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District Attorney

OFFICE OF THE DISTRICT ATTORNEY
TENTH JUDICIAL DISTRICT, COLORADO

February 15, 2012

VIA HAND DELIVERY

Chief Luis Velez
Pueblo Police Department
Pueblo Municipal Justice Center
200 S. Main Street
Pueblo, CO 81003

Re: Decision Letter
Officer-Involved Incident Concerning
Officer Stephen Biggs
Officer Thomas DeCesaro

Dear Chief Velez:

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 Police Department where non-criminal issues can be reviewed, or a civil action where less stringent laws, rules, and legal levels of proof apply.

I. Background

Effective January 1, 2006,¹ several law enforcement agencies in Pueblo County entered into a revised "Officer-Involved Incident Protocol of the Tenth Judicial District" (CIT agreement).

Among those who are signatories to the CIT agreement include the Pueblo Police Department and the Pueblo County Sheriff's Office (the Colorado Bureau of Investigation (CBI) is a signatory; in this case it conducted testing of evidence). 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

¹ 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.



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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.*

II. Statement of Investigation and Facts

A. Triggering the CIT Agreement

The Pueblo Police Department invoked the CIT agreement’s investigative protocols for this incident. The investigation was conducted by investigators from the Pueblo Police Department, the Pueblo County Sheriff’s Office, and the District Attorney’s Office.² Reports, photographs, and diagrams of the scene attached to this decision letter, were received from agencies involved in the investigation as well as an autopsy report prepared by a forensic pathologist.

B. Facts

1. The Call

At 3:14 a.m. on Thursday, December 22, 2011, Pueblo Police Department dispatch received a call from Pamela Hernandez reporting a male-female disturbance where a male had a deadly weapon, a knife. The location of the alleged incident was E. 8th Street and Monument on the Eastside in Pueblo, Colorado. Heavy snowfall was falling and accumulating at the scene and throughout the Pueblo County vicinity.

2. Police Officers Dispatched

Pueblo Police Officers Thomas DeCesaro (DeCesaro) and Antoinette Ramos (Ramos) were dispatched at 3:15:48 a.m. to the location of the alleged incident from their locations on the Southside of Pueblo. Both officers were en route in separate marked police vehicles at 3:16:46. At 3:18:27 Officer Stephen Biggs (Biggs) was added to the call and proceeded to the scene in a separate marked police vehicle. As the officers were en route the dispatcher aired “male has knife to her throat.”

3. Officers Arrive at the Scene

Biggs

Biggs was the first to arrive at the scene at 3:31:19 a.m. Notably, he was in full uniform and in a marked police vehicle (#932). He parked his police vehicle on E. 8th Street, just east of N. Monument facing northeast (Attached are three diagrams of the crime scene).

² This was the ninth investigation involving the CIT agreement.

Before Biggs exited his vehicle he could see the male and female [who were standing on the sidewalk on the northeast corner of the intersection, on a step in front of the recessed rock façade of the building's southwest corner], "both facing out away from the building towards me ... the female is in the man's arms ... with one arm on her lower body and an upper arm ... just below her chest, actually had a knife in his hand ... pressed against her throat." ³

Exiting his vehicle Biggs drew his firearm and flashlight, positioned himself on the sidewalk near the traffic-light pole on the northeast corner of the intersection. He gave oral commands to the male to drop the knife, but "he's not listening." According to Biggs, he gave several commands to "drop the weapon," "drop the knife," but the male was not responding. The female was crying loudly and the male appeared to be talking to the female but Biggs could not hear what the male was saying to her.

At about that time Biggs noticed DeCesaro, who also was in full uniform, and DeCesaro's marked police vehicle (#119) off to Biggs' left side (DeCesaro arrived at the scene at 3:31:46 a.m., his vehicle faced north on N. Monument; and he was standing to the left of and in front of his vehicle approximately 10-12 feet from the male and female). ⁴ Biggs was standing on the curb — on the edge of the curb line close to E. 8th Street next to the traffic-light pole. He also was approximately 10-12 feet from the male and female. He could hear DeCesaro say over the radio, "We need more officers up here. We need a Sergeant up here." DeCesaro asked for a rifle at the scene. Biggs continued to give oral commands to the male to drop the knife and DeCesaro was giving the male the same oral commands.

Biggs observed the male moving the knife from one side of the female's neck to the other side of her neck and "pushing the knife VERY hard into her neck ... causing a dimple ... in the woman's neck." He then asked the male: "What do you want us to do?" The male tells the female that he wants the officers to back up. The female repeats this: "He wants you to back up!" Then Biggs take a step off the curb down onto the street and put his flashlight away. "O.K. what else would you like us to do?" Biggs asks the male. The male whispers to the female and then she states: "He wants you to back up!" Biggs states "I'm not taking any further steps back!"

About this time Officer Derek Wyberg (Wyberg), who is also in full uniform, arrives at the scene at 3:34:14 a.m. and exits his marked police vehicle (#012). Wyberg's vehicle was parked facing east in the intersection, (as noted on the attached diagrams). Wyberg positions himself to the right (east) of Biggs and was holding a shotgun in his hand. The

³ Officers Stephen Biggs' and Thomas DeCesaro's quoted remarks are from transcripts of two separate interviews conducted by Pueblo Police Department Det. Cody Wager and Pueblo County Sheriff's Office Sgt. Warren Watts, after the incident.

⁴ DeCesaro's police vehicle had its video camera running during the episode and captured DeCesaro exiting his vehicle and standing in full view for approximately two minutes before he fired shots at the male (Mr. Noriega).

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male and female became agitated when they saw the shotgun in Wyberg's hand. The male pulls the female closer to him and states: "They're not going to shoot me. You're too close to me."

Just then the female starts to struggle with the male, dipping down, trying to pull away from him. As she is pulling away she was taking steps in the direction of Biggs but she never got more than a foot away from the male. The entire time the male was "struggling with her trying to pull her back ... and still trying to press the knife to her neck."

At this moment Biggs observed the following:

"... he keeps pulling her back. She keeps trying to push away ... the knife keeps repeatedly gets pushed back into her neck and he's pushing it harder like you can tell that he's really struggling to try and get her back to him ... about this time he gets enough of a hold on her and hooks the knife around her front and that I actually see it go and like cut into her, cut into her neck ... I could see blood actually coming from her neck ... once I saw that blood, I saw how hard he was trying to press that knife back into her neck, that's when I actually thought he was trying to kill her ... at this moment, that's what he's attempting to do ... she's trying to get a little bit of distance from him ... when I hear DeCesaro fire what I believe is three rounds ... I just hear pop, pop, pop ... the female ... gets distance from the male ... she takes a couple steps so that she's outside of his reach ... the male comes off of the step towards Officer DeCesaro ... he [the male] still has the knife in his hand and as he — as he's approaching DeCesaro ... he continues in that direction which is when I take a shot ... I fire one time [aiming for center mass — shooting for the left side view] ... the male stops and actually drops down to his knees and then onto his stomach ... laying ... on the ground not moving."

DeCesaro

As DeCesaro drove up to the scene he observed a male and female standing on the corner of E. 8th Street and Monument. He exited his vehicle, saw Biggs with firearm drawn, drew his firearm and saw that the male had a knife held to the female's left jugular.

The attention of the male and female was directed toward Biggs. Nonetheless, DeCesaro yelled: "Drop the knife! Drop the knife!" (DeCesaro keyed his radio so his commands could be heard). Then DeCesaro hears Biggs ask the male and female: "What do you want? What do you want?" According to DeCesaro, the female tells Biggs that he needs to back up. Biggs backs up a short distance. Then the female wants Biggs to back up even more and Biggs shouts that he is not backing up any further.

DeCesaro realizes that from where he is standing, near his vehicle, he could take a shot at the male from a better angle than Biggs, as the female was directly in front of Biggs.

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Notably, after Wyberg racked the shotgun, DeCesaro overheard the male state: "They're not going to get me with that gauge!" Then DeCesaro tried to talk to the male by stating "Hey man, what's going on? My name's Tommy. What's your name?" DeCesaro repeats but the male does not respond.

Then, the female attempts to duck "out of the bear hold ... but she separates from him for about a distance of 6 inches to 12 inches." According to DeCesaro:

"They take a step off the step. At that point, the male's trying to hang on to the female – I believe it's the arm with the knife, the right arm, reaches back and I believe he's going to kill her at that point – he's going to stab her with the knife I believe ... that's when I take my first shots at the male. I remember firing 4 shots but I remember hearing 5 ... I remember ... a less sounding firecracker boom which I'm assuming is officer Biggs' shot and then another boom from my gun."⁵

At that moment, according to DeCesaro, the female separated from the male, the male stumbles and then collapses to the ground in a prone position.

Wyberg

When Wyberg arrived at the scene he observed the male standing behind the female holding her around her neck. He heard DeCesaro yell: "It's O.K. man, drop the knife." Biggs was also giving the male oral commands to drop the knife and let the girl go. Wyberg saw a shiny object in the male's hand that was touching her throat. Wyberg recounted that at first the female was calm and told the officers that she was fine, "just let us go." But, again, the fact that Wyberg had the shotgun made the male upset. Wyberg then indicated:

"Suddenly (the female) took a step forward away from him (the male). He pulled her back and I heard her scream. Someone yelled, 'He's cutting her!' It looked like he was trying to cut her throat with the knife ... I started to raise the barrel of the shotgun at him when I heard what I thought was 5-6 shots. I saw DeCesaro approaching the male ... he fell to the ground and the female ran towards Biggs. Biggs approached where the male fell and stated 'I shot once.' Wyberg ran up to the male who had landed face down, grabbed his left arm from under him and notice blood coming from his chest. DeCesaro aired 'shots fired.' The male was not moving and was bleeding. DeCesaro helped me roll him onto his back ... I looked around and saw the knife right behind me ... partially hidden in the snow."

According to Wyberg, DeCesaro, Biggs and he were half surrounding the male at the time shots were fired and the officers were positioned 10-12 feet away from the male at the time

⁵ The video shows DeCesaro moving to the left as he fired. According to the autopsy report, his rounds entered the right back shoulder and flank of Mr. Noriega.

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shots were fired. Notably, snow was falling heavily during the incident but the scene was lighted.

Ramos

While pulling up to the scene, Ramos heard DeCesaro air "shots fired." She observed DeCesaro and Wyberg near an individual on the ground closer to the building and Biggs in the street with another individual on the ground, later identified as Jessica Duran, the female victim. Ramos was directed to transport Jessica to the police station but before Jessica was transported Ramos inquired of her whether she needed medical assistance as she had a cut on her neck, but the victim declined treatment. At the station Jessica provided an oral and written statement.

4. Transport of Mr. Noriega

After arriving at the scene, Officer Danny Rutherford (Rutherford) observed fire rescue personnel loading a male party on a gurney. Rutherford directed Wyberg to ride in the ambulance with the male. The male party was Guillermo Cruz Noriega. Mr. Noriega was transported to Parkview Medical Center. As he was directed to do, Wyberg rode in the ambulance with him. Hospital medical staff attended to Mr. Noriega for approximately twenty-five minutes. He was pronounced dead at about 4:25 a.m. on December 22, 2011.

5. Investigation of the Crime Scene

Other officers arrived on the scene, including Sheriff's deputies, to assist in the investigation. (diagrams)

There were seven spent shell casings on the street in front of police unit #119 (DeCesaro) and one shell casing located northeast of the traffic-light pole on the sidewalk at the intersection (Biggs). All of the spent shell casings were Federal .40 caliber Smith and Wesson. The casings were marked with placards M-9 through M-16. (diagram) Notably, there was a defect to the rock façade on the building wall which was behind where Mr. Noriega was standing — this defect appeared to be a bullet strike. (diagram) ⁶

6. Examination of Firearms

The following firearms were inspected:

Mossberg 12 GA shotgun, Serial # R454523. This firearm was not fired. The barrel was clean. Nine rounds had been removed from it. (Wyberg)

⁶ Items M-1 through M-8 noted on the attached diagram of the crime scene refer to a shoe, the knife, a purse, glasses, shirts, a gum packet, a cell phone, and the bullet impact mark.

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Glock .40 caliber model 22 pistol, Serial # MMB568 and three magazines. This firearm was not fired. The magazines were loaded fully with 15 live rounds each of .40 caliber Federal Hydra Shock, and one live round for a total of 46 live rounds. (Wyberg)

Springfield XD-40 semi-auto pistol, Serial # XD456022. This firearm was fired. The magazine in the pistol was loaded with 11 Federal Hydra Shock .40 Smith and Wesson caliber rounds, one less than the full 12 capacity of the magazine. (Biggs)

Springfield XD-40 40S&WSA-XD, backup pistol (ankle holster), Serial #XD501810. This firearm was not fired. The magazine in the pistol was loaded with nine rounds of Federal Hydra Shock 40 Smith and Wesson caliber rounds, full to capacity, with one round in the chamber. (Biggs)

Smith and Wesson M&P-40 semi-auto pistol, Serial # MRJ8770. This firearm was fired. The magazine in the pistol was loaded with eight Federal Hydra Shock .40 Smith and Wesson caliber rounds, seven less than the full 15 capacity of the magazine. (DeCesaro)

The firearms, magazines and rounds of .40 caliber Federal Hydra Shock duty ammunition were transported to the CBI for testing and ballistics comparison.

7. Photographs

Photographs of the crime scene were taken by Rutherford. Additional photographs and videos were taken subsequently of the crime scene by CIT investigators.

8. Witnesses

Pamela Hernandez, Delilah Renee Chacon and Desiree Marie Chacon:

Three witnesses to the shooting were interviewed: Pamela Hernandez, 44, who made the first 911 call; and Pamela's nieces Delilah Renee Chacon, 14, and Desiree Marie Chacon, 20.

All of these witnesses gave similar accounts: The three were looking for a local radio station's hidden "jingle bell rock" that evening. As they drove past E. 8th Street and Monument they saw what appeared to be a male dragging a female down the street. The male held the female with his hand by her neck. They observed the situation develop from the home of Mario Vialpando, one block north of the scene.

Pamela Hernandez:

Because the situation appeared odd to her, Hernandez drove around the block to see the male and female again. She heard the female yelling, "Please don't. Stop" in sequence several times. The male was holding the female with his hand around her neck; "I saw he had a knife to her throat." Hernandez thought the

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woman was in danger — the situation did not look good. Then the police arrived on the scene, displayed their firearms and gave commands to the male to “drop the knife, drop the knife;” and “Don’t do that, let’s talk, you don’t want this situation to end bad.” The male was not saying anything. She heard five shots.

Delilah and Desiree Chacon:

Delilah indicated that the male had a knife to the female’s throat and his hand around her waist. Delilah thought the female was in danger. According to Delilah, the “police showed up, asked the man to put the knife down.” She heard five gun shots.

Desiree recounted that the female looked drunk and the male was carrying her. Eventually, the couple was leaning against the wall of a building on E. 8th Street and Monument. Hernandez called 911; Desiree believed the female was in danger. Desiree heard gun shots.

Mario Vialpando:

Mario Vialpando, 1402 E. 9th Street (one block north of the scene), observed three females next to a vehicle. They asked him if he could help them and after asking them what was going on he said they told him “there was a guy down the street with a gun and he had it pointed at someone.” The females sat on his porch. He called 911 and told the dispatcher there was some type of disturbance with a weapon at 8th Street and Monument. He observed an officer exit his car and engage in some sort of conversation. It was difficult for him to hear the conversation, but he could hear the words, “drop it, drop it,” before hearing five or six shots.

Misty Ann Montoya, Abraham Salazar:

Misty Ann Montoya, who knew Mr. Noriega since they were children, confirmed that Mr. Noriega and Jessica Duran were at 1353 E. 7th Street the evening of December 21, 2011. According to Ms. Montoya, Mr. Noriega seemed “more paranoid than normal ... and edgy” and was upset with Jessica. Mr. Noriega was telling Ms. Montoya that he thought there was “some sort of charge ... (that) Jessica was trying to set him up.” Apparently, Mr. Noriega wanted to be out of jail so that he could spend Christmas with his daughter and “thought everyone was against him and wanted him to turn himself in before the holiday,” including Jessica.

In the early morning hours of December 22, 2011, Ms. Montoya told Mr. Noriega to leave the residence — he and Jessica were outside by the side of the residence arguing and fighting. Ms. Montoya heard Jessica yelling: “please stop, please no;” (about 10 times) ... it sounded like she was gagging.” The couple left, walking.

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Abraham Salazar, who lives with his girlfriend, Ms. Montoya, at 1353 E. 7th Street, as well as his brother Benjamin Salazar, were both present at the residence that evening and corroborated the statements of Ms. Montoya.

9. Interview of Victim Jessica Duran

Ramos transported Jessica Duran to the police station from the scene where she was interviewed. During the interview she did not know that Mr. Noriega had died

According to Jessica, she and Mr. Noriega were at a house on 7th Street across from Risley Middle School during the evening of Wednesday, December 21, 2011. At about 3:00 a.m. on December 22 they were asked to leave the house and began walking to her house. Jessica indicated that Mr. Noriega started to see police everywhere — on the “floor and on rooftops.” He thought they were trying to get him. Mr. Noriega stated to her that he “had no other option but to kill her” as he held a knife to her throat. Jessica explained to him that it was all in his head but that explanation made him angrier.

When they were near the corner at 8th Street and Monument, Mr. Noriega took the knife away from her throat and he was going to walk her home. Jessica said that cars were going back and forth and Mr. Noriega “lost it.” He then put the butt of the knife at her throat. But when the first officer arrived on the scene Mr. Noriega turned the knife around and put the blade deep in her throat, which hurt her. He was behind her holding the knife in his right hand against her throat. The first officer had his gun and flashlight pointed at the couple. When the second officer arrived Mr. Noriega became very nervous. She yelled for the officers to step back. The first officer was trying to negotiate with Mr. Noriega telling Mr. Noriega to drop the knife; officers on the scene commanded that “a good 10 times.” A third officer appeared and with a shotgun. Mr. Noriega put the knife “deeper” in her throat, which hurt. She knew that if he really “picked up his (shot) gun” she would have died.

Jessica said that she told the officers they needed to “get back because she had it under control.” The officers were about 10-15 feet from her. She fought with Mr. Noriega to get the knife away from her throat; he slipped; she fell to the ground. One of the officers fired shots at Mr. Noriega; she heard four shots. Then she was dragged to the street by an officer and held down.

When asked if she thought Mr. Noriega had intentions to kill her she responded “yes;” and she stated that she was scared. However, inconsistent with what she revealed in her interview, Jessica also said that she knew for a fact that Mr. Noriega didn’t have the intent to hurt her.

10. Autopsy

Based upon the history and autopsy of Mr. Noriega, in the opinion of Michael A. Burson, M.D., forensic pathologist, the manner of Mr. Noriega's death is homicide caused by multiple gunshot wounds "Thorax." There were a total of seven gunshot wounds to Mr. Noriega.

Gunshot wound #1 entered the back right shoulder and exited the right chest. Gunshot wound #2 entered the lateral left shoulder, exited the left chest, and re-entered the left chest without exit. Gunshot wound #3 entered the upper right back without exit. Gunshot wounds #4, #5 and #6 entered the right back, lateral right back, and lower right flank, respectively, without exit. Finally, gunshot wound #7 entered the right back without exit.

In summary, the bullets fired by DeCesaro (# 1, 3, 4, 5, 6 and 7) entered Mr. Noriega's body from side and rear angles, with left-to-right trajectories, at intermediate range; while the bullet fired by Biggs (#2) entered Mr. Noriega's body laterally, with a right-to-left trajectory, at intermediate range.

A total of six spent projectiles were recovered from Mr. Noriega's body. They were .40 caliber Smith and Wesson rounds matching the ammunition shot from the firearms used by DeCesaro and Biggs.

III. Procedural Considerations

A. 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 strategical 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(s) .

B. 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 prosecution 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). For example, a person who kills another person can be guilty of a crime and have a verdict of guilty rendered against him or her in a civil suit for damages.

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.

IV. Legal Analysis – Criminal Law

A. Criminal Liability in General

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 law, and it is proved beyond a reasonable doubt that the offense was committed without any statutorily-recognized justification or excuse. *See* Sections 18-1-407, 18-1-502, 18-1-701 and 18-1-710, C.R.S.

B. Use of Deadly Force by a Peace Officer

1. Legal Justification: Colorado's Use-of-Force Statutes

Subject to the provisions of section 18-1-707, C.R.S., a peace officer who uses excessive force in pursuance of such officer's law enforcement duties is subject to the criminal laws of Colorado, including the laws relating to homicide, to the same degree as any other citizen. Section 18-8-803, C.R.S.⁷

While knowingly or intentionally shooting and causing the death of another person is generally prohibited as homicide in Colorado, section 18-3-101 (1), C.R.S., the Colorado Criminal Code specifies certain circumstances in which the use of deadly physical force is justified. *See* Sections 18-1-701 and 18-1-707, C.R.S.

A peace officer is justified in using deadly physical force upon another person to effectuate an arrest, or when attempting to effectuate an arrest, only 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. Section 18-1-707(2) (a), C.R.S.

Additionally, a peace officer is justified in using deadly physical force upon another person to effect an arrest, or when attempting to effectuate an arrest, when he reasonably believes that it is necessary to effect an arrest, or to attempt to effectuate an arrest, of a person whom he reasonably believes "[O]therwise indicates ... that he is likely to endanger human life or to inflict serious bodily injury to another unless apprehended without delay," section 18-1-707(1) and (2)(b)(III), C.R.S., or has committed or attempted to commit a felony involving the use or threatened use of a deadly weapon,⁸ section 18-1-707(2)(b)(I), C.R.S.

In summary, these "use-of-force" statutes establish Colorado standards that provide that officers are "justified in using reasonable and appropriate physical force upon another person when and to the extent that the officer reasonably believes it necessary ..." *Boykin v. People*, 45 P. 419 (Colo. 1896) [A police officer who did not provoke an assault and was engaged in making an arrest is not obligated to retreat before defending himself].

2. Legal Justification: Colorado's Use-of-Force Statutes – Apparent Necessity v. Actual Necessity

Section 18-1-704(1), C.R.S. provides that "... a person is justified in using physical force upon another person in order to defend himself or a third person from what he reasonably

⁷ Section 18-8-803 C.R.S. "is consistent with national norms of acceptable force. Colorado officers may be charged with: (1) manslaughter, where they recklessly cause the death of another;" (18-3-104) "and (2) criminally negligent homicide, where they cause death by conduct constituting criminal negligence" (18-3-105). McGuinness, *Constitutional Issues in the Criminal Prosecution of Law Enforcement Officers*, 33 Colo. Law. 55 (2004).

⁸ A knife is a deadly weapon. Section 18-1-901(3)(e)(II), C.R.S.

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.” Notably, deadly force may be used if the officer reasonably believes a lesser degree of force is inadequate and the officer has reasonable grounds to believe, and does believe, that he or another person is in imminent danger of being killed, section 18-1-704 (2)(a), C.R.S. and *See Campbell v. People*, 133 P. 1043 (Colo. 1913), or the other person is committing or reasonably appears about to commit assault in the first or second degree,⁹ section 18-1-704(2)(c), C.R.S.

3. Public Entities: Policies required under Colorado Law

Section 18-8-804, C.R.S. provides that each public entity that employs police officers shall adopt policies or guidelines concerning the use of force by officers within that jurisdiction which must be complied with by the officers in carrying out their duties within that jurisdiction.

4. Effectuating an Arrest

A peace officer may arrest a person when he has a warrant commanding that a person be arrested or when he has probable cause to believe that an offense was committed and has probable cause to believe that the offense was committed by the person to be arrested. Section 16-3-102(1)(a) and (c), C.R.S. All necessary and reasonable force may be used in making an arrest. Section 16-3-101(2), C.R.S. Moreover, an officer can rely upon and accept information provided by another officer when formulating probable cause. *People v. Nanes*, 483 P.2d 958 (Colo. 1971).

5. The Split-Second Decision

Officer-involved shootings ultimately result from what is commonly called the “split-second decision to shoot. ... In a split second, law enforcement officers must recognize a threat, evaluate its seriousness, and instantaneously employ potentially deadly force against criminal suspects to combat apparent dangers to citizens, bystanders, fellow officers, and themselves.” McGuinness and Tucker, *Police Use of Force Standards under Colorado and Federal Law*, 36 Colo. Law. 47 (2007).

Put simply, the split-second decision is generally made to stop a real or perceived threat or aggressive behavior by the citizen. 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.” It is this split-second time frame which typically defines the focus of the criminal filing decision, not the string of decisions along the way that placed them in the “life or death” final frame.

⁹ Sections 18-3-202 and 203, C.R.S. define assault in the first degree and second degree, respectively.

Typically, 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.

6. Reactive Deadly Force Response

Often the threatening suspect may end up being shot and hit in side or rear angles as a result of an officer's reactive deadly force response. When an officer shoots a suspect and a bullet hits the subject in side or rear angles, this is a very different angle of entry than the average, uninformed civilian, law enforcement officer or officer of the court would expect.

In deadly force confrontations which are fully justified, "... [T]here is a 'lag time' between the recognition of the apparent threat and the actual use of force. In the time it takes to unholster, prepare, and fire a weapon, the position of the suspect often has changed."¹⁰ For example, when a suspect is moving, his position will be different when a bullet strikes him than it was when the officer's decision was made to shoot.

Research by Bill Lewinski, Ph.D. "... proves that in the street, action really does beat reaction ... [and] will provide a clear explanation for ... why so many suspects get shot in the back."¹¹ Dr. Lewinski notes:

"In an actual street encounter, an officer will never know whether he is facing the fastest, slowest or just the average person. The only way an officer can ensure his survival is to prepare for, and react as if he's facing the fastest person out there. All of the motions studied ... have come from actual officer-involved shootings, and reflect the real-life threats or circumstances."¹²

Notably, Lewinski's research finds that when "an officer gets the signal that his life is in danger, his concentration becomes exclusively focused on the threat, specifically the movement of the gun in his direction." This also is true when an officer gets the signal that another person is in imminent danger of being killed, especially aggravated movements by a suspect of a deadly weapon against the body of a person. According to Dr. Lewinski, "once the brain decides it's time to shoot, it is virtually impossible to interrupt the completion of that action."¹³

¹⁰ McGuinness and Tucker, *Police Use of Force Standards under Colorado and Federal Law*, 36 Colo. Law. 47 (2007).

¹¹ Lewinski, "Why is the Suspect Shot in the Back? Finally, Hard Data on How Fast the Suspect Can Be—in 11 Different Shooting Scenarios," *The Police Marksman*, (Nov./Dec.2000), pp. 20-28.

¹² Id.

¹³ Lewinski, "The Suspect is Shot in the Back. Is your Shooting Clean?," *The Police Marksman*, (Sept./Oct.1999), p. 23.

V. A Prosecutor Must Act Within the Bounds of Professional Ethics

A district attorney is not an ordinary litigant. He represents the People of the State of Colorado. Section 20-1-102, C.R.S. “In representing citizens, the prosecutor is vested with broad discretionary authority to investigate and charge criminal conduct.” *See People in Interest of J.A.L.*, 761 P.2d 1137 (Colo. 1988). Put simply, the role of a prosecutor is to seek the truth and for justice to be done, not merely to convict. ABA Standards for Prosecution and Defense Standards, 3-1.2(c) (1993).

A prosecutor’s duty is to “refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.” Rule 3.8(a), Colo. RPC [Colorado Rules of Professional Conduct].

VI. Question Presented

As there is no dispute that DeCesaro and Biggs (sometimes referred to as “officers” in the following analysis of the question presented) intended to shoot at the person they said was holding the blade of a knife at the throat of Jessica Duran, the determination of whether the conduct of the officers was criminal is primarily a question of legal justification. That is, the question presented in this case is whether, at the instant the officers fired the shots that mortally wounded Mr. Noriega, they reasonably believed, and in fact did believe, that they or another person, was in imminent danger of great bodily injury or death from the actions of Mr. Noriega.

VII. Standard of Review

“The evolving body of use-of-force law mandates a complete factual assessment of the unique facts and circumstances ‘at the moment’ of the particular use of force.” McGuinness and Tucker, footnote 10, *supra*. As previously stated, it is the split-second time frame which typically defines the focus of the criminal filing decision, not the string of decisions along the way that placed the officers and Mr. Noriega in the “life or death” final frame.

“The examination of a duty-related law enforcement incident with possible criminal implications necessitates a contextual analysis of instantaneous decision-making.”¹⁴

According to *Smith v. Freland*, 954 F.2d 343 (6th Cir., 1992):

“... [W]e must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes ‘reasonable’ action may seem

¹⁴ McGuinness, *Constitutional Issues in the Criminal Prosecution of Law Enforcement Officers*, 33 Colo. Law. 55 (2004).

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quite different to someone facing a possible assailant than to someone analyzing the question at leisure.” *Smith v. Freland*, at 347.

VIII. Conclusions

The events described by the officers and witnesses in this case are in pertinent part internally consistent, are consistent with one another, and are consistent with the physical evidence developed in the investigation. There is no direct evidence or physical evidence that materially contradicts or differs from the basic account given by the officers.

The officers’ statements to the contrary, the inspection of both officers’ firearms by investigators confirms that DeCesaro fired seven shots at Mr. Noriega, six of which wounded him and Biggs fired one shot which wounded Mr. Noriega. The shell casings recovered at the scene, which were identified as being fired from duty issued firearms of DeCesaro and Biggs, adds further confirmation of this fact. The description of the action taken by the officers during the final frames of their split-second decisions to shoot is consistent with causing the type of fatal wound sustained by Mr. Noriega.

Events During the Critical Time Frame Immediately Preceding the Officers’ Shots: From the frame of reference of both officers they had probable cause to effectuate or to attempt to effectuate the arrest of Mr. Noriega. Both were familiar with the 911 calls, the descriptions of the parties involved, the location of the parties, and the fact that the male party was holding a knife to the throat of the female. Upon arrival at the scene, the officers positioned themselves appropriately, and confirmed by observation Mr. Noriega’s dangerous actions and state of mind. Mr. Noriega was noncompliant with the oral statements and commands made by the officers, and the officers believed that the aggressive actions toward Jessica Duran by Mr. Noriega put her life in imminent danger.

Description of the Action During the Final Frames of the Split-Second Decisions: Mr. Noriega’s tense, rapidly evolving, uncertain, unpredictable actions with vigorous intensity and speed were a precursor to the shooting decision made by the officers. These actions by Mr. Noriega understandably could be perceived by the officers as life-threatening. Obviously, Mr. Noriega’s body language tended to be associated with their decisions to shoot.

In the words of DeCesaro:

“They take a step off the step. At that point, the male’s trying to hang on to the female – I believe it’s the arm with the knife, the right arm, reaches back and I believe he’s going to kill her at that point – he’s going to stab her with the knife I believe ... that’s when I take my first shots at the male. I remember firing 4 shots but I remember hearing 5 ... I remember ... a less sounding firecracker boom which I’m assuming is officer Biggs’ shot and then another boom from my gun.”

Biggs observed the following:

“... he keeps pulling her back. She keeps trying to push away ... the knife keeps repeatedly gets pushed back into her neck and he’s pushing it harder like you can tell that he’s really struggling to try and get her back to him ... about this time he gets enough of a hold on her and hooks the knife around her front and that I actually see it go and like cut into her, cut into her neck ... I could see blood actually coming from her neck ... once I saw that blood, I saw how hard he was trying to press that knife back into her neck, that’s when I actually thought he was trying to kill her ... at this moment, that’s what he’s attempting to do ... she’s trying to get a little bit of distance from him ... when I hear DeCesaro fire what I believe is three rounds ... I just hear pop, pop, pop ... the female ... gets distance from the male ... she takes a couple steps so that she’s outside of his reach ... the male comes off of the step towards Officer DeCesaro ... he [the male] still has the knife in his hand and as he — as he’s approaching DeCesaro ... he continues in that direction which is when I take a shot ... I fire one time [aiming for center mass — shooting for the left side view] ... the male stops and actually drops down to his knees and then onto his stomach ... laying ... on the ground not moving.”

The officers were mentally processing the general shape of the object in Mr. Noriega’s hand faster than the fine details. The officers believed that Mr. Noriega was going to kill Jessica Duran with a knife and they were in fear for her life. Then the officers fired their duty firearms at Mr. Noriega when the couple separated. In that split-second time frame, they chose to shoot so that Jessica Duran could live. The consequence of this is that Mr. Noriega’s body movement as the couple separated, and DeCesaro’s movements to his left as he fired, resulted in Mr. Noriega being hit by DeCesaro’s shots from side and rear angles, with left-to-right trajectories, at intermediate range; while the shot fired by Biggs entered Mr. Noriega’s body laterally, with a right-to-left trajectory, at intermediate range.

The officers were justified in using deadly physical force upon Mr. Noriega to effectuate his arrest or when they attempted to effectuate the arrest, as they reasonably believed that it was necessary to defend a third person from what they reasonably believed to be the use or imminent use of deadly physical force. Section 18-1-707(2) (a), C.R.S.

Additionally, the officers were justified in using deadly physical force upon Mr. Noriega to effect the arrest or to attempt to effectuate the arrest as they reasonably believed that it was necessary to effect the arrest, or attempt to effectuate the arrest, of Mr. Noriega whom they reasonably believed otherwise was likely to endanger human life or to inflict serious bodily injury to another unless apprehended without delay, section 18-1-707(1) and (2)(b)(III), C.R.S., or whom they reasonably believed was committing or attempting to commit a felony involving the use or threatened use of a deadly weapon, section 18-1-707(2)(b)(I), C.R.S.

In any event, the officers were justified in using physical force upon Mr. Noriega in order to defend a third person from what they reasonably believed to be the use or imminent use of unlawful physical force by Mr. Noriega, and the officers justifiably used a degree of force which

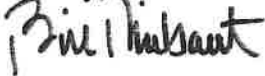
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they reasonably believed to be necessary for that purpose. The use of deadly force by the officers was justified as they reasonably believed a lesser degree of force was inadequate and they had reasonable grounds to believe, and did believe, that the victim was in imminent danger of being killed, section 18-1-704 (1) and (2)(a), C.R.S. and *See Campbell v. People*, 133 P. 1043 (Colo. 1913), and that the other person was committing or reasonably appeared about to commit assault in the first or second degree, section 18-1-704(2)(c), C.R.S.

IX. Decision ¹⁵

Taking into consideration the quantity, quality, admissibility and credibility of available evidence I conclude that at the instant DeCesaro and Biggs fired the shots that mortally wounded Mr. Noriega, they reasonably believed, and in fact did believe, that Mr. Noriega was going to kill Jessica Duran and they were in fear for her life. Put simply, the action taken by the officers is statutorily-recognized justification. Therefore, there is not a reasonable likelihood or probability that DeCesaro or Biggs committed a chargeable offense that can be proven beyond a reasonable doubt, unanimously, to a jury. Accordingly, no charges will be filed against the officers.

Sincerely,

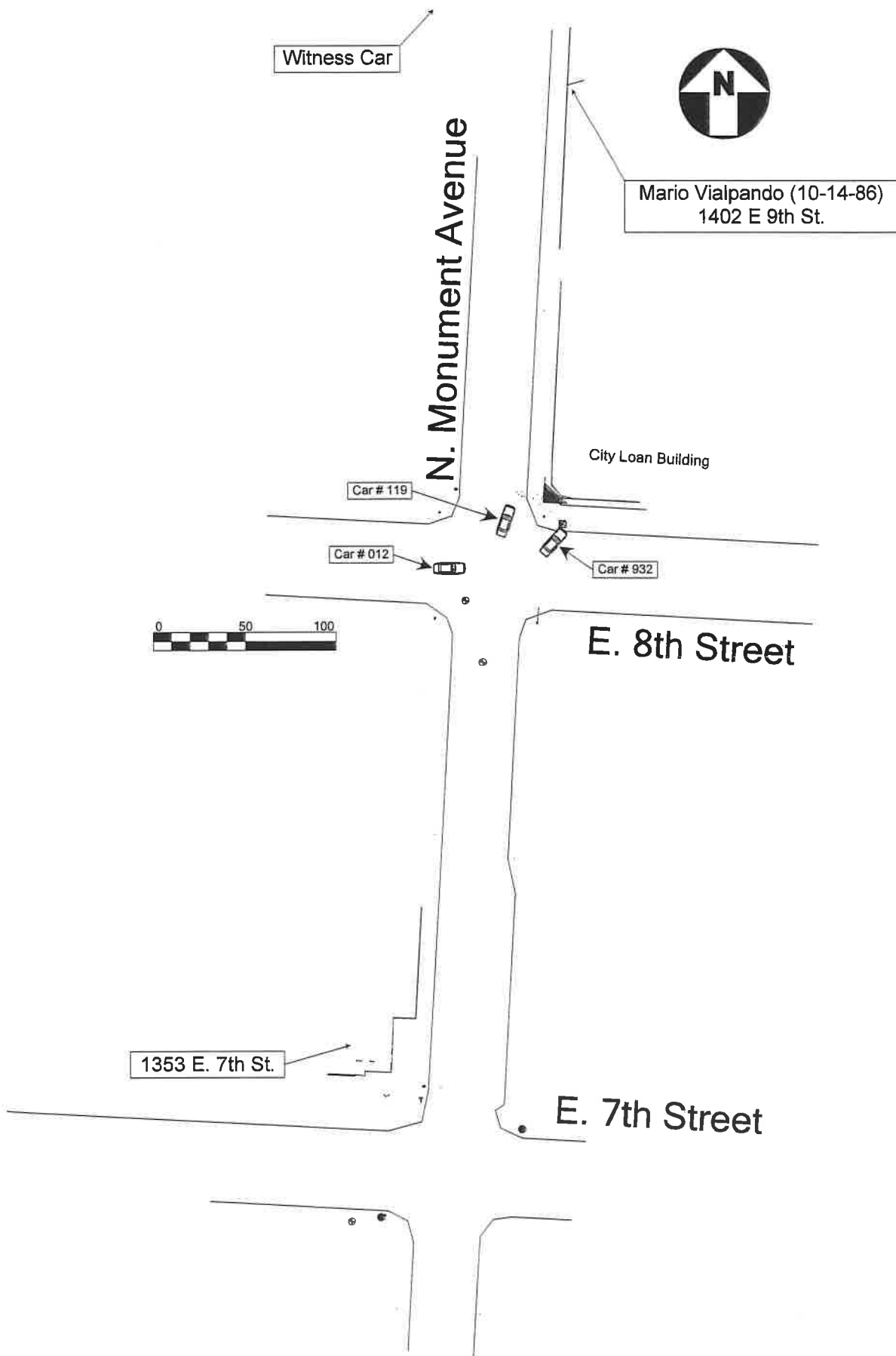


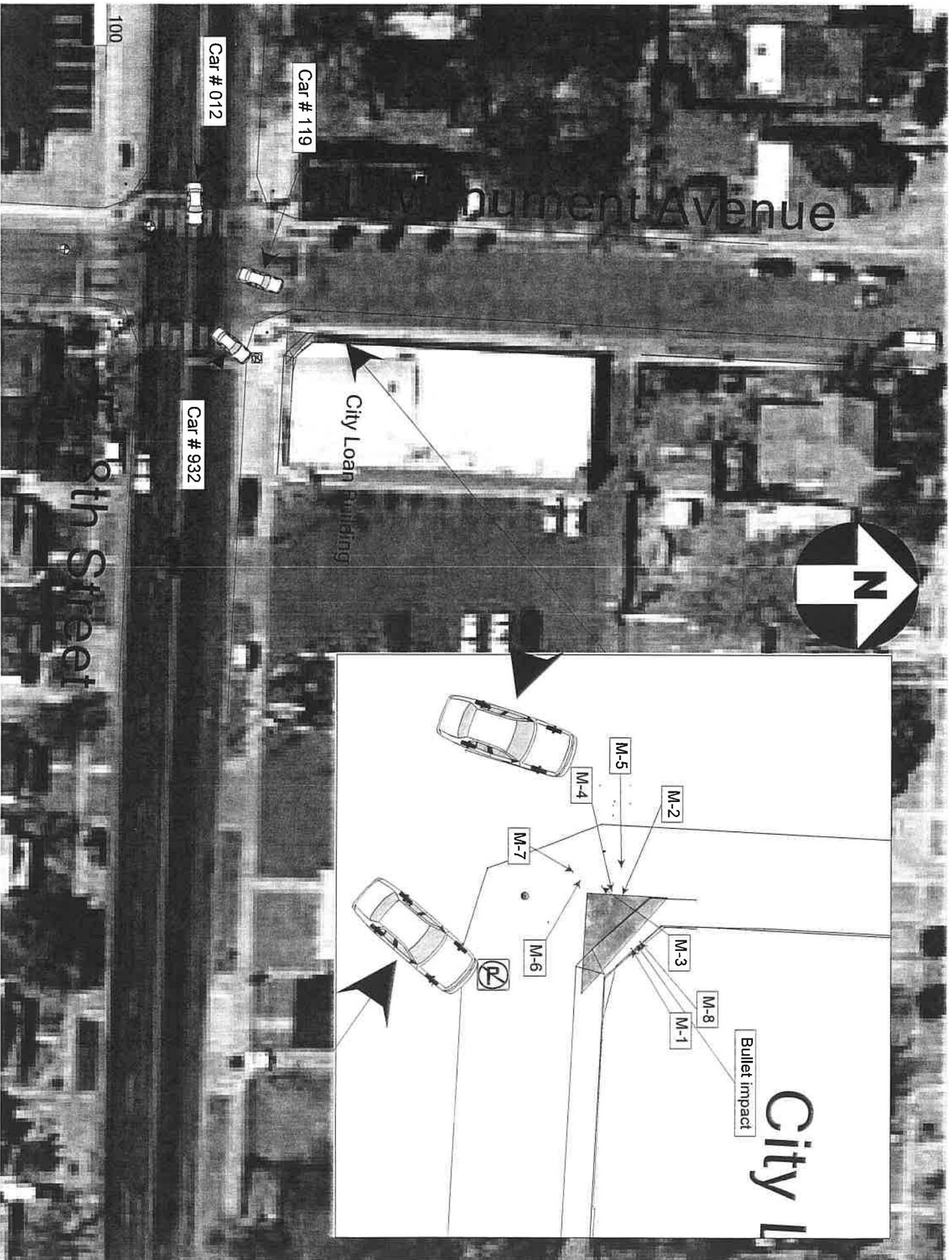
Bill Thiebaut
District Attorney

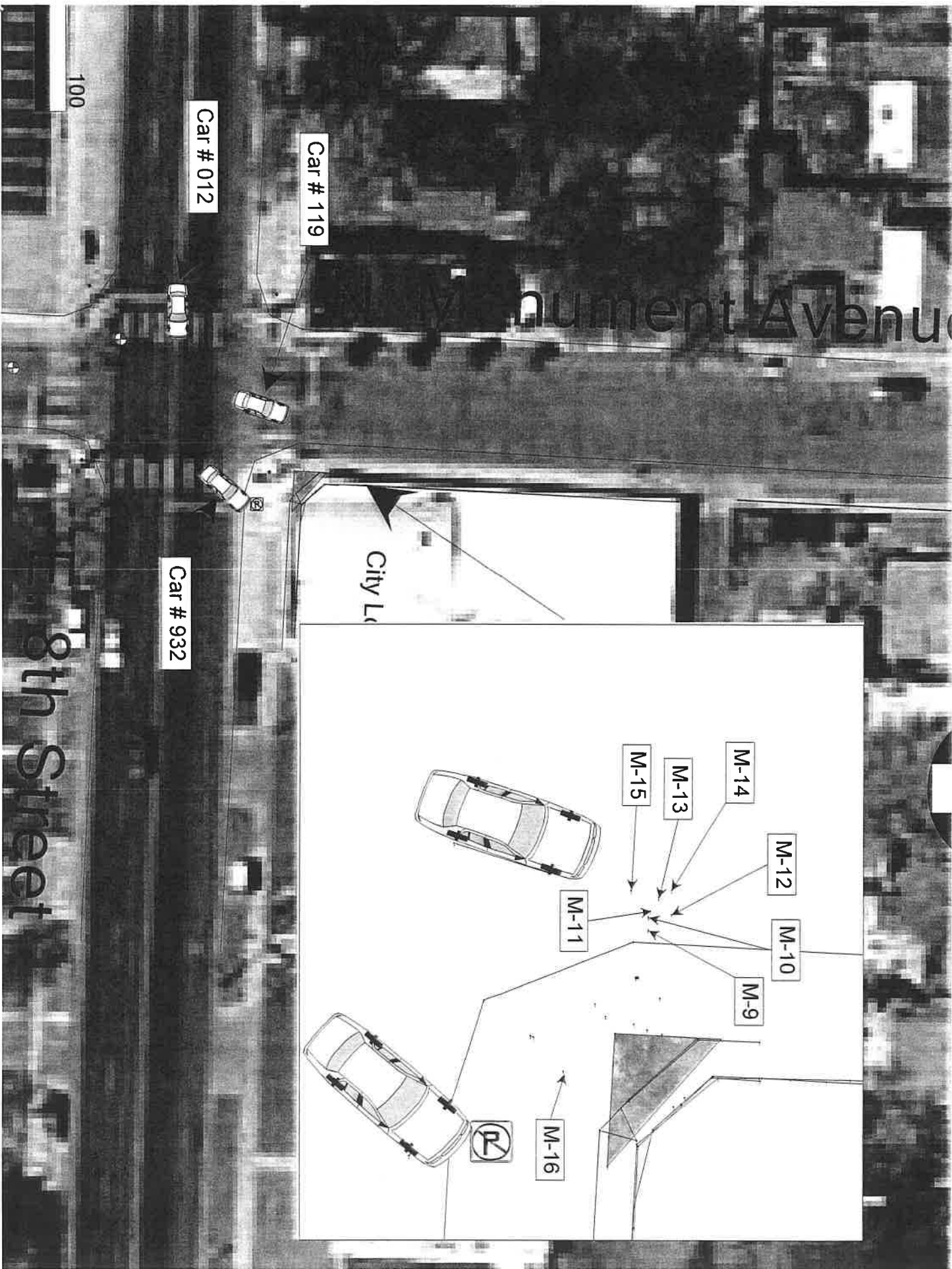
BT: rd

Cc: Sheriff Kirk Taylor, Pueblo County Sheriff's Office
Agent-in-Charge Mark Micciche, Colorado Bureau of Investigation
Agent-in-Charge Shawn West, Colorado Bureau of Investigation
Enclosures

¹⁵ 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.







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Car # 932

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