



# DenverDA

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June 5, 2015

Robert White  
Chief of Police  
Denver Police Department  
1331 Cherokee Street  
Denver, CO 80204

RE: The investigation of the shooting death of *Jessica Hernandez (D.O.B. 11/25/1997)*, by Denver Police **Officer Gabriel Jordan**, Badge 05076, and by Denver Police **Officer Daniel Greene**, Badge 98016, on January 26, 2015, in the 2500 block of the alley between Niagara Street and Newport Street, in Denver, Colorado.

Dear Chief White:

The investigation and legal analysis of the shooting death of Jessica Hernandez have been completed. I have reviewed the entire investigation to determine whether to file criminal charges and I have concluded that no criminal charges should be filed. The facts show this was a defensive shooting by both officers. That is, their decisions to shoot Ms. Hernandez were justifiable in light of the manner in which she drove the car in close and dangerous proximity to them, threatening the life of Officer Jordan who had little room to avoid the car. The facts show that the force used by both officers was legally justified, and not unlawful, under Colorado law.

I know this shooting has affected the Denver community and that the death of this young woman will forever impact her mother and father, family members and friends. I have met with the parents of Ms. Hernandez and have expressed my sympathy to them for their tragic loss. Some in the community were quick to call this shooting "excessive force." Others felt it was a justified shooting. These initial reactions were made before the investigation was completed and without knowledge of all of the facts. Now, if people study and evaluate the facts of this case, and consider my ethical obligations as a prosecutor in bringing criminal charges, they may understand why criminal charges are not appropriate.

This letter summarizes the facts revealed by the investigation, the primary legal issues involved, and the conclusions that led me to this decision. Diagrams and photographs are attached to help understand the facts. Also attached is a description of the protocol followed in Denver when investigating officer-involved shootings. That protocol was followed in this

investigation.

I will post this decision letter on our website, as we have done with decision letters concerning other officer-involved shootings. Also, as with other officer-involved shooting investigations, our file will be made available for interested citizens to review by making an appointment. If someone feels that my decision to not file criminal charges is wrong, he or she may seek judicial review under C.R.S. 16-5-209. Of course, my decision, which is based on criminal law standards, does not limit administrative action that may be taken by the Denver Police Department, or civil actions where different laws, rules, and legal levels of proof apply.

## STATEMENT OF FACTS

### Sunday night January 25, 2015, into Early Monday Morning

On Sunday, January 25, 2015, a Honda Civic belonging to Jose Carmen Guzman-Bonilla was stolen. The owner reported to the Federal Heights Police Department that the car was stolen sometime between 5:30 p.m. and 7:30 p.m. There were no suspects.

That night, Jessica Hernandez (“Hernandez”), a seventeen-year-old juvenile (born 11/25/97), drove the Honda to several locations in the Denver area. Four of Hernandez’s teenage friends (ages 15, 15, 16, 17) were passengers in the car with her for several hours Sunday night and until approximately 7:02 a.m. Monday morning when the shooting occurred.

Denver Police Department investigators interviewed the four teenagers shortly after the shooting. The teens reported going to a park together on Sunday night and driving around, but they were inconsistent in recounting their activities during the night and early morning.<sup>1</sup>

All of the passengers indicated that Hernandez eventually parked the Honda in the alley that runs north-south between Niagara Street (to the west) and Newport Street (to the east). She parked facing northbound in the alley just west of the detached garage behind the residence at 2511 Newport Street. All five teenagers stayed in the Honda and eventually fell asleep. One of them estimated it was approximately 2:00 a.m. or 3:00 a.m. when all of them were asleep.

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<sup>1</sup> Examples of inconsistencies among the teenagers: (a) One of the teenagers said that after leaving the park they “went and picked up weed from Thornton.” After this, they went to a McDonald’s restaurant near 10<sup>th</sup> Avenue and Sheridan Boulevard where they parked in order to use the Wi-Fi. While there, they noticed a police car pull up behind them. Hernandez was driving. She then “outran the cops.” This witness said Hernandez was driving around the neighborhood trying to get away from the cops and Hernandez and another passenger were saying: “We’ve got to get out of here. We’ve got to get out of here. This car’s hot.” They were able to avoid any contact with police at that time. This witness noted that Hernandez started the Honda by using a screwdriver instead of a key. None of the other three teenagers mentioned these incidents.

(b) The front seat passenger maintained that no alcohol or marijuana was consumed by anyone in the car. The other three passengers acknowledged that the group was drinking alcohol and/or smoking marijuana, but only one of them self-admitted to having participated. All three of these passengers said that Hernandez consumed both -- she drank alcohol and smoked marijuana from a pipe.

Monday, January 26, 2015

At 6:29 a.m., Mr. Justin Moore called police to report a suspicious vehicle parked in the alley in the 2500 Block of Newport Street. He reported that at least two people were in the car and the windows of the car were fogged up. He requested that an officer be sent to check on it.

The police dispatcher radioed this information to officers at 6:49 a.m. Officer Gabriel Jordan indicated he was leaving the District 2 police station and would respond to this call. At 6:56 a.m. Officer Jordan radioed that he had arrived at the alley between Niagara and Newport Streets. At 6:57 a.m. he learned through the CCIC database that the Honda he saw parked to the south of him in the alley was stolen. He radioed that the car was stolen; that he had not yet made contact with the occupants; that there were two occupants, maybe more; and that he was in the middle of the alley, having entered it from the north end.

At approximately 7:00 a.m., the teenager in the front passenger seat of the Honda awakened the others in the car because she noticed the police vehicle parked in the alley north of them.

At 7:00 a.m. Officer Jordan radioed that "...they're starting to get hinked up and moving around a lot..." Cover cars were told to speed up their response to "code 10" (emergency lights and siren). Shortly thereafter, Officer Daniel Greene radioed that he was arriving. The siren of his police car can be heard in the background of this call. The dispatcher tells him to enter the alley from the south. It was 7:01 a.m.

At 7:02 a.m. Officer Greene radioed that shots had been fired. Within seconds, an ambulance was requested "code 10."

The events in the alley leading up to the shooting, described in this letter, took place in a time span of about one minute.

### Witness Descriptions of the Events in the Alley

#### Officer Statements

##### **Officer Gabriel Jordan:**

Officer Gabriel Jordan gave a voluntary video recorded statement to investigators at the DPD Homicide Bureau a few hours after the shooting. He stated that he has been a Denver Police Officer for about nine and a half years and is currently assigned to District Two. On the morning of January 26, 2015, he reported to District Two to begin his shift at 6:00 a.m.

Officer Jordan told investigators that he received the dispatcher's radio call about a "suspicious vehicle" and he replied that he would respond to the alley. He was driving a fully marked police SUV with emergency lights on top and in front. He entered the alley from the north end, turning right from 26<sup>th</sup> Avenue, heading southbound into the alley. Before entering

the alley, however, he turned off all of the lights of the SUV, including the headlights. He saw the Honda parked on the east side of the alley, facing northbound. He drove closer so he could read the license plate and stopped. He then cleared the license plate on his in-car computer and learned that the Honda had been reported stolen.

Officer Jordan said that although the sun was coming up, "It was kind of hard to see. It was still a little bit dark." However, he could see at least two people in the car, maybe more. He did not illuminate the car with lights because, without other officers present, he did not want the occupants of the Honda to know he was there.

Before any cover officers arrived, he noticed movement within the car which caused him to believe the occupants had noticed him. He radioed this information on the police radio. He heard radio traffic concerning cars to cover him, and then he saw the emergency lights of a police car and saw Officer Daniel Greene pull northbound into alley from the south end and stop behind the Honda.

Officer Jordan said he then turned on the emergency lights of the SUV and drove closer to the front of the Honda, which was facing him. Officer Jordan got out of the police car, stood behind its driver's door, drew his weapon, and yelled commands to the occupants of the Honda: "Police! Get out of the vehicle! Police! Get out of the vehicle!" He saw a door on the driver side of the Honda open and "what looked like a Hispanic male looked back and then ducked his head back in and shut the door."<sup>2</sup>

The Honda then backed up slowly towards Officer Greene's police car and either made contact with Officer Greene's bumper or stopped right before it. At that point, the Honda then changed directions and moved forward slowly northbound, in the direction of Officer Jordan, and stopped. Officer Jordan said that he was facing the car and "...shouting 'Stop!' constantly -- as many times as I can yell, 'Stop! Stop the car! Stop! Police! Stop!'"

The Honda reversed again, turning at an angle and reversing toward the wooden fence on the west edge of the alley. The rear of the Honda hit a trash container and the fence. The front of the Honda was angled to the northeast. Officer Jordan said after the Honda crashed into the fence it stopped momentarily and he moved around his SUV to approach it. He circled around the back of the SUV and ran along its passenger side, southward toward the Honda. He was running on the west side of the alley on the cement moving south approaching the Honda. Immediately to his right as he ran south were a fence, a brick wall of a garage, and another fence. These formed the western perimeter of the alley. Officer Jordan said:

"And so I'm going around my car. Now I'm coming around the back and I come up on the [passenger] side [of my car] and there's a house -- it's a brick house or a -- a brick garage and a couple of wooden fences on both sides."

...I'm running up to them now telling them to 'Get out. Put your hands up. Get out. Get out.' Then the car engine revs up and it comes directly at me."

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<sup>2</sup> Other than this observation, both officers indicated they were not able to observe whether the persons in the Honda were male, female, older, younger, or any other characteristics about them.

Officer Jordan estimated that he was approximately 10 feet from the Honda when he heard the engine revving loudly and “before I know it, the car’s driving right at me at a high rate of speed and drives right at me.”

When asked to describe the path of the forward acceleration of the car from the point where it was stopped and angled northeast after hitting the fence, Officer Jordan said:

“It seemed to go -- and I don’t know ‘veers’ is the right word or not -- but to ‘veer’ off to the -- back to the west side of the alley toward me.”

Officer Jordan said the Honda was going much faster than during the earlier forward and backward movements it had made in the alley. When describing the car accelerating toward him, he said: “... An image that keeps coming back to me is the -- almost the entire hood and the -- the driver’s side light. And so it was -- it was no time....” The Honda came within “inches” of him.

“And as it’s coming at me, at some point, I had hit the car...with my hand pushing away, with part of...my hand. I don’t remember exactly where in front of the car but I remember being in front of the car and getting...to the side and pushing like this and I could still feel -- [crying] --

... I could still feel that the car...was coming and I felt like it was coming toward me and I’m -- pushing away, and -- and at the same time, I’m...going like this [demonstrating pushing away with his left hand] and I’m thinking that any minute I’m going to get pushed up against the background and I’m going to get tumbled through and I’m done. ... I was thinking I was going to die.”

When asked what the “background” was that he feared being pushed up against, he answered: “It was the...fence or the brick. I don’t know exactly where it was. I knew it was right behind me and the car was right in front of me.”

He described shooting, having only his right hand on the gun, when he was at the front fender on the driver side, pushing away from the car with his left hand:

“I waited till I had to hit the car away and I’m thinking now I’m going to go -- I’m going to get squished and -- and killed, and right then is when I fired. And...I’d be surprised if my gun wasn’t touching the driver’s side -- the window.”

He said he fired shots from his gun as fast as he could pull the trigger. His aim was “right at the driver’s seat right in front of me.” He believed he was shooting at a downward angle.

Officer Jordan described the path of the car after the shots were fired: “...the car

continued and then did end up hitting right behind me...where I thought I was going to be, and it hit the...house with the fence or whatever it was.”

It was his belief that the driver was trying to run him over. He felt that he was lucky to have survived.

When asked where he placed his left hand to push himself away from the car, he said he wasn't sure if it was “up closer to the windshield or if it was...just below it on the hood part,” but it was on the driver's side of the car, not in front of the car. He estimated that the fence or the brick wall was about one foot behind him when he pushed off of the car.

He did not remember the car making contact with him other than when he pushed off of it with his left hand, although he said it was possible. Several minutes after the shooting he felt pain in his left knee and his right ankle. He went to Denver Health Medical Center where he was examined and where x-rays were taken. His medical records indicate that he suffered a “possible avulsion fracture of the ankle.” The discharge instructions state: “There is a small chip fracture in your ankle. This fracture was caused by stretching the joint ligaments, which pulled off a small piece of bone.”<sup>3</sup> He was prescribed a “walking boot” to use as a substitute for a cast.

#### **Officer Daniel Greene:**

Officer Daniel Greene also gave a voluntary statement to investigators at the DPD Homicide Bureau that was video recorded a few hours after the shooting. Officer Greene told investigators he had been a Denver Police Officer for about seventeen years and was currently assigned to District Two. On the morning of January 26, 2015, he reported to District Two to begin his shift at 6:00 a.m.

Officer Greene stated he was driving a fully marked Ford Crown Victoria police vehicle. He drove to the alley in order to assist Officer Jordan. He approached from 25<sup>th</sup> Avenue with his emergency lights and siren on and turned northbound into the alley from the south end, opposite from Officer Jordan. He parked behind the Honda which was also facing north. He got out of his police car, drew his service weapon, and began ordering the occupants of the Honda to get out of the vehicle. He said Officer Jordan was giving similar orders. Instead, the driver put the Honda in reverse and backed slowly southbound into the front of Officer Greene's police car. The driver then put the Honda into drive and drove slowly northbound.

Since the car was moving slowly, Officer Greene said he holstered his gun and ran up beside the driver's door of the Honda. He could only see the silhouette of the driver. He said he began banging on the driver's window with his left hand, ordering the driver to stop. The driver stopped, but then put the vehicle in reverse again and began backing up.

Officer Greene backed away from the car and moved to the west side of the alley near the fence on the western edge of the alley. The driver turned the steering wheel to the left so that the

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<sup>3</sup> A fractured or broken bone is considered serious bodily injury under the laws of the State of Colorado.

Honda reversed in a southwest direction “and rammed the fence on the west side of the alley.” Officer Greene drew his handgun again, pointed it at the driver’s door, and continued to yell at the driver to stop. He was standing at the west edge of the alley near some weeds along the fence, just north of where the Honda rammed through the fence. The Honda was facing northeast. His view of the Honda was of the driver side of the car, not through the windshield. Because of dark window tinting he could not see the occupants.

Officer Greene described the next movement of the Honda as it accelerated away from the fence:

“The driver put the vehicle back in drive, keeping the wheel turned to their left. They then drove -- accelerated and drove northbound through the alley kind of in a north-northwestern direction. As the vehicle -- I -- I had nowhere to go. I was almost up against the fence line. As...it drove past me, Officer Jordan was still to my left or to the north of me. I heard one or two shots from his gun. Believing that, you know, knowing that he was to my left and believing that he was in the...path of the car, that he may be run over -- I then fired my weapon at the driver. I believe I fired three shots. The vehicle then came to a stop, almost rolled to a stop.

Officer Greene was on the driver side of the car as it turned around him to the northwest, avoiding him, but moving toward Officer Jordan. The engine was revving. He estimated the Honda was traveling at 10 mph and was about three to five feet from his body when he fired. He described his thoughts: “...I thought they were just going to, you know, run him over and get out of there.”

He explained that this acceleration of the car was different than the earlier back and forth movements:

“...the threat level just rose instantly because it was -- you know, at a much higher rate of speed, it was much more reckless, you know, and after hitting the fence and then starting to drive forward again, accelerating -- at that point, yeah, I felt like, you know, again, they... were trying to flee...at all costs.... I think Officer Jordan -- if he wasn’t able to get out of the way, I think he would have been run over and seriously injured or killed.”

Officer Greene said his shots were fired “almost simultaneously” with Officer Jordan’s shots. He said: “...I heard his shots before I fired, but I had my gun out and was preparing to shoot because I was afraid that he was going to get run over.”

Officer Greene notified dispatch that shots had been fired and requested an ambulance Code 10. After the passenger side doors were opened and the passengers were taken out, he could see that the driver was slumped over to the driver’s right, over the center console, and was not moving.

### Other Witness Statements

Within hours of the shooting, the four teenage passengers of the Honda were separately interviewed by DPD Homicide investigators. I will refer to the teenage passengers by the following designations based on where they sat in the Honda during the shooting:<sup>4</sup>

FSP = Front Seat, Passenger side

BSD = Back Seat, Driver side

BSM = Back Seat, Middle

BSP = Back Seat, Passenger side

#### **Front Seat Passenger (FSP):**

FSP, the sixteen year old who was the front seat passenger, was interviewed by Detective Randal Denison of the DPD Homicide Bureau. FSP's mother was also present during the interview. While waiting for Detective Denison to enter the interview room, FSP told her mother:

“They were all sleeping and I was sitting there and a [police] car pulled up in front of us and I woke them up and [Jessica] tried to drive backwards.... And then more cops, a whole bunch just pulled up, and then she was driving, and then he broke the window and shot her.”

Shortly into the interview, Detective Denison asked what happened when the police got there. FSP replied: “Jessie tried to drive off. And the cop went over there and broke the window and then that's when all that happened.” Seeking clarification, Detective Denison asked:

Q: So he just broke the window out?

A: Yeah.

Q: And then shot her?

A: Yeah.

...

Or he shot the window and then he shot her -- I don't know.

...

Because it splattered.

FSP said that before the shooting occurred there was a police car in the alley “parked in front of us for a minute.” At first, the red and blue lights were not on. When another police car pulled into the alley behind them, “that's when they turned on their lights.” She said there were flashing lights in front of them and behind them.

FSP saw officers on foot, on “both sides” of them. She recalled hearing the officers saying something to them but could not recall what was said.

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<sup>4</sup> This is to respect the privacy of the juveniles and their families. Disclosing their names or initials is not necessary for the issues addressed in this letter.

Detective Denison inquired about the sequence of events before the shooting:

Q: ...So tell me the sequence...of events. This police car comes up in front of you and that's when you try to drive off?

A: Well, the car has already started.

Q: Okay.

A: And we were driving off, and then he pulled up and he was sitting there for like -- I don't know -- a few minutes, and then cops came behind us, and then he turned on his lights.

Q: Okay, and so when did she try -- when did Jessie try to drive off?

A: We already had it started; and when he pulled up.

Q: Okay. Did she go straight towards that police car or back up?

A: Over to the side.

Q: She tried to go to the side of it?

A: [nodding head affirmatively]

Q: Okay, and then what happens? You try to go to the side of the police car. Does that -  
- what happens then?

A: And then that's what happened.

Q: Okay. Do you guys, did you run into the police car?

A: [shaking head negatively] Mm-mm [negative]. They shot her and then she crashed into the fence.

Q: She crashed into the fence?

A: Well, after he shot her.

Detective Denison left the interview room briefly to confer with other investigators. During this time, FSP told her mother: "I kept telling her to stop."

The day after her interview with police, on January 27, 2015, 9News aired a short portion of a recorded statement that FSP made to a reporter. In that recorded statement, FSP said:

"When the cops walked up they were on the side of her, and they shot the window; and they shot her. That's when she wrecked; and that's when the cop got hit."

9News also reported that "[FSP said] the officer was pinned between the car and a fence and that's why the officer suffered a broken leg."<sup>5</sup>

On May 28, 2015, FSP returned to DPD Headquarters to answer follow-up questions to clarify her statements. When asked about the 9News article quoting her saying that an officer was pinned between the car and the fence, FSP said she did not make that statement. She said she never saw an officer get hit by the Honda and she did not see an officer in the path of the car.

FSP recalled that the front windshield of the Honda was fogged up that morning. She said she could "barely see through it," but she could see through the bottom portion. FSP saw

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<sup>5</sup> The suggestion from both of these comments is that FSP saw an officer in the path of the Honda. This was not mentioned by FSP in her original interview at the Denver Police Department.

the first police car (Officer Jordan's SUV) parked in the alley facing them, with no lights on. However, she did not see it move closer to them after the second police car arrived behind them. FSP did not see an officer get out of the police vehicle in front of them and never saw an officer on foot near that vehicle. FSP said she did not hear commands from the police to stop or to get out of Honda before the shooting, nor did she notice an officer banging on the driver's side window, or banging on any part of the Honda. FSP said she did not notice the Honda backing into the trash can or the fence on the west side of the alley. The only thing she recalls the Honda hitting was the brick wall of the garage after the shooting.

FSP said that after seeing the police vehicles, Hernandez first drove the Honda in reverse. Hernandez then shifted the car into drive to go forward. FSP confirmed her statement that Hernandez was trying to drive to the (west) side of the police vehicle that was in front of them. FSP indicated that just before the shooting all of the officers came running from behind the Honda, "so they were behind us and on the sides." She said she did not see an officer on foot in the area in front of the Honda.

After the gunshots, the Honda crashed into the brick wall of the garage. For a moment afterward, FSP thought Hernandez was unconscious from hitting the garage.

#### **Back Seat, Driver Side (BSD):**

BSD, the seventeen year old who sat directly behind the driver, was interviewed by Homicide Detective Eric Bueno. BSD explained what occurred in the moments after realizing the police were in the alley.

Q: ...What's the first thing you remember when you wake up?

A: Them saying that, "There's a cop in front of us."

...

And then like Jessie got up and she like wiped the [window] because it was all foggy.

...

Q: Okay, the front window?

A: Yeah.

Q: And could you see what was going on?

A: Not really, like I -- I was all half asleep, but they were all freaking out.

...

And then she -- Jessie said, "Let's get out and let's run." But everybody was too scared.

...

And then she turned on the car and that's when like you hear like behind us, they're like, "Put your hands up. Put your hands up." And everybody in the back put their hands up.

Q: And who was saying that?

A: A cop.

Q: Okay. Could you see this person or you could hear?

A: I didn't see the cop but you could hear them from behind us. And then in front of us,

like they were saying, "Put your hands up." And they were pointing guns at us and everything, like --

Detective Bueno asked about the moment when shots were fired:

Q: Do you remember where you were at or what -- what you were doing when the shots started?

A: No, we were in -- I was in the back seat, and then he like shot at the front windows and then he shot at the back window.... We were all holding our heads like this [bending down covering head with both hands].

And Jessie was like trying to hide, like she was just freaking out. She like -- she wasn't doing anything. She didn't even go near one of them to run them over or nothing. Like all she accidentally did was probably hit a cop car, but she didn't do nothing to get shot at.

Later in the interview:

Q: Can you describe for me again just so I clearly understand -- when you woke up, did you think -- because obviously, you remember that the car was stolen --

A: [nodding affirmatively]

Q: Was Jessie trying to drive somewhere and --

A: No, I think she was trying to get away from that cop.

...

Q: So when the car started up, what did -- what did you think was going to happen?

A: I thought we were going to get away from the cops.

Q: Drive away?

A: [nodding head affirmatively]

BSD also indicates that the friends in the car were screaming for Hernandez to try to get away, to drive away.

Q: ...What did you say to Jessie?

A: I was like, "Drive, Jessie, drive. Go!" Like, everybody was screaming at her to go.

### **Back Seat, Middle (BSM):**

BSM, the fifteen year old passenger in the middle of the back seat, told Detective Eric Bueno what happened after the teenagers were awakened.

Q: And then what happens?

A: And then we try to leave, and then a cop car rolls up behind us and hits the back, like-

Q: Tell me...what do you mean by "try to leave?" Did you guys get out of the car?

A: No, like, drive.

...

Q: And then [Jessica] tried to go backwards?

A: Mm-hmm [affirmative], and then the cop rolls up and then he hops out and then starts banging on it for us to get out.

Q: He's banging on the Honda?

A: Mm-hmm [affirmative] ....

...

Q: Okay and so ... did the vehicle change directions?

A: Yeah, it was going -- at first it was like this [indicating backwards] and then we started going [indicating forwards and backwards], like --

Q: You backed up first?

A: Yeah.

Q: And then what? And then you tried to go forward?

A: Yeah.

BSM explained that both officers were outside of their vehicles and both were yelling at them to "Get out!"

Regarding the shooting, BSM described that one officer was standing next to the driver side of the car when he fired. And a second officer also shot.

Q: Okay. Where was the second one?

A: On the other side of [FSP's] seat.

Q: ...So [FSP] was in the front passenger seat?

A: Mm-hmm [affirmative]. So, on the other side.<sup>6</sup>

Q: Okay, and was it a window or what got damaged? What was broken?

A: All the windows.

### **Back Seat, Passenger Side (BSP):**

The fifteen year old passenger in the back seat, passenger side, described the events to Detective Eric Bueno:

A: ...And like when we woke up, it was like almost like daylight kind of-ish. And then the last thing like, we heard like cops all come and my friend, Jess, tried to like -- I guess tried to like move or escape -- I don't know.

Q: What do you mean by "move"? Move the car? Or--

A: Yeah. Because like both cops came from behind -- from behind and the front.

And then my friend, Jess, I don't know what she tried to do.

...

Q: And then did she -- was she able to drive at all?

A: No, she just moved back -- back and forth -- and then after that, that's when the cops broke the window.

...

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<sup>6</sup> If BSM meant that the second officer fired from a position on the passenger side of the Honda, this is refuted by the physical evidence. No shots were directed at the car from the passenger side of the Honda.

Q: And you say she tried to get away. The car moved forward?

A: Yeah, it moved forward and back.

Q: And back?

A: And then it just stopped and that's when the cops broke the window.

Q: Okay, and how did the cops break the window?

A: I didn't see.

Q: You didn't see anything?

A: [shaking head negatively] I just -- like because the -- the glass of the car was like -- I don't know how you say it -- like foggy. And I couldn't see anything.

BSP said the police officers were on foot outside of their police cars, screaming: "Stop! Stop moving the vehicle." He adds, "And then that's when she did and then that's when they came and broke the window."

### **Crystal Engler:**

On March 5, 2015, Crystal Engler (34 years old) provided information to the police describing what she observed from the east side of the alley, looking south, when she was standing at the alley gate in the backyard of 2531 Newport Street. She was interviewed by Homicide Detective Martin Smith.

Ms. Engler said she was at 2531 Newport Street in the kitchen when she heard yelling coming from outside. She heard "Get out of the vehicle!" yelled repeatedly, and, "Put your hands up!" She went outside and walked west through the back yard to the gate that opens to the alley. She described seeing two police vehicles, with another car between them, in the alley south of her. She saw two police officers on foot in the alley. They had their guns drawn. The officers were yelling commands to "Get out of the vehicle!" She told Detective Smith:

Instead, the car ended up like kind of accelerating and like -- like moving toward the police, like right toward the police, and -- and I did see an officer get hit, and it was kind of like he bounced off of it -- you know what I mean? It was like -- like, 'Oh my goodness!'

Detective Smith's questioning clarified the portions of this incident that she observed. She did not see the officers' initial confrontation with the Honda; she was in the kitchen when she first heard the police yelling. When she came out into the backyard, the yelling of instructions continued. She did not see the Honda drive in reverse.

When she was at the back gate, the only movement of the Honda she saw was forward acceleration. She heard the sound of the engine as the car accelerated. She saw the officer "bounce off" the car and then heard gunshots. She said after the officer got hit by the car, the driver "just kept going, and at this point, I think she is going to hit the other officer." She estimated hearing three gunshots but she did not see which officer shot.

Detective Smith asked her how many officers she felt the car was coming towards when it accelerated. She answered: "I think one. I think that another officer was off to the side a little bit."

When asked the position of the officer who "bounced off" the car, Ms. Engler first indicated he was on the front passenger side, but then corrected that a few moments later and indicated he actually bounced off of the front driver side of the car. Detective Smith explored that inconsistency by asking Ms. Engler to show him by demonstrating during the interview. She demonstrated that the "bounce off" occurred on the driver side of the car near the front. Ms. Engler said: "...I saw him move like more into like the front -- kind of like side, but like the front side of the car, and that's when she accelerated into him." She said there was another officer close to the one who bounced off the car.

After her interview at DPD Headquarters, Ms. Engler was taken to the alley so she could show Detectives Smith and Bueno the spot where she stood behind the gate. This spot is approximately 72 feet (24 yards) north of where the Honda stopped after the shooting.

### Crime Scene Investigation

After the shooting, Denver police investigators and Crime Lab personnel examined and photographed the alley scene, including the police vehicles and the Honda. Additional examinations of the Honda were conducted later after it was towed from the scene.

On the east side of the alley, damage was noted to the white aluminum siding of the garage adjacent to where Hernandez parked the Honda behind 2511 Newport Street.

On the west side of the alley, a wooden fence behind 2510 Niagara Street was damaged. A section of the fence between two fence posts had separated from the northern fence post. The fence remained upright, but the north end of this section had been pushed west into the yard a few feet. On the alley side of the fence, a trash container on wheels was up against this section of fence. There were marks in the dirt area indicating that the trash container had been forced into the fence, pushing the fence to the west. There also were tire impressions in the dirt on the alley side next to the fence.

North of the damaged fence, the Honda was at rest along a brick wall on the west side of the alley. The Honda was angled northwest, with the driver side front corner up against the wall of a small brick garage behind 2520 Niagara Street. This brick wall of the garage is parallel to the alley and is the western most boundary of the alley at that point. The front wheels of the Honda were turned to the left, directed toward the brick wall. The left corner of the front bumper was damaged from impact. There was other exterior damage to the Honda in several places, including rub marks on the front passenger side quarter panel which corresponded to the damage observed on the siding of the white garage behind 2511 Newport Street. There were also rub marks on the driver side behind the rear wheel with wood particles visible in the rub marks.

The windows of the Honda were tinted. The glass of the windows and windshields were

in place. However, there were bullet holes and associated fracture lines in the glass in three areas: the front windshield, the driver side front window, and the driver side rear window.

There were eight bullet holes in the Honda:

-1 bullet pierced the metal near the bottom of the “A-pillar” on the driver side. The bullet hole is below and to the side of the front windshield in front of the driver side mirror. This bullet did not enter the passenger compartment; it was lodged in the metal of the car.

-3 bullets pierced the front windshield glass on the driver side and traveled into the car.<sup>7</sup> It was determined that the trajectory of these bullets was downward into the car. The two bullets that struck lowest on the windshield also struck the top of the dashboard inside the Honda, damaging the dash area immediately next to the windshield. One bullet pierced the windshield a few inches higher and also struck the plastic housing of the steering wheel inside the car.

-3 bullets pierced the driver side front window.<sup>8</sup>

-1 bullet pierced the driver side rear window. This bullet grazed the back of the driver’s seat-back and struck the left side of the front passenger side seat-back. This bullet was recovered.<sup>9</sup>

In addition to the bullet that was recovered from the front passenger seat-back, two bullets and several bullet fragments were recovered from inside the car.

The ignition switch was observed to be hanging by wires. A screwdriver was found between the front passenger seat and the center console.

It was noted that the odor of marijuana emanated from the Honda. A glass pipe used for smoking marijuana was found in an open storage area in front of the gear shift. Four bottles of alcohol were in the car. One opened bottle of Crown Royal was next to the marijuana pipe; two opened bottles of vodka and one unopened bottle of beer were on the floor of the rear seat behind the driver.

A total of eight spent shell casings were recovered on the ground near the Honda.

-Five of these casings were found in the dirt area along the west edge of the alley.

-Three were on the cement portion of the alley a few feet to the east of the dirt area.

-Seven of the eight casings were to the south of where the Honda stopped.

In the area where the shell casings were found, the distance from the western edge of the cement portion of the alley to the fence on the western border of the alley is 3 feet, 6 inches.

The Honda was situated between the two police vehicles in the alley. The Honda is 6 feet wide and 14 feet long. In front of the Honda to the north was the police SUV driven by Officer Jordan. It was facing southbound, facing the front of the Honda. Its emergency lights were operating. The distance from the passenger side of the SUV to the wooden fence on the west side of the alley was approximately 6 feet, 3 inches.

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<sup>7</sup> The three bullets that pierced the windshield did not strike Hernandez.

<sup>8</sup> The three bullets that pierced the driver side front window struck Hernandez. See Factual Analysis below.

<sup>9</sup> This bullet did not strike Hernandez.

Behind the Honda to the south was the police car driven by Officer Greene. It was facing northbound, facing the rear of the Honda. Its emergency lights were operating. A rub mark was noted on the right front push bumper of this police car.

On March 13, 2015, investigators returned to the alley and placed Officer Jordan's police SUV at the same location that it occupied in the alley at the time of the shooting. This was done to see what view Ms. Engler would have had from the gate with the SUV in the alley. Investigators confirmed that with the SUV in that position in the alley there was a line of sight from the gate to the brick wall on the west side of the alley where the Honda came to rest, and to the fence just south of the brick wall.

### Reconstruction of the Honda's Movement in the Alley

Sgt. Mike Farr of the DPD Traffic Investigation Unit examined the Honda and the scene evidence in this case in order to reconstruct the movement of the Honda just prior to the shooting. Based on damage noted on the exterior of the Honda and at other locations in the alley, and based on scene measurements, Sgt. Farr's investigation concluded that the Honda made the following movements in the alley before it came to rest.

1 - Beginning at the spot where the Honda was first seen by the officers parked next to the garage behind 2511 Newport Street, the Honda moved in reverse. While moving in reverse with the front wheels turned to the left, the front right corner of the Honda scraped the white aluminum siding of the garage, causing damage to the aluminum siding and corresponding damage noted on the Honda. The rear bumper of the Honda also bumped or rubbed against the push bar on the front of the police car driven by Officer Greene. [See Diagram attached showing AOI #1 (area of impact #1)].

2 - The Honda was then driven forward some distance northward in the alley.

3 - The Honda then moved in reverse a second time. The driver angled the rear of the car in a southwesterly direction causing it to cross to the west side of the alley. The rear bumper of the Honda struck a large trash container on wheels that was next to the fence along the west edge of the alley. The force of the car against the trash container pushed it against the fence, causing the drag marks seen in the dirt area next to the fence and causing the north end of one section of the fence to separate from its fence post. The Honda pushed this area of the fence a few feet into the backyard of 2510 Niagara Street before the Honda stopped its movement in reverse. [See Diagram attached showing AOI #2].

Sgt. Farr noted wood debris in a rub mark behind the driver side rear wheel, consistent with the Honda scraping against the wooden fence post.

4 - From this point, the Honda moved forward to its point of rest along the brick wall on the western edge of the alley north of the fence damage. The distance traveled by the Honda after damaging the fence to where it came to rest was approximately 16 feet.

## Honda Acceleration Tests

Sgt. Farr also conducted acceleration tests on the Honda. The average maximum acceleration/drag factor he obtained was .262. The result of this acceleration testing indicates that, if accelerated from a stopped position through a 16 foot distance, the Honda could reach a speed of 11.21 mph (16.44 feet per second). The time it would take to travel sixteen feet from a stopped position at this acceleration rate is approximately 1.95 seconds.

## Autopsy

An autopsy was performed on Jessica Hernandez's body on January 26, 2015, by James L. Caruso, M.D., Chief Medical Examiner. Dr. Caruso noted that Hernandez "died as a result of multiple gunshot wounds that injured the heart and both lungs...." The autopsy noted four wound paths that were caused by three bullets. One bullet struck Hernandez in front of her left hip and pelvic area and two bullets struck her on the left side of her torso.

### **Gunshot Wound of the Torso, Superior**

The entrance point of one bullet was to the left side of the chest, 19 inches below the top of the head and 8 ¼ inches to the left of the anterior midline. The trajectory of this wound path was left to right, back to front, and upward. The bullet traveled through the left chest wall, below the left 6<sup>th</sup> rib into the left pleural cavity and caused a defect to the left lung. It perforated the pericardium, the heart through the left ventricle and the right atrium, and the middle lobe of the right lung. The bullet exited the right pleural cavity below the right 3<sup>rd</sup> rib, then came to rest without exiting the body in the subcutaneous tissue at a point 17 ½ inches below the top of the head and 6 ¼ inches right of the anterior midline.

The copper-jacketed bullet that caused this wound path was recovered from Hernandez's body. This bullet was later examined by DPD crime lab.

### **Gunshot Wound of the Torso, Inferior**

Another bullet entered Hernandez's lower left chest and upper abdomen 21 ¾ inches below the top of her head and 4 inches left of the anterior midline. The trajectory of this wound path was left to right, slightly back to front, and upward. The bullet traveled into the left pleural cavity. It perforated the lower lobe of the left lung and exited the body below the right 5<sup>th</sup> rib just right of the anterior midline, near the right nipple. It caused an exit wound situated 18 7/8 inches below the top of the head and 3 ½ inches right of the anterior midline.

The bullet that caused this wound path was not recovered during the autopsy since this bullet exited the body. However, prior to the autopsy, a bullet was recovered at DHMC where Hernandez had been taken by ambulance. The bullet was later examined by the DPD crime lab.

### **Gunshot Wound of the Pelvis and Right Thigh**

Two other wounds were caused by one bullet, in Dr. Caruso's opinion. A bullet caused an entry wound of the pelvis 29 ¾ inches below the top of the head and 4 ¾ inches left of the anterior midline in the area of the anterior-superior iliac spine. The trajectory of this wound path

was left to right and downward, with minimal deviation in the anterior-posterior axis. The wound path went from the anterior left hip, grazed the left pelvic bone, and continued through the subcutaneous tissue and skin of the suprapubic area just right of the anterior midline. The bullet exited and caused an exit wound 31 ¾ inches below the top of the head and ¾ inch right of the anterior midline.

The same bullet then caused another entrance wound in the anterior right thigh 28 ½ inches above the bottom of her right foot. The trajectory of this wound path in the thigh was left to right, front to back,<sup>10</sup> and slightly downward.

The copper-jacketed bullet that caused these wound paths was recovered from the muscle of the anterior right thigh. This bullet was later examined by the DPD crime lab.

### **Toxicological testing**

Toxicological testing on postmortem blood and urine samples noted that Hernandez had consumed alcohol and cannabis. She had 41ng/ml of Delta-9 THC in her blood.<sup>11</sup> Her blood alcohol concentration was .047 g/100 ml.

### Forensic Examinations by the DPD Crime Lab

The DPD Crime Laboratory Firearms Unit examined the two guns fired by the officers and the casings and bullets recovered during this investigation.

Officer Jordan's handgun is a 45 caliber semi-automatic pistol manufactured by Glock, model 21. Test fired bullets from this gun show that it has a "polygonally rifled barrel with eight lands and grooves and a right hand twist."

Officer Greene's handgun is a 45 caliber semi-automatic pistol manufactured by Heckler & Koch, model USP. Test fired bullets from this pistol show that it has a "polygonally rifled barrel with six lands and grooves and a right hand twist."

Of the eight shell casings recovered in the alley, five were identified as having been fired in Officer Jordan's Glock pistol; three were fired in Officer Greene's H&K pistol.<sup>12</sup>

The investigation determined that a total of eight bullets were fired by the officers. Officer Jordan fired five rounds. Officer Greene fired three rounds.

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<sup>10</sup> In the autopsy report, references to directions of wound paths are in relation to the body. Thus, the front to back reference here in relation to the right leg wound is consistent with a downward gunshot trajectory because Hernandez was sitting when struck.

<sup>11</sup> In prosecutions for driving an automobile under the influence of drugs, if a blood test shows the driver's blood contained five or more ng/ml of Delta-9 THC, there is an inference that the driver was under the influence of marijuana, per C.R.S. 42-4-1301. The level of Delta-9THC in Hernandez blood was over eight times this amount.

<sup>12</sup> In the photos, blue evidence markers 1, 2 & 3 indicate casings from Officer Greene's gun. Markers 4, 5, 6, 7 & 8 mark the casings from Officer Jordan's gun. Four of the five casings fired in Officer Jordan's gun were found in the dirt area along the west fence a few feet north of the three casings fired in Officer Greene's gun.

The bullet recovered from Hernandez's body referred to in the Autopsy Report under the description of the "Gunshot Wound of the Pelvis and Right Thigh" was determined to have been fired by a gun having a "polygonally rifled barrel with eight lands and grooves and a right hand twist." This is consistent with the Glock pistol used by Officer Jordan.

It was determined that the following three bullets were fired by a gun having a "polygonally rifled barrel with six lands and grooves and a right hand twist." This is consistent with the H&K pistol used by Officer Greene.

- The bullet recovered from Hernandez's body referred to in the Autopsy Report describing the "Gunshot Wound to the Torso, Superior."
- The bullet recovered at DHMC prior to the autopsy.
- The bullet recovered from inside the Honda from the front passenger seat-back.

No fingerprints or palm prints identifiable to Officer Jordan were found on the Honda.<sup>13</sup>

## FACTUAL ANALYSIS

### Physical Evidence:

The physical evidence supports the officers' statements that the Honda was moving forward when they fired at the driver. Likewise, the physical evidence supports the officers' statements regarding their positions in relation to the car when they fired. Moreover, the physical evidence supports Officer Jordan's statements regarding his effort to avoid the car by pushing off of it as he fired his shots.

The fact that seven of the eight spent shell casings were recovered in the alley south of the Honda is not conclusive, but it suggests that the Honda was moving northbound when the shots were fired. The fact that four of the five shell casings from Officer Jordan's handgun were found along the fence on the west edge of the alley, and north of the casings from Officer Greene, supports both of the officers' statements regarding Officer Jordan's location at the time of the shooting.

All three of the bullets fired by Officer Greene were recovered. Therefore, his three shots can be accounted for as follows: Two bullets pierced the driver side front window and struck Hernandez in the left chest; and one bullet pierced the driver side rear window, grazed the back of the driver's seat-back, and struck the left side of the seat-back of the front passenger seat.<sup>14</sup> The locations of these bullet strikes on the side windows support Officer Greene's statement that the Honda was going forward near him as he fired at the driver.

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<sup>13</sup> No conclusion can be drawn from this. Multiple factors affect whether friction ridge detail from a finger or palm will be transferred to a surface and whether it can be detected. The fact that the Honda was very dirty was one of several factors that could inhibit the transfer of prints.

<sup>14</sup> The three recovered bullets mentioned were fired from a gun having six lands and grooves with a right twist, similar to Officer Greene's H&K pistol. Officer Jordan's Glock pistol is *dissimilar*, in that it has eight lands and grooves, and therefore it can be eliminated as having fired these three bullets.

The other bullet defects in the Honda were caused by Officer Jordan's five gunshots. All five of his shots were fired with a downward trajectory.

-Four of the bullets were fired when the muzzle of the gun was to the front of the windshield and pointed at or near the front windshield. One bullet pierced the metal at the A-pillar near the front windshield and did not enter the car; two bullets pierced the lower front windshield and struck the interior dashboard in an area very close to the windshield; one bullet pierced the front windshield a few inches higher and then struck the interior of the car on the plastic housing of the steering wheel. All four of these shots were fired with a trajectory from front to back in relation to the car.

-One bullet was fired when the muzzle of Officer Jordan's gun was pointed at the driver side front window. This bullet pierced the driver side front window and struck Hernandez, causing the pelvic wound and the right leg wound.<sup>15</sup>

The locations of the bullet strikes from Officer Jordan's gunshots are consistent with his description of being extremely close to the car, pushing off of the car with his left hand, and shooting at the driver with a downward trajectory as the Honda was moving forward, with the gun in his right hand. Specifically, the trajectory of the bullet that pierced the windshield and struck the steering wheel housing corroborates that Officer Jordan was in contact with the car, or right next to it, when that shot was fired. That shot could not have been fired with that trajectory by Officer Jordan if he were not extremely close to the car. (See the photo on page 37 showing the yellow trajectory rod passing through the windshield and into the steering wheel housing at a steep downward angle). The trajectory of the shot through the driver side window that struck Hernandez in the hip is also consistent with Officer Jordan being extremely close to the car, and is consistent with his description of the shooting.

The pattern of the bullet strikes shows that the muzzle of Officer Jordan's gun was to the front of the windshield when four shots were fired, and was to the left side of Hernandez when one shot was fired. This evidence of movement of the gun in relation to the car is consistent with Officer Jordan's description of how he fired his weapon. This supports the conclusion that the bullet that passed through the driver side window was Officer Jordan's final shot.

#### Eyewitness Evidence:

The eyewitness evidence concerning the location of Officer Jordan when the shots were fired is not congruent, however. Differences are seen when comparing the statements of the two police officers and Crystal Engler with the statements of the four teenagers who were in the car with Hernandez.

On one hand, both police officers and Crystal Engler said Officer Jordan was in the path of the Honda as it was accelerating forward. On the other hand, none of the four teenage passengers told DPD investigators they saw an officer in the path of the car.

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<sup>15</sup> This bullet was recovered during the autopsy and was determined to have been fired by a gun having eight lands and grooves and a right hand twist. This is consistent with the Glock pistol used by Officer Jordan.

Of the eyewitness accounts, the physical evidence only supports the accounts given by the two officers and by Ms. Engler. The physical evidence is compelling evidence that Officer Jordan was where he described being when he fired his shots. The fact that the teenage witnesses did not see Officer Jordan there during the undoubtedly frantic and traumatic moments of the shooting is understandable under the circumstances. The teenagers had been consuming marijuana and alcohol, had just awakened from their sleep in a car, and their vision was obscured by the foggy windows. Police emergency lights and headlights were flashing in front of them and behind them. Multiple things over which they had no control were happening quickly in front of them, behind them, and to the side of them. Officer Greene was closest to the car on the driver side. According to him, he was yelling at the occupants. During the moments when the Honda accelerated forward and turned to the left, it is not so surprising that the passengers did not notice Officer Jordan on the west side of the alley north of them as he ran toward the car.

The eyewitness evidence regarding the forward movement of the Honda when the shots were fired is largely in agreement with the physical evidence. Ms. Engler described hearing the Honda's engine revving and seeing the car moving forward toward an officer. She saw the officer "bounce off" the car and then heard gunshots. Also, the teenagers in the Honda indicated that Hernandez was driving to escape. FSP indicates this when she explains that Hernandez tried to drive to the west side of Officer Jordan's police car, and that the car crashed after the shooting. FSP also emphasized to her mother: "I kept telling her to stop."

## LEGAL ANALYSIS

Criminal liability is established only if it is proved beyond a reasonable doubt that all of the elements defining a criminal offense have been committed and that the offense was committed *without legal justification or excuse*. While intentionally shooting and thereby causing the death of another human being is generally prohibited, Colorado law specifies certain circumstances in which the use of physical force and deadly physical force is justified by a peace officer and therefore not unlawful. In this case, because the evidence establishes that both officers intentionally shot Hernandez, and her death was caused by the shooting, the determination of whether either officer's conduct was criminal is primarily a question of whether the use of deadly force was legally justified.

### Applicable Statutes Regarding Justification for Deadly Physical Force

**C.R.S. 18-1-707** specifies when a peace officer is justified in using physical force and deadly physical force when the officer is making an arrest or preventing an escape from custody. Subsections (1) and (2) provide:

- (1) Except as provided in subsection (2) of this section, a peace officer is justified in using reasonable and appropriate physical force upon another person when and to the extent that he reasonably believes it necessary:

- (a) To effect an arrest or to prevent the escape from custody of an arrested person unless he knows that the arrest is unauthorized; or
- (b) To defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force while effecting or attempting to effect such an arrest or while preventing or attempting to prevent such an escape.

**(2) A peace officer is justified in using deadly physical force upon another person for a purpose specified in subsection (1) of this section 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 an arrest, or to prevent the escape from custody, of a person whom he reasonably believes:
  - (I) Has committed or attempted to commit a felony involving the use or threatened use of a deadly weapon; or
  - (II) Is attempting to escape by the use of a deadly weapon; or
  - (III) 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.

**C.R.S. 18-1-704** is the general Colorado statute pertaining to self-defense and defense of others. This statute is not restricted to peace officers when making an arrest or preventing escape from custody. As pertinent to this case, 18-1-704 states:

(1) Except as provided in subsections (2) and (3) of this section, a person is justified in using physical force upon another person in order to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by that other person, and he may use a degree of force which he reasonably believes to be necessary for that purpose.

**(2) Deadly physical force may be used only if a person reasonably believes a lesser degree of force is inadequate and:**

- (a) **The actor has reasonable ground to believe, and does believe, that he or another person is in imminent danger of being killed or of receiving great bodily injury; ....**

These statutory justifications for the use of deadly force are “affirmative defenses” to a homicide charge that alleges the death was caused intentionally or knowingly, as the evidence indicates here.<sup>16</sup> This means when the evidence raises these defenses the prosecution has the burden to disprove the defenses to the jury. In other words, the prosecution must prove, by proof

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<sup>16</sup> For homicide charges alleging that a defendant acted recklessly, with extreme indifference, or with criminal negligence, the jury considers evidence of self-defense and defense of another when determining whether the defendant’s culpable mental state was reckless, extreme indifference, or criminally negligent, but the issue is not treated as an affirmative defense.

beyond a reasonable doubt, that the facts do not support these defenses and that the force was not justified.

## CONCLUSION

The essential questions are whether the facts of this case support or refute the justifications of self-defense and defense of another. My judgment is that on these facts a jury would not reject either self-defense or defense of another, and a jury would not convict either officer of a criminal charge. Moreover, my own conclusion is that the facts show that both officers were legally justified in using deadly force in this case.

The critical issues are:

- (a) whether it was reasonable for the officers to believe that the movement of the Honda toward Officer Jordan was “the use or imminent use of deadly physical force”;<sup>17</sup> and,
- (b) whether it was reasonable for the officers to believe that Officer Jordan was “in imminent danger of being killed or of receiving great bodily injury;”<sup>18</sup> and,
- (c) whether it was reasonable for the officers to believe at the moment the shots were fired that deadly force against the driver was necessary to defend Officer Jordan and that a lesser degree of force was inadequate.

My conclusions from the facts are that the answers are “yes” to all of these questions. The facts listed below are particularly significant to my conclusions:

1. The persistence of the driver’s defiance of the officers’ lawful orders, especially after Officer Greene banged on the window next to the driver.
2. The intentional repositioning of the car, including ramming through the fence, in an effort to attempt a driving escape to the west side of Officer Jordan’s police SUV.
3. The sudden hard acceleration away from the fence, as opposed to the rather slow movements of the vehicle moments earlier.
4. The turning of the Honda to the northwest which placed Officer Jordan in the path of the car. No effort was made to steer away from him. To the contrary, effort was made by the driver to cause the car to go to the left after it accelerated away from the fence.<sup>19</sup>

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<sup>17</sup> C.R.S. 18-1-707(2)(a)

<sup>18</sup> C.R.S. 18-1-704(2)

<sup>19</sup> The location of the bullet strike to the housing of the steering wheel is evidence that the steering wheel was turned to the left when this shot by Officer Jordan was fired. (Also, the front wheels of the Honda were found turned sharply to the left at its point of rest next to the brick wall). This evidence shows that the driver was controlling the steering wheel to turn the car to the left. Otherwise, the front wheels would have straightened out on their own as the car was accelerated away from the fence.

5. The proximity of the car to Officer Jordan as it was moving forward.<sup>20</sup>
6. The speed of the car.
7. The short time the officers had to perceive the threat from the car and to react to it.<sup>21</sup>
8. The small space along the west side of the alley available for Officer Jordan to avoid the car, and the compression of this space as the car was turning and moving closer to the brick wall and the fence along the west side of the alley.
9. The high risk of serious injury or death to Officer Jordan if he were run over by the car or if he were crushed or dragged against the brick wall or into the fence as the car went forward.

Whether Hernandez saw and intended to drive over Officer Jordan is not known. It appeared so to the officers. Both officers expressed their beliefs that the driver's actions were intentional. Officer Greene said it was evident that the driver wanted to "escape at all costs." He said: "I felt like they would do whatever they had to do to escape being arrested or taken into custody." Likewise, Officer Jordan also believes the driver intended to run him over. He said: "There's no question about it. I'm lucky to be here... There's no question that they were trying to run me over."

As to the driver's intentions, a jury hearing this case would likely hear evidence of prior incidents in which Hernandez intentionally fled from police, and of an incident in which she assaulted a police officer who was arresting her. These prior incidents would be offered to support an argument that Hernandez drove intentionally with a "flee at all cost" mentality that morning, and that her intentions while driving the car made her a deadly threat to Officer Jordan.<sup>22</sup>

However, it is not necessary for me to know whether Hernandez's intent was to

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<sup>20</sup> The push-off from the car to save himself that Officer Jordan described was probably the same movement that witness Engler described as an officer being "bounced off" the car. The trajectory of the bullets through the windshield corroborate that Officer Jordan was very close to the car as the car moved forward and was turning to the left toward the brick wall.

<sup>21</sup> At maximum acceleration away from the fence it would take the Honda less than two seconds to travel the 16 feet to its point of rest along the brick wall. The time for the officers to perceive the movement of the car as a threat, decide to react, and react before it hit the brick wall would be a fraction of that time.

<sup>22</sup> On January 22, 2015, just four days prior to this shooting, a Thornton police officer saw Hernandez in the driver seat of a parked Honda Civic that had been stolen the day before. When the officer announced his presence, Hernandez looked at him and ran away. She was later found and arrested, and then released.

Three weeks before that incident, on January 1, 2015, Hernandez was observed driving her mother's car 80 mph in a 55 mph zone in Adams County. When a Trooper with the Colorado State Patrol signaled for her to pull over, she drove erratically in an attempt to elude him. She ultimately drove into an alley, stopped the car, and fled on foot. Two days later, the Trooper spoke to her at her mother's house and asked her what had caused her to run. Hernandez told the Trooper: "I got scared. I can't have any contact with the police." (She was on probation for other offenses at the time).

Another incident occurred on December 2, 2013, one week after her 16<sup>th</sup> birthday. She was seen smoking marijuana on Colfax Avenue by Denver police officers. When being handcuffed, and apparently while under the influence of marijuana, Hernandez became extremely profane and verbally threatening to the officers and their families. She then "head butted" one of the officers in the throat. She was charged, as a juvenile, with a felony assault on the police officer and was ultimately placed on probation.

drive over Officer Jordan, or whether she even saw him at that moment. This is because, regardless of Hernandez's actual intent, it was the acceleration of the car toward Officer Jordan when he had little opportunity to escape that posed the threat to him. The threat would appear identical to the officers whether Hernandez was intending to drive over Officer Jordan or not. In this situation, Colorado case law instructs that when examining the necessity for acting in self-defense or defense of others, a person is entitled to rely on "apparent necessity" so long as the conditions and circumstances are such that a person would reasonably believe that defensive action was necessary. See, *People v. La Voie*, 395 P.2d 1001 (1964); *Riley v. People*, 266 P.3d 1089 (Colo. 2011). Thus, in this case, the justifications of self-defense and defense of others apply regardless of Hernandez's intent at that moment.

In conclusion, after reviewing all of the evidence in this investigation, my judgment is that if a jury were presented with the totality of the evidence, the jury would find from the facts, as I do, that:

- The officers were lawfully attempting to arrest the driver of a stolen car;
- The officers reasonably believed that the sudden acceleration of the Honda toward Officer Jordan was the use or imminent use of deadly physical force by the driver;
- The officers reasonably believed that responding with deadly physical force was necessary in order to defend Officer Jordan.

These findings would result in a finding that the officers' use of deadly force was justified under C.R.S. 18-1-707, and therefore was not unlawful.

Similarly, regarding the justification set forth in C.R.S. 18-1-704, I conclude that a jury would find, as I do, that:

- The officers reasonably believed that the acceleration of the Honda toward Officer Jordan was an *unlawful* use or imminent use of force by the driver;
- The officers had reasonable grounds to believe, and did believe, that Officer Jordan was in imminent danger of being killed or of receiving great bodily injury;
- The officers reasonably believed less than deadly physical force was inadequate to defend Officer Jordan under the circumstances.

These findings would result in a jury finding that the officers' use of deadly force was justified under C.R.S. 18-1-704, and therefore was not unlawful.

The fact that the three bullets that struck Hernandez were fired from the driver's side of the car does not alter any of my conclusions and does not vitiate the legal justifications of acting in self-defense or defense of another. Officer Jordan fired one bullet through the driver side window that struck Hernandez. The evidence indicates that this was Officer Jordan's final shot, and that it was fired when the Honda was still a threat to him. The evidence shows that he was in the process of pushing away from the

Honda as he fired this shot. Officer Greene fired three shots from the driver side of the car, two of which struck Hernandez. The evidence shows that all of Officer Greene's shots were fired in order to defend Officer Jordan.

Finally, the facts of this investigation show that Officer Jordan and Officer Greene were lawfully doing their jobs that morning, and they gave lawful orders to Hernandez to stop and to get out of that car. This begs the question of why Hernandez chose to not comply with those orders. Perhaps she feared being caught driving a stolen car. Perhaps her judgement was impaired by marijuana and alcohol. We can draw these inferences from the facts. However, what is clear from the facts and needs no inference, is that her decisions created a very dangerous situation -- not just to herself and to the officers, but also to her friends who were in the car with her. Fortunately, none of them were injured or killed.

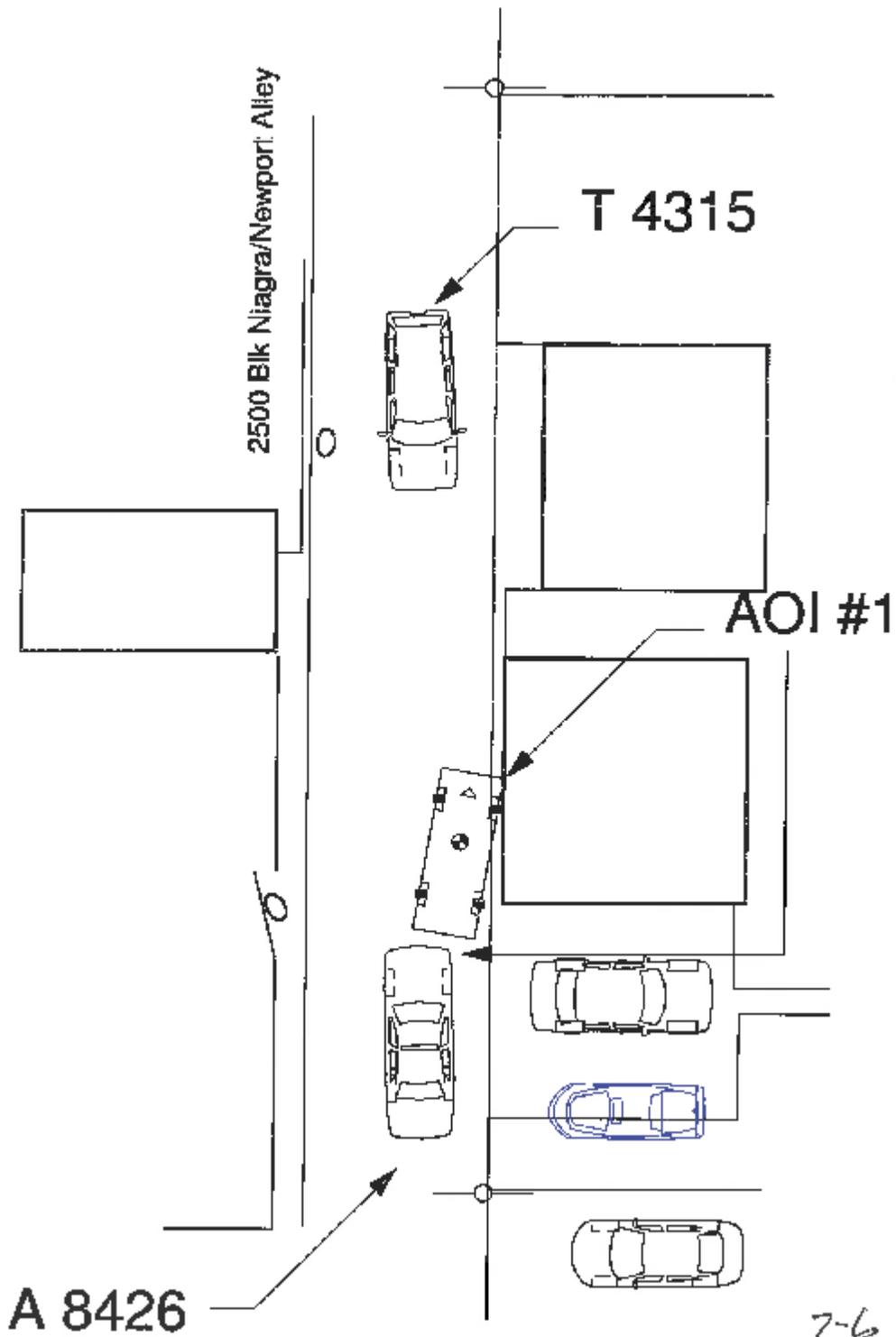
If there is one message I hope our community understands from this case, it is that this shooting was completely preventable. It would not have occurred if Hernandez had simply complied with lawful police orders.

Very truly yours,

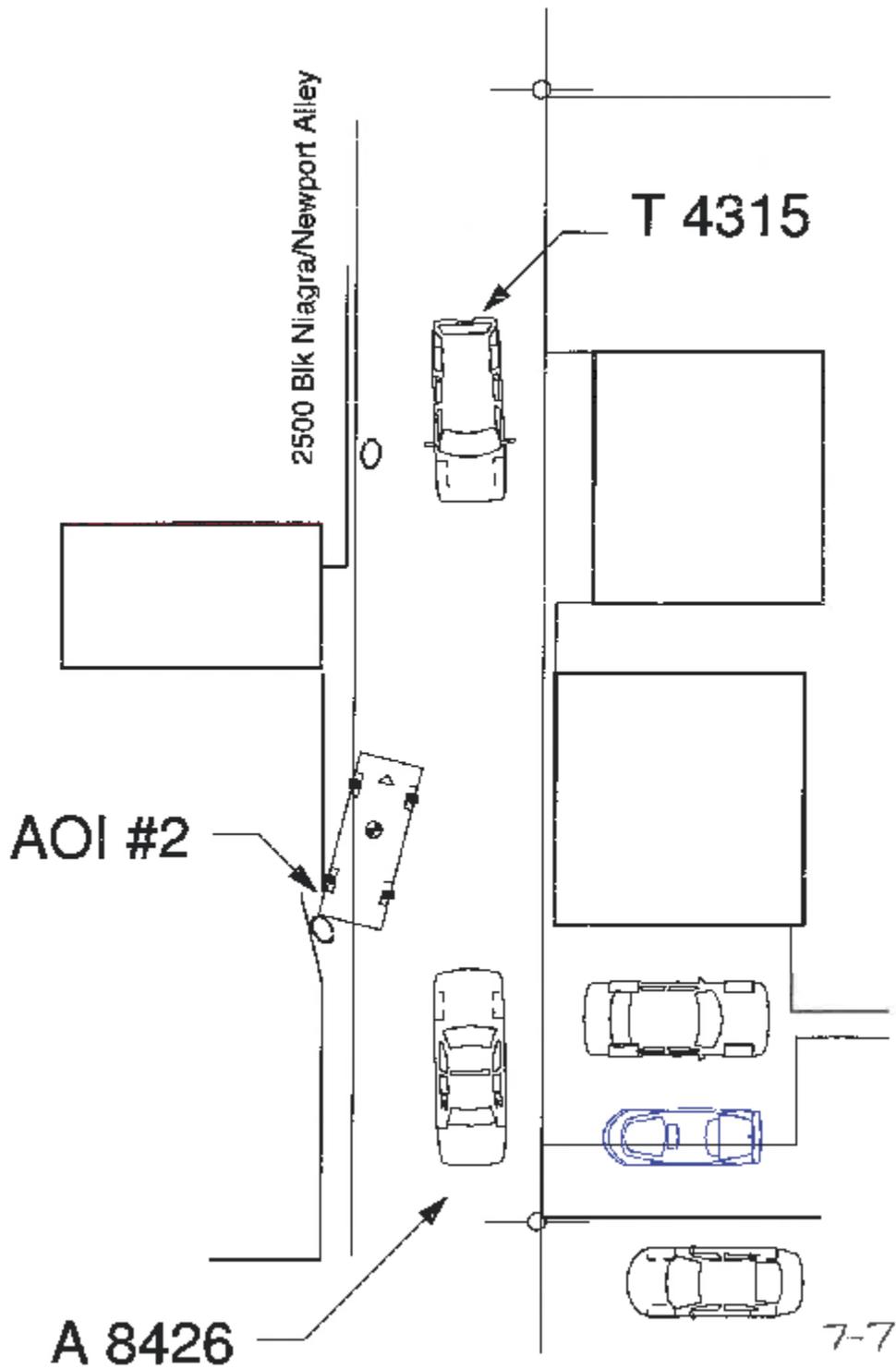
A handwritten signature in black ink, appearing to read "Mitchell R. Morrissey", written over a horizontal line. The signature is stylized and cursive.

Mitchell R. Morrissey  
Denver District Attorney

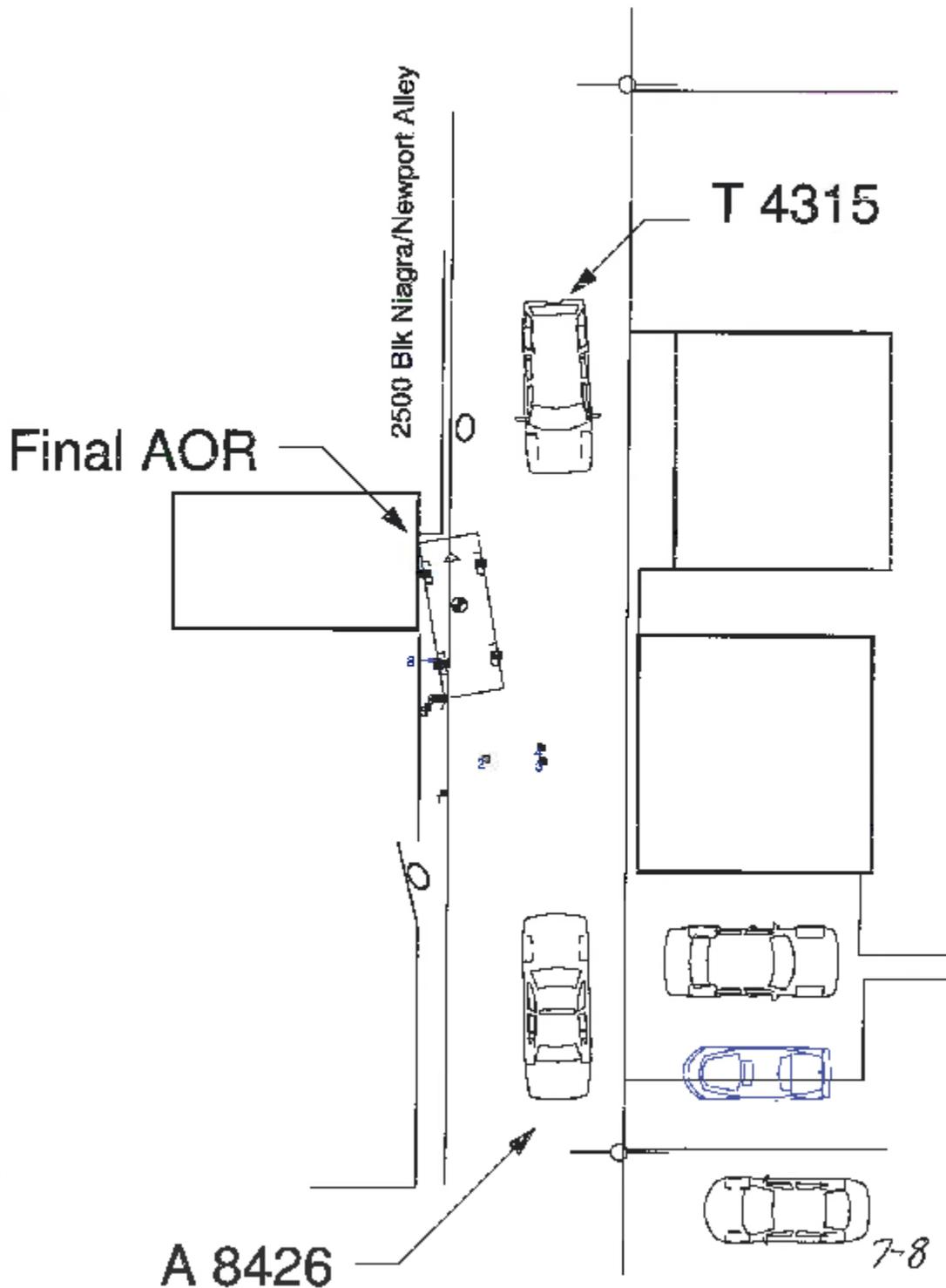
cc: Officer Gabriel Jordan; Officer Daniel Greene; Ryan Coward, Attorney for Officer Jordan; Sean Olson, Attorney for Officer Greene; Michael Hancock, Denver Mayor; All Denver City Council Members; Scott Martinez, Denver City Attorney; Stephanie O'Malley, Executive Director; David Quinones, Deputy Chief of Police DPD; Mary Beth Klee, Deputy Chief of Police DPD; Ron Saunier, Commander of Major Crimes Division; Gregory Laberge, Commander of Denver Crime Lab; Michael Calo, Commander of Police District 2; Ron Thomas, Commander of Internal Affairs Bureau; Lieutenant Matt Clark, Major Crimes Division; Sgt. James Kukuris, Homicide; Sgt. Ed Leger, Homicide; Detective Martin Smith, Homicide; Detective Eric Bueno, Homicide; Lamar Sims, Senior Chief Deputy District Attorney; Doug Jackson, Senior Chief Deputy District Attorney; Nicholas E. Mitchell, Office of the Denver Independent Monitor; Rev. William T. Golson, Jr.



This diagram shows the Honda at the point when it scraped the side of the garage and backed into the police car driven by Officer Greene.



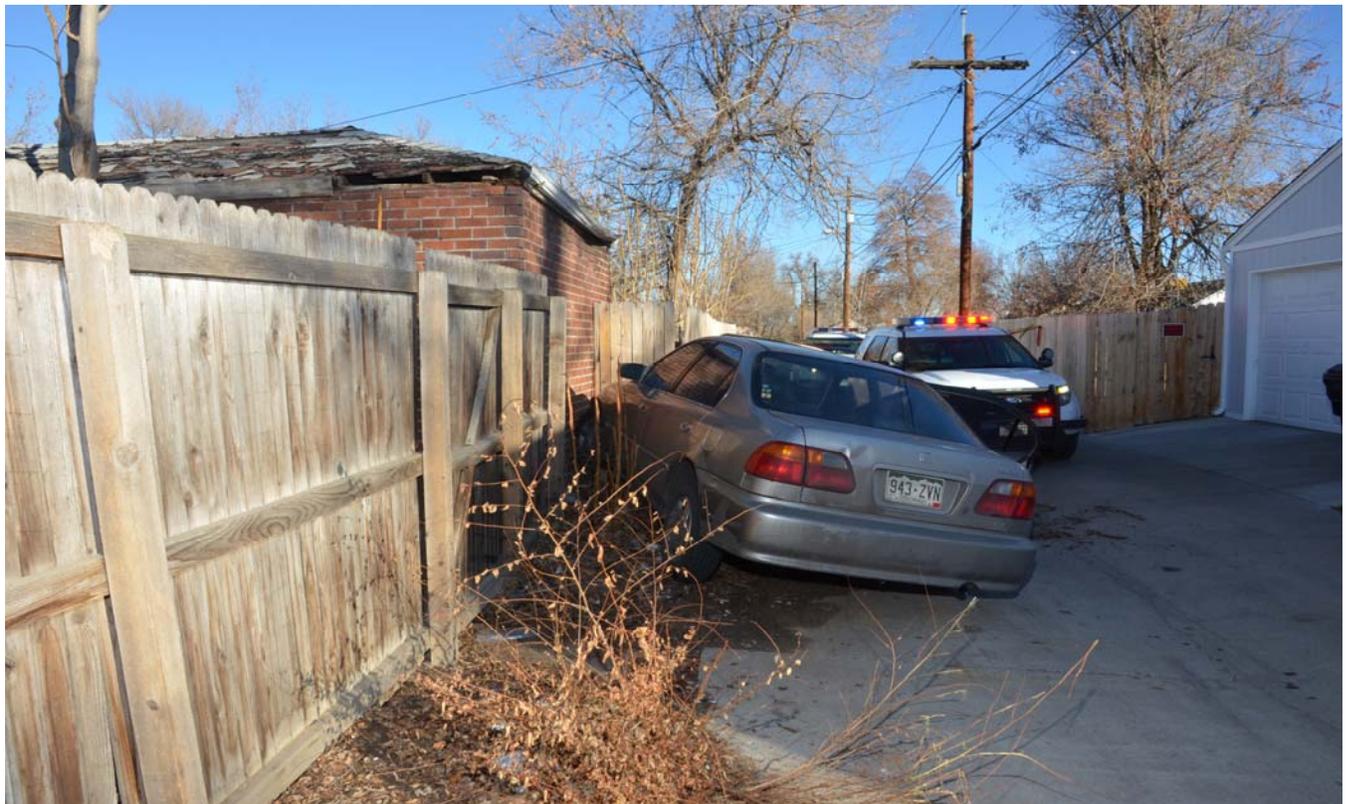
This diagram shows the location of the Honda after it was backed into the garbage container and the fence. Officer Greene said the front wheels of the Honda were turned to the left at this point.



This diagram shows the Honda at its point of rest after hitting the brick wall with the left corner of the front bumper. The numbers 1-8 designate spent shell casings found in the alley.



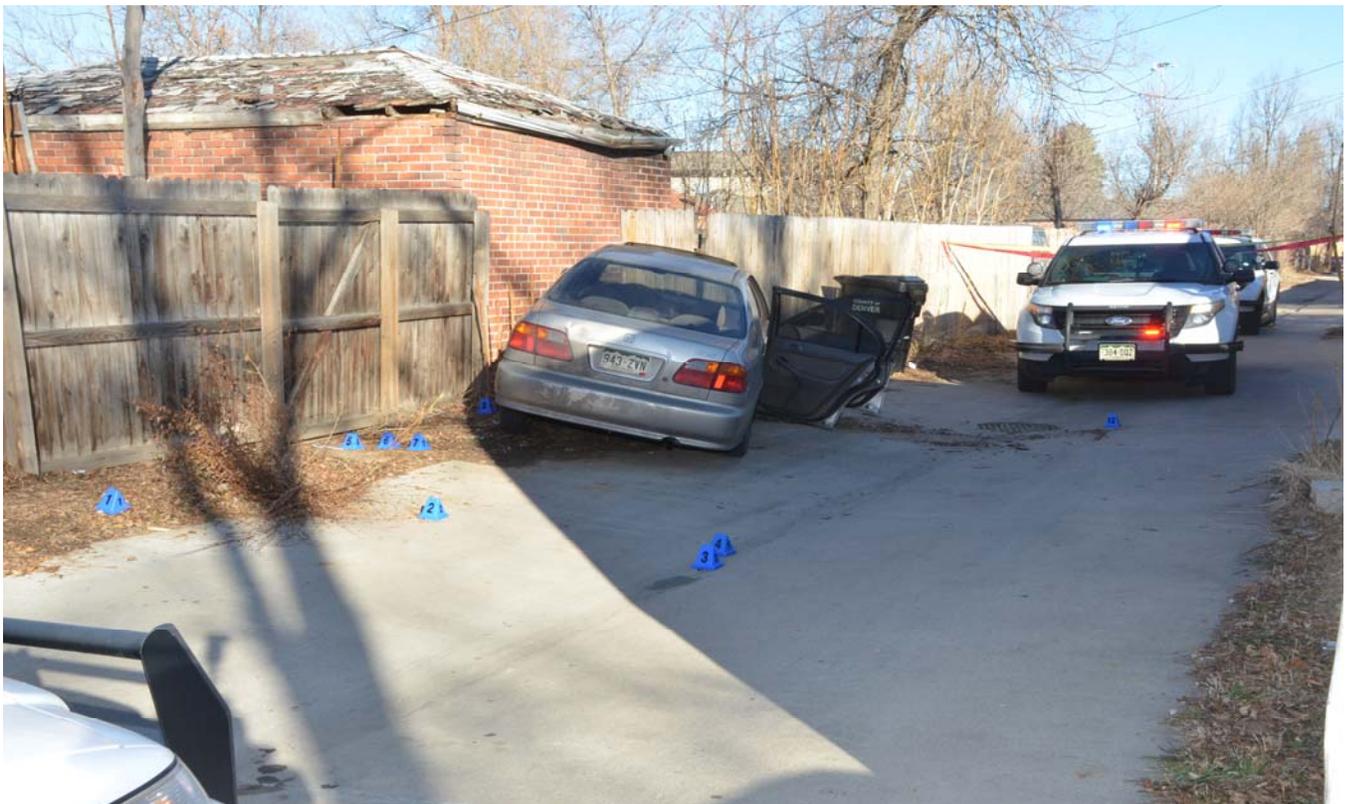
Looking north toward 26<sup>th</sup> Avenue.







Blue evidence markers (1-8) indicate the locations of eight spent shell casings recovered in the alley.



Three casings were from Officer Greene's gun (markers 1,2,3). Five casings were from Officer Jordan's gun (markers 4 – 8).



Looking south toward 25<sup>th</sup> Avenue.



These pictures show the area where Officer Jordan ran south toward the Honda.





There were eight bullet strikes to the exterior of the Honda.



Bullet strikes from four of Officer Jordan's five shots. The gun was forward of the windshield when fired.



Three bullets pierced the driver side front window (F,G,H). Two were fired by Officer Greene. One was fired by Officer Jordan.



The bullet through the driver side rear window that hit the front passenger seat-back was fired by Officer Greene.



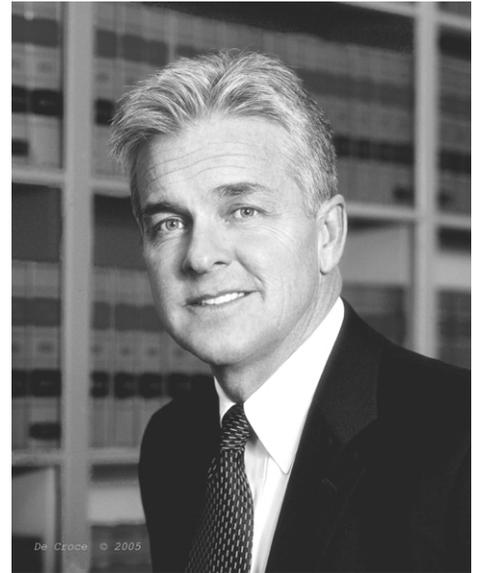
Two bullets struck the lower windshield and the dash. One bullet struck higher (A1) and struck the steering wheel housing (A2).



The yellow rod shows the trajectory of the bullet that pierced the windshield and struck the steering wheel housing.



This shows the position of the front wheel when the bullet struck the steering wheel housing. It also shows impact damage from the Honda hitting the brick wall.



*Mitchell R. Morrissey*  
*Denver District Attorney*

**OFFICER-INVOLVED SHOOTING  
PROTOCOL  
2015**

The Denver District Attorney is a State official and the Denver District Attorney's Office is a State agency. As such, although the funding for the operations of the Denver District Attorney's Office is provided by the City and County of Denver, the Office is independent of City government. The District Attorney is the chief law enforcement official of the Second Judicial District, the boundaries of which are the same as the City and County of Denver. By Colorado statutory mandate, the District Attorney is responsible for the prosecution of violations of Colorado criminal laws. Hence, the District Attorney has the authority and responsibility to make criminal charging decisions in peace officer involved shootings.

The Denver Police Department was created by the Charter of the City and County of Denver. Under the Charter, the police department is overseen by the Office of the Denver Manager of Safety, headed by the Executive Director of the Department of Safety. The Executive Director of the Department of Safety ("Executive Director") and the Chief of Police are appointed by and serve at the pleasure of the Mayor of Denver. The District Attorney has no administrative authority or control over the personnel of the Denver Police Department. That authority and control resides with City government.

When a peace officer shoots and wounds or kills a person in Denver, Colorado, a very specific protocol is followed to investigate and review the case. Officer-involved shootings are not just another case. Confrontations between the police and citizens where physical force or deadly physical force is used are among the most important events with which we deal. They deserve special attention and handling at all levels. They have potential criminal, administrative, and civil consequences. They can also have a significant impact

on the relationship between law enforcement officers and the community they serve. It is important that a formal protocol be in place in advance for handling these cases. The following will assist you in understanding the Denver protocol, the law, and other issues related to the investigation and review of officer-involved shootings.

For more than three decades, Denver has had the most open officer-involved shooting protocol in the country. The protocol is designed to insure that a professional, thorough, impartial, and verifiable investigation is conducted and that it can be independently confirmed by later review. The fact that the investigative file is open to the public for in-person review at the conclusion of the investigation assures transparency in these investigations. This serves to enhance public confidence in the process.

When an officer-involved shooting occurs, it is immediately reported to the Denver police dispatcher, who then notifies all persons on the call-out list. This includes the Major Crimes Commander, Senior Chief Deputy District Attorney, Division Chief of Patrol, Captain of Crimes Against Persons Bureau, Homicide Unit personnel, Director of the Crime Lab, Crime Lab Technicians, and others. These individuals respond first to the scene and then to DPD headquarters to take statements and conduct other follow-up investigation. The Denver District Attorney, Executive Director, and Chief of Police are notified of the shooting and may respond.

The criminal investigation is conducted under a specific investigative protocol with direct participation of Denver Police Department and Denver District Attorney personnel. The primary investigative personnel are assigned to the Homicide Unit where the best resources reside for this type

of investigation. The scope of the investigation is broad and the focus is on all involved parties. This includes the conduct of the involved officer(s) and the conduct of the person who is shot. Standard investigative procedures are used at all stages of the investigation, and there are additional specific procedures in the Denver Police Department's Operations Manual for officer-involved shootings to further insure the integrity of the investigation. For example, the protocol requires the immediate separation and sequestration of all key witnesses and all involved officers. Involved officers are separated at the scene, transported separately by a supervisor to police headquarters, and sequestered with restricted visitation until a formal voluntary statement is taken. Generally the officers speak with their attorney prior to making their voluntary statement. A log is kept to document who has contact with the officer. This is done to insure totally independent statements and to avoid even the appearance of collusion.

In most cases, the bulk of the criminal phase of the investigation is concluded in the first twelve to twenty-four hours. Among other investigative activities, this includes a thorough processing of the crime scene; a neighborhood canvass to identify all possible witnesses; the taking of written statements from all witnesses, and video-recorded statements from all key witnesses and the involved officer(s). The involved officer(s), like any citizen, have a Constitutional Fifth Amendment right not to make a statement. In spite of this fact, Denver officers have given voluntary sworn statements in every case, without exception, since 1979. Since November of 1983, when the video interview room was first used, each of these statements has been video-recorded. *No other major city police department in the nation can make this statement.*

Officers are trained to properly secure their firearm after an officer-involved shooting. The protocol provides for the firearm to be taken from the officer by crime lab personnel for appropriate testing. The officer is provided a replacement weapon to use pending the completion of the testing. The protocol also allows for any officer to voluntarily submit to intoxicant testing if they chose. The most common circumstance under which an officer might elect to do so would be in a shooting while working at an establishment that serves alcohol beverages. Compelled intoxicant testing can be conducted if there are indications of possible intoxication and legal standards are met.

The Denver Chief of Police and Denver District Attorney commit significant resources to the investigation and review process in an effort to complete the investigation as quickly as practicable. There are certain aspects of the investigation that take more time to complete. For example, the testing of physical evidence by the crime lab -- firearm examination, gunshot residue or pattern testing, blood analyses, and other testing commonly associated with these cases -- is time consuming. In addition, where a death occurs, the autopsy and autopsy report take more time and this can be extended

substantially if it is necessary to send lab work out for very specialized toxicology or other testing. In addition to conducting the investigation, the entire investigation must be thoroughly and accurately documented.

Officer-involved shooting cases are handled by the District Attorney, and the Senior Chief Deputies District Attorney specifically trained for these cases. As a rule, two of these district attorneys respond to each officer-involved shooting. They are notified at the same time as others on the officer-involved shooting call-out list and respond to the scene of the shooting and then to police headquarters to participate in taking statements. They are directly involved in providing legal advice to the investigators and in taking video-recorded statements from citizens and officer witnesses, and from the involved officer(s). They continue to be involved throughout the follow-up investigation.

The Denver District Attorney is immediately informed when an officer-involved shooting occurs, and if he does not directly participate, his involved personnel advise him throughout the investigative process. It is not unusual for the District Attorney to personally respond and participate in the investigation. At the conclusion of the criminal investigation the District Attorney personally makes the filing decision.

If criminal charges are not filed, a decision letter describing the shooting and the legal conclusions is sent to the Chief of Police by the District Attorney, with copies to the involved officer(s), the Mayor, City Council members, the Executive Director of the Department of Safety, other appropriate persons, and the media. If the involved peace officer is from an agency other than DPD, the letter is directed to the head of that agency.

A copy of the decision letter is also posted on the Denver DA website ([www.denverda.org](http://www.denverda.org)) so that members of the public may learn the facts of the incident and the reasons for the decision of the District Attorney. At this time, the case file that is maintained by Denver District Attorney's Office is available and open to the public for review, unless a criminal case is pending concerning the facts of the shooting, and subject to the Colorado Criminal Justice Records Act. Allowing our file to be reviewed permits interested members of the public to learn more about the investigation; to verify that our description of the facts in the decision letter is accurate; to verify that our decision is supported by the facts; and to determine whether they wish to challenge our decision under C.R.S. 16-5-209. Allowing access for review is important to the transparency of our decision making in these important cases, and serves to foster public trust and confidence in the investigative process and in the decisions that are made.<sup>1</sup>

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<sup>1</sup> However, the complete official file of the investigation remains in the custody of the Denver Police Department, which is the custodian of the case

If criminal charges are filed against the officer(s), the charges are filed in compliance with the same procedures as any other criminal filing. In that event, the file maintained by the Denver District Attorney's Office becomes available and open to the public for review at the conclusion of the criminal prosecution in the same manner as mentioned above.

## THE DECISION

By operation of law, the Denver District Attorney is responsible for making the criminal filing decision in all officer-involved shootings in Denver.

The same standard that is used in all criminal cases in Denver is applied to the review of officer-involved shootings. The filing decision analysis involves reviewing the totality of the facts developed in the criminal investigation and applying the pertinent Colorado law to those facts. The facts and the law are then analyzed in relation to the criminal case filing standard. For criminal charges to be filed, the District Attorney must find that there is a reasonable likelihood that all of the elements of the crime charged can be proven beyond a reasonable doubt, unanimously, to twelve jurors, at trial, after considering reasonable defenses. If this standard is met, criminal charges will be filed.

One exception to the Denver District Attorney making the filing decision is if it is necessary to use the Denver Statutory Grand Jury. The District Attorney will consider it appropriate to refer the investigation to a grand jury when it is necessary for the successful completion of the investigation. It may be necessary in order to acquire access to essential witnesses or tangible evidence through the grand jury's subpoena power, or to take testimony from witnesses who will not voluntarily cooperate with investigators or who claim a privilege against self-incrimination, but whom the district attorney is willing to immunize from prosecution on the basis of their testimony. The grand jury could also be used if the investigation produced significant conflicts in the statements and evidence that could best be resolved by grand jurors. If the grand jury is used, the grand jury could issue an indictment charging the officer(s) criminally. To do so, at least nine of the twelve grand jurors must find probable cause that the defendant committed the charged crime. In order to return a "no true bill," at least nine grand jurors

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records. If we have made a decision not to file criminal charges, the Denver Police Department begins an *administrative* investigation and review of the incident. This may result in the gathering of additional information and the production of additional documents concerning the incident. The Denver District Attorney's Office is not involved in the administrative investigation and does not receive the additional information or investigative materials developed in that investigation. At the end of the administrative review, therefore, the files maintained by the Denver Police Department pertaining to the shooting will likely contain more information than the criminal investigation file.

must vote that the probable cause proof standard has not been met. In Colorado, the grand jury can now issue a report of their findings when they return a no true bill or do not reach a decision -- do not have nine votes either way. The report of the grand jury is a public document.

A second exception to the Denver District Attorney making the filing decision is when it is necessary to have a special prosecutor appointed. The most common situation is where a conflict of interest or the appearance of impropriety is present. As an example, if an officer involved in the shooting is related to an employee of the Denver District Attorney's Office, or an employee of the Denver District Attorney's Office is involved in the shooting. Under these circumstances, an appearance of impropriety may exist if the Denver District Attorney's Office handled the case. This may cause our office to seek a special prosecutor.

## THE COLORADO LAW

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 causing injury or death to another human being is generally prohibited as assault or murder in Colorado, the Criminal Code specifies certain circumstances in which the use of physical force or deadly physical force is justified. As there is generally no dispute that the officer intended to shoot at the person who is wounded or killed, the determination of whether the conduct was criminal is primarily a question of legal justification.

Section 18-1-707 of the Colorado Revised Statutes provides that while effecting or attempting to effect an arrest, a peace officer is justified in using deadly physical force upon another person . . . when he reasonably believes that it is necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force. Therefore, the question presented in most officer-involved shooting cases is whether, at the instant the officer fired the shot that wounded or killed the person, the officer reasonably believed, and in fact believed, that he or another person, was in imminent danger of great bodily injury or death from the actions of the person who is shot. In order to establish criminal responsibility for knowingly or intentionally shooting another, the state must prove beyond a reasonable doubt that the person doing the shooting either did not really believe he or another was in imminent danger, or, if he did hold such belief, that belief was, in light of the circumstances, unreasonable.

The statute also provides that a peace officer is justified in using deadly physical force upon another person . . . when he reasonably believes that it is necessary to effect an arrest .

. . of a person whom he reasonably believes has committed or attempted to commit a felony involving the use or threatened use of a deadly weapon; or is attempting to escape by the use of a deadly weapon; or otherwise indicates, except through motor-vehicle violation, that he is likely to endanger human life or to inflict serious bodily injury to another unless apprehended without delay.

In Colorado, deadly physical force means force the intended, natural, or probable consequence of which is to produce death and which does in fact produce death. Therefore, if the person shot does not die, by definition, only physical force has been used under Colorado law.

#### GENERAL COMMENTS

The following statement concerns issues that are pertinent to all officer-involved shootings.

The great majority of officer-involved shootings in Denver, and throughout the country, ultimately result from what is commonly called the split-second decision to shoot. It is often the culmination of a string of decisions by the officer and the citizen that ultimately creates the need for a split-second decision to shoot. The split-second decision is generally made to stop a real or perceived threat or aggressive behavior by the citizen. It is this split-second time frame which typically defines the focus of the criminal-review decision, not the string of decisions along the way that placed the participants in the life-or-death final frame, although these certainly may be important in a case as well.

When a police-citizen encounter reaches this split-second window, and the citizen is armed with a deadly weapon, the circumstances generally make the shooting justified, or at the least, difficult to prove criminal responsibility under the criminal laws and required legal levels of proof that apply. The fact that no criminal charges are fileable in a given case is not necessarily synonymous with an affirmative finding of justification, or a belief that the matter was in all respects handled appropriately from an administrative viewpoint. It is simply a determination that there is not a reasonable likelihood of proving criminal charges beyond a reasonable doubt, unanimously, to a jury. This is the limit of the District Attorney's statutory authority in these matters. For these reasons, the fact that a shooting may be "controversial" does not mean it has a criminal remedy. The fact that the District Attorney may feel the shooting was avoidable or "does not like" aspects of the shooting, does not make it criminal. In these circumstances, remedies, if any are appropriate, may be in the administrative or civil arenas. The District Attorney has no administrative or civil authority in these matters. Those remedies are primarily the purview of the City government, the Denver Police Department, and private civil attorneys.

Research related to officer-involved shootings indicates that criminal charges are filed in approximately one in five hundred (1-in-500) shootings. And, jury convictions are rare in the filed cases. In the context of officer-involved shootings in Denver (approximately 8 per year), this ratio (1-in-500) would result in one criminal filing in 60 years. With District Attorneys now limited to three 4-year terms, this statistic would mean there would be one criminal filing during the combined terms of 5 or more District Attorneys.

In Denver, there have been three criminal filings in officer-involved shootings in the past 40 years, spanning seven District Attorneys. Two of the Denver officer-involved shootings were the result of on-duty, work related shootings. One case was in the 1970s and the other in the 1990s. Both of these shootings were fatal. The cases resulted in grand jury indictments. The officers were tried and found not guilty by Denver juries. The third criminal filing involved an off-duty, not in uniform shooting in the early 1980s in which one person was wounded. The officer was intoxicated at the time of the shooting. The officer pled guilty to felony assault. This case is mentioned here, but it was not in the line of duty and had no relationship to police work. In 2004, an officer-involved shooting was presented by the District Attorney to the Denver Statutory Grand Jury. The Grand Jury did not indict. A brief report was issued by the Grand Jury.

Based on the officer-involved shooting national statistics, there is a very high likelihood that individual District Attorneys across the country will not file criminal charges in an officer-involved shooting during their entire tenure. It is not unusual for this to occur. In Denver, only two of the past seven District Attorneys have done so. This, in fact, is statistically more filings than would be expected. There are many factors that combine to cause criminal prosecutions to be rare in officer-involved shootings and convictions to be even rarer. Ultimately, each shooting must be judged based on its unique facts, the applicable law, and the case filing standard.

The American Bar Association's *Prosecution Standards* state in pertinent part: "A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction. In making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved or to a desire to enhance his or her record of convictions. Among the factors the prosecutor may properly consider in exercising his or her discretion is the prosecutor's reasonable doubt that the accused is in fact guilty." The National District Attorneys Association's *National Prosecution Standards* states in pertinent part: "The prosecutor should file only those charges which he reasonably believes can be substantiated by admissible evidence at trial. The prosecutor should not attempt to

utilize the charging decision only as a leverage device in obtaining guilty pleas to lesser charges.” The standards also indicate that “factors which should **not** be considered in the charging decision include the prosecutor’s rate of conviction; personal advantages which prosecution may bring to the prosecutor; political advantages which prosecution may bring to the prosecutor; factors of the accused legally recognized to be deemed invidious discrimination insofar as those factors are not pertinent to the elements of the crime.”

Because of the difference between the criminal, administrative, and civil standards, the same facts can fairly and appropriately lead to a different analysis and different results in these three uniquely different arenas. While criminal charges may not be fileable in a case, administrative action may be very appropriate. The legal levels of proof and rules of evidence that apply in the criminal-law arena are imprecise tools for examining and responding to the broader range of issues presented by officer-involved shootings. Issues related to the tactical and strategic decisions made by the officer leading up to the split-second decision to shoot are most effectively addressed by the Denver Police Department through the Use of Force Review Board and the Tactics Review Board process and administrative review of the shooting.

The administrative-review process, which is controlled by less stringent legal levels of proof and rules than the criminal-review process, provides both positive remedial options and punitive sanctions. This process also provides significantly broader latitude in accessing and using information concerning the background, history, and job performance of the involved officer. This type of information may have limited or no applicability to the criminal review, but may be very important in making administrative decisions. This could include information concerning prior officer-involved shootings, firearm discharges, use of non-lethal force, and other conduct, both positive and negative.

The Denver Police Department’s administrative review of officer-involved shootings improves police training and performance, helps protect citizens and officers, and builds public confidence in the department. Where better approaches are identified, administrative action may be the only way to effect remedial change. The administrative review process provides the greatest opportunity to bring officer conduct in compliance with the expectations of the department and the community it serves. Clearly, the department and the community expect more of their officers than that they simply conduct themselves in a manner that avoids criminal prosecution.

There are a variety of actions that can be taken administratively in response to the department’s review of the shooting. The review may reveal that no action is

required. Frankly, this is the case in most officer-involved shootings. However, the department may determine that additional training is appropriate for all officers on the force, or only for the involved officer(s). The review may reveal the need for changes in departmental policies, procedures or rules. In some instances, the review may indicate the need for changing the assignment of the involved officer, temporarily or permanently. Depending on the circumstances, this could be done for the benefit of the officer, the community or both. And, where departmental rules are violated, formal discipline may be appropriate. The department’s police training and standards expertise makes it best suited to make these decisions.

The Denver Police Department’s Use of Force Review Board and the Tactics Review Board’s after-incident, objective analysis of the tactical and strategic string of decisions made by the officer that lead to the necessity to make the split-second decision to shoot is an important review process. It is clearly not always possible to do so because of the conduct of the suspect, but to the extent through appropriate tactical and strategic decisions officers can de-escalate, rather than intensify these encounters, the need for split-second decisions will be reduced. Once the split-second decision time frame is reached, the risk of a shooting is high.

It is clear not every officer will handle similar situations in similar ways. This is to be expected. Some officers will be better than others at defusing potentially-violent encounters. This is also to be expected. To the degree officers possess skills that enhance their ability to protect themselves and our citizens, while averting unnecessary shootings, Denver will continue to have a minimal number of officer-involved shootings. Denver officers face life-threatening confrontations hundreds of times every year. Nevertheless, over the last 20 years officer-involved shootings have averaged less than eight annually in Denver. These numbers are sharply down from the 1970s and early 1980s when there were 12-to-14 shootings each year.

Skill in the use of tactics short of deadly force is an important ingredient in keeping officer-involved shootings to a minimum. Training Denver officers receive in guiding them in making judgments about the best tactics to use in various situations, beyond just possessing good firearms proficiency, is one of the key ingredients in minimizing unnecessary and preventable shootings. Denver police officers handle well over a million calls for service each year and unfortunately in responding to these calls they face hundreds of life-threatening encounters in the process. In the overwhelming majority of these situations, they successfully resolve the matter without injury to anyone. Clearly, not all potentially-violent confrontations with citizens can be de-escalated, but officers do have the ability to impact the direction and outcome of many of the situations they handle, based on the critical decisions they

make leading up to the deadly-force decision. It should be a part of the review of every officer-involved shooting, not just to look for what may have been done differently, but also to see what occurred that was appropriate, with the ultimate goal of improving police response.

#### RELEASE OF INFORMATION

Officer-involved shootings are matters of significant and legitimate public concern. Every effort must be made to complete the investigation and make the decision as quickly as practicable. The Denver Protocol has been designed to be as open as legal and ethical standards will permit. "Fair Trial -- Free Press" standards and "The Colorado Rules of Professional Conduct" limit the information that can be released prior to the conclusion of the investigation, and the "Colorado Criminal Justice Records Act" dictates that the public interest be considered before releasing criminal justice records.

Officer-involved shooting cases always present the difficult issue of balancing the rights of the involved parties and the integrity of the investigation with the public's right to know and the media's need to report the news. The criminal investigation and administrative investigation that follows can never keep pace with the speed of media reporting. This creates an inherent and unavoidable dilemma. Because we are severely restricted in releasing facts before the investigation is concluded, there is the risk that information will come from sources that may provide inaccurate accounts, speculative theories, misinformation or disinformation that is disseminated to the public while the investigation is progressing. This is an unfortunate byproduct of these conflicted responsibilities. This can cause irreparable damage to individual and agency reputations.

It is our desire to have the public know the full and true facts of these cases at the earliest opportunity, but we are required by law, ethics, and the need to insure the integrity of the investigation to only do so at the appropriate time.

#### CONCLUSION

The protocol that is used in Denver to investigate and review officer-involved shootings was reviewed and strengthened by the Erickson Commission in 1997, under the leadership of William Erickson, former Chief Justice of the Colorado Supreme Court. The report released after the 15-month-long Erickson Commission review found it to be one of the best systems in the country for handling officer-involved shootings. We recognize there is no "perfect" method for handling officer-involved shooting cases. We continue to evaluate the protocol and seek ways to strengthen it.

We encourage any interested person to read the decision letter in these cases, and if desired, to review the investigative case file at our office to learn the facts. We find that when the actual facts are known a more productive discussion is possible.

*Mitchell R. Morrissey*

*Denver District Attorney*

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