



February 17, 2016

Chief Dave Spiller
4833 Bernal
Pleasanton, CA 94566

Dear Chief Spiller

Enclosed is the District Attorney's Final Report on the fatal shooting of Johnathon Deming, Jr. which occurred July 5, 2015.

I have reviewed the report and agree with the conclusion that the evidence does not justify criminal charges against Officer Daniel Kunkel.

As indicated in the report, no further action will be taken in this case.

A copy of the report will be available to the public no earlier than five working days after February 17, 2016.

Very truly yours,


Nancy E. O'Malley
District Attorney

Enclosure

DISTRICT ATTORNEY'S REPORT
OFFICER INVOLVED SHOOTING
OF
MR. JOHNATHON DEMING JR.

By: **Kevin Wong**
Deputy District Attorney

Brian Medeiros
Inspector

Approved By: **Nancy E. O'Malley**
District Attorney

Dated: **February 17, 2016**

INTRODUCTION

The Alameda County District Attorney's Office has assembled an Officer Involved Shooting (OIS) Team, which consists of experienced senior, assistant and/or deputy district attorneys as well as experienced inspectors, all of whom are sworn peace officers. A two-person team, consisting of an attorney and inspector, are assigned to respond to, investigate and evaluate cases where a peace officer has shot a person resulting in death. The OIS Team is authorized by agreement with each local law enforcement agency serving Alameda County, to conduct a separate but parallel investigation into the circumstances leading up to the death with the ultimate question of whether charges should be filed against the officer or anyone involved in the shooting. It remains the legal responsibility of the criminal division of the employing law enforcement agency to conduct the criminal investigation. It is also the legal responsibility of the Internal Affairs Division of the employing agency to conduct an administrative investigation of which the District Attorney's Office is not involved.

FACTUAL SUMMARY

On July 5, 2015, shortly after 2:00 a.m., the decedent, Mr. Johnathon Deming Jr. entered Specialty Sales Classics, a classic car showroom at 4321 First Street, Pleasanton by breaking a large glass window in the north showroom of the business. Mr. Deming Jr.'s entry set off the alarm and the Pleasanton Police Department was notified by Bay Alarm that entry had been made into the business. Before Pleasanton Police Department officers arrived at the scene, Mr. Johnathon Deming Jr. remained in the business looking for keys to the cars. During his search, Mr. Deming Jr. became increasingly frustrated and began damaging property inside the business. He damaged interior walls and windows with a large metal rod. At one point, Mr. Deming Jr. left the business through the initial point of entry and returned with a fire extinguisher. He proceeded to spray multiple cars in the south showroom with the fire extinguisher powder and then he threw the extinguisher at one of the cars.

Pleasanton Police Department officers arrived at 4321 First Street approximately ten minutes after being notified of the unlawful entry and began setting up a perimeter around the business. Officer Daniel Kunkel arrived on scene and set up a rear perimeter at the northwest corner of the business near the broken glass window, the initial point of entry. Officers could hear loud banging and screaming coming from inside the business. While the officers were setting up a perimeter and gathering at the front of the business on the southeast side, Mr. Deming Jr. became aggressive and violent towards the police. Mr. Deming Jr. picked up a large, heavy car jack and threw it at a large store front glass window in the direction of a police officer. The car jack bounced off the glass and fell on the hood of a car. Mr. Deming Jr. picked up another large car jack and threw it at the glass store front doors in the direction of police officers. The car jack broke through the glass and landed on the front sidewalk, coming to rest by the curb. Mr. Deming Jr. then came to the door entryway and challenged the officers by screaming at them. "Less-lethal" bean bags were deployed at Mr. Deming Jr. but did not strike him. He did not surrender and went back into the store.

Mr. Deming Jr. continued his aggressive behavior by climbing on cars and hanging from the rafters of the showroom. Pleasanton Police officers repeatedly commanded Mr. Deming Jr. to come out and surrender with no success. The officers made entry into the business and confronted Mr. Deming Jr. as he sat on top of a truck in the business. Despite the use of repeated verbal commands, a police canine, two unsuccessful Taser deployments, and “less-lethal” shotgun deployments, Mr. Deming Jr. did not surrender or comply with the Pleasanton Police officers. Instead he jumped off the truck and ran out of the business through the initial point of entry.

Officer Kunkel was the only officer covering the rear perimeter at the northwest side of the business when Mr. Deming Jr. exited from the business through the broken glass window. Officer Kunkel ordered Mr. Deming Jr. to stop but he ran past Officer Kunkel. Officer Kunkel deployed his Taser at the back of Mr. Deming Jr. but it did not have any effect. Officer Kunkel then began chasing Mr. Deming Jr. in a western direction. Upon chasing him, Officer Kunkel felt one of his hamstrings pop. He continued to chase Mr. Deming Jr. with the Taser wire still in Mr. Deming Jr.’s back. The two reached a parking lot and the Taser wire snapped. Mr. Deming Jr. turned around and screamed at Officer Kunkel. He then charged at Officer Kunkel and jumped up and kicked Officer Kunkel in the stomach area. Officer Kunkel felt his other hamstring pop and lost his balance, falling on his back. When he fell, the back of Officer Kunkel’s head hit the pavement.

Mr. Deming Jr. was positioned on top of Officer Kunkel and repeatedly struck Officer Kunkel in the face. Officer Kunkel was physically exhausted from the chase, in tremendous pain, and felt like he was about to lose consciousness. He was unable to create any space between him and Mr. Deming Jr., who continued to hit him in the facial area. Fearing that he would lose consciousness and ultimately his firearm to Mr. Deming Jr., Officer Kunkel used his Taser which was still in his right hand and drove the Taser into Mr. Deming Jr.’s forehead in “drive stun” mode. This created a little space between the two individuals but Mr. Deming Jr. did not stop striking Officer Kunkel. Officer Kunkel was able to rock his body slightly allowing him to retrieve his firearm with his left hand. Officer Kunkel raised his firearm in the direction of Mr. Deming Jr. and shot his firearm up at him three times, striking him once in the stomach and once in the head. Officer Kunkel remained on his back until officers arrived at the parking lot a short time later. Mr. Deming Jr. was detained and received medical attention from officers until the fire department and paramedics arrived to transport him to Eden Hospital. Mr. Deming Jr.’s death was pronounced at Eden Hospital at 4:53 a.m.

INVESTIGATIVE STEPS

On July 5, 2015, at approximately 4:40 a.m., the on-call OIS Team was notified that a Pleasanton Police Department officer had been involved in a shooting that could be fatal. The OIS Team consisted of this Deputy District Attorney and District Attorney Inspector Brian Medeiros. Upon notification, the OIS Team initiated its investigation into the shooting death of Mr. Deming Jr.

The OIS Team was informed that the officer involved shooting occurred at a classic car showroom, Specialty Sales Classics, 4321 First Street, Pleasanton, at approximately 2:35 a.m. The OIS Team arrived on scene at approximately 6:35 a.m. on July 5, 2015. When the OIS Team arrived, a primary and secondary perimeter had been placed around the scene. The Pleasanton Police Department (“PPD”) had secured the scene while obtaining a search warrant for the business and a suspected involved vehicle. At approximately 8:35 a.m., after the search warrants were signed by Alameda County Superior Court Judge Hernandez, the OIS Team participated in a walk-through of the scene with members of the PPD’s investigative team. This comprehensive walk-through included the location where the shooting occurred, the exterior of Specialty Sales Classics, and the interior of the business. The OIS Team completed its walk-through at approximately 10:00 a.m.

On July 5, 2015, after leaving the scene, the OIS Team went to PPD. At this location, the OIS Team reviewed dispatch recordings related to the incident and a video from a Taser brand body camera worn and activated by Sergeant Eric Gora during the events leading up to, and shortly after the shooting. Due to officer fatigue, the decision was made by PPD to conduct most of the officer interviews on July 6, 2015. Through his attorney, Officer Daniel Kunkel, the officer involved in the shooting, complained of symptoms consistent with a concussion and requested PPD to postpone his interview. This request was granted and Officer Kunkel’s interview was rescheduled for July 6, 2015, pending medical clearance.

On July 6, 2015, the OIS Team returned to PPD. The OIS Team reviewed the statements of Sergeant Eric Gora and Officer Brandon Cobler. The OIS Team reviewed relevant footage from the seven surveillance cameras from the interior of Specialty Sales Classics. The OIS Team also participated in the interview of Officer Kunkel who had been medically cleared for light duty by a doctor earlier in the day.

As part of its continued investigation, the OIS Team thoroughly reviewed the PPD’s investigative reports; supplemental reports; police officer statements; civilian statements; police radio dispatch recordings; police officer body-worn video recordings; surveillance video recordings; photos; the autopsy protocol and photos; the coroner’s report and photos; the toxicology reports; medical records; social media materials; videos made by the decedent in the days before the incident; and additional evidence collected during the investigation.

SCENE WALK-THROUGH

The incident began in and around Specialty Sales Classics, 4321 First Street, Pleasanton. Specialty Sales Classics is an exotic car dealership located on the northeast corner of First Street, which runs in a north-south direction, and Spring Street, which runs in an east-west direction. Behind Specialty Sales Classics to the west is a parking lot. Continuing west from this parking lot is a fence, and then another small parking lot for a business, Stone Group, Inc. The OIS occurred in the small parking lot of Stone Group, Inc. During the July 5, 2015 walk-through of the scene, the following was observed by the OIS Team.

A fully marked PPD SUV patrol vehicle, numbered "402," was parked facing westbound on Spring Street parallel to the parking lot between Specialty Sales Classics and the Stone Group, Inc. parking lot. Patrol vehicle "402" was Officer Kunkel's assigned vehicle on July 5th. There was a Taser wire visible on the pavement and underneath the driver's side front tire of this police vehicle. The northwest corner of Specialty Sales Classics' building was located in a southeastern direction from the driver's side of Officer Kunkel's patrol vehicle. At the northwest corner of the Specialty Sales Classic building was a large glass window facing west, which was broken and was determined to be the point of entry and also the point of exit. Immediately to the west of the large broken glass window were low bushes and then a sidewalk. Further to the west, there was a sidewalk where two green Taser doors were located on the floor. These Taser doors open up and detach when a Taser is deployed and the probes with wires shoot out of the weapon.

Continuing west on the sidewalk from the green Taser doors, there was a white Mercedes van parked in a southerly direction at the northeast corner of the Stone Group, Inc. parking lot. The van had paper dealer plates. The right rear door to the van was ajar and a couch was visible in the rear of the van. In the front passenger seat, an electronic tablet and a long, black, metal rod could be seen. A Livermore Police Department SUV patrol vehicle was parked in a southwesterly direction in the middle of Spring Street and to the rear of the white Mercedes van. It was later determined that this vehicle was assigned to Livermore Police Department Sergeant Jim Horton on July 5th.

In front of the white Mercedes van and to the southwest, numerous items were observed on the ground of the Stone Group, Inc. parking lot in an area between a fence to the east and a curb line with a patch of ivy to the west. Next to the western ivy curb line and closer to Spring Street was a pool of blood; the decedent's clothing; a military "dog-tag" style necklace; and a wallet. Further away from the ivy curb line and away from Spring Street there were three bullet casings; a black Taser; a medical bag; and a handgun. Also on the ground of the parking lot, closer to the front of the white Mercedes van was a less-lethal rifle and medical gloves. The pavement in the Stone Group, Inc. parking lot was older, rough asphalt.

After the shooting scene was observed, entry was made into Specialty Sales Classics. Specialty Sales Classics consists of two showrooms, one to the north and one to the south, which are connected by a hallway. On either side of the hallway there were several rooms, including at least two offices. The front entrance of the business was located in the south showroom building and consists of two glass doors facing east towards First Street. One of the doors had its glass broken. East of this broken glass door, there was a large red tire jack partially on the street and partially on the curb. There was broken glass outside the front door and also multiple bean bag rounds from a less-lethal rifle.

Upon entering the south showroom of the building, to the right was a room with a red Ferrari inside. On the hood of the Ferrari was another large tire jack. In a small office off of the room with the Ferrari there was part of a guitar on the floor. There was broken glass on the floor as you enter the south showroom. There was a red vehicle parked in the south showroom and on the front hood of the vehicle were the words, "CONFRONT ME IN PEACE. I HAVE MUCH TO TEACH." The words appeared handwritten with the use of a black marker.

Continuing west into the south showroom, the room opened up to the right where a bathroom is located. On a mirror inside the bathroom appeared the words, "HOPE & HUMANITY HAS FAILED." These words also appeared handwritten with a black marker. To the west of the bathroom entrance, the south showroom contained many vehicles. Near the vehicles west of the bathroom entrance, multiple Taser doors and Taser wires were observed on the floor. Also on the floor were multiple bean bag casings. A black sharpie was observed on the floor under one of the vehicles.

Further west into the south showroom by the hallway that connects the two showrooms, there was a dark colored vehicle. On the floor near this vehicle were a broken box and a key. On the hood of the car were additional keys. Dusty shoeprints could also be observed on the hood of this vehicle. Also on the floor were wooden fragments that appeared to be from a guitar. Upon entering the hallway to the north, there were office entrances on the east and west walls.

The office along the east wall of the hallway contained several desks and file cabinets. Some of the drawers inside the office were open. Further east in the room, there was another doorway that led back out to the south showroom. In the office, near that south-facing doorway was a surveillance monitor that appeared to be showing numerous video feeds from surveillance cameras inside the store.

Continuing north through the hallway, there is a second room along the west wall. This room appeared to be a storage room. The wall between this storage room and the hallway contained multiple frosted glass window panes. Outside of this storage room there was a hole in the hallway drywall. Continuing along the western hallway wall, some of the frosted glass window panes were broken out. Across from these broken windows, another hole was observed in the eastern hallway drywall.

Inside the north showroom were numerous additional vehicles. On many of the vehicles, a white powder could be seen on the hoods and other portions of the vehicles. On the floor in the north showroom was a red fire extinguisher. In the northwest corner of the north showroom was the large broken glass window which was determined to be the point of entry and exit. The OIS Team concluded its walk-through at this location.

INVOLVED OFFICER STATEMENT

Statement of Officer Daniel Kunkel

Officer Daniel Kunkel of the PPD gave his statement on July 6, 2015.¹ The statement was taken at PPD and the OIS Team participated in the interview. Officer Kunkel was given an admonition regarding the statement and he agreed to give a statement. At the time of the incident, Officer Kunkel had approximately eight and a half years of experience as a police officer at PPD and the Antioch Police Department.

¹ Officer Kunkel was scheduled to give a statement on July 5, 2015. However, through his attorney, he complained of symptoms consistent with a concussion. Given his compromised condition, the statement was postponed to July 6, 2015 and Officer Kunkel sought further medical evaluation.

Officer Kunkel started his shift at 6:00 p.m. on July 4, 2015. He was wearing his department-issued blue uniform with patches on both shoulders, with department-issued badge and name tape. He was wearing his full duty belt. On the right side of the belt were magazines for his firearm, a radio, a Taser, and OC spray. On the left side of the belt were a small “mag” light, a department-issued 45-caliber Sig Sauer firearm, and an audio digital recording device. Officer Kunkel’s dominant hand is his left hand. His police vehicle number was “402” and his call sign was “H11.” Officer Kunkel had a “Scorpion” video recording device affixed to his shirt beneath his collar in the center of his chest.

Officer Kunkel received the initial dispatch related to 4321 First Street while out on another call. The initial dispatch received by Officer Kunkel was that an alarm had activated at the business located at 4321 First Street and he responded to the dispatch. While in route to the location, about 30-seconds before arriving, he received information from Sergeant Gora over the radio that a suspicious Mercedes vehicle with the back door open was parked nearby. Sergeant Gora also provided information over the radio that there was visible glass broken from the business and that he was hearing screaming coming from inside of the business. Sergeant Gora gave the order over the radio for officers to respond with vehicle lights and sirens activated.

Upon arrival, Officer Kunkel positioned his vehicle on the north side of the business facing westbound right by the corner of the Specialty Sales Classic building where the window break was located. Officer Kunkel saw Sergeant Gora standing at the northwest corner of the business by a large broken window and met with him there. The hole in the window was large enough for a person to crawl through and Officer Kunkel observed broken glass on the floor inside the business. Sergeant Gora moved to a different position out of Officer Kunkel’s view to the front of the building. As additional units arrived on scene, these officers took positions towards the front of the building.

Officer Kunkel was the only officer positioned on the rear perimeter, by the northwest corner of the business next to the broken window. He estimated he was positioned here for approximately five to ten minutes before he saw the individual flee the business. While standing on the sidewalk, he watched inside the business through the broken window. The interior lights of the business were on. While watching the business through the window, Officer Kunkel heard items being broken, items being smashed, and glass being broken. He also heard screeching, yelling, and growling coming from the individual inside the building. He saw and heard an item fall from the ceiling.

On three occasions, Officer Kunkel observed the individual with black hair in a ponytail inside the business. Officer Kunkel described the individual as taller than him with a slender build. Officer Kunkel is 6’1” tall and weighs approximately 240 pounds. When he saw him in the business, the individual was looking up and shaking his head rapidly, screaming, mumbling, raising his hands erratically, and acting like someone who was under the influence of a stimulant. Based on his observations and his experience with individuals under the influence of controlled substances, Officer Kunkel felt that the individual was potentially going to be combative towards officers.

Officer Kunkel feared that the individual inside the business was actively burglarizing the business and based on his prior experience as an Antioch Police officer, he knew and had encountered burglars who retreated out of a premise through the point that they entered. When this thought went through his mind, Officer Kunkel radioed to try and get another officer or a canine to take a position with him at the point of entrance, the broken glass window. He received no response. Officer Kunkel believed that they were going to enter the building from the front. Shortly thereafter, he heard what he initially thought were two or three muffled gunshots. However, he then heard Sergeant Gora state over the radio that “less-lethal” shotguns had been deployed.

Approximately three to five seconds after the shots, Officer Kunkel saw the individual running inside the business towards the broken window. Officer Kunkel remembers trying to get on the radio to let others know the individual was coming out of the back of the building but he couldn’t get on the radio because everyone was talking on the radio. At this point, Officer Kunkel drew his Taser. He watched as the individual stepped up on the window ledge and jump through the window towards him. Upon exiting the building, the individual was approximately three feet from Officer Kunkel and looked right at him. Officer Kunkel identified himself as a police officer and told him to stop. The individual did not listen to this command.

Officer Kunkel then raised his Taser with his right hand and as the individual ran towards him, he attempted to deploy the Taser. Officer Kunkel realized the Taser was on “safe” and it did not deploy. The individual continued to run past Officer Kunkel. Officer Kunkel let the individual pass him so he could deploy the Taser at his back, a larger muscle group. At this point, the individual was approximately five feet away from Officer Kunkel, running in a westbound direction on the sidewalk towards the Mercedes van. Officer Kunkel stated that he deployed the Taser at the individual’s back and told the individual to stop, but the individual continued to run. Officer Kunkel saw at least one of the Taser prongs make contact with the individual’s back below his shoulder blades. Officer Kunkel also heard the Taser “cycle,” but the individual continued to run towards the van. As Officer Kunkel began to run after the individual, he felt one of his hamstring muscles “pop.” Officer Kunkel felt “excruciating pain” as he pursued the individual. Officer Kunkel stated that he was still telling the individual to stop.

The individual did not stop but continued to run around the back of the Mercedes van and towards the front of the van in the nearby parking lot. Officer Kunkel was still running after him. At this point, Officer Kunkel felt the Taser wire connecting the prong and the Taser cartridge expand out to the point that it snapped. Officer Kunkel recalls activating his Taser again. At this point, Officer Kunkel estimates he was approximately ten to eighteen feet away from the individual in the parking lot. This parking lot area was relatively dark. According to Officer Kunkel, there was nothing preventing the individual from continuing to run away through the parking lot. He was considering setting up a perimeter to surround the individual. However, when the Taser wire snapped, the individual stopped running, turned around, and began screaming. Officer Kunkel described the screaming as consistent with an animal in distress. He could not make out exactly what he was screaming, but described it as something like, “You are going to Tase me?” or “Don’t Tase me.” Officer Kunkel described the individual’s stance as combative and his nature as aggressive. The individual’s fists were clinched.

The individual ran rapidly at him. Officer Kunkel never had anybody advance on him like this individual did. Officer Kunkel believed the individual was going to assault him so Officer Kunkel braced himself in a defensive position by putting his left foot out behind him. He could see the individual had both hands in fists as he ran at him and he was clearly upset. The individual was still screaming and Officer Kunkel expected to get hit with fists. As he got closer, the individual jumped up and did a “martial arts-type” kick at Officer Kunkel’s waist. Officer Kunkel also recalls being hit in the face multiple times with the individual’s closed fists. The hitting and the kick caused Officer Kunkel to lose his balance and fall backwards. At this time, Officer Kunkel felt “excruciating pain” in his opposite hamstring and he fell onto his back.

The individual then jumped on top of Officer Kunkel and began hitting Officer Kunkel repeatedly in his face. Officer Kunkel felt pain on the back of his head due to hitting the rough concrete when he fell back and from being hit while he was on the ground. Officer Kunkel felt pain on his face, his nose, and his eyes due to being hit repeatedly. Officer Kunkel tried to get some space between the individual and his body to free himself but he was unsuccessful. He described the individual as being on top of him like a “ring fighter.” Officer Kunkel could see the individual’s face was close to his so he knew the individual was not standing. Officer Kunkel stated that he was struggling to stay conscious, he was fatigued, and he was in pain.

As the individual was hitting him in the face repeatedly, Officer Kunkel stated that he feared he was going to lose consciousness and he feared that the individual was going to kill him if he had a chance to. Officer Kunkel was paying attention to the individual’s arms because he didn’t want to be disarmed. Officer Kunkel believed he was going to lose consciousness from being so fatigued and in so much pain. He then realized that he still had his Taser in his right hand. He did not remember if he removed the Taser cartridge or not but he was able to raise his right arm up towards the individual. His right arm now blocked punches coming from the individual. Officer Kunkel then activated his Taser in “drive stun” mode and drove the Taser into the individual’s forehead. He believed he made contact with the individual’s forehead with the Taser. He heard the Taser cycle and this act allowed Officer Kunkel to gain enough space to draw his handgun.

Officer Kunkel believed that at any moment he was going to die because he was going to pass out from exhaustion and the individual was going to kill him. He believed that if the Taser had not worked to create more space, he would have been a “dead man.” Following the Taser “drive stun,” Officer Kunkel was able to rock towards his right side slightly. He dropped his Taser and he was able to draw his handgun with his left hand. Officer Kunkel pointed his gun at the individual at point blank range and he fired his handgun at the individual one time. He did not know where he hit him as he did not aim. He didn’t know if the gunshot was a contact shot or taken from a couple feet away. Officer Kunkel fired the first shot because he thought he was going to lose consciousness and that the individual was going to disarm him and kill him with his own handgun.

According to Officer Kunkel, the first shot did not have an effect and the individual continued. Officer Kunkel then shot one more time at the individual with his left hand. When he took the second shot, the individual was still above him and still attacking him. After Officer Kunkel shot the second shot, he heard the individual “growling” next to him. The individual

then hit the ground approximately an arm's length away. Officer Kunkel looked over and he saw the individual was on the ground. At that point he stopped shooting because the individual had stopped. He stated he used every bit of energy he had to shoot those two shots. Officer Kunkel just lay on the ground, thankful that he was breathing. He could not move because he was so exhausted and he just lay on the ground with his arms at his sides. Officer Kunkel could hear footsteps approaching. He attempted to radio that shots were fired but he couldn't get through because there was so much radio traffic.

Officer Kunkel recalled lying on his back and being thankful that he was alive. He was thankful that his partners arrived to offer assistance. Other officers told him to get up but he was unable to get up on his own and wanted to lay there due to the pain. He told the other officers to render medical assistance to the person who just attacked him. He remembers being so thankful that his team came to help him because "he thought he was dead." Officer Kunkel stated that he didn't think he was going to see his wife or kids ever again and that if he didn't do what he did, he was going to die.

Officer Kunkel remembered Officer Palmquist grabbing his right hand to help him up. He could not get up on his own due to the pain and exhaustion. He left his gun at the scene where it had been when he put his arms extended out to his sides after the shooting. The two walked away from the scene and across the street where the ambulance eventually arrived to treat him.

Officer Kunkel told Officer Palmquist that he thought the individual was on drugs. He described the individual as not "even acting human" and "displaying this super-human strength." He believed that the individual was on some sort of stimulant or drug that was making him not feel pain and act the way he acted. Officer Kunkel stated that the noises he heard the individual making from inside the business sounded like an animal. He stated that when the individual attacked him he was screaming like an animal. Officer Kunkel stated that the individual was exhibiting strength that he couldn't protect himself. Given the prior use of Tasers and less-lethal shotguns on the individual, Officer Kunkel believed that he needed to protect his life by shooting the individual.

With regards to considering the use of other levels of force, Officer Kunkel stated that he did when he used his Taser on the individual and that didn't work. He had pepper spray but could not reach for it. With regards to activating his "Scorpion" video recording device, Officer Kunkel stated that he did not activate it because he was too busy focusing on the burglary and the suspect inside the building. In the past he has tried to turn it on and it doesn't go on. In his experience, the device commonly doesn't work and he has to look down to confirm that it is on. In his opinion, doing this is an officer safety issue because he is taking his eyes off someone who can hurt him.

OFFICER WITNESS STATEMENTS

Statement of Sergeant Eric Gora

Sergeant Eric Gora of the PPD gave a statement on July 5, 2015. Sergeant Gora has been with the PPD for approximately five years. Prior to working with the PPD, Sergeant Gora was a police officer for the City of Citrus Heights for approximately four years and the Stockton Police Department for approximately two years.

Sergeant Gora started his shift at 6:30 p.m. on July 4, 2015 and his call sign was "S13." He was responsible for eight officers that evening. He was dressed in a full police uniform with badges and PPD patches. He had a full duty belt and he was wearing a Taser body-worn video camera. Sergeant Gora stated that this video camera has been assigned to him as part of a "pilot" program with the PPD and he has had it for approximately 30 days. During this testing phase, he has been trying to use it during any type of enforcement action to see how the camera performed in various settings. His police vehicle number was "481."

Sergeant Gora heard the alarm call out to 4321 First Street, and since he was nearby, he decided to respond to the call. He thought it was unusual that the dispatcher reported that someone answered the phone inside the business. When Sergeant Gora arrived, he parked in a parking lot nearby Specialty Sales Classic. He noticed in the parking lot that there was a white Mercedes van with paper license plates and with the rear door slightly opened and a dome light on. Sergeant Gora made sure no one was in the van and noticed a couch in the van. He notified dispatch of this information.

Sergeant Gora next noticed that on the northwest side of the business there was a large glass window that was broken. He also notified dispatch of this information. Sergeant Gora went to the north corner and he heard loud metal banging coming from the south side of the business. He suspected that someone was trying to steal a vehicle from the business. At this point he tried to turn on his Taser body-worn video camera by double-clicking the "on" button. He did not hear the audible tone that indicated the video camera was on. Sergeant Gora periodically attempted to turn on the video camera and thought there was something wrong with it until he later realized that earlier in the shift, he had turned the camera off because he was reviewing police reports at the station. Therefore, there was a delay until he finally turned on the Taser video camera.

Sergeant Gora requested units to come to the scene "Code 3" (with lights and sirens). He was uncertain of the situation he had inside with the banging and screaming inside the business and the broken glass. He wanted to set up a perimeter. Officer Kunkel was the first officer to arrive and Sergeant Gora contacted him on Spring Street. He had Kunkel set up on the northwest side of the business while he covered the northeast side. Sergeant Gora heard more metal banging and screaming coming from inside the business. Officer Middleton arrived on scene carrying his rifle and Sergeant Gora directed Officer Middleton to cover the southeast side of the business. At this point, Officer Kunkel and Officer Middleton both transmitted over the radio at different times that he saw an individual inside the business.

Sergeant Gora also saw the individual in the business. He was tall, wearing dark clothing, and had a bandana over his face. The individual inside was moving back and forth and at one point he came up to the window, put his middle fingers up and yelled, "Fuck you." Sergeant Gora stated that the individual did this with intense anger. Around this time, Officer Paulsen, Officer Palmquist, Officer Bennett, and Officer Cobler arrived. He directed Officer Cobler to cover the rear, southwest corner of the business. The individual inside went into a room in the south building behind a red Ferrari in the showroom.

Officer Palmquist and Officer Bennett were to Sergeant Gora's right, loading "less-lethal" rounds into the shotgun. At this point, Sergeant Gora saw the individual come out of the room carrying a large car jack with four wheels. He was carrying it with both hands and he threw the jack at the large window in front of the Ferrari. Sergeant Gora was standing outside in front of this window and he observed the car jack bounce off the window and land on the hood of the Ferrari. Sergeant Gora was about ten feet from the glass and the car jack was headed directly in his direction.

The individual inside the business went back into the room behind the Ferrari. The individual came back out of the room with another large car jack. At this point, Officer Paulsen was to Sergeant Gora's left and Officer Palmquist and Officer Bennett were still to his right side. The individual then carried the car jack to the front glass doors of the business and threw it towards the glass. The car jack broke the glass door and flew out onto the sidewalk, coming to rest partially off the curb and on the street. Officer Paulsen was closest to the jack when it came out of the business. The subject came to the threshold of the door and he was yelling angrily. Sergeant Gora could see the individual's eyes and forehead and he appeared angry. The individual's fists were clenched and he was screaming. Sergeant Gora stated that the individual was not yelling words but described it as enraged screaming. He also stated that commands were given to the individual at this time to show his hands, get on the ground, and come outside.

While standing in the threshold of the door, Sergeant Gora yelled over to Officer Palmquist and Officer Bennett to deploy the "less-lethal" shotgun. Sergeant Gora was hoping this would stun the subject before the subject retreated into the business where the officers would lose any tactical advantage due to the various rooms and cars to hide behind. There was initially a malfunction with the "less-lethal" shotgun but eventually one shot was fired by Officer Bennett towards the subject at the door. The shot missed the individual at the door and the individual retreated back into the business.

Sergeant Gora determined that a felony was occurring in the business. Officer Sheldon with the canine unit came to the front door. He stated that Officer Sheldon announced into the building, "Come out now or you are going to get bit by the dog." The individual was now hanging from the rafters of the business. He then observed the individual fall from the rafters, approximately 15 feet. Sergeant Gora directed Officer Paulsen to get a "less-lethal" shotgun. At that point he recalls being able to turn on his Taser video camera.

Sergeant Gora believed that he had the resources he needed to make entry into the business. There were two officers with rifles, two officers with "less-lethal" shotguns, two officers with handguns, and a canine unit. He observed the individual inside on top of a vehicle

at the time of the entry. Officer Sheldon entered first, followed by the officers with lethal rifles, then the officers with “less-lethal” shotguns, and then the officers with handguns. The officers then surrounded the truck upon which the individual was sitting on the roof. Sergeant Gora doesn’t recall the individual saying anything.

Officer Sheldon with the canine was at the extreme right. Next to Officer Sheldon were Officer Bennett (less-lethal) and Officer Pitti (rifle). Sergeant Gora was next to Officer Palmquist and both of them had firearms. To his left, Officer Paulsen (less-lethal) and Officer Middleton (rifle) were positioned. Sergeant Gora had his firearm pointed at the individual and officers were giving commands to come off the truck and show his hands. Sergeant Gora stated that the individual was “fidgety.” He then gave Officer Bennett the order to deploy the Taser at the individual in order to assist taking him into custody. At the deployment of the Taser, Sergeant Gora did not hear a good deployment and he watched the individual pull out a “barb” from his left leg and his jacket. Sergeant Gora stated that he believed it was Officer Paulsen who also deployed his Taser, but he was uncertain if it made contact.

Sergeant Gora then made the order for “less-lethal” shotgun deployment in order to get the individual off of the car and then the canine could assist in gaining custody of the individual. He believed one round was deployed and he observed the individual roll off the passenger side of the truck. Sergeant Gora saw Officer Paulsen deploy two bean bag rounds at the individual as the individual fled through a small office. He stated that the canine unit was released to chase the fleeing individual. Sergeant Gora observed the individual in a full sprint and then jump through the northwest broken glass window. He was following the other officers and he heard Officer Sheldon yelling commands to his dog, “No! No! No!” Sergeant Gora then heard three (3) gunshots.

Sergeant Gora ran behind all the other officers towards the parking lot with the white Mercedes van. He observed Officer Cobler, another officer, and the canine apprehending the individual who was resisting. Sergeant Gora then observed Officer Kunkel on his back, hands out to his side, and his gun was on the ground. Officer Kunkel was grimacing in pain and his eyes were closed. He then looked to the individual on the ground and he could see blood coming from his face and he saw blood coming from the stomach area. Sergeant Gora radioed for medical. Shortly after that, Officer Kunkel was being helped up by other officers and Sergeant Gora heard him say something regarding injuring his hamstrings.

Sergeant Gora then tried to get other officers to administer life-saving first aid. He stated that the individual was moving around and screaming. Sergeant Gora directed officers to maintain the integrity of the crime scene and he waited for the fire trucks to arrive at the scene. Once the medics arrived, Sergeant Gora made the required notifications to other PPD officers and worked on crime scene integrity.

Sergeant Gora contacted Officer Kunkel and directed that pictures be taken of Officer Kunkel. He observed a Taser wire wrapped around Officer Kunkel’s leg. He took a safety statement from Officer Kunkel. Officer Kunkel stated the individual was not armed. Officer Kunkel stated that he shot two times. In response to whether there were outstanding suspects, he recalls Officer Kunkel stating something to the effect of, “Sergeant, I tried but...why did he have

to do that?" Sergeant Gora asked Officer Kunkel if he was hurt and Officer Kunkel replied, "My legs are killing me." Officer Kunkel stated, "I went down on my back. I tased him and then I shot him." He then had Officer Palmquist stay with Officer Kunkel until the paramedics took him from the scene.

Statement of Officer Bradley Palmquist

Officer Bradley Palmquist of the PPD gave a statement on July 5, 2015. He has approximately four years of experience as a police officer at PPD and South San Francisco Police Department.

Officer Palmquist started his shift at 6:00 p.m. on July 4, 2015, and his call sign was "H31." He was dressed in full police uniform with a full duty belt. He had an audio recorder and a "Scorpion" video-body camera. His police vehicle number was "408."

Regarding the incident at 4321 First Street, Officer Palmquist was with his partner, Officer Paulsen, on another call when he heard Sergeant Gora on the police radio say something about going to an alarm call. He also heard Sergeant Gora say something about a Mercedes vehicle with paper plates with an open rear door. This caught Officer Palmquist's attention because earlier in the shift there was a call regarding an interrupted burglary involving a Mercedes with paper plates. Officer Palmquist worked with Sergeant Gora enough that he can sense from the tone of his voice that something was not right. He then heard Sergeant Gora mention that there was a window broken and Officer Palmquist decided to leave the current call and go assist Sergeant Gora. He also heard Sergeant Gora request more units and a canine unit from Livermore. He and Officer Paulsen headed towards 4321 First Street in separate patrol vehicles.

As he was responding, Officer Palmquist heard Sergeant Gora over the radio stating that he could hear screaming or yelling inside. Before arriving on scene, Officer Palmquist also heard an officer on the radio state that he had eyes on the subject inside and that he had run to the front and to the back. Officer Palmquist stated that he believed something more than a typical burglary was going on based on the information over the radio. He arrived at the scene and parked north of the business on First Street.

Sergeant Gora requested over the radio that either he or Officer Paulsen get a "less lethal" weapon so Officer Palmquist grabbed his "less lethal" shotgun from his patrol vehicle. Officer Palmquist proceeded to the corner of the store and had Sergeant Gora and Officer Bennett assist in witnessing his loading of "bean bag" rounds into his "less lethal" shotgun. Officer Bennett also had a "less lethal" shotgun. While loading the "bean bags," he could hear a lot of commotion and yelling and he heard officers giving commands, "Show us your hands. Show us your hands." Officer Palmquist's shotgun jammed so he decided to take out his handgun and cover Officer Bennett, who had a "less lethal" shotgun.

The two went towards the front of the store and he could hear a lot of commotion. Officer Palmquist looked inside the store and he saw a male inside with dark clothing throw a large object at a front window. The large object broke the glass. The male was within three or four feet of the window. According to Officer Palmquist, there were officers outside and directly in front of the window at which the object was thrown. He estimated that the officers were approximately six to eight feet away from the male when the large object was thrown. In Officer Palmquist's opinion, the object was thrown directly at the officers and he was trying to "intentionally harm officers." Officer Palmquist later learned that the large object was a large vehicle floor jack.

After the object was thrown at the window, Officer Palmquist observed Officer Middleton pointing his rifle at the suspect. While the suspect was not surrendering, his hands were visible and there was nothing in his hands. Officer Palmquist heard an officer giving commands to, "Show us your hands. Come outside." Sergeant Gora gave the command for a "less lethal" shotgun and Officer Bennett, who was to Officer Palmquist's right, shot one "bean bag" round at the suspect. At the time Officer Bennett was approximately twelve feet from the suspect. Officer Palmquist could not tell if it hit the suspect's right side. The suspect looked directly at Officer Bennett and was making a lot of noise but Officer Palmquist could not understand him due to a cloth covering his mouth. The police continued with commands to the suspect to come outside and show his hands.

The suspect, after the "less lethal shot," made a "weird" turn to his right and onto "all fours." The suspect then ran or galloped away on "all fours" back into the store. Officer Palmquist stated that the suspect went straight to the back of the store and out of sight to the right side of the business. The suspect then was seen jumping on top of a car. According to Officer Palmquist, the suspect was acting "completely irrational." Officer Palmquist observed the suspect walking back and forth and yelling, but he couldn't understand what he said. He then observed the suspect climb up some pipes and perch himself on a ledge approximately twenty feet up from the ground. The lighting of the store was adequate that Officer Palmquist could see the suspect. He saw that the suspect was tall, slender, with long hair, dark clothing, and had a bandana over his mouth.

The suspect was up on the rafters and began hanging and swinging from a beam, working his way towards the middle of the store. Eventually, he fell from the beam but immediately got up and headed to the rear of the store. This surprised Officer Palmquist because he thought that a fall from that distance would cause someone to break an ankle or leg. At this point, the officers were at the door of the store. Then Officer Sheldon brought the police dog to the front door where the floor jack had broken the glass and stated, "Hey, you better come out. I'm going to send my dog." The suspect just stood there, staring at Officer Sheldon. The suspect walked to the right of the store and then sat up on an old black pickup truck. Commands from Officer Sheldon continued at this time.

Officer Sheldon entered the store and the other officers, including Officer Palmquist, followed behind. The officers created a third of a circle around the suspect who was still on top of the pickup truck. Officer Palmquist was positioned to the left of Officer Sheldon and other officers, towards the middle of the store. He stated that the suspect was saying things at the time

but he could not hear exactly what the suspect was saying. Verbal commands were also given by Officer Sheldon but he could not hear exactly what those commands were. Officer Palmquist described the suspect as perched on the truck acting nonchalant but erratic. Officer Palmquist clarified that his description of erratic was based on the suspect's weird motions, lack of focus, and constant looking around.

Officer Palmquist stated that an officer to his right attempted to "Tase" the suspect but the Taser darts appeared to skip off the vehicle and not make contact with the suspect. He could not remember the order but a "less lethal" round and another Taser were deployed. With regards to the Taser deployment, he observed one Taser dart hit the suspect's center mass (chest). He didn't see where the other dart hit, but there was no reaction at all by the suspect and the suspect pulled the dart off with one hand. The suspect had a look on his face like he thought it was funny. The suspect then leaned to his right and went off the vehicle. He then observed Officer Paulson fire two "less lethal" shots at the suspect. The suspect immediately ran away and made a right through the hallway of the store. Officer Palmquist lost sight of the suspect. Officer Palmquist was third or fourth in the line of officers chasing him and just saw the suspect as a "blur" leaving the store out through the broken window.

Officer Palmquist then observed Officer Sheldon assist the canine out through the window. He then heard Officer Sheldon yelling, "No, no, no!" at the canine. He observed Officer Cobler run past the window, northbound into the street and the canine was chasing Officer Cobler. Officer Palmquist then heard gunshots a few seconds later. Officer Palmquist eventually exited through the window behind three other officers. He then ran westbound behind other officers. It was a short distance and he reached a parking lot. Officer Palmquist stated that he observed the suspect lying on his side but face down, with his head pointing in a northbound direction. The officer in front of him ran towards the suspect. Officer Palmquist then looked to the left of the suspect's body and saw Officer Kunkel.

Officer Palmquist then focused his attention on Officer Kunkel. Officer Kunkel was lying on his back, hands above his head, and he wasn't moving. Officer Palmquist thought that he was observing a "dead cop." The two bodies were a few feet from each other. Officer Palmquist went over to Officer Kunkel and kneeled down by him. He observed Officer Kunkel's eyes were wide open and he was staring off into the distance. As Officer Palmquist kneeled down and looked over Officer Kunkel, Officer Kunkel did not acknowledge him being there. In his left hand, Officer Kunkel was grasping his handgun. Officer Palmquist repeatedly asked Officer Kunkel if he was okay and for a few seconds, probably longer, there was no reaction - no answer, no movement, nothing. Officer Palmquist then physically shook Officer Kunkel and after a few seconds, Officer Kunkel responded that he was okay. Officer Kunkel appeared "dazed" and "out of it." Officer Palmquist also noticed at that time that there were Taser wires around each of Officer Kunkel's legs and down onto the ground.

With regards to observing injuries at this time, Officer Palmquist described Officer Kunkel's face as red, particularly in the nose and cheek area. Officer Palmquist also described Officer Kunkel's face as "super pale." Officer Palmquist remained with Officer Kunkel and kept asking if he was okay. Officer Kunkel, at some point, mentioned that he had injured both of his hamstrings. Officer Palmquist removed the gun from Officer Kunkel's hand and slid it six

inches away on the ground. Officer Palmquist stated that he had to use all his weight just to help Officer Kunkel up from the ground and then walked him away from the scene. Officer Palmquist described Officer Kunkel as having trouble taking his first steps and he put Officer Kunkel's arm over him to assist him walking in the street. Another officer also helped Officer Kunkel walk. They walked over to a patrol vehicle and Officer Kunkel was unable to sit, stating that he couldn't move his hamstrings. Officer Palmquist stood with Officer Kunkel, waiting for the ambulance to come. Officer Palmquist noticed while they were standing there that the Taser wires were still on Officer Kunkel's body.

While accompanying him, Officer Palmquist stated that Officer Kunkel said something like, "I thought he was going to pull a gun on me. I'm glad he didn't pull a gun." Officer Palmquist told Officer Kunkel not to talk and to just wait for the ambulance. A brief time later, he stated that Officer Kunkel said, "I'm so happy I'm alive." At some point, Officer Kunkel described the incident to him. Officer Kunkel stated to him that the suspect was running and that he was behind the suspect. Officer Kunkel stated to him that he fired his Taser at the suspect but it didn't do anything and the suspect turned around and started to charge him. Officer Kunkel stated that the suspect then did some sort of a "jump kick/punch thing" and that he got hit in the face and kicked in the chest. When the second ambulance arrived, the medical personnel attended to Officer Kunkel.

Officer Palmquist stated that medical attention was given to the suspect first and that the first ambulance attended to the suspect. He assisted Officer Kunkel to take off his duty belt and he removed the Taser wires from Officer Kunkel's legs. The Taser wires and the duty belt were placed in paper evidence bags and were given to Sergeant Gora. He then followed Officer Kunkel's ambulance to the hospital. When Officer Kunkel was transported from the ambulance to the hospital, he was strapped onto a gurney and had a "c-spine" on. Officer Palmquist stayed at the hospital until Officer Kunkel was medically cleared. He walked him out of the hospital and Detectives transported Officer Kunkel from the hospital.

During the incident, Officer Palmquist never had his recorder on. He never used force while at the scene. Before the interview, he did not have communication with anyone about the incident. With regards to the whole incident, Officer Palmquist believed that the suspect must have been under the influence of drugs based on him falling from the rafters to the concrete and then getting right up without injury. Officer Palmquist believed that they would have to get the suspect to comply by using a large amount of force because he wasn't listening to the police and he was showing pain was not affecting him. Tasers and bean bags were not working and the fall had no effect on him.

Statement of Officer Brandon Cobler

Officer Brandon Cobler of the PPD gave a statement on July 6, 2015. Officer Cobler has been an officer with PPD for approximately one year. His call sign on the date in question was "K31." He was in full PPD uniform during the incident in question, including badges on his shoulders, name tag, and star police badge.

In the early morning of July 5, 2015, when his shift was ending, Officer Cobler received information on an alarm call from Sergeant Gora and knew it was an emergency call because Sergeant Gora had requested additional units. Officer Cobler parked on the east side of First Street on the south side of the building. He positioned himself on the southeast corner of the business with his gun drawn. Officer Cobler observed the suspect inside the business throw a red floor jack out of the glass front door and then stand there “flipping off” the officer with both his hands. Officer Cobler had experience as a mechanic and the jack he observed being thrown out the window was a really heavy two or four ton model and he watched it roll down to the street. There were three to four officers near the area where the jack landed outside. After “flipping off” the officers, the suspect went inside.

At that point, Officer Cobler was ordered to go to the southwest corner of the building, the back side away from First Street. In that area, there were two large glass windows that had large sheets blocking any view inside the business. Officer Cobler could see Officer Kunkel on the northwest corner of the business approximately one hundred yards away standing on Spring Street. He could hear the radio traffic describing what the suspect was doing and inside he sounded like a “caged animal.” He heard the suspect breaking things inside.

Officer Cobler heard over the radio that he was leaving the building from the rear. Officer Cobler didn’t see the suspect or Officer Kunkel. Officer Cobler ran along the north side of the building towards Spring Street. As he reached the northwest corner, the canine unit focused on Officer Cobler and he attempted to avoid the dog. At this point, Officer Cobler did not focus on anything else but avoiding the dog. He heard a muffled gunshot coming from the west that he thought was a “firework.” This changed Officer Cobler’s attention to the location of Officer Kunkel and the suspect.

Officer Cobler ran westbound on Spring Street. He then saw Officer Kunkel and the suspect on the ground. His attention first focused on Officer Kunkel, who was making some moaning noise and he obviously was in pain. Officer Cobler then noticed that the suspect was moving quite a bit and he didn’t know at that time that the suspect had been shot. He then focused on assisting with the suspect. The suspect was moving on the ground placing his hand on his stomach and then head. The suspect was moaning a lot but wasn’t saying anything. When he assisted the suspect, Officer Cobler could see the gunshot wounds. He noticed a Taser probe on the suspect’s shirt and he believed it was in the front of the shirt.

Officer Cobler recalls seeing a gun on the floor. He did not take close note of it because he was attending to the suspect but he believed it was in between Officer Kunkel and the suspect. The suspect struggled while Officer Cobler was applying handcuffs on him. The suspect continued to struggle even after the handcuffs were on. Officer Cobler took out a glove and applied it to the suspect’s stomach wound. He then remained with the suspect until the fire department arrived, applying pressure to the suspect’s two wounds.

Officer Cobler made contact with four civilian witnesses at Railroad Avenue and Spring Street while putting up caution tape. The four witnesses were young adults and they were at their friend's house on Railroad Avenue. They all conveyed to Officer Cobler they didn't see anything but that they heard gunshots so they came over to see what happened. Three stated to Officer Cobler that they heard three gunshots, while one said he heard three to four shots. Two of the individuals heard loud curse words or a verbal argument immediately before the gunshots.

Statement of Officer Mark Sheldon

Officer Mark Sheldon of the PPD gave a statement on July 6, 2015. He has been a police officer with PPD for thirteen years and Alameda County Sheriff's Office for two years. At the time of the incident he was a patrol canine officer. His call sign was "K21" and his patrol car number was "486." He was in full PPD uniform during the incident in question.

On July 5, 2015, Officer Sheldon heard the original call out over dispatch from Sergeant Gora regarding 4321 First Street. He heard information over dispatch regarding a van with the back door open, a window broken at the building, and someone screaming inside. While responding to the call, he heard over the radio that a perimeter was set up at the scene, that officers could see a suspect inside, and that a "less-lethal" shotgun was deployed.

He contacted Sergeant Gora upon arrival to the scene. Sergeant Gora briefed him on the incident and told him that they had a "good 459" or burglary inside. Based on the information gathered from the radio and from Sergeant Gora, Officer Sheldon got the canine out of his patrol car and positioned himself outside the front door on First Street, which had a broken glass panel. From his position, Officer Sheldon was able to see the individual hanging from the rafters of the building. He watched the individual with a bandana over his face going from rafter to rafter and then drop down about twenty feet from the rafters. Officer Sheldon then lost sight of the individual.

Officer Sheldon then announced to the individual to come out or he was going to send the dog and he was going to bite you. The dog had been barking before this announcement. He doesn't know how many times he repeated this announcement. Officer Sheldon believed that he stated the announcement loud enough for the individual to hear him. Officer Sheldon stated that before he positioned himself at the front door, he heard other officers trying to engage the individual inside the business to comply.

Officer Sheldon could not see the individual and did not know what threat the individual was or if he had access to a weapon. He didn't want to send the dog in alone due to all the broken glass. Officer Sheldon wanted to move to a position with other officers so that he could see the individual inside the business. He and other officers moved from outside the front door and inside the business to a position where they could see the whole warehouse. When they reached this position, they saw the subject sitting on an old truck. Other officers "flared" out around the subject.

At this point Officer Sheldon held the police dog on a leash and had no other weapons in his hands. He estimated that he was fifteen to twenty feet away from the individual. He was kneeling down next to the canine unit and giving announcements to the individual. Other officers were also giving announcements to the individual. His announcement was, "If you don't come down, you're going to get bit." The other initial announcements were conveying "You need to come down," "Show us your hands," and "Come down off the car." The subject's hands were visible and he did not appear to have anything in his hands. The individual did not comply with any commands.

Officer Sheldon stated that one officer deployed a Taser at the individual. The individual picked out one of the probes from the Taser and said, "What is this, a Taser?" The individual looked at it and threw it down. Officer Sheldon stated that one probe hit the left thigh but he did not believe the Taser made full contact with the individual. The Taser had no effect at all on the individual. He noticed that the individual was sweating profusely.

Officer Sheldon stated that they continued to give orders to come down. At one point, the individual slid down the truck like he was going to come down but then said, "I'm not going to come down. I don't want to get bit." Officer Sheldon responded, "If you come down, you are not going to get bit." The individual then went back up on the truck. They verbally tried to get him to comply. Another Taser was deployed but it was unsuccessful. The individual then slid off the truck and out of his view. Officer Paulsen then fired two rounds of bean bags at the individual. Officer Sheldon saw the individual running away. He released his dog and it chased the individual into an office and then down a hallway towards the north building.

During the chase, the canine unit slid into a car and then went around the car and towards the broken glass window in the north building. Officer Sheldon lost sight of the subject. Officer Sheldon helped the canine unit outside through the window. At this point, Officer Cobler was coming from a southern perimeter position to the area and the canine focused on Officer Cobler, confusing him with the suspect. Officer Sheldon was able to command the canine not to bite Officer Cobler and gained control of the dog. When Officer Sheldon got to Spring Street with the dog, he heard two gunshots coming from the west, from behind the van.

The other officers were exiting the building through the broken glass window and the group of officers headed west towards the big white van. Upon turning into the parking lot, Officer Sheldon saw Officer Kunkel lying on his back with his gun off to the side. Officer Kunkel was motionless, with his feet to the south and head to the north. He observed the subject lying on his stomach about five feet away to the north from Officer Kunkel with his head to the north. Officer Cobler and Officer Pitti were trying to get the subject handcuffed behind his back. The individual was struggling and resisting. Officer Sheldon made the decision to have the dog bite the individual to assist in gaining compliance. The officers were able to get the handcuffs on the individual after the bite.

Statement of Officer Tyler Paulsen

Officer Tyler Paulsen of the PPD gave a statement on July 6, 2015. He has been a police officer with PPD for two years and Clear Lake Police Department for four years. At the time his call sign was "H32" and his patrol vehicle number "407," which was equipped with a less lethal shotgun. He was in full PPD uniform during the incident in question.

On the morning of July 5, 2015, he was dispatched to 4321 First Street and received information from Sergeant Gora over the radio regarding a subject inside the business screaming. When he arrived, he joined other officers at the front door of the business on First Street. He learned from Sergeant Gora that Officer Kunkel and Officer Cobler were on the backside of the business. From the sidewalk, he could see the individual inside the business and the individual appeared "irate" or "agitated." Officer Paulsen, based on his officer experience, believed that there was something wrong with the individual or the individual was under the influence. The individual was jumping on cars and hanging off the rafters. Officer Paulsen heard from other officers that the individual was saying he was a "mountain lion" and that, in response, police were getting the "wrap" ready to detain him.

Officer Paulsen described observing the individual pick up a large car jack and run towards the officers and threw the jack at them. The individual was approximately five feet from the window when he threw it. The jack hit the large glass window and fell down on to the hood of a car in the showroom. Officer Paulsen stated that the individual picked up another large car jack and threw it out through the front glass windowed doors and it came onto the street. Officers began to back up when he came to the front door because they anticipated he was going to throw it through the glass. At this point, Officer Paulsen stated it was "a whole new ball game" because the subject had picked up pretty heavy equipment and threw them. Officer Paulsen believed the individual was attempting to hit officers with these car jacks. Officer Paulsen stated that the individual picking up heavy pieces of equipment, coupled with his bizarre behavior, raised "big red flags that there was something wrong with this guy."

The individual then stood at the threshold of the front door. At this point officers were giving him the commands to come outside. The individual did not comply and appeared agitated. Sergeant Gora gave the command to deploy the "less-lethal" shotgun. Officer Bennett shot the "less-lethal" round. Officer Paulsen stated that the bean bag did not hit the subject but the subject retreated back into the business. Officer Paulsen realized that Officer Bennett's shotgun malfunctioned so he went to his vehicle to retrieve his "less-lethal" shotgun. He then returned to the front door of the business.

With other officers at the front of the business, they made the decision to enter the business. When Officer Paulsen entered with other officers, he observed the subject on the roof of a pickup truck. The officers created a semi-circle around the individual. With the officers, there were different options available with canine, Taser, "less-lethal," and lethal. Officer Paulsen stated that Officer Sheldon, with the canine unit, gave commands to the individual to get down from the car and the individual stated that he didn't want to get bit. It was obvious to Officer Paulsen that the individual was not complying and not coming down with the dog so they

deployed the Taser. The first Taser was deployed and wasn't effective. The individual was agitated and upset and he pulled the Taser dart from the front area of his clothing.

More commands were given to the individual to comply but he did not, and he appeared upset. Officer Paulsen did not know what the individual was going to do. Officer Paulsen deployed his Taser and it wasn't effective. Officer Paulsen didn't know if the Taser darts hit the individual. The subject was off the truck and he started to run. A command was given to use "less-lethal" so Officer Paulsen dropped his Taser and transitioned to his shotgun. He then fired one bean bag at the meaty portion of the subject's arm but it was not effective. Officer Paulsen fired another bean bag at the fleeing individual. Officer Paulsen did not know if the bean bags hit the individual or not, but there was no effect on the individual and he fled the scene through the office and towards the north building.

Officer Paulsen pursued the individual with the other officers and he reached the large broken glass window in the north building. He knew the individual had fled through the broken window. As he was exiting the building through the window, he heard gunshots and over the radio he heard, "Shots fired." Officer Paulsen then ran towards a white van that was parked nearby. He got to the back of the van and he saw Officer Kunkel on his back on the ground.

Officer Paulsen also saw the individual on the ground. Officer Paulsen grabbed one of the individual's arms with both of his hands trying to get handcuffs on and Officer Cobler had the other arm. Officer Paulsen stated that the subject continued to "flop around" and still appeared very strong. They eventually got handcuffs on him and Officer Paulsen rendered medical aid to the subject until an ambulance arrived.

VIDEO EVIDENCE

Specialty Sales Classics Video Surveillance

Mr. Deming, Jr. is first observed on the video surveillance entering the north showroom of Specialty Sales Classics through a large broken window at approximately 2:05:49 a.m. on the surveillance system's clock.² He walks through the hallway with a bandana covering the lower portion of his face, an acoustic guitar over his shoulder, and a black metal pole in his hand. He enters different rooms that line the hallway and opens a hallway closet door. He then opens a car door at the end of the hallway in the south showroom, places the black metal bar in the car, and looks inside at the driver's side. He appears to be looking for something inside the vehicle. Mr. Deming Jr. walks to the eastern side of the south showroom past the glass double-door entrance to the showroom.

He then enters an office along the north wall of the south showroom. Inside the office there are three desks, a file cabinet, a printer, and numerous chairs. In the foreground of the video of the office, there is a video screen that Mr. Deming Jr. stops and looks at. Mr. Deming Jr. next turns around and answers a cordless phone that was positioned on the desk behind him. He has the phone to his ear for more than 30 seconds and appears to be talking into the phone.

² The surveillance system's clock was not accurate. Based upon Bay Alarm's log, the motion sensor in the business was first tripped at 2:01:34 a.m., approximately four minutes before the surveillance system's clock.

He picks up a small item and a SLR-style digital camera from the same desk and walks out of the office. He returns to the office and then leaves again. He returns to the office, picks up a cordless phone, looks at it, and then places it on a desk. Mr. Deming Jr. begins to play the guitar and look at the video surveillance monitor. He looks in drawers in the office and then exits the office through the door that accesses the hallway.

Mr. Deming Jr. walks across the hallway and slightly to the north to a room with a glass-pane door and half of the hallway walls are glass-panes. He turns on the lights and then exits this room, turning off the lights. He walks down the hallway to the south showroom and reaches into a vehicle to retrieve his black metal pole. He closes the vehicle door with his foot. He then walks to the western portion of the south showroom where a pickup truck is parked. Next he walks into the hallway and walks into the first office on the west side of the hallway holding a black metal rod. Mr. Deming Jr. exits this office and throws his hand up in the air. He walks across the hallway to the north, opens a closet door, looks inside, and then closes the door. He walks east towards the south showroom and then turns back and starts running towards the north showroom.

Mr. Deming Jr. runs into the north showroom and then runs to the eastern portion of the showroom, passed numerous parked cars towards the windows facing First Street. He next walks west through the north showroom, looking into two of the vehicles before returning to the hallway. He returns to the office with the video screen and sits down at a desk. He opens the top drawer and picks up what appear to be keys. He quickly gets up, walks towards the desk closer to the video screen, and then stops at the video screen and looks at it again. Mr. Deming Jr. appears to talk at the screen. He opens another drawer and then closes it with his foot. He exits this office and walks across the hallway to another office.

Mr. Deming Jr. exits the office and begins to walk down the hallway towards the north showroom. He stops by entrance to the office with a glass-paned door and drives the black metal pole with both hands into the hallway wall. Mr. Deming Jr. pulls the black metal pole out and then drives the pole into the wall on the opposite side of the hallway. Mr. Deming Jr. pulls the black pole out of the wall and then drives it into a window pane on the opposite side of the hallway. He then walks into the north showroom and appears agitated, raising the bar over his head with both hands and gestures quickly down towards the floor.

He walks back through the hallway to the south showroom and holds up his hand in apparent frustration. Mr. Deming Jr. next gets into the driver's seat of the vehicle he previously retrieved his black pole from, and remains inside for approximately ten (10) seconds. He exits and enters the office with the video surveillance monitor. He appears to search throughout the office and then exits again. He walks to the north showroom, pauses at the entrance to the showroom, and then exits the north showroom through the original point of entry, the broken glass store window, at approximately 2:19:17 a.m. on the surveillance system's clock.

Mr. Deming Jr. returns inside Specialty Sales Classics through the same point of entry at approximately 2:20:57 a.m. He is carrying a fire extinguisher and his guitar. He places his guitar down and proceeds to spray multiple cars with the fire extinguisher contents. Residual powder from the fire extinguisher can be seen left on the cars. Mr. Deming Jr. next throws the

fire extinguisher, hitting a light colored vehicle on the front hood. He raises his hands in the air and walks to the point of entry again. He then picks up his guitar and exits the north showroom, covering his face with his arm likely due to the residual fire extinguisher smoke.

Mr. Deming Jr. walks through the hallway towards the south showroom. He then kicks the door open to the office with the video surveillance monitor. He looks around the office, appearing to search for something. He leaves the office but returns moments later, tossing an object across the office. He then picks up what appears to be a black “Sharpie” marker from one of the desks. He walks out of the office and into the south showroom.

In the south showroom, Mr. Deming Jr. writes something with the black marker on the roof of a red vehicle. He then walks to the large window facing First Street and looks outside. He bangs the large window with his guitar and puts his hands up at his sides, appearing to communicate with someone outside. Next, he picks up a glass fishbowl and throws it towards the front glass double-door entrance. The fishbowl hits the wall and breaks on the floor. He searches a podium located in that area of the store. Mr. Deming Jr. walks towards the western portion of the south showroom and then breaks his acoustic guitar by striking a vehicle two times and the hallway wall once. He returns to the front of the store and searches the podium area again.

Mr. Deming Jr. returns to the office with the video surveillance monitor. He turns towards the entrance and kicks the door twice. He searches multiple drawers and finds a box in the desk on the far side of the office. He immediately walks out of the office and walks to the south showroom. He looks through the box and carries it to the front of the south showroom. A vehicle can be seen through the glass windows driving northbound on First Street and Mr. Deming Jr. raises his “middle finger” in the direction of the vehicle. He walks back toward the western part of the south showroom and looks through the box. While looking into the box, he periodically looks towards the front of the south showroom. He next empties out the contents of the box onto the hood of the vehicle and starts looking at the items on the hood. The items appear to be keys. Mr. Deming Jr. picks up and looks at several sets of keys and the keychains on the keys.

After looking at the keychain of one key, he looks up and heads directly to a vehicle with two stripes in the middle of the front hood. He gets inside this vehicle and sits in the driver’s seat. He exits the vehicle and looks again at the keychain attached to the key. He walks towards the front of the south showroom but returns promptly to the hood of the vehicle where he emptied out the keys from the box. Mr. Deming Jr. looks at the keys and looks intently at the key chains. He then appears to look up at the ceiling and scream. He looks at additional keys and then walks towards the front of the south showroom again.

At the front of the south showroom, he approaches the front glass double-door entrance and looks outside. He then backs up and then jumps up to kick one of the glass doors. There are vehicles passing by in a northbound direction on First Street. While the vehicles are passing by, Mr. Deming Jr. stands near the double-doors carrying a large red car jack. He then appears to throw the car jack towards the glass doors. The front door is blocked by a sign and it is not clear from the video whether he goes outside the door. He is out of view for more than fifteen (15) seconds but then reappears ducking and running away from the front glass double-doors. He

next does a somersault roll on the floor and out of the camera's view. At least two individuals (likely PPD officers) with flashlights can be seen through the large glass windows facing First Street.

Mr. Deming Jr. runs towards the back of the south showroom and through the hallway towards the north showroom. He takes off his bandana but then puts it back on while turning around in the hallway and back towards the south showroom. Next, he jumps on top of the vehicle with the keys on the hood and climbs from the top of the trunk up by the surveillance camera. Shortly after this his feet can be seen swinging on the top portion of the video screen. It appears he is hanging from the showroom rafters. Then his foot is seen close to the camera and debris falls by the camera. The camera then points towards the floor instead of into the south showroom.

At this time, two police officers can be seen looking inside the south showroom from the First Street sidewalk. At 2:38:18 a.m., an officer with a canine opens one of the front glass double-doors to the south showroom. Entry is made into the south showroom by the officer and canine at 2:39:05 a.m. The canine officer is followed into the south showroom by four additional officers who have weapons in their hands. The first officer has a rifle, the second officer has a Taser, the third officer is carrying a "less-lethal" shotgun, and the fourth officer is holding a pistol. Two additional officers are standing outside and one has a strobe flashlight pointed into the south showroom. After approximately ten (10) seconds, these officers enter the showroom. One officer is carrying a rifle and the other officer is carrying a "less-lethal" shotgun. Mr. Deming Jr. is not captured on any in-store surveillance camera after the police entry until approximately 2:40:43 a.m. when he is seen running away from the south showroom through the hallway.

Mr. Deming Jr. runs into the north showroom, and in a continuous motion, jumps up onto a car and then over the other side. He runs straight to the original point of entry and exits Specialty Sales Classics at 2:40:48 a.m. on the surveillance system's clock. The police canine appears to run into the car Mr. Deming Jr. had jumped on and over. The canine goes to the window Mr. Deming Jr. just exited and is followed by the officers. Sergeant Gora can first be seen walking into the north showroom from the hallway at 2:40:58 a.m. When the officers reach the glass window there is a pause before the officers leave the north showroom. Flashlights can be seen outside on the other side of the glass. Eventually, all of the officers exit the north showroom at 2:41:30 a.m. on the surveillance system's clock.

Sergeant Eric Gora's Personal Digital Recording Device

Sergeant Eric Gora's personal digital recording device ("PDRD") begins recording with no audio. Once the recording device is activated, the device includes thirty (30) seconds of recorded video prior to activation but no audio. Sergeant Gora is walking on First Street in front of Specialty Sale Classics' south showroom. He walks to the sidewalk in front of the north showroom and contacts another officer who is loading a "less lethal" shotgun with bean bags. He then walks back towards the area in front of the south showroom, stating, "Just hold that corner. Let's try and get eyes on him." Another officer standing outside the window of the south showroom states, "I got him right here. He's in the rafters." This information is heard conveyed to dispatch. The video shows a red car jack partially on First Street in front of the

glass double-door entrance to the south showroom. The glass is broken on the left door entry door and there is a large greyish car jack wedged between a red vehicle and a large glass showroom window to the right of the store entrance.

One officer standing to the left of the entrance and looking into the south showrooms states, "Hey, let's get a wrap up here because he's saying he's a mountain lion and shit, so..." Other officers are heard saying they'd get it later. There is discussion regarding who is in the back and the officers state that there are two officers in the back of the store, Officer Cobler and Officer Kunkel. Sergeant Gora goes to talk to the canine unit who is situated on the sidewalk on First Street in front of the north showroom. He tells the officers to keep an "eye on him."

In talking to Officer Sheldon, the canine unit, Sergeant Gora states, "He's in there. He's got a mask. He's wearing really bulky kind of clothes. I think he's 'eleven-five' or 'fifty-one-fifty.' Screaming out he's a mountain lion." Sergeant Gora states to Officer Sheldon that he is taping this several times. The two walk back over towards the entrance to the south showroom. One officer standing in that vicinity states, "He's right here in the rafters. On the right hand side."

Officer Sheldon and another officer open the right front door to the south showroom at approximately 2:45 on the video counter. Officer Sheldon states loudly, "Hey, you better come out! We'll send the dog. Come on dude. Hey!" The dog begins barking when the officer is talking. While the officer is yelling, a person can be seen moving from left to right inside the store and then out of view. Sergeant Gora states, "We have a good 'four-five-nine.'" An officer yells, "Hey you better [unintelligible]. I'm gonna send the dog. This is your last chance, dude." The dog continues to bark. Sergeant Gora organizes the entry team. Another officer can be heard yelling, "Come out dude." Yelling can be heard coming from inside the store on multiple occasions at this time. At 3:35 on the video counter, Sergeant Gora states, "SAM 13 to units in the back. We're making entry with the canine." Entry into the store is made at approximately 3:37 on the video counter by the canine unit and three other officers before Sergeant Gora.

Upon entry into the south showroom, officers can be heard screaming, "Your hands! Get them up!" Another officer can be heard stating, "You're going to get bit." The canine unit and an officer with an assault rifle go straight into the showroom. Officers can be heard stating, "Better come down" and "Come down off the car." An officer with the less lethal shotgun, an officer with a Taser, and Sergeant Gora move to the left of the showroom around a maroon car and then behind the front hood of a red Mustang. As Sergeant Gora moves around the maroon car, Mr. Deming Jr. can be seen sitting on the roof of a vintage truck with his hands up.

Mr. Deming Jr. gets down from the roof of the truck and sits on the hood facing the officers. In this location, at times his hands are up. The canine is barking and the police officer discussion with Mr. Deming Jr. is difficult to hear.

At approximately 4:24 on the video counter, Mr. Deming Jr. retreats back to the top of the roof of the truck. Mr. Deming Jr. states, "I have nothing. I mean you no harm. [Unintelligible]." An officer says, "If you don't get down, you're going to get bit." Mr. Deming Jr. is heard asking, "What's gonna happen if I don't?" An officer responds, "The dog is going to

bite you.” At approximately 4:40 on the video counter, Sergeant Gora gives an order to Officer Bennett to transition to his Taser. Two clear commands are given by an officer to Mr. Deming Jr. to get on the ground.

From the right side of Sergeant Gora’s video, the first Taser is deployed at Mr. Deming Jr. at approximately 4:50 on the video counter. Sergeant Gora states, “No” indicating the Taser didn’t appear to work. Mr. Deming Jr. appears to pull a Taser probe from his leg area and tosses it to the ground. Mr. Deming Jr. states, “What the fuck is that? Really?” Three PPD officers who were to Sergeant Gora’s right then move closer to Mr. Deming Jr.’s position. Mr. Deming Jr. remains on the roof of the truck. At approximately 5:01 on the video counter, a second Taser deployment is made at Mr. Deming Jr. Mr. Deming Jr. appears to grab at a Taser probe on his shirt in his stomach area. He then begins to stand up on the roof while facing the PPD officers. At approximately 5:06, Sergeant Gora gives the order for a “less-lethal shotgun” deployment. Mr. Deming Jr. then turns and jumps off the truck roof in a direction away from the PPD officers. A shotgun sound is then heard.

As officers chase after Mr. Deming Jr., two additional shotgun shots are heard. Sergeant Gora makes his way further west into the showroom and then towards the hallway which connects to two showrooms. At approximately 5:22 on the video counter, an officer can be heard stating, “He’s out the back.” At approximately, 5:33, Sergeant Gora reaches the back window in the north showroom, where officers are standing. An officer can be heard shouting, “Off!” At approximately 5:41 on the video counter, three (3) apparent gunshots can be heard. Then glass can be heard breaking. Officers are able to proceed out of the showroom, through the broken window.

Sergeant Gora is the last to exit the showroom and follows the other PPD officers westbound on the sidewalk. When Sergeant Gora reaches the Stone Group, Inc. parking lot by the Mercedes van, “Code 3 medical” can be heard over Sergeant Gora’s radio. Upon arriving at the parking lot, at approximately 6:09 on the video counter, the video shows one officer shining a light at Officer Kunkel’s head while Officer Kunkel is lying on his back. At the same time, to the right of Officer Kunkel and closer to Sergeant Gora in the video, multiple PPD officers appear to be detaining Mr. Deming Jr. Sergeant Gora approaches Officer Kunkel’s area and radios for medical. In the video, an officer can be seen attending to Officer Kunkel’s left hand area and appears to be reaching for Officer Kunkel’s firearm.

The video also shows Officer Kunkel’s Taser on the pavement by his outstretched right arm. At this time, officers can be seen a short distance away from Officer Kunkel on the top right of the video detaining Mr. Deming Jr. Mr. Deming Jr. can be heard groaning. While Officer Kunkel is still on his back, officers are attending to him and a Taser wire can be seen near his stomach and waist area. At approximately 6:43 on the video counter, PPD officers are heard shouting about medical bags and officers are seen moving quickly to nearby police cars to retrieve medical bags. Sergeant Gora directs an officer to retrieve a medical bag and then radios for two ambulances. At approximately 7:17 on the video counter, Officer Kunkel is escorted from the parking lot and, “I can’t walk” can be heard on the video.

The rest of Sergeant Gora's video primarily contains video of PPD officers providing medical assistance to Mr. Deming Jr. until the paramedics or fire department arrive. At approximately 12:20 on the video counter, Sergeant Gora asks Officer Kunkel if he's hurt or injured and a response is heard related to hamstring injuries and being hit in the face. At approximately 12:40 on the video counter, the fire department arrives on scene.

Sergeant Jim Horton's Personal Digital Recording Device

The first three minutes of Livermore Police Sergeant Jim Horton's PDRD documents his driving to the scene. He arrives on scene and parks his vehicle on First Street facing southbound, just north of Spring Street. Sergeant Horton gets out and walks to the rear of his vehicle, opening the rear tailgate. He retrieves an assault rifle from the back area of the vehicle and he arms the rifle with a magazine of ammunition.

At approximately 4:14 on the video counter, shouting can be heard. Sergeant Horton then leaves the back area of the vehicle and briefly heads southbound on First Street. However, at approximately 4:20 on the video counter, he abruptly turns around back towards the rear of his vehicle.³ He runs around the back of the vehicle, closing the rear tailgate and heads towards the driver's side. At approximately 4:24 on the video counter, while Sergeant Horton is still outside of the SUV, you can hear someone scream in the distance, "Mother-fucker!" Sergeant Horton opens the driver's side door, gets into his vehicle, closes the driver's side door, and begins to place the key in the ignition. At approximately 4:34 on the video counter three (3) apparent gunshots can be heard from inside the vehicle.

Sergeant Horton drives his vehicle onto Spring Street, communicating to Livermore dispatch that shots had been fired and he was not involved. At approximately 5:01 on the video counter, Sergeant Horton exits his vehicle and two officers can be seen running past a white van and arriving in the parking lot across Spring Street from where Sergeant Horton parked. The officer in front appears to be Sergeant Gora.

As Sergeant Horton enters the parking lot at approximately 5:12 on the video, several officers can be seen attempting to handcuff Mr. Deming Jr. Blood can be seen on the pavement on Mr. Deming Jr.'s head. At the top of the video screen, Officer Kunkel can be seen lying on his back with his right arm out to his side and above his head and his left arm to his side about shoulder height. Officer Kunkel is not moving. A black Taser can be seen by Officer Kunkel's right hand.

Sergeant Horton is asked if he has an "AED" (automated external defibrillator) and he responds yes. He next goes back to his vehicle to retrieve the medical device and brings it back to the scene where officers are attending to Mr. Deming Jr. At 6:36 on the video, Sergeant Horton exits the parking lot and walks towards Spring Street. Officer Kunkel can be seen walking with the assistance of another officer eastbound on Spring Street. Sergeant Horton goes to assist Officer Kunkel.

³ According to Sergeant Horton's statement to PPD on July 6, 2015, at this time he observed two people running away from the business in a westbound direction on Spring Street. Sergeant Horton believed it was a suspect being chased by an officer.

Upon arriving at Officer Kunkel, Sergeant Horton asks, "You ok?" There is heavy breathing and then Officer Kunkel responds, "I pulled both my hamstrings." There is more heavy breathing as they walk over to a curb. When the officers request Officer Kunkel to sit down by the curb, Officer Kunkel responds, "I can't. I can't." Sergeant Horton then asks him to lean on the bumper of a nearby police vehicle. Officer Kunkel can be seen hunched over the hood of the vehicle with his hands by the front grill and an officer by his side. While leaning on the hood, Officer Kunkel can be heard saying, "I fired twice." Sergeant Horton and the other officer tell Officer Kunkel not to say anything right now.

The remaining portion of Sergeant Horton's personal video recording shows him setting up crime scene tape around the perimeter of the entire scene. During this task, at 19:50 on the video counter, Sergeant Horton speaks with another Livermore Police Department officer about what he saw and he says, "I got out. I was getting my rifle out and I saw them running so I got back in my car." He turns off his PDRD. Later he turns his PDRD back on as he speaks with PPD officers attempting to assist with anything they need during their investigation.

ADDITIONAL EVIDENCE REVIEWED⁴

Coroner Investigator's Report and Photos of Decedent (July 5, 2015)

On July 5, 2015, Alameda County Sheriff's Office Coroner Bureau Deputy Karen Easling was the assigned deputy to the death of Mr. Deming Jr. Deputy Easling reported that Mr. Deming Jr. was taken from the scene at Specialty Sales Classics in Pleasanton by Paramedics Plus to Eden Medical Center in Castro Valley. Mr. Deming Jr. was taken to the operating room at Eden Medical Center and was pronounced dead by Doctor L. Phillips at 4:53 a.m. Deputy Easling and Deputy C. Frazier arrived at Eden Medical Center at approximately 6:05 a.m. They went to the operating room where the decedent was located.

Detective Jonathan Chin of PPD also arrived at Eden Medical Center on the morning of July 5, 2015. He was escorted to Mr. Deming Jr.'s body in the operating room by medical personnel. Detective Chin took photos of Mr. Deming Jr.'s injuries. The photos taken at this time show two distinct tiny circular-shaped injuries on Mr. Deming Jr.'s forehead area. There are also two less noticeable and less circular-shaped injuries on the forehead. One injury is above Mr. Deming Jr.'s left eyebrow; two, more pronounced injuries, are above the bridge of his nose; and one injury, somewhat less pronounced, is located above the right eyebrow. It is difficult to determine the exact distance between the injuries as the card with ruler measurements appears in the foreground of the photo, an unknown distance away and above the injuries.

Detective Chin was present when Deputy Easling and Deputy Frazier arrived at Eden Medical Center. The Coroner's deputies also took photos of Mr. Deming Jr. at Eden Medical Center which shows the same condition of his forehead area. According to the Coroner's deputies, after the photos were taken at Eden Medical Center, Mr. Deming Jr.'s body was wrapped up in plastic and sheets and transported by the Coroner's deputies to the morgue. At the

⁴ While not exhaustive of all of the evidence reviewed, the following are summaries of additional evidence reviewed.

morgue, the Coroner's deputies took "intake photos" of Mr. Deming Jr. The injuries and dried blood on Mr. Deming Jr.'s forehead are not readily apparent in these photos taken at an unknown distance. However, the Coroner's deputies attribute this difference to the blood being inadvertently wiped off by the plastic and sheets during the movement and transport of the body from the hospital to the morgue. According to the Coroner's deputies, it is not uncommon for the body and head to move in the vehicle during transport to the morgue causing dried and coagulated blood to inadvertently wipe off on the plastic and sheets wrapping the body.

Autopsy Protocol and Photos (July 9, 2015)

Dr. Paul W. Herrmann performed the autopsy upon the body of Mr. Deming Jr. on July 9, 2015 at the Coroner's Bureau in Oakland at approximately 9:30 a.m. Dr. Herrmann concluded that the cause of death was bullet wounds of the head and abdomen.

Dr. Herrmann observed an entrance gunshot wound on the right side of the decedent's face. The wound was located near the right ear. It had no deposition of smoke or powder or evidence of burning. The direction of this wound was from inferior (lower portion of body) to superior (upper portion of body). The direction of the wound from the entry point was also from posterior (back) to anterior (front) at a very slight angle of less than five degrees, and from decedent's right to left at approximately thirty degrees. The bullet fractured the right zygomatic arch and traveled upward through the lateral wall of the orbit, disrupting the globe of the eye. It entered the skull and into the cranial cavity, causing disruption to the frontal lobe, the cortex, and the left parietal lobe. The wound was described as "quite hemorrhagic." Portions of the bullet were found in the floor of the right anterior fossa; beneath the arachnoid, on the superior of the left parietal lobe; and in the right temporal muscle.

Dr. Herrmann also observed another gunshot entrance wound in the front of the decedent's body at the abdomen. He did not note any deposition of smoke or powder or evidence of burning. The direction of the wound is upward at an angle of approximately forty (40) to forty-five (45) degrees. The wound travels from the front of the body towards the rear of the body at approximately a forty (40) degree angle and in a right to left direction. The bullet passed through the abdominal wall, creating a large hole in the left parietal peritoneum. The wound caused hemorrhage of the left leaflet of the diaphragm and also apparently affected the stomach. There was also considerable disruption of the posterior parietal wall lateral to the left kidney, with considerable hemorrhage in the area. The bullet was removed just lateral and below the left kidney. Four blood-soaked towels were observed in the abdominal cavity.

A review of the photos taken during the autopsy on July 9, 2015 show gunshot wounds consistent with the descriptions provided in the Autopsy Protocol. There are various contusions and abrasions visible on the decedent's face and forehead. In the Autopsy Protocol, Dr. Herrmann noted fifteen superficial abrasions at the left side of the decedent's forehead. A review of the photos of the decedent's face and forehead areas showed these abrasions to the forehead but did not show the two to four tiny circular-shaped forehead injuries documented in the photos taken by Detective Chin on July 5, 2015.

Toxicology Reports

On July 10, 2015, Central Valley Toxicology, Inc. (CVT) performed a blood alcohol analysis on a blood sample taken from the decedent, Mr. Deming Jr., on July 5, 2015 at 3:15 a.m. The blood sample tested “Negative” for the presence of “Blood Ethyl Alcohol.” Also on July 10, 2015, CVT performed a “Complete Drug Screen” on a blood sample taken from the deceased on July 5, 2015 at 3:14 a.m. The results of this drug screen showed, “No common acidic, neutral or basic drugs detected.”

On July 31, 2015, CVT performed an additional test on Mr. Deming Jr.’s blood taken from the decedent on July 5, 2015. This testing included additional drug screening for “Bath Salts,” Psilocin, and Synthetic Cannabinoids. The blood sample tested “Negative for the presence of “Blood Ethyl Alcohol.” The blood sample showed, “No common acidic, neutral or basic drugs detected.” The blood sample tested “Negative” for the presence of “Bath Salts.” The blood sample tested “Negative” for “Psilocin (metabolite of Psilocybin).” The blood sample tested “Negative” for “Synthetic Cannabinoids.”

Officer Kunkel’s Taser Records

Officer Kunkel was issued for use a Taser X26P with the serial number X12001X5H. An evidence log was generated from Officer Kunkel’s Taser, providing data regarding when the Taser was armed, the trigger pulled, placed into safe. The Taser log also provides information on the duration the Taser was used, the temperature at the time, and the battery remaining. The log from Officer Kunkel’s Taser includes data from August 5, 2013 to July 14, 2015. The Taser log shows the following activity on July 5, 2015:

<u>Local Time</u>	<u>Event</u>	<u>Duration</u>
05 Jul 2015 02:08:47 [02:36:06]	Armed	-
05 Jul 2015 02:08:47 [02:36:06]	Trigger	5 Seconds
05 Jul 2015 02:08:54 [02:36:13]	Trigger	5 Seconds
05 Jul 2015 02:09:02 [02:36:21]	Trigger	5 Seconds
05 Jul 2015 02:09:13 [02:36:32]	Safe	26 Seconds

This data shows that on July 5, 2015, Officer Kunkel’s Taser was armed and the trigger was pulled three separate times activating the Taser for approximately five seconds each time. Following the three separate triggers, the Taser was placed in safe mode. The twenty-six seconds indicates the total approximate time that the Taser was on from “Armed” mode to “Safe” mode.

On July 14, 2015, the log shows that the Taser was connected to a “USB” which is necessary to download the data from the Taser to a computer. Upon the connection to USB, a “Time Sync” appears on the log indicating an update of the time from “14 Jul 2015 14:51:55 to 14 Jul 2015 15:19:14.” Therefore, on July 5, 2015, the clock on Officer Kunkel’s Taser was

approximately 27 minutes and 19 seconds slow. Therefore, the adjusted times are shown in brackets above.

Bay Alarm Log and Call to Specialty Sales Classics

Bay Alarm provided information to PPD. Bay Alarm provided the alarm log for Specialty Sales Classics from July 5, 2015. According to the Bay Alarm log, motion was detected in the rear left showroom at 2:01:34 a.m. A call was made by Bay Alarm to Specialty Sales Classics at 2:03:01 a.m. and an unverified man was contacted refusing to give his name. According to the log, Bay Alarm first contacted PPD at 2:08:08 a.m. and again with an update at 2:09:18 a.m. Numerous motion sensors throughout the store detect motion with the last motion detected at 02:42:12 a.m.

Bay Alarm also provided PPD with an audio file of the call placed to Specialty Sales Classics at 2:03 a.m. On the recording, Mr. Deming Jr. answered the phone stating, "How's it going?" The Bay Alarm caller identified herself as Candice and states that she is from Bay Alarm. Mr. Deming Jr. said, "Hello." Candice said hi and then asked to whom she was speaking with. Mr. Deming Jr. replied, "You are speaking with...[pause]...I don't know my name." She asked again whom she was speaking with. Mr. Deming Jr., replied, "I have no name." She asked for account information. Mr. Deming Jr. stated, "I'd like to know where the keys are." There is a pause and then he stated, "Someone in my life please tell me something." Candice then requested his name again. Mr. Deming Jr. stated, "I found some keys. I found a camera." The call ended.

Police Radio Recordings and Report

The OIS Team reviewed the PPD police radio recordings on July 5, 2015 at PPD with Detective Brandon Stocking. Detective Stocking was able to provide us with the call signs of each officer and assist us with identifying the officer making the radio transmission. The OIS Team also obtained and reviewed a copy of the police radio recordings and the "Detail Call For Service Report" from the PPD. All of the following times are approximate and were taken from the "Detail Call For Service Report." Dispatcher Harvey is the dispatcher communicating with the officers' radio transmissions. This summary of the radio recordings primarily focuses on Officer Kunkel's radio transmissions under the call sign "H11."

At approximately 2:14:55 a.m., Officer Kunkel received the dispatch regarding the audible alarm at 4321 First Street, Specialty Sales Classic. The first PPD officer to arrive at Specialty Sales Classic was Sergeant Gora (S13) at approximately 2:18:58 a.m. At approximately 2:21:08 a.m., Officer Kunkel arrived on scene and stated, "I'm 97, didn't want to interrupt." There are numerous radio transmissions regarding other PPD officers in route to the scene and Sergeant Gora providing instructions for when they arrive.

At 2:23:05 a.m., Officer Kunkel stated, "I've got eyes on. There's a male subject, pony tail, wearing all black clothing. He's running to the front of the building." At 2:23:16 a.m., Officer Kunkel stated, "I can't see if he's holding anything." At 2:23:52 a.m., he stated, "He's got a box in his hands."

At approximately 2:24:12 a.m., Officer Kunkel stated, "There might be another person in here as well. I don't know if he's talking to himself or somebody else. It looks like he's coming out the back now towards me." Officer Kunkel next asked for an estimated time of arrival for the canine unit.

Sergeant Gora is heard setting up the southwest corner of the perimeter. At approximately 2:26:49 a.m., Officer Kunkel stated, "Henry-11, he's moving towards the front again. He put the box down. He's got something in his hand. I can't tell what it is." Officer Kunkel's next transmission was to ask Sergeant Gora, "Sam-13, Henry-11, you want the canine over here with me at the window with the hole in it?"

Sergeant Gora, at approximately 2:28:22 a.m., transmitted, "Sam-13, he just tried to force his way through the front. He's got a big pole." Officer Kunkel stated, "I'm holding my spot in the rear. Can I get an update from the front?" There are transmissions from officers that the subject is challenging them, then he was running to the back, and that "less-lethal" had been deployed." These radio transmissions were likely made when Mr. Deming Jr. threw the car jack out of the front glass door onto the street and "less-lethal" shotguns were deployed.

At approximately 2:29:55 a.m., Officer Kunkel stated, "Henry-11, he's still at the back of the building." There are numerous transmissions from other officers that they could hear the subject screaming, that he was walking on cars, and that he was climbing in the rafters.

At approximately 2:33:53 a.m., Sergeant Gora transmitted, "Sam-13 to the units in the back. We are making entry with the canine." Officer Kunkel transmitted in response, "Copy, for the canine, there's glass all over the ground back here." There is a transmission communicating to the rear perimeter, "To the rear. He's out the back to the rear."

At approximately 2:35:39 a.m., Officer Kunkel transmitted, "We got one out the back of the building." On this radio transmission, Officer Kunkel's voice is noticeably different from his previous transmissions and sounds like it was made while Officer Kunkel is moving. At approximately 2:35:58 a.m., Officer Kunkel stated, "Henry-11, shot fired." Again, Officer Kunkel's voice is different from his previous transmissions, sounding out of breath.

The next set of transmissions by PPD officers is regarding getting medical assistance to the scene.

Office Kunkel's Medical Records

On July 5, 2015, paramedics arrived at 4321 First Street, Pleasanton to attend to Officer Kunkel. "Paramedics Plus" generated a "Patient Care Report" for Officer Kunkel, documenting his physical condition and the medical attention received at the scene. According to the "narrative" section, Officer Kunkel complained of face, head, and bilateral leg pain upon initial contact with the paramedics. The paramedic notes in the narrative that Officer Kunkel was "emotional" and "distracted." The paramedic notes that photos were taken of Officer Kunkel's uniform and duty belt at the request of a sergeant. Paramedics reassessed Officer Kunkel and he

was described as “calmed” and “more relaxed.” Upon reassessment, Officer Kunkel complained of “neck pain with numbness and tingling to both feet.” Officer Kunkel was placed in a “C-spine” for precaution. The paramedics noted in the narrative that Officer Kunkel still complained of face, head, and leg pain in addition to the neck pain. Officer Kunkel was transported to Valley Care Hospital by the paramedics.

Officer Kunkel’s “Patient Care Report” from “Paramedics Plus” also contains a “Patient Complaint” section and there is an entry “My Face Hurts” for “PT Described Complaint (See Comments)” Additionally, there is an “Assessment” section of the report. There is an assessment entry for Officer Kunkel’s “Head” noting, “Pain: Pt c/o 4/10 sharp pain to Occipital lobe.” In this section, there is also an assessment entry for Officer Kunkel’s “Face” noting, “Soft Tissue Swelling/Bruising: Pt c/o 4/10 pain to bilateral cheeks and chin with bruising and red markings.” There are additional assessment entries for both legs noting, “Pain w/o Swelling/Bruising: Pt c/o 5/10 pain to rear of both Legs.”

On July 5, 2015 at approximately 3:35 a.m., Dr. Robert T. Kwak of ValleyCare Medical Center Emergency Department in Pleasanton treated Officer Kunkel and medical records document this treatment. These medical records note that Officer Kunkel’s chief complaint was back pain and bilateral lower extremity pain. The medical records also note that Officer Kunkel told Dr. Kwak that he got punched and kicked in the face. Additionally, Officer Kunkel complained of hamstring pain, tingling in his feet, neck pain, and that his face hurt. Officer Kunkel also stated to Dr. Kwak that he hit the back of his head but that he didn’t lose consciousness, no vomiting or seizures. Dr. Kwak noted mild abrasions to Officer Kunkel’s left hand and right elbow. Dr. Kwak discharged Officer Kunkel to home.

On July 5, 2015 at approximately 1:18 p.m., Officer Kunkel visited ValleyCare Medical Center Urgent Care in Dublin and the medical records show that he was treated by Dr. Edward Y. Kan. During this visit, the medical records document Officer Kunkel’s chief complaint as a concussion. The records also document Officer Kunkel complaining of mild frontal and posterior headache, pain to the right and left cheek region, and pain to the hamstring region. Dr. Kan also documented Officer Kunkel stating he was struck multiple times in the face and his head was slammed to the ground. Officer Kunkel further stated he saw stars but did not black out. The medical records contain an entry by Dr. Kan regarding Officer Kunkel’s head noting “some area of redness to the posterior scalp,” and “mild swelling noted to the right and left maxillary cheek region but no significant bruising.” Under the diagnosis section, there are entries for “Concussion – closed head injury, w/o loc”; “Contusion – face”; “Thigh Muscle Strain, Left”; and “Thigh Muscle Strain, Right.” Dr. Kan discharged Officer Kunkel to home.

On July 6, 2015, Officer Kunkel went to Stanford Health Care – ValleyCare and was treated by Dr. Walter Panganiban. The medical records from this visit document that Officer Kunkel was complaining of concussion symptoms and pain to his face, head, and lower legs. Officer Kunkel stated to Dr. Panganiban that he hit the back of his head on concrete and pulled his hamstrings on July 5th. He also complained of pain to the bridge of his nose and cheekbones. He told the doctor that he had a small headache with light dizziness. Dr. Panganiban entered into the “Diagnosis” section “Concussion With No Loss Of Consciousness” and “Other Specified Sites Of Sprains And Strains.”

According to the medical records, over the next three weeks, Officer Kunkel returned to Stanford Health Care – ValleyCare on four occasions and complained of similar concussion symptoms and pain to his face and hamstrings. The headaches and dizziness are documented in the records for each visit. On the last visit, the headaches worsened considerably. Additionally, Officer Kunkel experienced increased pain to his right knee and lower back area and MRI's were conducted for both conditions. With regards to the right knee, the MRI revealed, a "Contusion versus small partial-thickness tear at the posterior root of the lateral meniscus" and a "Small interstitial tear at the proximal origin of the patella tendon." With regards to the lower back area, the MRI revealed "annular tears with very small disc protrusions" at the lower four lumbar levels and "degenerative facet disease at each lumbar level."

APPLICABLE STATE LAW

The question addressed by the Alameda County District Attorney's Office OIS Team is whether the fatal shooting of Mr. Johnathon Deming Jr. by Pleasanton Police Department Officer Daniel Kunkel on July 5, 2015 constituted a violation of law. To determine whether a crime should be charged requires the careful examination of the facts of the case and the applicable law.

The California District Attorneys Association Uniform Crime Charging Standards Manual directs that criminal charges shall not be brought unless the prosecutor, based upon a complete investigation and thorough consideration of all the evidence, is satisfied the evidence shows the accused is guilty of the crime to be charged. These charging standards further direct that there must be legally sufficient admissible evidence to prove each element of the crime. The admissible evidence must be of such convincing force that it would warrant conviction of the crime by a reasonable and objective fact finder after that fact finder has heard all the evidence and after considering the most plausible, foreseeable defenses that could be raised by the evidence.

The following California laws related to homicide are applicable in this case:

- Penal Code Section 187 states that murder is the unlawful killing of a human being with malice aforethought.
- Penal Code Section 188 states that malice may be expressed or implied. It is express when there is manifested a deliberated intention to unlawfully take away the life of a human being. It is implied when the killing resulted from an intentional act, the natural consequences of the act are dangerous to another with conscious disregard for human life.
- Penal Code Section 192 states that manslaughter is the unlawful killing of a human being without malice aforethought.
- Penal Code Section 197 states that homicide is justifiable and not unlawful when committed by a person when resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person.

APPLICABLE JURY INSTRUCTIONS

CAL CRIM 505

A person is not guilty of homicide if he was justified in killing someone in self-defense or defense of another. The person acted in lawful self-defense or defense of another if:

1. The person reasonably believed he or someone else was in imminent danger of being killed or suffering great bodily harm;
2. The person reasonably believed that the immediate use of deadly force was necessary to defend against that danger; and
3. The person used no more force than was reasonably necessary to defend against that danger.

CAL CRIM 507

A person is not guilty of murder or manslaughter if he killed someone while acting as a public officer. Such a killing is justified, and therefore not unlawful, if:

1. The person was a public officer;
2. The killing was committed while overcoming some actual resistance to some legal process or while performing any other legal duty;
3. The killing was necessary to accomplish one of those lawful purposes; and
4. That person had probable cause to believe that the individual killed posed a threat of death or great bodily injury, either to the public officer or to others.

A public officer has probable cause to believe that someone poses a threat of death or great bodily injury when facts known to the person would persuade someone of reasonable caution that the other person is going to cause death or great bodily injury to another.

Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

The People have the burden of proving beyond a reasonable doubt that the killing is not justified. If the People fail to meet this burden, the public officer must be found not guilty.

ANALYSIS

California law permits the use of deadly force in one's own self defense if it reasonably appears to the person claiming the right of self defense that he actually and reasonably believed that he was in imminent danger of great bodily injury or death. *See People v. Williams* (1977) 75 Cal. App. 3d. 731. In protecting himself, a person may use all force that he believes reasonably necessary and which would appear to a reasonable person, in the same or similar circumstances, to be necessary to prevent the injury that appears to be imminent. These same principles apply when a person reasonably believes that great bodily injury or death is about to be inflicted upon another person to protect that individual from attack. Actual danger is not necessary to justify the use of deadly force in self-defense or defense of others. If one is confronted by the appearance of danger which one believes, and a reasonable person in the same position would believe, would result in death or great bodily injury, one may act upon those circumstances. The right of self-defense is the same whether the danger is real or merely apparent. *See People v. Toledo* (1948) 85 Cal.App.2d 577.

Shortly after Officer Kunkel arrived on the scene, he positioned himself as the rear perimeter at the northwest corner of Specialty Sales Classic. Officer Kunkel saw the large window in the north showroom that was broken and knew this was the likely point of entry. While positioned on the rear perimeter, Officer Kunkel heard sounds coming from within the store. Prior to PPD's entry into the south showroom, Officer Kunkel described hearing screaming and growling coming from the building. He also heard glass breaking and items banging. Officer Kunkel saw Mr. Deming Jr. in the business on multiple occasions from his position and he could see that Mr. Deming Jr. was acting erratically. Based on his observations, Officer Kunkel believed Mr. Deming Jr. was possibly under the influence and could potentially be combative with police officers.

While on the perimeter, based on all of the information available to Officer Kunkel, it was reasonable for him to conclude that there existed probable cause that an ongoing felony burglary and vandalism was occurring inside the business. Based on his law enforcement experiences with burglaries, he knew that the point of entry was often the point of exit. Therefore, Officer Kunkel was at a heightened sense of awareness while positioned at the rear of the store. In fact, in his interview, Officer Kunkel stated that he attempted to get another officer or a canine unit positioned in the rear of the store with him because he believed the suspect would exit the store to the rear but he was unsuccessful. On the police radio recordings, a transmission by Officer Kunkel requesting a canine unit can be heard shortly before Mr. Deming Jr. fled through the point of entry. During the approximately ten to fifteen minutes Officer Kunkel was positioned at the rear of the store, he was the only PPD officer covering this point of entry.

The Initial Encounter

Shortly before Mr. Deming Jr. emerged from the store from the north showroom Officer Kunkel heard less lethal shotgun discharges. When Mr. Deming Jr. exited the north showroom, he was fleeing the crime scene and also the police. In his interview, Officer Kunkel stated that he identified himself as a police officer and told Mr. Deming Jr. to stop but Mr. Deming Jr. kept running past him in a western direction. Officer Kunkel was in full police uniform and used verbal commands to gain compliance but Mr. Deming Jr. did not comply or surrender to Officer Kunkel.

Observing that Mr. Deming Jr. was not stopping, Officer Kunkel eventually armed and deployed his Taser at Mr. Deming Jr.'s back in an attempt to stop him and gain compliance. Officer Kunkel stated he was successful in hitting Mr. Deming Jr. in the back with at least one Taser prong and he heard the Taser "cycle" through. This less lethal use of force did not cause Mr. Deming Jr. to stop running away or to comply with Officer Kunkel. Officer Kunkel then ran in a western direction after Mr. Deming Jr. It is at this point that Officer Kunkel stated that he felt one of his hamstrings "pop." He continued to run after Mr. Deming Jr. with the Taser wire and probe deployed in Mr. Deming Jr.'s back all the way to the Stone Group, Inc. parking lot.

Consistent with Officer Kunkel's account of his initial encounter with Mr. Deming Jr., two green Taser doors were observed at the scene in the area slightly west of the broken window of the north showroom (point of exit) on the sidewalk. These green doors pop open and detach when a Taser is first deployed and the probe with wires shoot out. The location of the green Taser doors is entirely consistent with where Officer Kunkel stated he first used his Taser on Mr. Deming Jr. Additionally, according to the Taser Records, an initial Taser trigger pull (the first of three) appears on the log which documents this first deployment. Further, photos and PDRD videos taken shortly after the incident document the Taser wire on Officer Kunkel's uniform around his waist area. All of this evidence supports Officer Kunkel's account that he deployed his Taser shortly after he saw Mr. Deming Jr. flee from the store and ran after Mr. Deming Jr. to the parking lot with the Taser wire and probe still deployed in Mr. Deming Jr.'s back.

Also consistent with Officer Kunkel's statement regarding his initial encounter with Mr. Deming Jr is Officer Kunkel's hamstring injury. In giving chase from his perimeter location, Officer Kunkel stated that his hamstring "popped" and he felt excruciating pain. Sergeant Horton's PDRD video captures Officer Kunkel leaving the parking lot where the shooting occurred minutes after the incident. Officer Kunkel can be seen limping, holding his hamstring, and needing the assistance of another officer to walk from the scene. Officer Kunkel states while walking, "I pulled both my hamstrings." He is unable to sit on the curb and needs to lean on a patrol car due to his injuries. Officer Kunkel's paramedic and medical records also corroborate the hamstring injury. Additionally, there are photos of Officer Kunkel taken approximately ten days after the incident that document significant bruising on the back of both hamstrings.

Officer Kunkel's description of the sequence of this initial encounter is also corroborated by Sergeant Horton's PDRD video. On the PDRD, shouting can be heard after Sergeant Horton has retrieved his rifle but before he moved away from his vehicle. It is only after he moves from the vehicle that Sergeant Horton stated he observed two individuals running westbound away

from the building. This PDRD footage supports the sequence of events provided by Officer Kunkel that he first verbally commanded Mr. Deming Jr. to stop, then he deployed his Taser, and finally, he chased Mr. Deming Jr. on foot.

The Altercation

Officer Kunkel stated that he continued to run after Mr. Deming Jr. until they reached the parking lot where the Mercedes van was parked. At that point the distance between them, approximately ten to eighteen feet, caused the Taser wire to snap. Officer Kunkel stated he activated the Taser again at this point. According to Officer Kunkel, this snapping of the wire seemed to cause Mr. Deming Jr. to stop and immediately turn around. Upon turning around, Officer Kunkel stated that Mr. Deming Jr. screamed, "You are going to Tase me?" or "Don't Tase me" and ran towards him at a rapid pace. Officer Kunkel stated that while running at him, Mr. Deming Jr. was clearly upset and had his fists clinched. Mr. Deming Jr. jumped up and kicked Officer Kunkel in the stomach area, causing him to fall backwards. At this time, Officer Kunkel stated that he felt his other hamstring get injured.

Officer Kunkel stated that when he fell, he hit the back of his head on the pavement. He stated that Mr. Deming Jr. was on top of him while he was on the ground and he was hitting him multiple times in the face. At this point Office Kunkel felt like he was about to lose consciousness and pass out. He felt fatigued and pain in his hamstring injuries. Officer Kunkel stated that he could not get any space between him and Mr. Deming Jr. as he continued to get hit in the facial area. At this point, Officer Kunkel believed he was going to lose consciousness and that Mr. Deming Jr. would then disarm him and kill him. Officer Kunkel realized he still had his Taser in his right hand and in a desperate effort to gain space, Officer Kunkel stated that he drove the Taser into Mr. Deming Jr.'s forehead and pulled the trigger in "drive stun" mode. Officer Kunkel stated that he heard the Taser go through its "cycle."

Officer Kunkel stated that the use of his Taser on Mr. Deming Jr.'s forehead created enough space so that Officer Kunkel could rock his body slightly and pull his firearm out of his holster with his left hand. With Mr. Deming Jr. on top of him and still striking him, Officer Kunkel raised his right arm up slightly and fired his gun once at Mr. Deming Jr.'s body. Mr. Deming Jr. was still above him and attacking him when Officer Kunkel raised his right arm up slightly more and fired a second gunshot at Mr. Deming Jr. Officer Kunkel stated that Mr. Deming Jr. hit the ground a short distance away from him and stopped attacking him. Officer Kunkel stated that he just lay on the ground exhausted from the struggle and his injuries. Eventually, other officers came to the scene and helped take him away from the parking lot.

The altercation in the Stone Group, Inc. parking lot is largely corroborated by other evidence collected during the investigation. For example, when the two reached the parking lot and the Taser wire snapped, Officer Kunkel stated that he activated the Taser and heard it cycle. He also stated that during the altercation, he activated his Taser in "drive stun" mode on Mr. Deming Jr.'s forehead. According to the Taser report, there were two additional Taser trigger pulls after the initial trigger pull (at the rear of the business) for a total number of three trigger pulls. The data from the Taser report is consistent with Officer Kunkel's statement regarding the number of times he used this less-lethal force option throughout the incident.

The presence of the Taser wire on Officer Kunkel's body and waist area is also consistent with his account of the changing distances between him and Mr. Deming Jr. during the altercation. Officer Kunkel stated that the Taser wire was extending because he was chasing behind Mr. Deming Jr., who had the Taser probe in his back. As Mr. Deming Jr. got further away from Officer Kunkel, the Taser wire continued to extend until it snapped when they reached the lot. Upon the Taser wire snapping, Officer Kunkel stated that Mr. Deming Jr. charged at Officer Kunkel, kicked him, and ended up on top of him. In Sergeant Gora's PDRD recording, the Taser wire can be seen on Officer Kunkel's stomach and waist area shortly after the gunshots when Officer Kunkel can be seen lying on his back in the parking lot. This Taser wire positioning is consistent with the wire snapping between the two in the parking lot and then the wire being sandwiched between the two when Mr. Deming Jr. charged at and ended up on top of Officer Kunkel.

After the Taser wire snapped and before Mr. Deming Jr. charged at Officer Kunkel, Officer Kunkel stated that Mr. Deming Jr. screamed at him. Officer Kunkel couldn't make out exactly what he screamed but it was something like, "You are going to Tase me?" or "Don't Tase me." On Sergeant Horton's PDRD recording, after he turns to go back into his patrol vehicle and right before he opens the door to get in the vehicle, a scream of "Mother-fucker" can be heard. While not specifically the words recounted in Officer Kunkel's statement, it is aggressive language that was screamed loudly. Also, it precedes the gunshots heard on Sergeant Horton's PDRD recording by approximately ten seconds, a time period in which a physical altercation as described by Officer Kunkel could occur.

Officer Kunkel's injuries are documented in his medical records and are consistent with his account of the altercation. It should be noted that the entries in these medical records are made by medical personnel and are important in assessing and treating the patient's injuries. Patients tend to be particularly candid during medical evaluations in order to get the appropriate medical care. Also, some of these entries are made shortly after the injuries occurred so there is little time for fabrication. In Officer Kunkel's paramedic records, taken shortly after the altercation and at the scene, the paramedics noted Officer Kunkel complaining of sharp pain to the back of his head, pain to his face, pain to his neck, and pain to the back of his legs. The paramedic records also note "bruising and red marks" to Officer Kunkel's cheeks and chin. These injuries are entirely consistent with Officer Kunkel's description of the altercation with Mr. Deming Jr. – feeling multiple hamstring strains; hitting the back of his head on the pavement when falling back; and being struck in the face repeatedly while on the ground.

Additionally, medical records from Officer Kunkel's hospital visit on July 5, 2015 and the weeks following the incident corroborate his account of the altercation. His hamstring injuries are reflected in all of the medical records and bruising is documented in photos taken of Officer Kunkel after the incident. Officer Kunkel stated that as he fell backwards after being kicked by Mr. Deming Jr., the back of his head hit the pavement. The medical records document pain to Officer Kunkel's head and concussion symptoms on the day of the incident and for weeks following the incident, with symptoms worsening at times. Doctors treating Officer Kunkel after the incident consistently diagnosed him with a concussion. This concussion diagnosis is consistent with hitting the back of his head on the pavement. Further, the medical records

document pain to Officer Kunkel's face which is consistent with his account that he was struck multiple times in the face by Mr. Deming Jr.

The PDRD recordings of Officer Kunkel following the gunshots are consistent with Officer Kunkel's statement regarding his physical condition, state of mind, and injuries during the altercations with Mr. Deming Jr. Officer Kunkel stated that he was physically exhausted during the altercation with Mr. Deming Jr. and believed that he was going to pass out. Officer Kunkel also stated that both hamstrings were injured during the chase and the altercation when Mr. Deming Jr. jumped up to kick him. He also stated that Mr. Deming Jr. repeatedly hit him in the face while on top of him. The PDRD recordings of Sergeant Horton and Sergeant Gora show Officer Kunkel lying on the parking lot pavement, motionless even though some time had passed since the gunshots. Officer Kunkel can be seen and heard breathing heavily, even minutes after the altercation. Officer Kunkel can also be seen on the video having trouble walking and cannot even sit down due to his hamstring injuries. Officer Kunkel's physical condition as observed on the PDRD recordings following the gunshots are consistent with Officer Kunkel's claim that he was physically exhausted by the whole incident to the point of passing out. Further, on Sergeant Gora's PDRD recording shortly after the shooting, Officer Kunkel is asked if he's injured and he responds that his hamstrings and face are injured.

Sergeant Horton and Sergeant Gora's PDRD recordings of the body positioning of Officer Kunkel and Mr. Deming Jr. shortly after the gunshots are consistent with Officer Kunkel's description of the altercation and how it ended. Officer Kunkel is lying on his back just past the Mercedes van with his feet facing south and his head facing north. This positioning in the parking lot is consistent with Officer Kunkel's description that he chased Mr. Deming Jr. around the back of the Mercedes van and into the parking lot. This chase into the parking lot would have been in a north to south direction. Officer Kunkel's body orientation, with his back on the pavement and his head facing in a northern direction, is consistent with his statement that Mr. Deming Jr. turned around in the parking lot, charged at him, and jumped up to kick him, ultimately knocking Officer Kunkel down on his back. According to Officer Kunkel's statement, Mr. Deming Jr. would have been charging from a south to north direction and the force of his kick would cause Officer Kunkel's head to face in a northern direction as his back hit the pavement.

Also evidenced in the PDRD recordings following the gunshots is Mr. Deming Jr.'s body in close proximity to and to the northwest of Officer Kunkel. Mr. Deming Jr.'s feet are facing south and his head is facing north. Mr. Deming Jr.'s positioning following the gunshots is consistent with a physical altercation Officer Kunkel described with Mr. Deming Jr. First, Mr. Deming Jr. is in relatively close proximity to Officer Kunkel which suggests a physical altercation in which the two were in close contact with one another as Officer Kunkel described. Next, Officer Kunkel described Mr. Deming Jr. as right above him and that he was striking him in his face. This would put Mr. Deming Jr.'s head in a north-facing direction as he struck Officer Kunkel, and this is the direction Mr. Deming Jr.'s head is facing after the gunshots. Finally, Officer Kunkel described firing his gun with his left hand and in the direction of Mr. Deming Jr. These gunshots would travel from Officer Kunkel's left to his right, which would be in a western direction. Ultimately, Mr. Deming Jr. is found to the northwest of Officer Kunkel's body, consistent with Officer Kunkel's statement describing the altercation and the gunshots.

The positioning of Officer Kunkel's firearm and his Taser shortly after the gunshots can also be observed on the PDRD recordings. In Sergeant Gora's PDRD recording, the firearm is seen being removed from Officer Kunkel's left hand as he lay on his back on the pavement. The firearm is then placed on the pavement nearby. In both sergeants' PDRD recordings, the Taser can be seen on the parking lot pavement next to Officer Kunkel's right hand. The positioning of each of these weapons is consistent with Officer Kunkel's statement of how they were used during the altercation, with which hand, and when they were used. The Taser and firearm were used in quick succession during the altercation with Mr. Deming Jr. and the presence of both weapons in or near Officer Kunkel's hands is consistent with recent use.

The injuries to Mr. Deming Jr.'s forehead, documented in photos taken by Detective Chin at Eden Medical Center in the early morning of July 5, 2015, are also consistent with Officer Kunkel's statement regarding the altercation. Two distinct, tiny, circular-shaped injuries appear on Mr. Deming Jr.'s forehead above the bridge of his nose. Additionally, two other small injuries but less distinct, also appear on Mr. Deming Jr.'s forehead above his left and right eyebrows. Officer Kunkel described in great detail the use of his Taser in "drive stun" mode on Mr. Deming Jr.'s forehead in order to obtain space between their bodies as Mr. Deming Jr. repeatedly struck Officer Kunkel. Officer Kunkel stated that he made contact with the Taser as a last resort to gain space before he passed out from exhaustion. These injuries to Mr. Deming Jr.'s forehead are consistent with Officer Kunkel's account of the altercation in the parking lot and his use of the Taser while on his back on the pavement.

The direction of the gunshot wounds as noted in the Dr. Herrmann's Autopsy Protocol are also consistent with Officer Kunkel's statement describing how he shot his firearm at Mr. Deming Jr. during the altercation. Dr. Herrmann's determination regarding the direction for both of the gunshot wounds to the facial and abdomen area is from Mr. Deming Jr.'s right side to left side and in an upward direction. Officer Kunkel stated that at the time of the gunshots, Mr. Deming Jr. was on top and above him. Officer Kunkel also stated that he drew his gun with his left hand and aimed in an upward direction from the left. A shot from Officer Kunkel's left hand side would likely travel from Mr. Deming Jr.'s right to left if he was on top of and facing Officer Kunkel. Further, a gunshot from a position on the ground, as Officer Kunkel described, would likely travel in an upward direction. It should be noted that Dr. Herrmann's autopsy was conducted three days after Officer Kunkel's statement on July 6th.

Mr. Deming Jr.'s Conduct Before The Altercation With Officer Kunkel

As part of the review of all of the facts of this case, it is important to consider Mr. Deming Jr.'s conduct throughout the early morning of July 5, 2015, leading up to the altercation with Officer Kunkel. This conduct is relevant because it may provide corroboration or lack thereof for Officer Kunkel's statement. The conduct also provides insight into Mr. Deming Jr.'s intent and state of mind immediately before encountering Officer Kunkel.

A review of the evidence before Mr. Deming Jr. fled from the business and initially encountered Officer Kunkel, shows that he was consistently aggressive and combative throughout that early morning. Mr. Deming Jr. had approximately ten minutes and countless opportunities to leave the business after his unlawful entry set off the alarm and before PPD

arrived. Once PPD arrived, Mr. Deming Jr. had numerous opportunities and another approximately fifteen minutes to peacefully surrender or comply with PPD's orders to come out of the business. Instead, Mr. Deming Jr. was not compliant from the time PPD first arrived on the scene and often displayed hostility and physical aggression towards the police. PPD applied numerous levels of non-lethal force to gain Mr. Deming Jr.'s compliance and were unsuccessful each time. As discussed above, this aggressive and non-complaint behavior continued during his interactions with Officer Kunkel.

In reviewing the Specialty Sales Classic surveillance video cameras, Mr. Deming Jr. entered the business by breaking the glass window in the north showroom. Initially, he appeared calm as he walked through the business. He started to look through desk drawers and based on his statements over the phone to Bay Alarm, he was looking for keys. The evidence shows that Mr. Deming Jr. very likely entered the business to steal one of the cars inside. Eventually the surveillance footage shows that Mr. Deming Jr. became noticeably frustrated when he could not find keys to the cars. He then acted out violently while in the store. Mr. Deming Jr. used a metal rod to punch holes in the hallway walls and a store glass window. At one point before the PPD arrived, Mr. Deming Jr. left the store, and instead of leaving the scene entirely, he returned to the store and vandalized the cars inside the showroom with a fire extinguisher. Mr. Deming Jr. also violently threw the fire extinguisher, striking one of the cars.

The surveillance footage also shows Mr. Deming Jr.'s aggressive and violent demeanor once the PPD arrive to surround the store. He appeared to bang his guitar at the glass front door communicating with the police. He then picks up a glass fishbowl nearby and throws it towards a wall, breaking it. Mr. Deming Jr. proceeded to the rear of the showroom and smashed his acoustic guitar on a car and a wall. This was very violent, destructive behavior and consistent with the behavior Officer Kunkel encountered.

Mr. Deming Jr. also began to kick doors numerous times when the police were on scene. At one point, Mr. Deming Jr. ran towards the glass front door, jumped up and kicked the glass front door with one foot. This kicking activity is particularly relevant because Officer Kunkel described Mr. Deming Jr. jumping and kicking him during the altercation in the parking lot. Shortly after kicking the front door, Mr. Deming Jr. picked up two heavy car jacks and twice threw the jacks towards the front glass windows. On the second occasion, the tire jack broke the glass door and went out towards the street. From PPD officer statements, officers were standing in close proximity to the car jacks when they were thrown which indicates that officers were the likely targets. After throwing the car jack through the front door, Mr. Deming Jr. went to the threshold of the door and challenged the officers. When "less-lethal" shotguns were deployed at him, he did not surrender but continued his aggressive behavior. All of Mr. Deming Jr.'s conduct was aggressive and violent towards the police, consistent with the conduct Officer Kunkel described.

Also evident from Sergeant Gora's PDRD, is that Mr. Deming Jr. was given numerous opportunities to surrender once the PPD officers arrive at the scene and he refused to comply. PPD officers verbally requested Mr. Deming Jr. to surrender outside of the store and upon entry. PPD officers can be observed utilizing the canine unit to obtain compliance from Mr. Deming Jr. but he refused to surrender. Mr. Deming Jr. would not come down from the hood of the vehicle

he was sitting on and he retreated towards the roof of the car. PPD officers used Taser deployments to try and obtain compliance but Mr. Deming Jr. tossed the Taser probes aside from his pants and jacket and did not comply. Mr. Deming Jr. then moved to the top of the vehicle and less-lethal shotgun bean bags were deployed at him. He did not surrender to the PPD officers and instead, ran from the store. PPD officers utilized numerous levels of force to attempt to gain compliance from Mr. Deming Jr., who was, and had committed multiple felonies in their presence, and Mr. Deming Jr. continually refused to surrender or comply.

While no drugs nor alcohol were found in Mr. Deming Jr.'s blood samples, his conduct by all accounts and the video evidence was clearly erratic, aggressive, and violent. Some of the evidence indicates that Mr. Deming Jr. may have been at an emotional crossroads while in the store before the altercation with Officer Kunkel. Mr. Deming Jr. wrote on a red vehicle in the store, "CONFRONT ME IN PEACE. I HAVE MUCH TO TEACH." On a bathroom mirror, he wrote with a sharpie, "HOPE & HUMANITY HAS FAILED." Finally, Mr. Deming Jr. smashed his guitar by striking it on a vehicle and a wall. A review of Mr. Deming Jr.'s social media pages and personal videos made before the incident, indicate Mr. Deming Jr. was a musician who often played the acoustic guitar. The fact that Mr. Deming Jr. would violently and intentionally break a prized possession like his acoustic guitar may be indicative of his troubled state of mind shortly before he encountered Officer Kunkel outside the store. Mr. Deming Jr.'s conduct and demeanor before encountering Officer Kunkel was very much consistent with Officer Kunkel's description of Mr. Deming Jr.'s actions during the altercation.

CONCLUSION

Upon careful review of all of the evidence presently available, this Deputy District Attorney concludes that Officer Kunkel acted in lawful self-defense in shooting Mr. Johnathon Deming Jr. There is insufficient evidence to support charging Officer Kunkel with any crime. In arriving at this conclusion, this Deputy District Attorney visited the scene hours after the incident; participated in the involved officer's statement; thoroughly reviewed the PPD's investigative reports; supplemental reports; police officer statements; civilian statements; police radio dispatch recordings; police officer body-worn video recordings; surveillance video recordings; photos; the autopsy protocol and photos; the coroner's report and photos; the toxicology reports; medical records; social media materials; videos made by the decedent in the days before the incident; and additional evidence collected during the investigation. The evidence is overwhelmingly consistent with Officer Kunkel's account of his initial encounter and altercation with Mr. Deming Jr. in the early morning hours of July 5, 2015. The evidence shows that Officer Kunkel believed that lethal force was necessary because he believed he was about to

lose consciousness as a result of Mr. Deming Jr.'s ongoing attacks, which would lead to the loss of retention of his firearm and ultimately his death. The evidence supports the conclusion that Officer Kunkel acted under the actual and reasonable belief that Mr. Deming Jr. posed a threat of death or great bodily injury to him.

By: Kevin Wong
Deputy District Attorney

Approved By: Nancy E. O'Malley
District Attorney

Dated: February 17, 2016