



**OFFICE OF THE DISTRICT ATTORNEY
TENTH JUDICIAL DISTRICT, COLORADO
J.E. CHOSTNER
District Attorney**

November 23, 2020

Chief Troy Davenport
Pueblo Police Department
Pueblo Municipal Center
200 S. Main Street
Pueblo, CO 81003

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

Re: District Attorney CIT Decision Letter
Officer Involved Incident on May 15, 2020
Location: 2610 E. 13th Street, Pueblo, CO 81001
Deceased: Robert Avila (DOB 6/22/1980)
Injured: Sarah Naranjo (DOB 6/10/2000)
Officers Involved: Brandon Victor and Logan O'Hayre

Dear Chief Davenport and Sheriff Taylor:

The 10th Judicial District Critical Incident Team (CIT) was activated on May 15, 2020, to investigate an Officer Involved Incident which resulted in the death of Robert Avila (DOB 6/22/1980) and serious bodily injury to Sarah Naranjo (DOB 6/10/2000). The Pueblo County Sheriff's Office (PCSO) was designated as the lead investigative agency. Other CIT participants include the Pueblo Police Department (PPD), the Colorado Bureau of Investigations (CBI), Pueblo County Coroner, and the 10th Judicial District Attorney's Office (DA). Pursuant to CIT protocol at the conclusion of the investigation, PCSO submitted an executive summary as well as all investigative reports and materials generated by the CIT supporting agencies.

SYNOPSIS OF INCIDENT:

On May 15, 2020, at approximately 2:00 a.m., PPD Officer Brandon Victor was heading South on Reading Street in the City of Pueblo, Colorado, approaching the intersection at 4th Street when he observed a green Honda passenger vehicle (bearing Colorado license plate DHP834) in the northbound lane of Reading Street, facing southbound, impeding traffic. As Officer Victor approached, he observed that the vehicle was idling with the rear taillights illuminated as well as the interior dome. However, no occupants were visible. Officer Victor proceeded to conduct a clearance on the vehicle's license plate utilizing his mobile data computer. The clearance revealed that the vehicle was reported stolen out of the City of Pueblo on May 14, 2020.

Officer Victor then aired to dispatch that he would be contacting the vehicle in the area of 4th Street and Reading Street. Dispatch then aired for cover to respond. As Officer Victor proceeded to pull alongside the vehicle, he was still unable to see any occupants. Officer Victor continued to pull in front of the green Honda at an angle to prevent potential oncoming traffic from colliding with the parked vehicle. After positioning his patrol vehicle, Officer Victor was still unable to observe any occupants in the vehicle. Officer Victor then exited his patrol vehicle with his duty weapon drawn for further investigation.

As Officer Victor approached the driver's side window, he observed that the driver's side window was three quarters of the way open and that the green Honda was occupied by a male driver, later identified as Robert Avila, and a female front passenger, later identified as Sarah Naranjo. Both parties were slumped deep into their respective seats and did not appear to be moving. Officer Victor then aired this information to Dispatch. Not knowing if either party was experiencing a medical issue, Officer Victor decided to attempt contact with the parties instead of waiting for a cover officer to arrive. While reaching for the driver's door handle, but before having an opportunity to attempt to open the door, the male driver awoke and made eye contact with Officer Victor. Officer Victor immediately announced himself as a police officer and instructed the male to shut the vehicle off. The male did not comply and instead reached with his left hand across his body toward the center console. Fearing the driver was potentially reaching for a weapon, Officer Victor reached inside in the open driver's side window with his left arm, in an attempt to prevent the driver's motion. As Officer Victor reached in, the male turned back placing his hands on the steering wheel in a "ten and two" position consequently pinning Officer Victor's left hand and arm, just past his wrist watch, against the inner bicep and armpit of the male driver.

The driver then proceeded to turn the wheel hard to the left and accelerated the vehicle. As the vehicle moved forward, Officer Victor attempted but failed to free his arm as the green Honda collided with his patrol vehicle. After the collision, the male continued to accelerate the vehicle. Officer Victor was able to observe that directly in the path of the vehicle lay a metal chain-link fence, a light pole, and what he perceived to be an industrial lot with debris beyond the fence. Officer Victor continued attempts to free his arm but was unsuccessful. As a result, Officer Victor became scared that he would lose his footing and fall under the vehicle and collide with the fence and pole, resulting in serious bodily injury or death. With his firearm still in his right hand, Officer Victor aimed the weapon through the open window and fired several rounds striking both the male driver, Robert Avila, and the female passenger, Sarah Naranjo.

Officer Victor aired over the radio that shots were fired and that both occupants of the green Honda were injured. Officer Victor then requested three ambulances respond to the scene: one for himself and one for each of the occupants to the green Honda. PPD Officer Logan O'Hayre responded shortly, thereafter. Upon arrival Officer O'Hayre observed a green Honda which appeared to have gone over the curb and had come to rest on a fence. Officer O'Hayre further observed Officer Victor standing at the driver's side door of the Honda. As Officer O'Hayre approached the Honda from the passenger side, he observed that the driver had an apparent gun shot wound to the head and appeared to be deceased. Officer O'Hayre noted that the female front passenger was in obvious pain with apparent wounds to her stomach, leg, and arm.

Officer O'Hayre indicated that Officer Victor informed him that his left shoulder was out and that he had been drug by the vehicle. Officer O'Hayre then had Officer Victor wait by his patrol vehicle where responding PPD Officer Cristina Marroquin contacted him, checked for possible injuries and then transported him to Parkview Medical Center. The passenger of the stolen Honda, Sarah Naranjo, was transported by American Medical Response (AMR) to Parkview Medical Center. The driver, Robert Avila, was pronounced deceased at the scene.

PROCESSING AND EVIDENCE COLLECTION

PCSO Detective Bethany Solano responded to Parkview Medical Center on May 15, 2020, at approximately 2:45 a.m., to process both the female passenger Sarah Naranjo, as well as PPD Officer Brandon Victor.

Detective Solano took photographs of Officer Victor at which point she observed a small red mark on the inside of Officer Victor's upper left forearm. Detective Solano did not observe any other marks or apparent injuries to Officer Victor. Detective Solano examined Officer Victor's boots and did not observe anything of evidentiary value. Detective Solano collected Officer Victor's uniform and duty belt.

PPD Officer Alan Peil was able to obtain photographs of Sarah Naranjo prior to medical personnel performing surgery. It was observed that Ms. Naranjo had an entrance wound on the upper right thigh where a projective was later removed, an entrance wound on the left side of her back exiting in the mid front abdomen, and finally a "through and through" wound to her left forearm. Officer Peil reported to Detective Solano that the doctor believed the wound from the left-back continued through Ms. Naranjo's abdomen and then through her left forearm. The removed projective and a serious bodily injury (SBI) form were collected.

All items were taken back to the PCSO Annex at 920 N. Main Street for further processing.

Detective Solano began with processing Officer Victor's duty belt and uniform. Detective Solano first captured photographs of all items and did not observe any apparent fresh marks on Officer Victor's duty belt. His duty weapon and two magazines were then examined. Officer Victor reported that he maintains his spare magazines fully loaded with seventeen rounds each, and his weapon duty weapon magazine fully loaded with a round in the chamber for a total of 52 rounds.

Detective Solano removed the duty weapon and two magazines and processed them with the following results:

Glock 17 Gen 5 9MM (with Inforce tac light) SN#BFLC356;

- 1-9MM live cartridge in the chamber;
- 13-9MM live cartridges in the magazine from the handgun;
- 17-9MM live cartridges in spare magazine one;
- 17-9MM live cartridges in spare magazine two;

Total of 48 live cartridges out of a possible 52.

Officer Victor's uniform was also processed and photographed. Detective Solano observed that the shirt appeared to have a small amount of dirt/dust on the lower left-back side. Detective Solano observed on Officer Victor's pants a large amount dirt/dust on the front upper left pant leg in the thigh area, a small amount of dirt/dust on the upper right pant leg in the thigh area, the lower right pant leg, and the back right pant leg toward the bottom. There were no obvious defects on his clothing. An alternate light source was used to observe any potential biological evidence, with none being detected. The clothing and weapon were then placed into evidence.

Sarah Naranjo's clothing was then processed and photographed. Detective Solano observed that Ms. Naranjo's gray t-shirt appeared to have been cut and soaked with suspected blood predominately on the lower left-back area. A defect was also notable in the same area. Detective Solano further observed suspected blood on the front-right side of the shirt from the shoulder to the abdomen. The lower left side was observed to contain suspected blood along with two possible defects. Ms. Naranjo's green shorts also appeared to be cut and predominately soaked with suspected blood on the upper left side. A pair of cut pink underwear, two black socks, and a cut yellow necklace were also collected.

PCSO Detective David Butterfield responded to the area of 4th Street and Reading Avenue to process the scene. Upon arrival, Detective Butterfield began by documenting the scene with photographs. Detective Butterfield observed a single PPD patrol vehicle bearing the designation of unit #873 and a green four door Honda sedan just in front of the patrol vehicle. The green Honda was partially off the ground with the front of the vehicle on a small metal pole attached to a chain link fence. Inside the vehicle, Detective Butterfield observed a deceased male in the driver's seat, later identified as Robert Avila. Mr. Avila appeared to be leaning slightly over to the right toward the passenger and back as the driver's seat was laid down. Detective Butterfield observed two gunshot wounds with one to Mr. Avila's head and one to the chest. Upon removal from the car, Detective Butterfield noted that a search of his person was conducted with the removal of several items from Mr. Avila's pockets which were placed in evidence.

In continuing his search of the scene, Detective Butterfield located a medical face mask just outside the front passenger door, a clump of hair with blood where the female passenger was removed from the scene by medical personnel, and a single spent 9 MM shell casing located near the driver's side door of the green Honda.

Detective Butterfield then documented the condition of the PPD patrol vehicle. No items were observed of evidentiary value, but marks on the bottom of the driver's side rear door which travelled to the front quarter panel were observed. Detective Butterfield noted that they appeared to be a result from a car collision. Detective Butterfield further noted the presence of tire impressions on the ground to the left of the front driver's side tire, as if the patrol vehicle had been pushed slightly to the right. Detective Butterfield later viewed the on-board dash camera system from Officer Victor's patrol vehicle which confirmed these observations.

Detective Solano along with other detectives later processed the green Honda, in more detail at the PCSO Annex evidence bay at approximately 10:05 a.m., on May 15, 2020. The condition of the vehicle was documented with photographs. Detective Solano observed that the front bumper appeared to be coming off. The passenger fender and front bumper had a large dent and the hood appeared to be pushed up. On the driver's side exterior door, Detective Solano noted that there appeared to be a void in the dirt/dust on the vehicle, as well as, another void on the rear driver's side door. Detective Solano noted that the driver's side window was partially open measuring 150 millimeters from the door frame to the top of the window. The vehicle was further processed for DNA and fingerprints with five latent prints being lifted from the driver's side door/window and one latent print from the rear driver's door.

Detective Solano observed that the interior of the vehicle was cluttered and contained a large number of syringes. Several suspected blood stains were located and marked inside the vehicle. In addition to DNA swabs and fingerprints, three (3) 9 MM spent shell casings were recovered from the driver's side back seat/floorboard area, as well as one empty assault rifle magazine from the same area. A red Samsung tablet, with possible brain matter, was recovered from the driver's side back seat. A black LG cell phone was recovered from the center console area, in addition to a Black TLC cell phone, and a Gold iPhone from a passenger side backpack. Two clothing items with suspected blood, a pink sweatshirt and blue jeans, were also recovered from the passenger side floorboard area.

Finally, body worn camera video was also collected from PPD Officers Brandon Victor, Christina Morroquin, Logan O'Hayre, Seth Jensen, Alan Peil, Bradley Padilla, Brian Gowin, Gabriel Maldonado, Jacob Hill, Justis Shipp, Lowell Griffiths, Michael Cirra, Monique Mulder, Ryan Masterson, Samuel Story, Scott Aubuchon, and Zachary Baxter.

Significantly, the body worn camera footage collected from Officer Victor, only captures events that happened after the green Honda came to rest and shots had already been fired, up to the point where Officer Victor was transported to Parkview Medical Center. There was no video footage which captured the events that transpired at the car window of the green Honda when Officer Victor first contacted Mr. Avila. Officer Victor claimed in his interview with Detectives, after the incident, that he did tap the button on the camera to activate it, but that he must have failed to press hard enough and did not realize this until the car came to rest. He further explained that the cameras were newer and required a harder "press" to activate, and that he simply must not have pressed hard enough.

Dash camera footage was recovered from Officer Victor's patrol vehicle. However, as noted previously, Officer Victor positioned his patrol vehicle in front of the green Honda, and thus the

initial contact was similarly not captured on this video. A review of the video does reveal that shortly after Officer Victor is seen exiting his vehicle and walking to the rear, to presumably contact the green Honda, the car and camera appear to get jostled. That is consistent with Officer Victor's statements that Mr. Avila accelerated into and collided with his patrol vehicle. After the vehicle can be seen jostling, the green Honda comes into view on the left side of the frame at a high rate of speed. Officer Victor can be seen at the driver's side window moving with the vehicle which is consistent with his statement and his arm had been pinned and he was unable to free himself, in effect being pulled along by the vehicle. Officer Victor's left arm does appear to be in the vehicle, and upon coming to rest, Officer Victor can be observed pulling his arm free and then can be seen communicating over his radio. During the remainder of the video, at intervals, Officer Victor can be seen vigorously shaking his left arm. This is consistent with statements he made at Parkview Medical Center that he felt pain, as well as numbness in his left arm due to the incident.

AUTOPSY OF ROBERT AVILA

The autopsy of Robert Avila was conducted on May 15, 2020, at 2:45 p.m., at St. Mary Corwin Medical Center. The autopsy was performed by Forensic Pathologist Dr. Daniel Lingamfelter.

Dr. Lingamfelter ultimately opined that Mr. Avila died as a result of two gunshot wounds, one to Mr. Avila's head and one which entered Mr. Avila's chest, all of which collectively perforated the skull, brain, heart, pulmonary trunk, aorta, and lungs, which resulted in severe craniocerebral injuries, massive blood loss, and death. The sequence in which the gunshot injuries were sustained could not be determined by the autopsy results.

The gunshot wound to Mr. Avila's head entered at the upper left temple and did not show the presence of muzzle injury, soot, or gunpowder stippling. The direction of the bullet appeared to be left to right and slightly front to back. After perforating the left temple, the bullet sequentially perforated the left temporoparietal skull (with internal beveling), left temporoparietal cerebrum, right parietal cerebrum, and the right parietal skull (with external beveling) before exiting.

The injuries sustained as a result included generalized subscalpular/subgaleal hemorrhages, skull fragmentation, generalized subarachnoid and subdural hemorrhages, and hemorrhagic pulverization along the wound path. The exit wound was observed on the right parietal scalp. Two metal yellow jacket fragments were recovered from the skull and brain.

The gunshot wound to Mr. Avila's chest was observed to have entered Mr. Avila's upper left chest and did not show the presence of muzzle injury, soot, or gunpowder stippling. After perforating the skin, subcutaneous tissues, and musculature, the bullet sequentially perforated the anterior left second rib, left upper lung, anterior upper pericardium, cardiac atria/pulmonary trunk/ascending aorta, right lower lung, the posterolateral right eighth rib, and penetrated the musculature of the right thoracic back. No exit wound was present.

Injuries sustained as a result included right hemothorax, left hemothorax, hemopericardium, and bilateral renal pallor. A deformed/mushroomed, medium caliber, metal yellow jacketed bullet was recovered from the musculature of the right thoracic back.

Toxicology was performed on Mr. Avila which revealed the presence of the following substances: Methamphetamine 562 ng/mL, Amphetamine 82 ng/mL, 6-Acetylmorphine present, Morphine 31 ng/mL, Codeine < 20 ng/mL.

LEGAL GUIDELINES

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 person. Furthermore, he may use a degree of force which he reasonably believes to be necessary for that purpose. § 18-1-704(1), C.R.S.

A person is justified in using deadly physical force upon another person in order to defend himself or a third person if he reasonably believes a lesser degree of force is inadequate and he has reasonable grounds to believe, and does so believe, that he or another person is in imminent danger of being killed or receiving great bodily injury. § 18-1-704(2)(a), C.R.S.

In evaluating whether one is justified by self-defense, a person is entitled to act on appearances. People v. La Voie, 395 P.2d 1001 (Colo. 1964). The United States Supreme Court evaluated whether officers used excessive force under the Fourth and Fourteenth Amendments by approaching the issue of reasonableness from the perspective of a reasonable officer at the scene, rather than with the 20/20 vision of hindsight. Plumhoff v. Rickard, 143 S. Ct. 2012 (2014). In that case, officers fired a total 15 shots at a suspect in a fleeing car that was determined to constitute a grave public safety risk. In its ruling the Court said "...It stands to reason, that, if police officers are justified in firing at suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended..." Further, the Court took into account that police officers are often forced to make split-second judgments about the amount of force necessary in a particular situation; in circumstances that are tense, uncertain, and rapidly evolving.

Although not in effect on the date of the incident, the circumstances and actions of Officer Victor were also evaluated under the provisions outlined in Colorado Senate Bill 20-217 which the Governor signed into Colorado law on June 19, 2020. In it, certain Colorado Revised Statutes (C.R.S.) were repealed and reenacted with amendments. Specifically, § 18-1-707(3), (4), (4.5), C.R.S., which deals with the use of deadly force in making an arrest.

A peace officer is justified in using deadly physical force to make an arrest only when all other means of apprehension are unreasonable given the circumstances and:

- a) The arrest is for a felony involving conduct including the use or threatened use of deadly physical force;
- b) The suspect poses an immediate threat to the peace officer or another person;
- c) The force employed does not create a substantial risk of injury to other persons.

§ 18-1-707(3), C.R.S.

A peace officer shall identify himself or herself as a peace officer and give a clear verbal warning of his or her intent to use firearms or other deadly physical force, with sufficient time for the warning to be observed, unless to do so would unduly place peace officers at risk of injury, would create a risk of death or injury to other persons. § 18-1-707(4), C.R.S.

Notwithstanding any other provision in this section, a peace officer is justified in using deadly force if the peace officer has an objectively reasonable belief that a lesser degree of force is inadequate and the peace officer has objectively reasonable grounds to believe, and does so believe that he or another person is in imminent danger of being killed or of receiving serious bodily injury. § 18-1-707(4.5).

In addition to provisions related to a peace officer's use of deadly physical force, Colorado Senate Bill 20-217 also created requirements related to the use of body worn cameras. Its pertinent part it provides that:

A peace officer shall wear and activate a body-worn camera or dash camera, if the peace officer's vehicle is equipped with a dash camera, when responding to a call for service or during any interaction with the public initiated by the peace officer, whether consensual or nonconsensual, for the purpose of enforcing the law or investigating possible violations of the law. § 24-31-902(1)(a)(II), C.R.S.

If a peace officer fails to activate a body-worn camera or dash camera as required by this section or tampers with body-worn or dash-camera footage or operation when required to activate the camera, there is a permissive inference in any investigation or legal proceeding, excluding criminal proceedings against the peace officer, that the missing footage would have reflected misconduct by the peace officer. § 24-31-902(1)(a)(III), C.R.S.

In addition to any criminal liability and penalty under the law, if a court, administrative law judge, hearing officer, or a final decision in an internal investigation finds that a peace officer intentionally failed to activate a body-worn camera or dash camera or tampered with any body-worn or dash camera, except as permitted in this section, the peace officer's employer shall impose discipline up to and including termination, to the extent permitted by applicable constitutional and statutory personnel laws and case law. § 24-31-902(1)(a)(IV)(A), C.R.S.

In addition to any criminal liability and penalty under the law, if a court, administrative law judge, hearing officer, or a final decision in an internal investigation finds that a peace officer intentionally failed to activate a body-worn camera or dash camera or tampered with any body-worn or dash camera, except as permitted in this section, with the intent to conceal unlawful or inappropriate actions or obstruct justice, the P.O.S.T. board shall suspend the peace officer's certification for a period of not less than one year and the suspension may only be lifted within the period of the suspension if the peace officer is exonerated by a court. § 24-31-902(1)(a)(IV)(B), C.R.S.

In addition to any criminal liability and penalty under the law, if a court, administrative law judge, hearing officer, or final decision in an internal investigation finds that a peace officer intentionally failed to activate a body-worn camera or dash camera or tampered with any body-worn or dash

camera, except as permitted by this section, with the intent to conceal unlawful or inappropriate actions, or obstruct justice, in an incident resulting in a civilian death, the P.O.S.T. board shall permanently revoke the peace officer's certification and the revocation may only be overturned if the peace officer is exonerated by a court. § 24-31-902(1)(a)(IV)(C), C.R.S.

CONCLUSION

Unfortunately, there is a lack of video evidence in this matter which could shed light on how the initial interaction between Officer Victor and Mr. Avila escalated in the fashion that it did. That same absence is also regrettably dispositive of the issue presented to this Office, as there is no other eyewitness account or piece of physical evidence processed or collected in this investigation which would contradict Officer Victor's account of the incident.

During the normal course of Officer Victor's routine patrol, he encountered a green Honda in the area of 4th Street and Reading Avenue, on May 15, 2020. Immediately notable, was that the vehicle was idling, in the lane of traffic facing the wrong way posing a hazard to oncoming vehicles. Officer Victor ran the plate and was immediately alerted that it was a stolen vehicle out of Pueblo.

Officer Victor described that he then pulled in front of the stolen Honda, which is confirmed by the dash camera footage recovered from his patrol vehicle. Officer Victor indicated that the decision to position himself in that fashion was atypical and counter to training, particularly with reference to a stolen vehicle. The thought process he offered for that decision was that the vehicle appeared to be unoccupied at that time and because he was afraid of oncoming cars getting into a collision with the Honda, he was attempting to position his patrol vehicle, which was larger, as a more obvious/noticeable object that oncoming traffic would see and be able to avoid. Officer Victor did not utilize his patrol vehicles lights to further accomplish that goal.

Officer Victor indicated he let dispatch know that he was in contact with a stolen vehicle, and was aware that cover would be responding, albeit he does not know from where or how long they will take to arrive.

At this point, Officer Victor exited his patrol vehicle and indicated that he drew his duty weapon as a precaution, as the vehicle was stolen and while he did not, at this point, observe anybody inside, he was not certain the vehicle was unoccupied. There was no apparent explanation, however, as to why Officer Victor didn't wait for cover officers to arrive before attempting to initiate contact with the vehicle.

Officer Victor indicated in his interview with Detectives that as he approached the driver's side door, he was able to see the vehicle was occupied by a male, later identified as Mr. Avila in the driver's seat; and a female, later identified as Sarah Naranjo, in the passenger seat. He further indicated that their bodies were reclined back, they were not awake/conscious, and he was unsure if they were even breathing. Due to these observations, he indicated that he then reached for the driver's side door handle to access the vehicle to check on the condition of the occupants.

At this moment, Officer Victor indicates that the driver woke up and looked directly at him. In addition to being obviously dressed in full PPD uniform with a badge visible, Officer Victor

described that he then commanded Mr. Avila: "Police! Shut it off!". Officer Victor indicated that, not only did Mr. Avila ignore the order, he began to reach with his left arm across his body toward the center console. While the gear shift is located in the center console, reaching across one's body with their left arm to put a vehicle in gear would be an atypical movement. Understandably, given the vehicle was stolen, the manner in which it was parked, and Mr. Avila's failure to heed Officer Victor's order, Officer Victor became concerned that the purpose of this movement was to gain access to a weapon that could harm him.

Officer Victor then reached into the open window with his left arm in an effort to grab the suspect and prevent him from turning. Officer Victor recounts that as he was reaching into the open window, Mr. Avila returned to a normal seated position causing Officer Victor's hand and wrist, up to just past his wristwatch, to be caught between Mr. Avila's arm and his armpit/side. Mr. Avila then accelerated rapidly while turning the vehicle hard to the left. Officer Victor indicated this pinned his arm into the vehicle to such a degree that he was unable to free his arm after continuous attempts.

At that moment, Officer Victor was in an untenable situation. While firing his weapon without the ability to take careful aim into the vehicle, presented a risk to Ms. Naranjo, if allowed to continue unabated, the path of the Honda would have taken Officer Victor over a chain link fence, possibly colliding with a large metal pole, and through an industrial lot with debris and a large work truck parked beyond the fence. That would have been, in addition, to the possibility that if he were to lose his footing while trying to keep pace with the vehicle, he might fall under the moving vehicle. Both scenarios posing a substantial risk of serious bodily injury or death to Officer Victor.

Unfortunately, there is a lack of video evidence in this matter which could corroborate whether the initial contact between Officer Victor and Mr. Avila transpired as Officer Victor has described. That same absence is also regrettably dispositive of the issue presented to this Office, as there is no other eyewitness account or piece of physical evidence processed or collected in this investigation which would contradict Officer Victor's account of the incident.

As previously noted, when interviewed by PCSO Detective Melissa Rohrich, Ms. Naranjo was unable to provide any account of what transpired prior to her being awakened from gunshot wounds. Aside from indicating that she and Mr. Avila had been using narcotics to the point of passing out and admitted that Mr. Avila stole the vehicle in which they were sleeping and that he was "running from the cops". She stated that she was not awake during whatever interaction took place between Officer Victor and Mr. Avila.

Likewise, the neighborhood canvas did not reveal a single witness who observed any portion of the incident, with only a few even having heard anything, other than acknowledging there had been gun shots. The minimal forensic evidence that was recovered from the scene does not serve to contradict Officer Victor's representation of the events.

Within those factual constraints, the use of deadly force by Officer Victor appears to be justified. As noted above, the prevailing legal standard at the time of the incident which guides this review holds that a person is justified in using deadly physical force upon another person in order to defend

himself or a third person if he reasonably believes a lesser degree of force is inadequate and he has reasonable grounds to believe, and does so believe, that he or another person is in imminent danger of being killed or receiving great bodily injury. § 18-1-704(2)(a), C.R.S.

Furthermore, “reasonableness” for purposes of this analysis has been determined by the United States Supreme Court, to mean a reasonable officer at the scene, rather than a hindsight 20/20 review. In establishing that standard, the Supreme Court was recognizing, as this Office must here, that officers are frequently forced to make split-second judgments about the amount of force necessary in a particular situation often under circumstances that are tense and rapidly evolving. Plumhoff v. Rickard, 134 S. Ct. 2012, 2020 (2014). Perhaps even more significant was the Court’s ruling that if “police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended.” Id at 2022. The later holding significantly impacted the intensity and volume of deadly force which may be employed by a peace officer.

Here, Officer Victor encountered a situation where despite commands to shut off the vehicle, Mr. Avila ignored a lawful directive and made a furtive movement toward the center console that under the circumstances could reasonably have been interpreted by Officer Victor to be an attempt to reach for a weapon. The force employed by Officer Victor at this point was non-lethal and was merely an attempt to reach in and prevent Mr. Avila from reaching over in the vehicle. Mr. Avila then did not simply pin Officer Victor’s arm in the vehicle, he began accelerating and dragging Officer Victor toward objects that posed a substantial risk of serious bodily injury to Officer Victor. Officer Victor was unable to free himself, and there were appeared to be no indication that Mr. Avila was going to stop. In the face of that lethal threat, Colorado statute supported by the above referenced case law would conclude that Officer Victor was justified in the application of deadly force and may do so until the threat abated. The evidence in this case revealed that Officer Victor fired at most four shots which appeared to cease as soon as the vehicle came to rest. Both the limited number, as well as their cessation once the vehicle stopped appear to be reasonable under the circumstances.

Although not the legal standard in effect at the time of this incident, an analysis of the present facts and circumstances under the law changes as a result of Colorado Senate bill 20-217 would seem to reach the same conclusion.

As outlined previously C.R.S. 18-1-707(3) holds that:

A peace office is justified in using deadly physical force to make an arrest only when all other means of apprehension are unreasonable given the circumstances and:

- a) The arrest is for a felony involving conduct including the use or threatened use of deadly physical force;
- b) The suspect poses an immediate threat to the peace officer or another person;
- c) The force employed does not create a substantial risk of injury to other persons.

§ 18-1-707(3), C.R.S.

Here, Officer Victor did attempt to employ non-lethal means of apprehension when Mr. Avila ignored lawful commands by simply reaching into the vehicle in an attempt to restrain Mr. Avila. At the point Officer Victor's arm became pinned, was being drug by the vehicle and Mr. Avila was imminently going to collide with objects posing a grave risk to Officer Victor, there were not other reasonable means of apprehension available. Subsection (a) of 18-1-707(3) would also appear to be satisfied under the circumstances. The action of pinning Officer Victor's arm and subsequently forcing him to be drug by the vehicle would constitute the felony offense of Assault in the Second degree under C.R.S. § 18-3-203(1)(c) or possibly the offense of Assault in the First Degree under C.R.S. § 18-3-202(1)(e).

Based on the aforementioned facts, the actions of Mr. Avila clearly posed an immediate threat to Officer Victor. An analysis under subsection (c) of 18-1-707(3) presents more difficulty. While there is no doubt that firing the weapon into the passenger compartment of the vehicle posed a risk of injury to any occupant other than Mr. Avila, under the extreme circumstances of having to fire his weapon while being dragged from a vehicle there does not seem to be a manner by which Officer Victor could have discharged the weapon in a fashion that posed less of a risk to Ms. Naranjo.

Notwithstanding the analysis under C.R.S. § 18-1-707(4), Officer Victor would still be justified under an analysis of C.R.S. § 18-1-707(4.5) which establishes that a peace officer is justified in using deadly force if the peace officer has an objectively reasonable belief that a lesser degree of force is inadequate and the peace officer has objectively reasonable grounds to believe, and does so believe that he or another person was in imminent danger of being killed or of receiving serious bodily injury.

Here, Officer Victor indicated to detectives that he was unable to extricate his arm from the vehicle after multiple attempts even after the green Honda had collided with his patrol vehicle. At that point, the green Honda was imminently going to impact the fence of the industrial business which lay beyond where there was present various materials and debris as well as a large work truck in the apparent path of the vehicle. Time did not allow for Officer Victor to employ a lesser degree of force, let alone was there one available to him. Furthermore, the objects that lay in the path of the vehicle taken together with the possibility that he may have lost his footing and fallen beneath the car if it continued to accelerate, clearly creates reasonable grounds for him to believe, and he stated to Detectives he did, in fact, believe that he was in imminent danger of being killed or suffering serious bodily injury.

The problematic analysis, had Colorado Senate bill 20-217 been in effect at the time of this incident, lay with respect to the provisions under C.R.S. § 24-31-902 as it relates to the failure to activate his body-worn camera. Under those provisions which were previously outlined, a permissive inference is created in any investigation and legal proceeding, excluding a criminal proceeding against the peace officer, that the missing footage would have reflected misconduct by the peace officer. If the failure to activate was further determined after an internal investigation to have been intentional, it would have required mandatory employment discipline up to and including termination of Officer Victor by the Pueblo Police Department. If it was further determined that the intent was to conceal unlawful or inappropriate actions or obstruct justice, it

would have required mandatory revocation of Officer Victor's P.O.S.T. Certification as this incident resulted in the death of Mr. Avila.

In the final analysis, and under the totality of the circumstances and the prevailing standards which must guide this review, it is my conclusion that Officer Victor was justified by the self-defense provisions of the laws of the State of Colorado in the use of force he employed in light of what he reasonably believed to be imminent use of unlawful deadly physical force by Robert Avila; and that he reasonably believed a lesser degree of force would be inadequate. He had reasonable grounds to believe, and did believe, that he was in imminent danger of being killed or receiving serious bodily injury. The actions of Officer Victor were legally appropriate and, therefore, no criminal charges will be filed.

Dated this 23rd day of November, 2020.



J.E. Chostner
District Attorney