly weapon, or, finally, that he was attempting to escape by the use of a deadly weapon. In order to establish criminal responsibility for knowingly or intentionally causing the death or bodily injury of another, the state must prove beyond a reasonable doubt that the person doing the shooting either did not really believe in the existence of the requisite circumstances, or, if he did hold such belief, that belief was, in light of all available facts, unreasonable.

CONCLUSION

When an assailant enters a bank or credit union wearing a hood and mask, pulls a firearm from his waistband, and aims it at a uniformed police officer, there is a high probability that someone is going to be shot. Fortunately, it was not Officer Vasconcellos or any other innocent person in the Credit Union at that time. Based on the facts of this case, as described in detail in this letter and shown in “Appendix 3,” I conclude that under applicable Colorado law no criminal charges are fileable against Officer Joshua Vasconcellos in the wounding of Raymond Martinez. In fact, Officer

Vasconcellos's quick and decisive action prevented these armed assailants from entering the bank. His actions clearly stopped an aggravated robbery of the Credit Union and the potential injury or death of the numerous customers and employees who were present.

As in every case we handle, any interested party may seek judicial review of our decision under C.R.S. 16-5-209.

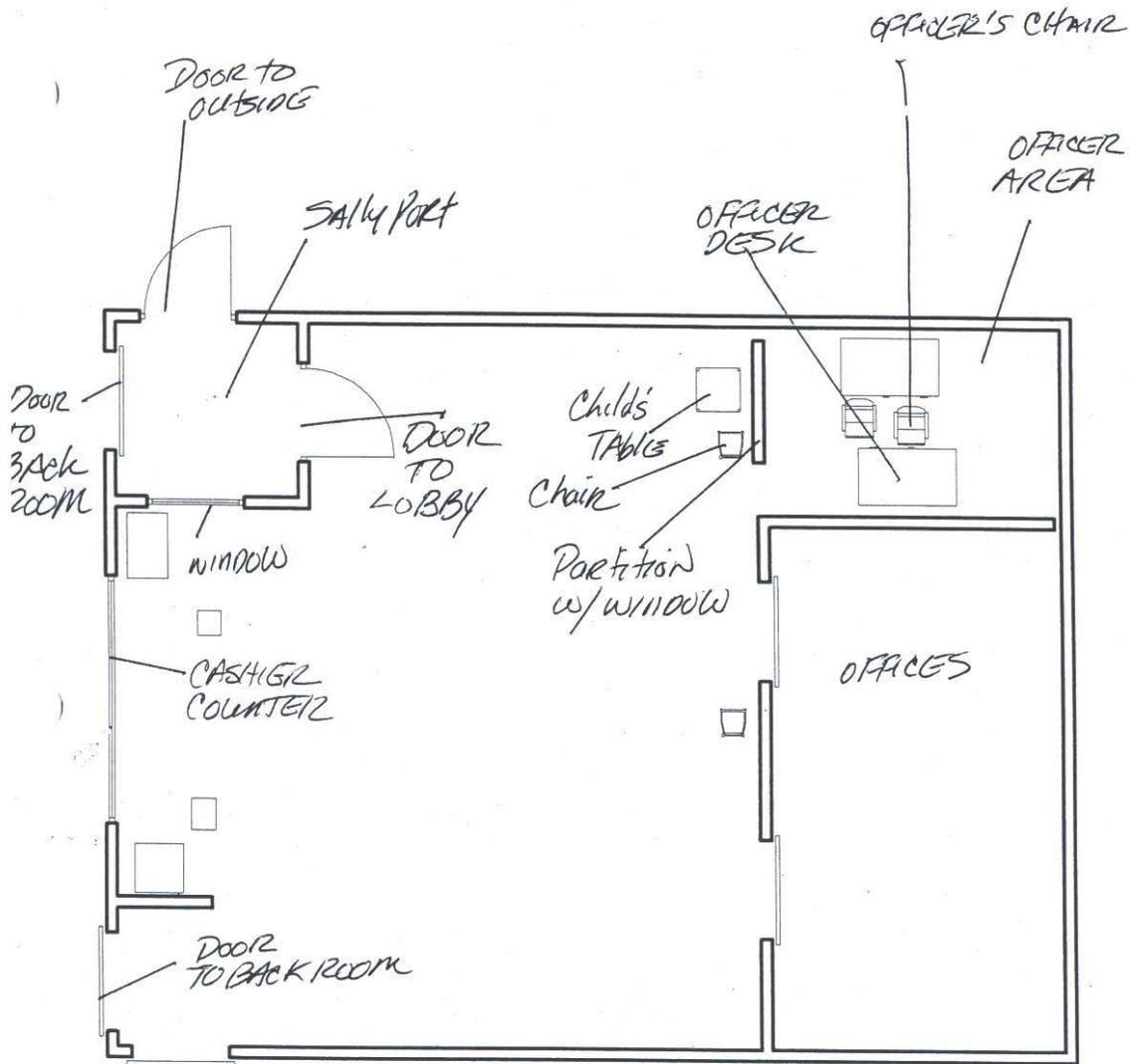
Very truly yours,

A handwritten signature in black ink that reads "Bill Ritter Jr." in a cursive style.

Bill Ritter, Jr.
District Attorney

cc: Officer Joshua Vasconcellos
Joseph Van Horn, Esq.
John W. Hickenlooper, Mayor
All City Council Members
Alvin J. LaCabe, Jr., Manager of Safety
Cole Finegan, Denver City Attorney
Marco Vasquez, Deputy Chief
Michael Battista, Deputy Chief
Dan O'Hayre, Division Chief
Dave Fisher, Division Chief
Steve Cooper, Division Chief
Mary Beth Klee, Division Chief
Dave Abrams, Captain, Crimes Against Persons Bureau
Jon Priest, Lieutenant, Homicide
Steve Shott, Homicide Detective
Martin Vigil, Homicide Detective
John Lamb, Commander, Civil Liability
Chuck Lepley, First Assistant District Attorney
Lamar Sims, Chief Deputy District Attorney
George Poland, 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

Appendix 1



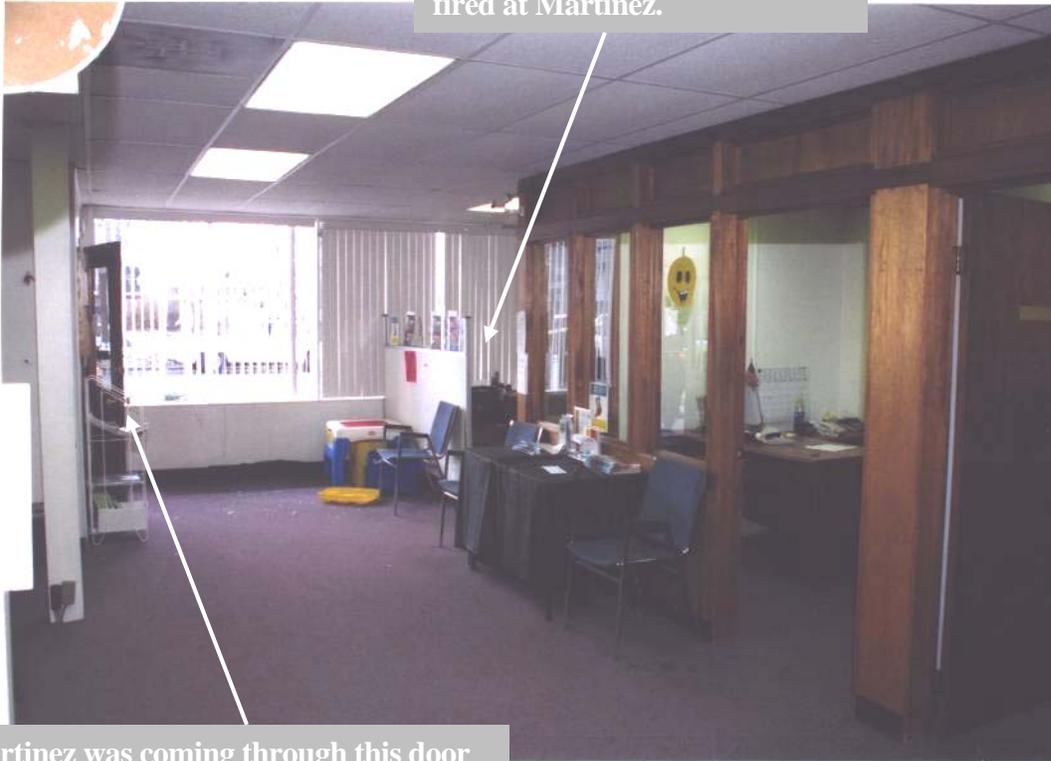
FRONT LOBBY
SALLY PORT

MEV 86012
NOT DRAWN TO
SCALE 11.7x.13

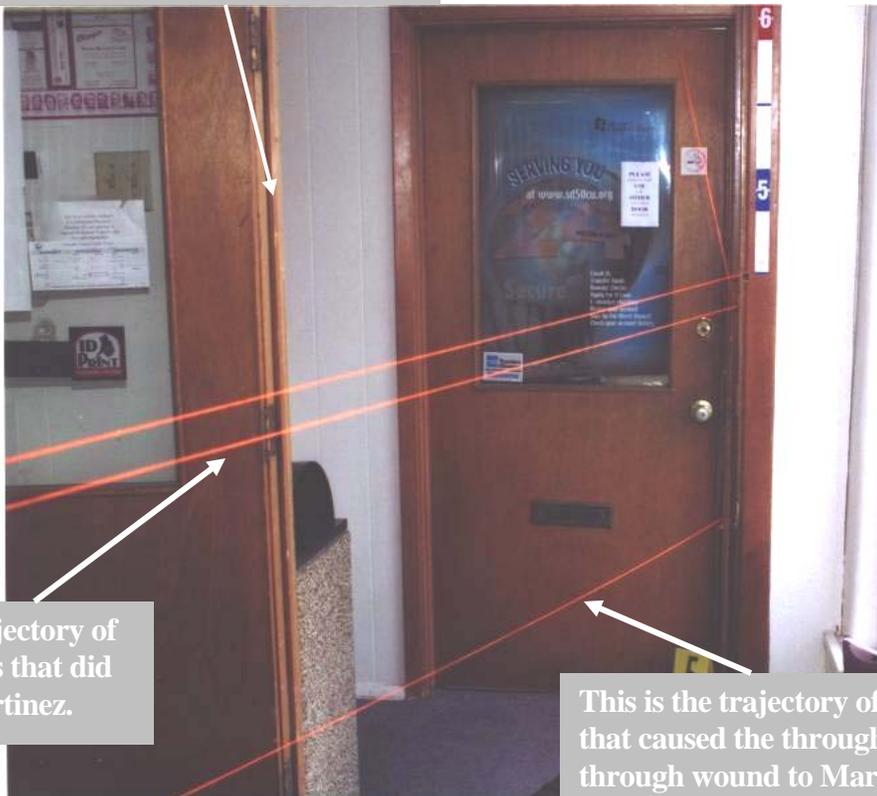
2550 IRVING ST.

Appendix 2

Officer Vasconcellos was positioned in this area behind the partition at the time he fired at Martinez.



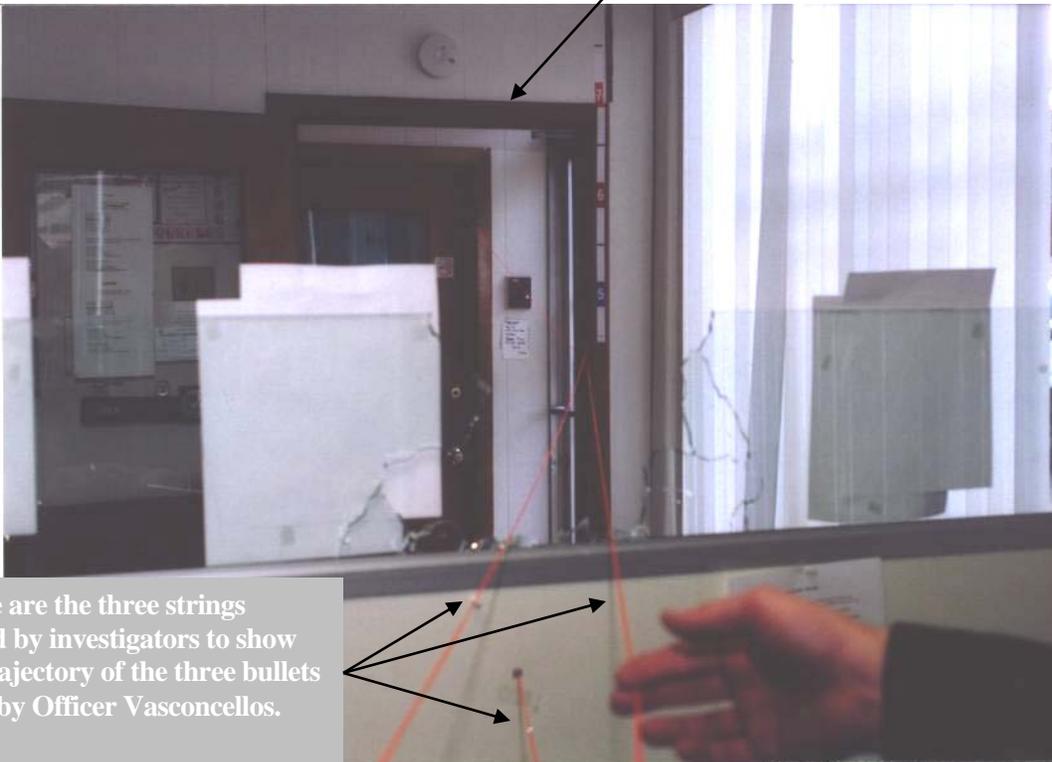
Martinez was coming through this door with handgun pointed at Officer Vasconcellos when he was shot.



This is the trajectory of the two bullets that did not strike Martinez.

This is the trajectory of the bullet that caused the through-and-through wound to Martinez's leg.

Appendix 2
(continued)



Appendix 3

