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BILL THEIBAUT  
District Attorney

OFFICE OF THE DISTRICT ATTORNEY  
TENTH JUDICIAL DISTRICT, COLORADO

December 9, 2009

VIA HAND DELIVERY

Sheriff Kirk M. Taylor  
Pueblo County Sheriff's Office  
909 Court Street  
Pueblo, CO 81003

Re: Decision Letter  
Robert John Borrego Jr.

Sheriff Taylor:

The investigation and legal analysis regarding the above matter have been completed. My decision, based on criminal law standards, does not limit administrative action by the Pueblo County Sheriff's Office where non-criminal issues can be reviewed, or a civil action where less stringent laws, rules, and legal levels of proof apply.

**Background**

Effective January 1, 2006,<sup>1</sup> several law enforcement agencies in Pueblo County entered into a revised "Officer-Involved Incident Protocol of The Tenth Judicial District" (CIT agreement). Signatories to the CIT agreement include the Pueblo Police Department, the Pueblo County Sheriff's Office, the Colorado State Patrol, and the Colorado Bureau of Investigation (CBI). The CIT agreement establishes a team approach to the investigation of certain critical incidents involving peace officers. Such a team provides any participating law enforcement agency requesting assistance proficient investigators to assist in the investigation of a critical incident to enable a "thorough, unbiased investigation of any critical incident involving a law enforcement officer." Notably, the protocol adopted in the CIT agreement recognizes that "[A]long with an open investigation for public evaluation, the incident investigators and agency managers must understand the legal rights, obligations and authority of the agencies and individuals involved." *Officer-Involved Incident Protocol of the Tenth Judicial District, Statement of Pueblo County Law Enforcement Agencies.*

<sup>1</sup> Prior to its effective date of January 1, 2006, the original CIT agreement was revised on December 21, 2005. The revisions are not material or relevant to this inquiry.



## **Statement of Investigation and Facts**

### ***Triggering the CIT Agreement***

The Pueblo County Sheriff's Office invoked the agreement's investigative protocols for this incident. The investigation was conducted by investigators from the Pueblo County Sheriff's Office, the CBI and District Attorney's Office.<sup>2</sup> Reports were received from agencies involved in the investigation as well as diagrams of the crime scene.

### ***Facts***

#### **The Charges against Borrego**

On May 8, 2009, a warrant for the arrest of Robert John Borrego Jr. (Borrego) (DOB: July 8, 1991) was issued by the district court. The warrant set bail in the amount of \$50,000 cash, property, surety. Borrego, 17 years old, got into a fight outside the Colorado State Fairgrounds following a tough-man competition and allegedly stabbed another juvenile with a butterfly knife.

Thereafter, a complaint and information was filed directly in the criminal division of the district court alleging that Borrego committed the criminal offense of assault in the second degree in violation of section 18-3-203(1)(b), C.R.S.; and possession of an illegal weapon and harassment, in violation of sections 18-12-102(4), C.R.S. and 18-9-111(1)(a), C.R.S., respectively.<sup>3</sup>

#### **The Detention of Borrego before May 26**

Prior to the filing of the complaint and information, Borrego was confined in the Pueblo Youth Center (PYC), a facility for juvenile offenders. Following a motion to detain Borrego in the Pueblo County Detention Facility (jail), based upon the direct file, the district court ordered that Borrego be detained "in Pueblo County Jail" (May 26, 2009). Moreover, an order was entered terminating the juvenile court proceedings, bail was set at \$50,000 cash, property, surety, and a return date was set for June 1, 2009.

#### **Confinement of Borrego-May 26**

Borrego was booked into jail. He filled out and signed a pre-admission medical information sheet wherein he answered in the affirmative the question: Have you ever attempted to harm

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<sup>2</sup> This is the seventh investigation involving the CIT agreement.

<sup>3</sup> Pursuant to section 19-2-517(1)(a)(II)(A) and (C), C.R.S. a district attorney may file directly if the juvenile is fourteen years of age or older at the time of the commission of the alleged offense and is alleged to have committed a felony enumerated as a crime of violence and is alleged to have used, or possessed and threatened the use of, a deadly weapon during the commission of the felony offenses against the person.

yourself?" His explanation was that he did so "Friday" (presumably referring to May 22 while at PYC). This information sheet was reviewed by a medical officer. As a result, Borrego was placed on suicide precaution or watch.<sup>4</sup>

#### **Confinement of Borrego-May 27**

Borrego was housed on the second floor of the jail in a medical cell. A mental health initial needs assessment by Terry Hand, a mental health therapist, dated May 27 also indicated that on May 22 Borrego banged his head "4X against ... brick wall" while at PYC. Her diagnostic impression of Borrego was, in part: Axis I, adjustment disorder with depressed mood; and Axis II, antisocial personality traits. Her plan for Borrego stated: "Cleared from suicide precaution. House per classification." Notably, her progress notes of even date made it clear that Borrego "denied suicidal thoughts/plans/intent at this time." Thereafter, she cleared Borrego from suicide precaution or watch, but he remained on periodic observations.

#### **Confinement of Borrego-June 1**

Borrego was moved to the third floor of the jail on June 1 and was the only inmate housed in 3E Wing.<sup>5</sup> A diagram of 3E Wing is attached to this decision letter. Notably, the toilet cannot be seen from the doorway because of a metal barrier, which is in the shape of an "L".

#### **Confinement of Borrego-June 10**

A health assessment of Borrego was completed by a health provider on June 10. There were no complaints on the part of Borrego and no health problems were revealed.

#### **Confinement of Borrego-June 15**

At approximately 10:01 p.m. while conducting a routine wing observation on 3E Wing, detention officers working on the third floor of the jail discovered Borrego inside 3E Wing unresponsive and with a jail issued bed sheet tied around his neck. Detention officers administered CPR, Automatic External Defibrillator (AED), and applied oxygen with a bag valve mask to Borrego in an effort to resuscitate him. American Medical Response (AMR) emergency services arrived to take over the resuscitation. Borrego was transported to Parkview Medical Center and later was pronounced dead by medical staff at the hospital.

The last physical and verbal observation of Borrego before his body was discovered occurred at 9:08 p.m. June 15 and Borrego appeared fine. Notably, at around 9:00 p.m. Borrego was taken out of his cell for a telephone visit in the dayroom. While returning to his cell room, Borrego was trying to communicate with other inmates in another housing unit. He was told

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<sup>4</sup> Notably, an inmate medical assessment was performed by medical officer Brandon T. Lozano on May 27 which confirmed that Borrego had attempted suicide "Friday by banging head on wall."

<sup>5</sup> A juvenile is required to be physically segregated from adult offenders. Section 19-2-508(4)(b), C.R.S.

by a detention officer not to communicate with other inmates because the detention staff had to keep him away from adult inmates. Borrego was taken back to his housing unit. While detention officers were conducting an observation next door to Borrego's housing unit, the officers heard a loud bang or thud in Borrego's cell room. Borrego was told to not behave that way and to sit on his bunk. Borrego complied with the directive.

#### **On-scene Note and Autopsy**

An investigation of the crime scene revealed a note written by Borrego, which indicated that he was contemplating suicide.

Dr. Kelly Lear-Kaul, an expert forensic pathologist from Arapahoe County, Colorado, opined that the cause of death was asphyxia due to hanging by ligature.

#### **Procedural Considerations**

##### ***Administrative Actions***

An administrative review is controlled by less stringent legal levels of proof and rules than a *criminal review* and can provide both positive remedial options and punitive sanctions. This process can be said to result from an agency's "internal affairs" investigation and provides significantly broader latitude in accessing and using information concerning the background, history and job performance (prior conduct) of the involved officer(s). Issues related to the strategic decisions made by the involved officer(s) leading up to the critical incident are most effectively addressed by the department's administrative review. This type of information may have limited or no applicability to *criminal reviews*, but is very important in making administrative decisions.

There are a variety of actions that can be taken administratively by the department in response to its review. On the one hand, the department's review may reveal that no action is required. On the other hand, the department may determine that rules were violated and that formal discipline may be appropriate. Or, the department may make findings that support additional training for all officers on the force, or the need for changes in departmental policies, procedures and rules. In summary, departmental action can be taken for the benefit of the community, department, its' officers or the involved officer.

##### ***Civil Law versus Criminal Law***

The civil law provides remedies for essentially private wrongs — actions in which the state may not have an interest. Monetary damages can be sought under a civil suit for a wrongful act that violates a legal right of an injured party. Plaintiffs in civil litigation are required to prove their case by a preponderance of the evidence or some lesser standard of proof;

although some cases have indicated that “clear and convincing evidence” may be the required standard of proof.

A crime normally involves a wrongful act specifically prohibited by the criminal law. In most cases the law requires the wrongful act be accompanied by criminal intent. In other words, a person intentionally commits a prohibited act. Of course, a criminal action requires that the prosecutor prove its case “beyond a reasonable doubt” — the highest standard of proof. Notably, the criminal law and civil law can overlap. Conduct by a person that constitutes a crime can also involve a tort (a wrongful act that violates a legal right of an injured party).

It is the general responsibility of a district attorney to review cases prior to placing them into the judicial branch’s court system. Put simply, a district attorney has a criminal “charging” responsibility. Charging may be through the complaint/information process or the grand jury presentment process. The charging “discretion” reposed in a district attorney is an awesome power to be used judiciously. If ever justice is to be established in a community, it will first come from a local district attorney’s charging practices. This is the area of discretionary power that best defines a prosecutor’s personal criminal justice philosophy. Accordingly, if there is reasonable likelihood or probability of conviction, a district attorney may conclude that one has committed a chargeable offense. Among other things, this standard takes into account the quantity, quality, admissibility and credibility of available evidence.

## **Legal Analysis – Criminal Law**

### ***Duties of the Sheriff***

#### **Custody of the Jails and Prisoners**

The office of Sheriff is created in the Colorado Constitution. Colo. Const. art. XIV, sec. 8. Where a sheriff’s office is created under a state constitution the sheriff draws his authority from the state constitution and from state statutory language. *70 Am. Jur. 2d Sheriffs, Police and Constables, section 30*. For example, the qualifications of a sheriff are set forth under Colo. Const. art. XIV, sec. 8.5 and section 30-10-501.5, C.R.S., while training requirements are found at section 30-10-501.6, C.R.S. As a general rule sheriffs, within the scope of their respective counties (in this case Pueblo County has the same boundaries as the Tenth Judicial District), are given power and have the duty, among other things: as a peace officer (section 16-2.5-101, C.R.S.) to prevent and detect crime, preserve the peace and public order, and enforce the criminal laws, *e.g.*, section 30-10-516, C.R.S.; to “... serve and execute, according to law, all processes, writs, precepts, and orders issued ... by lawful authority and to him directed, and [he] shall serve the several courts of record held in his county,” sections 30-10-515, 30-1-104, and 13-45-104 C.R.S.; and **to have charge and custody of the jails**

**and prisoners of his county**, and to transport prisoners, sections 30-10-511 and 514, C.R.S. and sections 17-26-102 and 103 C.R.S.

#### **Custody of Juveniles Charged as Adults**

No jail shall receive a juvenile unless the juvenile has been ordered by the court to be held for criminal proceedings as an adult. Sections 17-26-121 and 19-2-508(4)(a), C.R.S.

During the 2009 legislative session, HB 09-1321 was enacted into law effective upon the signature of the governor, which was June 1, 2009.<sup>6</sup> According to prime sponsor of the bill Representative Claire Levy (D-Boulder), the legislation was an attempt to give “some thought ... to whether a juvenile should be moved to jail when they get charged with an adult crime. The prosecutor will have to consult with the defense attorney and consider a host of factors in determining where to hold him until the case is resolved.”<sup>7</sup> Representative Levy argues that juveniles who face adult charges are in jail, segregated from adults. If no other juveniles are in jail, the juvenile, in essence, sits in what amounts to solitary confinement. Carrying the logic out, she contends that being in isolation “causes anxiety and paranoia and exacerbates existing mental disorders. These youth are 36 times more likely to commit suicide in an adult jail than in a juvenile detention facility.”<sup>8</sup>

#### **Policies of the Jail: Suicide Prevention/Offender Accountability**

The jail provides guidelines for the management of potentially suicidal inmates. Pueblo County Detention Bureau Policy and Procedure Number 3.4.9, dated 6-17-2004 (reviewed 5-6-09). Essentially, an inmate is screened at the time of housing for both obvious and subtle signs of potential for suicide. They are screened again during their initial classification interview. Generally, if an inmate is placed on suicide watch it can be in a designated close observation area. A chronological log is maintained by the suicide watch officer who logs the inmate’s behavior and other relevant information at periodic intervals. Pueblo County Detention Bureau Policy and Procedure Number 3.4.9, *supra*.

Moreover, it is the policy of the jail “to maintain safe, secure facility operations through a comprehensive system of twenty-four-hour offender accountability that includes counts, record-keeping systems, and other internal supervision programs.” Pueblo County Detention Bureau Policy and Procedure Number 3.1.10, dated 8-1-1994, revised 1-31-2002 (reviewed 5-6-09). Most importantly, staff is on duty at critical posts 24 hours a day in order to supervise, observe, and interact with inmates. “Staff will be available within sight and sound to assist other staff responding to an emergency.” Pueblo County Detention Bureau Policy and Procedure Number 3.1.10, *supra*.

<sup>6</sup> Colo. Session Laws 2009, Ch. 351, Sec. 19-2-508(3)(c), at 1833; Colo. Const. art. V, sec. 1(3) and sec. 19.

<sup>7</sup> “Deadly sentences for juvies,” *The Denver Post*, August 30, 2009.

<sup>8</sup> *Id.*

## **Conclusions**

### ***HB 09-1321***

HB 09-1321 did not apply to Borrego's case. Even if it had, the bill does not, in my judgment, effectuate the original, ultimate intent of the legislation – having a juvenile confined in a juvenile facility, not a jail. Even though HB 09-1321 requires a district attorney and defense counsel to consider the factors set forth in 19-2-508(3)(c)(II)(A-J), C. R.S., often there is no agreement reached between them, as in this case, which results in the juvenile being ordered by the court to be held in jail. In practice, this kind of consultation between the prosecution and defense occurred prior to HB 09-1321.

If it was the intent of the General Assembly to require a hearing before a juvenile is confined in jail, it would behoove the General Assembly to expressly state a hearing requirement so that a court can consider the host of factors set forth in 19-2-508(3)(c)(II)(A-J), C.R.S., in determining whether jail is the appropriate place of confinement. Colorado law on May 26, 2009, did not disallow a hearing before Borrego was transferred to jail. Notably, Colorado law on June 15, 2009, does not assure a hearing before a juvenile is transferred from a detention facility to a jail.

### ***Legal Confinement***

The jail received Borrego only after it was ordered by the district court on May 26, 2009, that he be held for criminal proceedings as an adult. Section 19-2-508(4)(a), C.R.S. At admission to the jail and subsequent thereto, the jail physically segregated Borrego from adult offenders. Section 19-2-508(4)(b), C.R.S.

### ***Jail Policies***

Jail policies were followed during the three-week confinement of Borrego. Pueblo County Detention Bureau Policy and Procedure Number 3.4.9, dated 6-17-2004 (reviewed 5-6-09) and Number 3.1.10, dated 8-1-1994, revised 1-31-2002 (reviewed 5-6-09).

Upon entering the jail, Borrego was placed on suicide precaution or watch. He was housed on the second floor of the jail in a medical cell. A mental health initial needs assessment made it clear that Borrego “denied suicidal thoughts/plans/intent at this time.” Thereafter, he was cleared from suicide precaution or watch, but remained on periodic observations.

Borrego was moved to the third floor of the jail and was the only inmate housed in 3E Wing. A health assessment of Borrego was completed by a health provider. There were no complaints on the part of Borrego and no health problems revealed. At approximately 10:01 p.m. June 15, 2009, while conducting a routine wing observation on 3E Wing detention

Sheriff Taylor  
December 9, 2009  
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officers working on the third floor of the jail discovered Borrego inside 3E Wing unresponsive and with a jail issued bed sheet tied around his neck. Detention officers administered CPR, Automatic External Defibrillator (AED), and applied oxygen with a bag valve mask to Borrego in an effort to resuscitate him. AMR emergency services arrived to take over the resuscitation. Borrego was transported to Parkview Medical Center and later was pronounced dead by medical staff at the hospital.

The last physical and verbal observation of Borrego before his body was discovered occurred at 9:08 p.m. June 15, 2009, and Borrego appeared fine. Notably, at around 9:00 p.m. Borrego was taken out of his cell for a telephone visit in the dayroom. While returning to his cell room, Borrego was trying to communicate with other inmates in another housing unit. Borrego was told by a detention officer not to communicate with other inmates because the detention staff had to keep him away from adult inmates. Borrego was taken back to his housing unit. While detention officers were conducting an observation next door to Borrego's housing unit, the officers heard a loud bang or thud in Borrego's cell room. Borrego was told to not behave that way and to sit on his bunk. Borrego complied with the directive.

### **Decision<sup>9</sup>**

Taking into consideration the quantity, quality, admissibility and credibility of available evidence I conclude that there is not a reasonable likelihood or probability that a crime was committed or that a chargeable offense occurred in the unfortunate, untimely death of the juvenile Robert John Borrego Jr. that can be proven beyond a reasonable doubt, unanimously, to a jury. Accordingly, no charges will be filed.

Sincerely,



Bill Thiebaut  
District Attorney

BT:rd  
Cc: Agent Marc Micciche, CBI

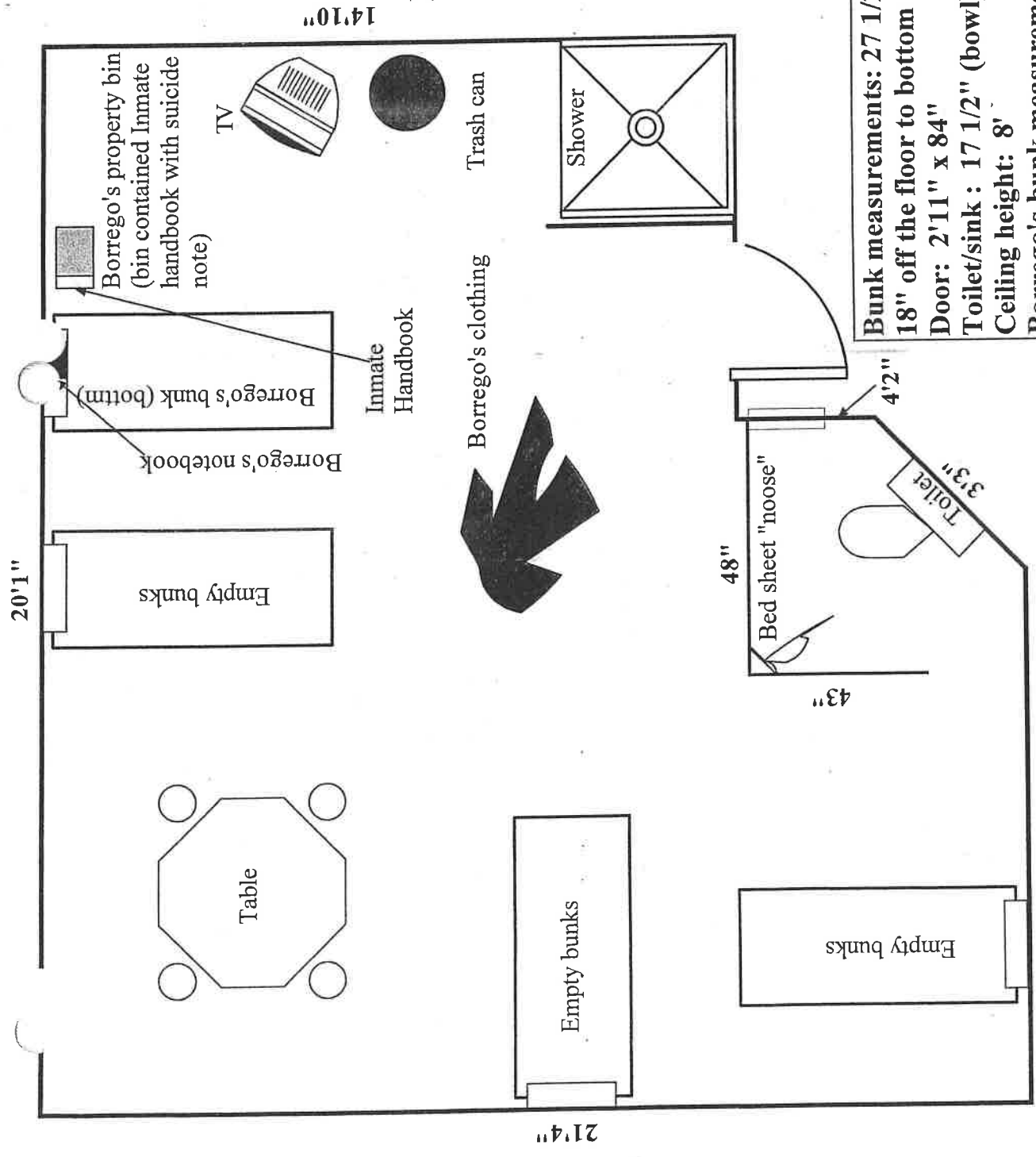
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<sup>9</sup> According to the CIT agreement, as soon as practical after the critical incident and receipt of the investigative report, the District Attorney "...shall determine whether anyone committed a crime. The District Attorney shall communicate his findings, conclusions of law and decision via a decision letter to the chief law enforcement officer of the venue and employer agencies involved. ." *Officer-Involved Incident Protocol of the Tenth Judicial District, District Attorney Responsibilities*, at page 37.





Pueblo County Sheriff's Office  
 909 Court St.  
 Pueblo, CO 81003  
 Kirk M. Taylor, Sheriff  
 CR#09D1713



Bunk measurements: 27 1/2" wide x 60" tall x 80 3/4" long  
 18" off the floor to bottom bunk, 54" to bottom of top bunk  
 Door: 2'11" x 84"  
 Toilet/sink: 17 1/2" (bowl) 18" (sink)  
 Ceiling height: 8'  
 Borrego's bunk measurement from wall with TV: 53"  
 Second bunk from TV wall: 99"  
 Table measurements: 40" (table) 12" (stools)  
 Wall barrier: 60" tall with 10 1/2" gap from floor to bottom of barrier

Drawn by Detective Dave Clements  
 June 24, 2009  
 Not to Scale