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December 28, 2007

## **Public Statement of the Manager of Safety Regarding an Officer-Involved Shooting by Officer Ricky Nixon on April 20, 2006 at 699 West 29<sup>th</sup> Avenue Which Resulted in the Death of Jimmy Orozco**

### **I. SYNOPSIS**

On Friday, April 20, 2006, JF<sup>1</sup> was just arriving home after working until nearly 4:30 in the morning at his studio. When he pulled into the parking garage for his apartment complex at 699 West 29th Avenue, JF saw a man on the third level. This man's behavior seemed "suspicious" to JF. Keeping an eye on the man, JF parked his car and headed toward his apartment. Once he entered his apartment, JF had a direct view of the parking garage. There JF continued watching the suspicious man who was still on the third level of the parking garage. The man was walking back and forth from a black Cadillac Escalade and a white vehicle. At this point, JF decided to call the police. JF explained:

It seemed suspicious to me because I thought I saw him change directions or something. Once I got inside the door of the apartment building, I peeked around to see what he was doing. He was walking up the ramp when I first saw him, now he was walking down the ramp. I saw him walk over to the black SUV that was parked next to the white van. I also saw him messing with a white car on the other side. Once I saw him jiggle the handles of the cars, I decided to call it in because I didn't want to take a chance because he was going to multiple cars.

In response to JF's call to 911, Officers Robert Anderson and Rick Nixon were dispatched to the parking garage at 699 West 29th Avenue, on a possible theft from motor vehicle in progress. The officers were assigned to a marked patrol car. After entering the garage and as they passed by a black Cadillac Escalade, Officer Nixon noticed that the rear passenger door window of that vehicle was

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<sup>1</sup> For the purpose of this public statement, certain witnesses not directly involved in the officer's use of force are identified by initials only. However, the full identities of these witnesses are contained in the Denver Police Department investigative files related to this case.

broken out. The officers turned their patrol car around, got out and walked down the ramp to check out the Escalade.

After his initial report of the incident, JF hung up the phone and went to watch the man from his back balcony which had a view of the parking garage. However, when he saw the man hide in a white car upon the entry of the police car into the garage, JF decided to call back to 911. JF stayed on the phone with the 911 operator and continued reporting what he saw as the officers approached the Escalade. He explained to the 911 operator that the man was sitting in a white car. More importantly, JF, advised that the man was behind the officers. The police dispatcher immediately advised the officers that the suspect was sitting in a white car behind them. Both officers turned and saw a white car parked in a parking space almost directly across the lane from them. The officers approached this car. As they did, they saw a man sitting behind the steering wheel. Officer Nixon loudly ordered the man out of the car. Instead of complying with the order, the driver started the car and, in Officer Nixon's words, "punched it", rapidly accelerating the car. The car came straight toward the officers with tires squealing. Officer Rick Nixon was in the direct path, and was, literally, within touching distance of the on-coming car. Officer Nixon aimed his weapon at the center mass of the suspect who was aiming the car at him. The officer fired a single shot and stopped firing as soon as the car passed him by. The suspect vehicle continued traveling around the corner, before crashing into several unoccupied parked vehicles.

After the suspect vehicle crashed, a man got out of the car and took off running. Officers Anderson and Nixon caught and arrested that man, later identified as Devon Lee Kelly, on the second level of the parking garage. As they cuffed the suspect, JF heard one of the officers asking the man why he had tried to run them over. At this point, consistent with the reporting of JF and their own observations, both officers thought that there was only one suspect involved. In fact, the officers so strongly believed that there was only one person involved that when they handcuffed Mr. Kelly they notified the police dispatcher that they had the suspect in custody.

At the time that they captured Mr. Kelly, neither officer was aware that there had been two people in the car. Indeed, neither the officers, nor JF (who had seen the entire incident from even before the officers had arrived), saw a second man in the white car. When a manager of the complex began to survey the damage to the parked cars and approached the suspect vehicle, she saw that there was another man in the car. This person was in the driver's seat and was later identified as Jimmy Orozco. Mr. Orozco, who had been struck by Officer Nixon's bullet, was seriously injured. The officers immediately called for an ambulance and for additional police response. Because the ambulance could not enter the parking garage, police officers and paramedics carried Mr. Orozco to the ambulance. He was transported to Denver Health Medical Center where he was pronounced dead. An autopsy established that Mr. Orozco died as the result of a perforating gunshot wound from the single bullet fired by Officer Nixon.

## II. THE INVESTIGATIVE PROCESS IN THIS CASE

As with all officer-involved shootings, this case was jointly investigated by the Denver Police Department Homicide Unit and the Denver District Attorney's Office. The Office of the Independent Monitor (hereinafter "OIM") was on hand to observe the investigation, as were members of the Internal Affairs Bureau. Interviews were observed by the OIM, as required by Ordinance and permitted by the protocol of the District Attorney's Office. The criminal investigation was completed and the District Attorney's decision letter was released on May 5, 2006. In the language of the statutory requirements, the District Attorney declined to file charges against Officer Nixon, concluding:

Based on the totality of the facts developed in this investigation, the single shot fired by Officer Nixon was not criminal conduct under C.R.S. 18-1-707 (2) and 18-1-704 (1). We could not prove beyond a reasonable doubt that it was unreasonable for Officer Nixon to perceive that Orozco's conduct posed an imminent threat to him or his partner when he fired the single shot. The vehicle driven by Orozco was a deadly weapon under Colorado law because in the manner in which it was being used by Orozco, it was capable of producing serious bodily injury or death to either or both of the officers. The District Attorney's authority and responsibility in these cases is not to determine whether an officer should or should not shoot in a given situation, but rather to determine if the act is criminal if an officer does elect to shoot and wounds or kills a person. Under the specific facts of this case, no criminal charges are fileable against Officer Nixon in the shooting death of Orozco.

At this point, the case was turned over to the Denver Police Department's Internal Affairs Bureau for review. Internal Affairs, pursuant to policy, referred the case to the Use of Force Review Board. On November 29, 2006, the Use of Force Review Board held a hearing on this case. The Independent Monitor observed the totality of the hearing, including the Board's deliberations. The Use of Force Review Board determined that no further investigation was needed and forwarded its recommendations to the Chief of Police, Gerald Whitman. The recommendations of the Use of Force Review Board are advisory in nature, and are not binding on Chief Whitman. In his meeting with Chief Whitman, the Monitor addressed some policy considerations raised during the Use of Force Review Board regarding those occasions when an officer shoots his weapon at a moving vehicle. The Monitor met with both Chief Whitman and the Homicide investigators who had been on scene. The Homicide detectives had undertaken an exhaustive review of the shooting, including a re-enactment and a reconstruction of the trajectory of the single shot fired by Officer Nixon. With this additional evidence, the Monitor determined that the shooting was in policy. As stated in the OIM 2006 Annual Report:

Specifically, the suspect accelerated the vehicle at a high rate of speed directly toward the involved officer. Based on the need of the

officer to immediately respond to the threat posed by the vehicle and the trajectory of the bullet when it entered the vehicle's window, the evidence indicated that the officer fired once when he felt he was in danger and then stopped shooting when he felt the danger had passed.

After reviewing the investigation, considering the recommendation of the Use of Force Review Board and consulting with the Monitor, Chief Whitman concluded that there were no violations of Department rules or policies in this incident and forwarded the case to the Manager of Safety's Office.

Upon receiving the case, this Office reviewed the investigation files prepared by the Homicide Unit and Internal Affairs Bureau, including the officer statements, witness statements, diagrams, photographs, and physical evidence reports. This Office also studied the Use of Force Policy in effect on the date of the shooting and was aware of relevant training materials and academy training methods. It also gave consideration to the decision of the Denver District Attorney and to the recommendations and conclusions of the Independent Monitor, the Chief of Police, and the Use of Force Review Board.

### **III. FACTUAL BACKGROUND**

In the early morning hours of April 20, 2006, a Denver resident, JF, had been working in his studio. JF did not finish working on his project until after 4:00 a.m. When JF returned home to the Metro Apartments at 699 West 29th Avenue at about 4:30 in the morning, he saw a man (who was later identified as Devon Kelly), wearing a black, or dark brown leather jacket. JF said that the man was on the third floor of the parking garage. As noted above, the man's behavior seemed suspicious to JF because he was walking up and down the ramp. Once JF got inside the door of the apartment building, he surreptitiously watched to see what the man was doing. As he watched, JF saw this man walk over to a black Cadillac Escalade SUV, which was parked next to a white van. When JF saw the man jiggle the handles of the car, he decided to call the police. As JF explained, he didn't want to take any chances because the man was going to multiple cars.

When he got to his apartment, JF called 911 to report that a theft from motor vehicle was in progress. JF reported that he was watching a suspect break into a black SUV on the third floor of the parking garage at his apartment complex at 699 West 29th Avenue, Denver, Colorado.

The 911 operator told JF that officers would arrive shortly. Denver police officers Rick Nixon and Robert Anderson, working in a marked police car, were dispatched to cover the call. Officers Nixon and Anderson were told that the vehicle broken into was a black SUV on the third level of the parking garage. When the officers reached the entry gate, they discovered that it was open. Upon entering the parking garage, the officers drove up to the third level of the garage looking for a black SUV.

After his initial report of the incident, JF went out onto his balcony to see what the man he had seen was doing. From the balcony, JF had a clear view into the third floor of the parking garage. As JF watched the police car enter the garage, he also saw the man that he had earlier seen jiggling car door handles run back to a white Honda. When he saw the marked police car enter the third level, JF called 911 again. JF spoke to the same 911 operator with whom he had spoken on his first call. JF stayed on the line and began relaying everything he was seeing to the 911 operator as it was happening. His information was aired immediately to the officers on scene.

With Officer Anderson driving, the marked police car circled up the parking garage ramp and entered the third level. Initially, Officer Anderson drove past a black Cadillac Escalade. Officer Nixon, however, saw that the window of the Escalade was either broken or rolled down and informed Officer Anderson. They pulled into a parking space to back up, turn around and return down the ramp to the area where the Escalade was parked. The police car was now stopped in the traffic lane, between two rows of parked cars. The front of the police car was facing back down the ramp, with the car's lights on and directed toward the Escalade. It was also within a very short distance of the white Honda in which the suspect was hiding, unbeknownst to the two officers.

Officers Nixon and Anderson walked the 30 or 40 feet back down the ramp to the Escalade. Both officers were in full police uniform with visible badges, guns and gun belts and were easily recognizable as law enforcement officials. The garage was well lighted and from his balcony, JF could easily identify them as police officers.

Officer Nixon used his flashlight to look into the back window of the Escalade. He could see exposed wires. It appeared to Officer Nixon that something had been recently removed. Officer Nixon saw broken glass on the ground and the broken out window, still attached to the tint covering which held the glass together. It was on the ground underneath a white van parked next to the Escalade.

While the two officers were assessing the Escalade, JF remained on the phone with the 911 operator and continued relaying the movements and actions of the officers and the suspect as they were occurring. He had watched the officers drive past the Escalade, turn around, park their car and get out. JF saw that the officers actually walked past the man he had seen jiggling car handles and who was hiding in the white Honda.

The police dispatcher immediately notified the officers that the eyewitness, JF, was advising 911 that the suspect was in a white sedan directly behind them. The suspect's vehicle was approximately two car spaces up the ramp from the Escalade and was backed into the parking spot. Although there was lighting in the parking garage, the white suspect vehicle had tinted windows which prevented the officers from seeing into the car. The officers used their flashlights to illuminate the area of the driver's seat as they approached the vehicle. They

attempted to get into a position to flank the front of the car, which was facing them, from both sides.

Officer Anderson saw the white Honda and looked into it. He realized that there was someone in the car and warned Officer Nixon. Both officers moved closer to the suspect vehicle. With his flashlight in one hand, Officer Nixon, took his gun out of his holster. He advanced on the vehicle on the driver's side. Officer Anderson approached the vehicle on the passenger side. Both officers ordered the suspect to get out of the car. Officer Anderson's impression was that there was only one person in the car. Instinctively Officer Anderson shined his light into the driver's side of the vehicle. Officer Nixon also shined his flashlight into the car. When the light hit the suspect's eyes, the officers heard the engine start and accelerate rapidly. The suspect driver immediately started the engine and sped out of the parking spot— directly toward the officers with his tires squealing. This all occurred instantaneously.

As Officer Nixon explained:

When I shine my light in the car, all I see is the driver. I said get out of the car. The next thing I know the car starts up and he just punches it. I mean, he's looking right at me and I'm looking right at him and he just accelerates and comes right at me.

When the suspect accelerated the car at the officers, Officer Anderson was partially across the traffic lane, within feet of the front of the suspect's vehicle on the lower side of the ramp. Officer Nixon was partially across the traffic lane. He was also directly in front of and only feet away from the suspect vehicle. Officer Nixon was in a position that was slightly above Officer Anderson on the ramp. Both officers were walking toward the suspect's vehicle. Immediately behind the officers was a full row of vehicles parked side-by-side up the ramp, including the Escalade. Officer Anderson had his flashlight in hand and his firearm was still holstered. Officer Nixon had his flashlight in his hand. He had just drawn his firearm when the suspect floored the vehicle and sped forward.

JF, who continued to watch from his balcony, heard the officers yelling at the driver. As he looked on, JF saw the car moving toward the officers and heard the tires screeching.

Officers Nixon and Anderson both gave sworn videotape statements to investigators. In accordance with protocol, the officers were separated immediately after the shooting and were sequestered at police headquarters until their statements were taken.

In his sworn videotaped statement, Officer Anderson stated, in pertinent part, that he could not see the suspect until the flashlight hit the suspect's eyes. When he yelled for the suspect to get out of the vehicle, the suspect instantly started the car, "floored it and whipped out of the parking spot". There was a "high engine noise". He knew Officer Nixon was right in front of the vehicle at this time, not off

to its side. Officer Anderson jumped and ran out of the way. He also heard a shot, but he could not see Officer Nixon at that instant and could not tell if Officer Nixon or the suspect was shooting. Officer Anderson said that he would have been struck by the vehicle had he not taken the immediate, evasive action. He described how the vehicle came within one or two feet of him, saying "I could have touched the car at that time". When the suspect accelerated, Officer Anderson jumped to his left to try to get to safety. Explaining that his main concern was to get out of the way, Officer Anderson said: "I thought the car was going to hit me ... it scared the crap out of me." After the Honda went past him and down the ramp, Officer Anderson saw Officer Nixon chase after the car on foot. Officer Anderson ran up the ramp to the police car with the intent to catch up to Officer Nixon. About the time he started his pursuit in his police car, he heard a crash below him. He saw a party jump out of the suspect's crashed vehicle and run.

In his sworn videotaped statement to investigators, Officer Rick Nixon stated, in pertinent part, that when Officer Anderson saw there was someone in the car, he (Officer Nixon) drew his firearm. He yelled at the suspect to, "Get out of the car". He said the suspect was looking right at him. He said he was looking right into the eyes of the suspect when the suspect started the car and came right at him (Officer Nixon). Officer Nixon stated,

I felt like I was stuck there, like I couldn't move. I took one shot, you know what I thought was center mass. I thought this guy was going to run me over and kill me the way he was looking at me was as if I was in his way he didn't care what he did to get out of there. Bob was still, I don't know if he was to the rear of me, but I know he was on the left side of me. I didn't know if he was in the way of the car, I don't know all I know was that I was stuck and focused on the driver. I felt like I was going to be run over. I took a shot and the next thing I know the car turned and started heading down the ramp and all of a sudden he wrecked into like three or four hit one car or whatever and started a collision with a couple of other cars that were parked.

Officer Nixon's statement evidenced the serious danger with which he felt he and Officer Anderson were confronted. After explaining that the driver looked at him like he would come right at the officer and "kill me", Officer Nixon described being just inches away when the car turned in front of him. It was so close he said that he could reach out and touch it. Officer Nixon told how he heard the tires squeal when the suspect accelerated toward him. His feeling, as the car came at him, was that the driver was going to go right through him. Officer Nixon described thinking that he was going to get run over and either go underneath or on top of the car.

Investigators also obtained written and/or videotaped statements from other witnesses, including both civilians and officers. The eyewitness who was watching the incident as it unfolded and reporting what he was seeing to the 911 operator, JF, provided a videotaped statement. In that statement, JF explained

that when he heard the single gunshot, he immediately ducked down. When he looked up again, he saw the Honda run into several cars in the parking garage. He then saw the man jump from the car. This was the same man he had seen checking the doors of cars in the garage. The man then ran down the ramp to the second level, where he surrendered to one of the police officers. That officer was Officer Nixon, who took the man into custody. After his statement was taken at police headquarters, investigators returned with JF to the scene and obtained follow up information. JF also allowed investigators to photograph his apartment balcony, from which he had witnessed the incident.

In his statement, JF described his observations from the time he came home from work and saw the suspicious person in the parking garage. He detailed his 911 call to the Denver Police Department and the information he provided directing the officers' attention to the suspect's white car. As noted above, at one point he was directing the officers to the suspect car, saying to the 911 Operator:

. . . your officers are right next to him right now, they just drove by and I mean, he just got back in his car and he's hiding. It's a, it's a white sedan, that's all I can see, I can see his head. I've been watching him. They got to turn around and it's the white sedan right behind them.

JF also explained that, when the officers turned around from the Escalade and started to walk toward the suspect's car, he saw the back-up lights of the white car come on. The car sped out of the parking space with its tires squealing. It appeared to him that the officers were about in the middle of the ramp and in danger of being hit. He said he heard the officers shouting but could not tell what they were saying. He then heard a gunshot and ducked down in case a bullet came toward him. When he looked up, he saw the white car traveling down the ramp and then strike several cars before coming to a stop. JF saw the male he had described earlier get out of the white car and run down the ramp. The police car followed. The male stopped running and surrendered to the officers on the second floor of the parking garage. Although JF could not hear everything that the officers were saying when they made the arrest, he was absolutely clear that he heard an officer shout and ask the male "why he tried to run them over", JF also made note that one of the officers bent over as if he was injured and the other officer patted him on the back. He said he did not learn until later that there was a second male in the white car. The following are pertinent comments to the 911 Operator:

. . . now he's trying, he's trying to drive away right now. There he goes, they got him. Now there's gunshot. Oh, shit. Oh my God. They just hit, he just ran into like four different cars. They got him, he's on foot. He's running down to the second floor. He's on the second floor parking garage heading ... They got him. He's got his hand up now. He's down on the ground.

JF and both officers believed there was only one person in the vehicle at the time of the shooting. They did not realize that a second offender, Devon Lee Kelly, was concealing himself in the passenger seat. Kelly had reclined the passenger seat until it was almost level with the back seat. When the suspect's vehicle crashed into the parked cars, it was Kelly who jumped from the vehicle and ran. However, the officers believed it was the driver exiting through the passenger door. Consequently, when they caught and handcuffed Kelly on the second floor of the parking garage they believed the event was over. In fact, the officers advised the Dispatcher that the suspect was in custody. Officer Nixon assumed his single shot had missed the suspect.

As other officers were arriving at the scene, one of the managers from the apartment complex, JB, who had heard a single gunshot and a car crash, decided to go down to the garage to find out what had happened. JB talked with the officers who were still with Devon Kelly on the 2<sup>nd</sup> level of the garage. They informed her that they had responded to a call that someone was breaking into a vehicle on the third level of the garage. After talking with the police officers, JB and JC another employee of the complex, went up to the 3<sup>rd</sup> level of the garage to assess the damage to their tenants' cars. When they approached the suspect's crashed vehicle, JB looked in and saw a wounded man. She immediately screamed for assistance. Officers rushed to her location and discovered Jimmy Orozco laying wounded in the driver's seat. His condition was clearly grave. The responding ambulance was not able to enter the parking garage because of its height. Therefore, Orozco was removed from the vehicle by paramedics and carried to the street level. He was transported to Denver Health Medical Center and pronounced dead at 5:23 a.m.

Statements were also taken from other residents of the apartment complex. No other residents had actually observed the incident, however, several of them were ear witnesses. These witnesses heard a variety of things including the officers yelling, Officer Nixon's gunshot, the impact noises from the suspect vehicle crashing into several cars in the parking garage, the alarms of cars that were set off by the crashes, the apartment manager yelling for help when she found Mr. Orozco, the police and ambulance response and the noises resulting from the gathering of testimonial and physical evidence at the crime scene. Among them were SB who described hearing sounds like arguing then a car crash; JA who simply heard a scream, a car crash and the sounds like gunshots; NK who heard what she thought were two gunshots, tires screeching and a male yelling "get out of the car" two times, as well as the sounds of car alarms and other loud sounds; JR who heard a single gunshot, more noise, car alarms going off and some men shouting at another and asking "Did you get hit?"; AS heard two men shouting and a single gun shot; JS heard shouting, a single gunshot and a wreck, "in that order"; RT heard loud tires screeching, then a crash followed by a shout "Police", then sounds of what he thought was a man and woman arguing; and DW awoke to the sound of loud screeching and saw an officer with his gun drawn running after an African American with his hands up, who he placed under arrest. DW also heard the sounds of a car screeching around the corner and hitting a few cars before crashing into one car, then she heard a girl screaming "call 911". As

noted above, none of these witnesses observed the actual crime of theft from motor vehicle, nor did they observe any of the initial confrontation when Jimmy Orozco accelerated the car at the officers and Officer Nixon fired his weapon.

Devon Kelly, the man whose actions of jiggling the handles of cars on the third floor of the parking garage initiated JF's call to 911, was not injured. Mr. Kelly was taken into custody and provided a videotaped statement to Denver Police detectives. On the 20<sup>th</sup> of April, 2006, according to Mr. Kelly, he and his acquaintance, Jimmy Orozco, were driving around together in a white Honda Accord, owned by Kelly's girlfriend. It was Mr. Kelly's impression that they were going to see a female friend of Jimmy's.

Mr. Kelly asserted that he had fallen asleep and that when he woke up, he found himself alone in the car. At this point, the car was inside of a parking garage. Mr. Kelly said that he assumed Jimmy Orozco had gone inside to see his girlfriend. Mr. Kelly claimed that he then got out and walked to a secluded area of the parking garage to urinate. As Mr. Kelly tells it, he was on his way back to the car when he saw Orozco waving him over to a black Cadillac Escalade. When he approached, Orozco told him to carry some items to the Honda. Mr. Kelly asserted that he was not happy with what Orozco was doing, but that he did take the items back to the Honda. Mr. Kelly alleged that he then went back to sleep. It should be noted, however, that JF's physical description of the suspect and his clothing makes clear that it was actually Kelly who was moving around the parking garage and attempting to get into the Cadillac Escalade.

During his videotaped interview, Mr. Kelly was asked about what he saw. Mr. Kelly claimed that after carrying the stolen amplifier to the car Orozco was driving, he got back in and fell asleep again. As he described it:

Next thing you know, it felt like 20 - 30 minutes later all I heard boom, I heard boom boom and I just jumped up and started running. They said he was shot, I didn't even hear no shot all I saw was that the car was mashed into the thing. ...

I heard the car start and I hear boom, then not five seconds after that I heard another boom and I just jump up and start running. ...

Putting it together I heard a boom, he got shot and then he had to hit the other car then. I came to my senses and then another boom it jerked me.

When asked what Jimmy was doing after the shot, Mr. Kelly responded, "nothing, he's drivin'". At no point in his interview did Mr. Kelly claim to have been awake when Jimmy Orozco accelerated the car at the officers or when Officer Nixon fired his weapon.

Officer Nixon fired the single shot from his Sig Sauer, model P226, 9mm semi-automatic pistol. The weapon has a magazine capacity of 15 rounds. The

weapon was being carried with the magazine fully loaded and an additional round chambered—a total of 16 rounds in the weapon. After the shooting and pursuant to protocol, his weapon was taken by Denver Police Department Crime Lab personnel. Fifteen live rounds were recovered from the weapon. A single spent 9mm shell casing was recovered at the scene. Technician Frank Kerber of the Denver Police Department Crime Lab identified the shell casing as having been fired from Officer Nixon's firearm.

The single shot fired by Officer Nixon entered the very bottom of the driver's-side window just above the car body. The window was shut at the time of the shooting. This is consistent with Orozco's wound which entered his body on the left side of his chest under his left arm and traveled from left to right through his chest cavity. This is also consistent with his left arm being raised to steer the vehicle as he sped out of the parking spot.

On April 20, 2006, Dr. James Wahe performed an autopsy on the body of Orozco. The cause of death was determined to be the result of a single gunshot wound to the left chest. The bullet was recovered by Dr. Wahe from Orozco's body and was later identified by Technician Frank Kerber as having been fired from Officer Nixon's firearm.

The crime scene investigation revealed that the suspect's vehicle could have traveled directly forward as much as three feet six inches before arcing to the right as he sped out of the parking spot and down the ramp. There were visible tire-tread marks on the ramp surface which are consistent with the officer and witness statements regarding hearing squealing tires. These tracks also provided the basis for a photo and videotaped simulation of the probable path of the suspect's vehicle during the critical time frame. This simulation is consistent with the officers' statements and is indicative of life-threatening conduct by Orozco. Whether Orozco's intent was to run down the officers or to escape at any cost, in a split second his conduct clearly placed the officers' lives in harm's way. Their perceptions of this threat are consistent with the physical evidence.

Electronic and other items taken from the Escalade were recovered in the suspect's vehicle. Both Orozco and Kelly have a number of prior arrests and prior felony convictions. At the time of this incident, Jimmy Orozco was facing two pending felony charges in Denver for Aggravated Motor Vehicle Theft and Possession of Burglary Tools. These two charges resulted from an arrest made on February 20, 2006. Additionally, on April 5, 2006, only 15 days before this incident, Mr. Orozco had been arrested on a contempt of court citation out of Douglas County.

For the thefts which occurred on the night of this incident, Devon Kelly was charged with two felony counts. One charge was for First Degree Criminal Trespass, with Intent to Commit a Crime, a Class 5 Felony. The other charge was for Criminal Attempt First Degree Criminal Trespass, with Intent to Commit a Crime, a Class 6 Felony. Devon Kelly, who claimed to have fallen asleep and stated that he "didn't like it" but he had to help Mr. Orozco carry stolen items from

the car in the garage, pleaded guilty to a Class 6 Felony for his actions on the night of this incident. The charge to which Mr. Kelly entered a plea of guilty was Criminal Attempt First Degree Criminal Trespass, with Intent to Commit a Crime. Mr. Kelly has also been arrested on two separate occasions since this incident, bringing his total arrests to over 30.

#### **IV. ANALYSIS**

As a general matter, an administrative review analyzing whether an officer-involved shooting was in accordance with Departmental policy focuses on three areas: (1) the reasonableness of the tactics utilized by the officer immediately prior to the shooting; (2) the reasonableness of the officer's assessment of the threat; and (3) the reasonableness of the use of force option selected by the involved officer.

It should be noted that there is a significant difference between the evidentiary standards that were utilized by the District Attorney in his criminal review of this shooting incident and the standard utilized in an administrative review. The criminal review process required a determination of whether, at the moment force was used, there existed proof "beyond a reasonable doubt" that officers had no legal justification under the applicable criminal statute, C.R.S. § 18-1-707, for the use of physical force and/or deadly physical force under the circumstances presented. That means that Officer Rick Nixon could not be found criminally liable unless there was proof beyond a reasonable doubt that when he fired his weapon, it was unreasonable for him to believe that Jimmy Orozco presented a threat of serious bodily injury or death to himself or to a third person. That third person who was believed to be endangered could be either a fellow police officer or members of the public.

The administrative review process is much broader in scope and requires a determination regarding whether there exists a "preponderance of evidence" to show that the involved officer violated the Department's Use of Force Policy or any other rules and regulations that were in effect on the date of the shooting.

The Policy encompasses the criminal statute applied by the District Attorney's Office as it relates to the reasonableness of an officer's actions at the moment deadly force is used, but also encompasses other aspects of tactics and training regarding an officer's actions prior to the actual use of force. The Policy indicates that officers should recognize that their conduct immediately connected to the use of force may be a factor which can influence the level of force necessary in a given situation. It acknowledges that officers may escalate or de-escalate the use of force as the situation progresses or circumstances change and may use tactical options (such as warnings, verbal persuasion, cover, concealment, barriers, disengagement, repositioning, retreat, containment and others) as a preferable response to a deadly force confrontation, if reasonable under the circumstances.

The Policy also specifically indicates that officers are to rely upon their training in making the decision as to the level of force to be used. With regard to potential deadly force situations, Denver Police officers are trained in classroom lectures, video based scenarios, and practical exercises to employ certain tactical principles wherever possible or practical. The purpose of these principles is to better ensure the officers' safety, as well as the safety of the public. These can include:

1. the use of cover and/or concealment;
2. the use of barriers between the officers and the potential threat;
3. the use of communication among the involved officers, as well as with the potential threat;
4. the use of movement to:
  - a. seek a better tactical position;
  - b. increase the distance between the officers and the threat;
  - c. increase the time the officers have to react to the threat.

As it relates to the sections of the Policy referencing the criminal statute, the Policy expressly incorporates C.R.S. § 18-1-707 which sets forth the legal framework under which a police officer is justified in using deadly physical force. The applicable language states, in part:

A peace officer is justified in using deadly physical force upon another person...when he reasonably believes that it is necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force.

In applying that section of the policy, the task in this administrative review is to determine whether the evidence and circumstances of this case make it more likely than not that a police officer would not have been reasonable in believing that Jimmy Orozco presented a threat of the imminent use of deadly physical force against that officer or a third person.

In addition, as it relates to the provisions of the policy dealing with tactical considerations and de-escalation, the task of this administrative review is to determine whether the evidence presented makes it more likely than not that a police officer would not have been reasonable in employing similar tactics as those used in this case when attempting to arrest Jimmy Orozco.

In making the above determinations, consideration must be given to all the circumstances, including, without limitation, the information which was available to the involved officers, as well as any reasonable inferences arising from that information; the observations of the officers; the lighting that is present and the visibility at the scene; the distances between the officers and the threat; the logistics at the scene; the timing of the incident; the immediacy of the threat; the nature of other offenses believed to have been committed; the manner in which force was both threatened and used; and the practicality and feasibility of employing other tactical options under the circumstances. It is necessary to

gauge the behavior of these officers against what would be expected of an objectively reasonable police officer under similar circumstances. It must be determined whether, given all these circumstances, the officer's decision to shoot his weapon was justified given the perceived threat posed by Jimmy Orozco.

#### **A. The Reasonableness of the Officer's Tactics**

In this case, Officers Richard Nixon and Robert Anderson were responding to a radio call that described a theft from motor vehicle in progress. An eyewitness who reported the theft had seen a single man checking the handles of multiple cars in the parking garage. The eyewitness called at approximately 4:40 a.m. that he was able to watch the suspect as the man tried to enter several cars in a well lighted parking garage. When the officers responded, the eyewitness saw the man run back to a white sedan and "hide". The officers drove by the white sedan without seeing the man. They stopped their marked police car, turned it around so that it was facing down the ramp and the headlights would shine on a black Escalade that had a window broken out. The officers got out of their marked car and checked out the black Escalade, still unaware that the suspect the eyewitness had seen was in a car behind them. When informed that the suspect was in a white sedan behind them, the officers immediately approached.

The parking garage was well lighted and both officers were in full police uniforms with visible badges, guns and gun belts. They both carried flashlights. The officers had to approach the suspect vehicle from the front as it was facing out toward the traffic lane. They separated to flank the car, with one officer on each side as they approached it from the front. The white sedan had tinted windows which required the officers to use their flashlights. With his weapon in one hand and his flashlight in the other, Officer Nixon shined his light into the driver's side of the car.

Officer Nixon gave a loud and clear order to the suspect to get out of the car. Officer Anderson also ordered the suspect to get out of the car. Instead of acknowledging or complying with the officers' commands, Jimmy Orozco looked directly at the officers, started the car and accelerated rapidly toward them.

As the suspect vehicle raced toward them, Officer Anderson was able to jump out of the way. Officer Nixon was directly in front of the car and could not see Officer Anderson. Officer Nixon raised his weapon and aimed through the windshield at the driver. In the split second that it took for Nixon to pull the trigger (a physical and mental process generally referred to as target acquisition and reaction time), the intended target had moved both forward and laterally to the officer's left (driver's right). This caused the bullet to penetrate the bottom left corner of the driver's side window and strike Jimmy Orozco under the left arm as his hand was on the steering wheel. Officer Nixon fired only once and ceased firing as the car passed him and no longer presented a threat to either officer. The suspect vehicle then continued turning and went down the ramp to the second level.

These officers were confronted with a sudden and unanticipated situation when, rather than complying with the officers' orders to get out of the car, Mr. Orozco escalated this confrontation to a deadly level by unexpectedly starting the car, accelerating rapidly and driving directly toward Officers Nixon and Anderson. Both the statements of the two officers and that of the civilian eyewitness establish unequivocally that Officers Nixon and Anderson were in danger of being run over, seriously injured and possibly killed by Jimmy Orozco

Officer Nixon and Officer Anderson demonstrated sound tactical thinking by approaching the suspect and issuing a verbal command in an attempt to resolve the situation in a peaceful manner. However, Mr. Orozco refused to comply with this command; instead, Orozco escalated the confrontation by starting his vehicle, accelerating rapidly and aiming it directly at the officers. Because of the location in which Orozco had chosen to park the car, which had tinted windows, the officers had to approach the vehicle without cover. They were, literally, within a few feet of the suspect vehicle. There was, at most, seconds between the officers' commands to get out of the vehicle and Mr. Orozco accelerating the car toward the officers. It was at this instant, with Officer Nixon standing directly in front of the car and Officer Anderson within inches of it, that the officers were at the deciding point for the determination of whether to use force and the level of force needed. In these few moments, Officer Nixon and Officer Anderson found themselves without any cover, without any barrier between themselves and Orozco, without any response or acknowledgement to their commands and without any time to move to a better tactical position. Officer Anderson was far enough to the side that he was able to jump and run out of the way of the car. Officer Nixon was stuck in front of the rapidly accelerating car, unable to see if Officer Anderson was safe and locked into eye contact with a suspect who looked directly at him, ignoring the officer's order and aimed the car right at him. Jimmy Orozco chose to ignore the officers' orders and instead, further escalated the threat. The actions by Jimmy Orozco eliminated any opportunity for these two officers to de-escalate the situation. Even though his gun was out throughout his confrontation with Jimmy Orozco, Officer Nixon did not fire until Mr. Orozco started the car, accelerated it rapidly and directed it right at the officers. At this point, Officer Nixon was without the time or the ability to move out of the way of the deadly weapon which Mr. Orozco had made of his car.

By all appearances, Orozco had chosen to use his vehicle as a deadly weapon and attempt to kill or seriously injure Officers Nixon and Anderson, rather than submit to police authority. Officer Nixon was appropriately focused on neutralizing a danger not only to his own life, as well as to the life of Officer Anderson who was also in the path of the vehicle that Orozco had turned into a deadly weapon. When confronted with this perceived and immediate deadly threat to the lives of Officer Anderson and himself, Officer Nixon responded appropriately with deadly force, firing his weapon one time and ceasing fire as soon as the threat had passed.

In light of the immediacy and lethality of the threat which Mr. Orozco posed, this Office concludes that appropriate tactics were used. Based upon the totality of the circumstances, no other reasonable tactic was available that might have allowed Officer Nixon to avoid or reduce the likelihood of a deadly force encounter and still safely carry out his sworn duties as a police officer.

#### **B. The Reasonableness of the Assessment of the Threat**

This analysis requires consideration of the justification for using force. It is clear from the consistent statements of both officers and the witness that the actions of Mr. Orozco placed both Officers Nixon and Anderson in grave danger.

The perception of Officers Nixon and Anderson that they were in imminent danger was reasonable. These officers were across the traffic lane, in front of the suspect's vehicle when they learned that the suspect was hiding in a car behind them. As they cautiously approached and gave commands to get out of the car, Mr. Orozco chose to escalate the situation into a deadly confrontation. Mr. Orozco was but a few feet away from the officers when he started the car and sped out of the parking spot directly toward them. He accelerated so rapidly toward the officers that he made his tires squeal, a sound that was heard by the officers and citizens in the apartment complex.

Officer Anderson knew Officer Nixon was right in front of the vehicle, not off to the side. As noted above, Officer Anderson could not see the suspect until the flashlight hit Mr. Orozco's eyes. When he yelled for the suspect to get out of the vehicle, the suspect instantly started the car, "floored it and whipped out of the parking spot". There was a "high engine noise". He knew Officer Nixon was right in front of the vehicle at this time, not off to its side. Officer Anderson jumped and ran out of the way of the vehicle. Officer Anderson was clear that he would have been struck by the vehicle had he not taken the immediate evasive action. He stated the vehicle came within one or two feet of him and that he could have touched the car. Officer Anderson stated "I thought the car was going to hit me".

Officer Nixon stated in part that the suspect was looking right at him. He said he was looking right into the eyes of the suspect when the suspect started the car and came right at him. As noted above, Officer Nixon explained that he thought the driver was going to run him over and kill him. Officer Nixon described the look that Orozco gave him when the officer shined his flashlight in his face as "if I was in his way he didn't care what he did to get out of there". Officer Nixon knew only that Officer Anderson was off to his left, but he didn't know if Officer Anderson was in the way of the car. Officer Nixon described feeling like he was going to be run over at the time he fired his weapon. Officer Nixon directed his fire exclusively at the driver of the vehicle, Jimmy Orozco, who he believed posed an immediate threat.

The Denver Police Department's Use of Force Policy provides in part that officers will not discharge firearms at or from moving vehicles. The policy generally discusses the risks involved in firing at a moving vehicle and encourages officers to move out of the way of a moving vehicle "if possible" rather than discharging their firearms. The evidence in this case clearly demonstrates that at the moment he fired his weapon, Officer Nixon did not have the time or ability to safely move out of the way of the vehicle nor was he able to determine whether Officer Anderson had done so.

In addition, the Use of Force Policy specifically states that officers will not discharge firearms at moving vehicles "[e]xcept in self defense or defense of another from what the officer reasonably believes to be the use or imminent use of deadly physical force". It is evident here that the manner in which Mr. Orozco used the vehicle created a real and imminent use of deadly force. As explained in the District Attorney's letter regarding this incident:

The vehicle driven by Orozco was a deadly weapon under Colorado law because in the manner in which it was being used by Orozco it was capable of producing serious bodily injury or death to either or both of the officers.

It is further evident that the officers did, in fact, believe that Mr. Orozco was intent on seriously injuring or killing either or both of them and that they were about to be run down by Orozco. In the opinion of this Office, the evidence and statements of percipient witnesses in this case establishes that the perception of Officer Nixon that he was in imminent danger of having deadly physical force used against him was objectively reasonable. Likewise, it is also the opinion of this Office that the perception of Officer Nixon that Officer Anderson was in imminent danger of having deadly physical force used against him by Jimmy Orozco was also objectively reasonable.

### **C. The Reasonableness of the Use of Force Option**

This analysis requires consideration of the justification for the amount of force utilized by Officer Nixon. Officer Nixon resorted to deadly physical force in firing his weapon at Mr. Orozco. Consideration must be made for the split second reaction time between the moment which Officer Nixon believed he was in imminent danger and the moment he fired his weapon at what he described as "center mass".<sup>2</sup> Officer Nixon's view of the suspect was through the windshield of the vehicle; however, during that split second of time, Orozco's vehicle moved forward and to the right, thereby changing the position of the vehicle enough for the bullet to penetrate the window of the driver's-side door and not the windshield.

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<sup>2</sup> Denver Police Officers are trained that when deadly force is justified, officers should direct their fire at "center mass" (the torso area), the largest area of the body and the area in which bullet strikes are most likely to incapacitate the threat.

As explained above, peace officers are justified in using deadly physical force when they reasonably believe that level of force is necessary to defend themselves or others from what they believe to be the imminent use of deadly physical force. The Department's Use of Force Policy focuses on the "objective reasonableness" of a police officer's decision to use deadly physical force under the "totality of circumstances" present at that time. The officer is required to rely on his or her training, experience, and assessment of the situation in deciding the level of force to be employed and to exercise reasonable and sound judgment. The Policy recognizes that police officers often face circumstances that are "tense, uncertain and rapidly evolving", requiring them to make split-second life or death decisions, which was certainly the case in this particular incident. In those circumstances, a higher level of force may be deemed reasonable than would be the case if the officer had minutes or hours to make that choice. The Policy also provides that the greater the level of threat facing the officer, the greater the level of force that may be used by the officer.

It is important to point out that under the Department's Use of Force Policy, as well as the criminal statutes governing the use of force, an officer is not deemed to have used excessive force simply because it is later determined that the officer was mistaken in his belief that a subject posed an imminent threat of death or serious bodily injury. An officer need only base a decision to use deadly force on an "apparent necessity", not an "actual necessity". Thus, the officer is entitled to act on appearances. However, in doing so, it is the officer's responsibility to draw reasonable conclusions from the facts and surrounding circumstances.

Finally, it is necessary to reiterate that the Denver Police Department's Use of Force policy permits an officer to fire at a moving vehicle "... in self defense or defense of another from what the officer reasonably believes to be the use or imminent use of deadly physical force". As noted above, it is evident here that the manner in which Mr. Orozco used the vehicle created a real and imminent use of deadly force. There is no doubt that, as stated by the District Attorney, the "vehicle driven by Orozco was a deadly weapon under Colorado law because in the manner in which it was being used by Orozco, it was capable of producing serious bodily injury or death to either or both of the officers".

Several witnesses, including both officers, Devon Kelly and JF make direct statements that there is enough light for a person to see clearly while inside the garage. In addition, the scene investigation established that there are several ceiling lights throughout the parking garage and all of them were in working order. These statements and the physical and photographic evidence leave no doubt that the fully marked police car and the two officers in full police uniform would have been clearly visible to Mr. Orozco as he sat in the suspect vehicle. Similarly, there can be no doubt that Mr. Orozco saw the officers when they approached the car he was driving and ordered him to get out. The facts discussed in the preceding section (B) are equally dispositive in determining whether the degree of force used against Jimmy Orozco was reasonable and justified. The actions of Mr. Orozco created a situation in which Officer Nixon reasonably believed that deadly physical force was imminent and his life, as well as the lives of others, was

in danger. Officer Nixon explained that he specifically saw Orozco look directly at him as the suspect accelerated the engine. In the second or two before Orozco put the vehicle into gear and hurtled the car toward the two officers, Officer Nixon gave a command to the suspect to get out of the car and held his fire until the car actually was in motion. Officer Nixon watched, hoping that Officer Anderson could get out of the way, as Orozco ignored his commands to get out of the car and instead put the car into gear and sped directly toward him and Officer Anderson. At that point, Officer Nixon had no time to get out of the way himself and fired a single shot at Orozco. When the deadly threat of the speeding car passed the officers, Officer Nixon immediately ceased his fire.

As indicated previously, the facts and circumstances surrounding this event lead to the conclusion that Officer Nixon's belief that he was in imminent danger from deadly physical force was objectively reasonable. Similarly, the facts and circumstances detailed here and available in the file of this investigation demonstrate conclusively that the belief of Officer Nixon that Officer Anderson was also in imminent danger from deadly physical force was objectively reasonable. Therefore, the use of deadly physical force by Officer Nixon against such a threat was also reasonable.

#### **D. Summary of Findings**

It is the finding of this Office that the actions of Officer Nixon on April 20, 2006, were reasonable and necessary to defend against the perceived imminent and deadly threat posed by Jimmy Orozco. This Office further finds that Officer Nixon's actions in firing his weapon on this date was not reckless, negligent, or unreasonable despite the fact that Mr. Orozco was in a moving vehicle. The officer's actions were a direct and appropriate response to what he reasonably believed to be the imminent use of deadly physical force against him. Given these circumstances, this office concludes that Officer Nixon's actions were in compliance with the provisions of the Denver Police Department's Use of Force Policy.

#### **V. ADDITIONAL ISSUES**

##### Side Window Bullet Entry

Even though his gun was out throughout his confrontation with Jimmy Orozco, Officer Nixon did not fire until Mr. Orozco started the car, accelerated it rapidly and directed it at the officers. Officer Nixon waited to fire until the last possible moment when the car was in motion toward the officers. Officer Nixon had no possible way of knowing that Orozco would turn the vehicle slightly to the right before reaching the officers. Likewise, he had no way of knowing whether Officer Anderson, like himself, was unable to move out of the path of the rapidly approaching vehicle.

Nevertheless, the placement of the bullet through the driver's-side window, at least, raised the question of whether Officer Nixon fired from a position at the side of the vehicle after he was aware that the vehicle no longer presented a reasonable threat to him or Officer Anderson.

As part of its investigation, the Homicide Bureau and the District Attorney's Office meticulously recreated the shooting at the actual scene of the incident using all the statements, physical evidence, photographs and measurements available. The results indicated that the path of the bullet through the driver's-side window was consistent with Officer Nixon aiming his weapon at the driver from a position in front of and to the right of the vehicle's midline at the time the vehicle began to move toward him. Taking into consideration an officer's normal reaction time (measured in milliseconds) and the speed of the vehicle, the investigators estimated that the vehicle moved approximately five to ten feet as well as three to four feet to the right from its original position in the fraction of a second that it took for Officer Nixon to react to the threat and pull the trigger of his weapon. The investigative report concluded that "with such movement, the officer could have had a point of aim on the windshield of the vehicle and strike the side-window".

#### Delay in Medical Assistance

In this case, after Officer Nixon fired at Jimmy Orozco, the vehicle continued down one level of the parking garage and struck several vehicles before coming to rest. It is apparent from the witness statements that both officers and the lay witnesses believed that there was only one person in the car, Devon Kelly, the suspect in the break-ins.

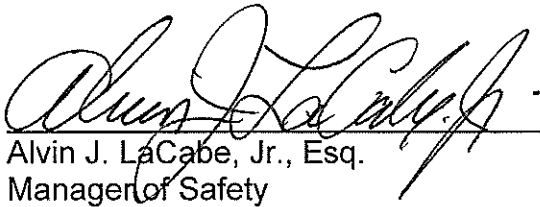
Believing that Devon Kelly was the driver of the vehicle and that there were no other persons in the car or in the parking garage, the officers' focus was on making sure that Mr. Kelly was in custody and not injured. Because of that belief and the focus on the captured suspect, the officers did not immediately go to the suspect vehicle. Thus, there was a delay of a few moments before Mr. Orozco was discovered and medical assistance was requested for him.

Nonetheless, had the officers immediately summoned medical assistance for Jimmy Orozco, the outcome would have been the same. The Coroner's report states in part that Jimmy Orozco died of a perforating gunshot wound to the chest. There was a perforation of the lungs, aorta, right hemidiaphragm, and liver. The inevitable result of this wound was death. Accordingly, the short delay from the time when the officers caught Devon Kelly and the time when the apartment manager notified the officers that there was a wounded man in the car did not impact the fatal outcome of Mr. Orozco's wound.

**IV. CONCLUSION**

In closing, we want to assure the public and the members of this Department that we have reviewed and analyzed this case carefully. The conclusions reached here are consistent with those of the District Attorney's Office, the Independent Monitor, and the Chief of Police. These consistent conclusions result from no other reason than they are dictated by the facts. It is always a concern to the Department when a police officer has to use force in the line of duty. However, in many instances, as in this case, the actions of the person against whom force was used have precipitated that use of force.

Officers Nixon and Anderson were undertaking a routine, but potentially dangerous, duty when they were confronted by Jimmy Orozco. There can be no doubt that this was an incident which should never have risen to a level requiring deadly force, but the actions of Jimmy Orozco made that necessary. Nonetheless, the citizens of Denver should know that on April 20, 2006, Officer Nixon acted reasonably under the circumstances with which he was confronted.

  
Alvin J. LaCabe, Jr., Esq.  
Manager of Safety

12/28/07  
Date

  
Mary A. Malatesta, Esq.  
Deputy Manager of Safety

12/28/07  
Date