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Thomas Connor

Commander

Thornton Police Department

9551 Civic Center Drive

Thornton, CO 80229

Dear Commander Connor,

As you know, I was retained by your department and the City Attorney's Office to review an incident that occurred on April 30, 2024. This incident resulted in the fatal shooting of Jasmine Castro and Joby Vigil by three Thornton Police Department (TPD) officers. The involved officers were Marc Faivre, Scott Schilb and Tim Fuss. I was asked to review the circumstances surrounding the incident and provide an opinion as to whether the involved officers' actions met the reasonable officer standard and were consistent with current police practices and procedures. To assist me in understanding the circumstances I was provided with body worn camera videos (BWC's), officer interviews, Thornton Police Department policies and training materials, an autopsy report, as well as written reports from a police practices expert and the district attorney's office.

To assist in explaining my reasoning, and to support my conclusions, I am using the same summary of events that were offered by the district attorneys' expert, Mr. Seth Stoughton. I believe the summary to be an accurate depiction of the events that occurred on April 30th, 2024, and by citing it, allows for a clearer understanding of why I have drawn different conclusions from Mr. Stoughton.

On April 30th, 2024, TPD Officers Marc Faivre, Tim Fuss and Scott Schilb were on patrol. As members of the TPD impact team, a proactive street crimes unit, they were wearing plain clothes in black tactical vests with chest badges and in unmarked vehicles with discrete emergency lights. Officer Fuss was in one vehicle while Officer Faivre was driving a second vehicle in which Officer Schilb was a passenger.

At approximately 2:37 AM, the officers observed a dark colored Infiniti EX35 with front end damage and no license plate. After observing the vehicle for a period of time, Officer Faivre, who was driving an unmarked pickup truck, attempted to initiate a traffic stop. The vehicle fled, and officers terminated the stop but followed the vehicle.

At approximately 2:59 AM, Officer Fuss reencountered the vehicle near a gas station, where he saw the driver exit and walk to the back of the vehicle. Officer Fuss later reported a person in a hoodie "pointing" at him in "kind of a bladed stance" and then firing a single gunshot at him before getting back in the vehicle. Officer Fuss further reported that the individual got back into the car, but that there was a second gun shot as Officers Faivre and Schilb arrived on scene. Both Officers Faivre and Schilb reported hearing the second gun shot, with Officer Faivre later

reporting that he believed a passenger was shooting because he did not see any muzzle flash from the driver's side of the Infiniti. The Infiniti fled, and officers initiated a vehicle pursuit.

As the Infiniti turned northbound onto Garrison Street it started to drive on the shoulder of the road. Officer Fuss believed that the driver was maneuvering it into a position in which the driver could shoot at him, so he executed a precision immobilization technique (PIT) while driving at 40 to 50 mph. The Infiniti came to a stop. As it did, Officers Faivre and Schilb observed that there were two people in the vehicle. The officers BWC videos reflect that, almost immediately after the Infiniti stopped, Ms. Castro exited the vehicle through the driver's window, followed immediately thereafter by Mr. Vigil.

Officer Fuss exited his vehicle and came around the back of Officers Schilb and Faivre's vehicle, positioning himself on the driver's side of the Infiniti. According to Officer Fuss's later statement, the driver, later identified as Ms. Castro, was either climbing out of the driver's window or had climbed out of the window of the Infiniti and was starting to run. Officer Fuss later stated that he saw "something black" in Ms. Castro's hand, but he could not "identify it as a gun." Officer Fuss fired at Ms. Castro from approximately 7 to 10 yards away until "she dropped and was no longer moving." Officer Fuss's BWC reflects that, at the point when he began firing, Ms. Castro was starting to stand and turn away from him after falling to her hands and knees. The passenger, later identified as Mr. Vigil, also exited the Infiniti from the driver's window. Officer Fuss's BWC video indicates that he shifted his aim to point his weapon at Mr. Vigil but did not fire at him.

Officer Faivre, who was driving his vehicle that he shared with Officer Schilb, was positioned with his window "almost perfectly aligned with the [Infiniti's] passenger window." He later stated that he could see Ms. Castro and Mr. Vigil "just grabbing and reaching all over the car" and he saw the driver, Ms. Castro, reach down and pick something up while the passenger, Mr. Vigil, spun around in his seat and making motion towards the back behind the center console, then both the driver and passenger started to exit the vehicle. Officer Faivre later stated, "I see the driver is [out of the vehicle], can't see what's in their hands, and I think they're going to shoot us again for the third time now tonight." He reiterated that he could not see either Ms. Castro or Mr. Vigil's hands. Officer Faivre shot both Ms. Castro and Mr. Vigil from a position behind his open driver's door, firing through or over the Infiniti.

Officer Schilb, who had deployed his rifle while in the front passenger seat of the vehicle being driven by Officer Faivre, later stated that he exited and went around the rear of his vehicle, hearing gunfire as he did so. He further stated that as he came around the corner, he saw Ms. Castro with a firearm at her waistline. Officer Schilb fired at Ms. Castro. Officer Schilb later reported then seeing Mr. Vigil coming out of the vehicle, very close to Ms. Castro. Although Officer Schilb thought Mr. Vigil might attempt to acquire the firearm from Ms. Castro, he saw Mr. Vigil "kind of curl up and roll towards the car" so he did not shoot at Mr. Vigil.

Shortly After the shooting, officers moved forward and secured Ms. Castro and Mr. Vigil. As they did so, they recovered a black handgun from the ground near Ms. Castro. Shortly thereafter, they began chest compressions on Ms. Castro. They did not provide medical assistance to Mr. Vigil, and both contemporaneous and later statements indicated that they did not do so because the nature of his injuries were such that assistance was obviously futile. Both Ms. Castro and Mr. Vigil were later declared deceased, with autopsies attributing their deaths to multiple gunshot wounds.

Police use of force has been a contentious topic for many decades. This is particularly true when that use of force results in death. These incidents can be emotionally charged and divisive. In many cases, even though the use of deadly force has been determined to be lawful, the optics are awful. Managing use of force by officers is one of the most challenging issues for law enforcement and the public. Fortunately, the United States Supreme Court (USSC) has provided clear parameters focused on the use of force. Two cases decided by the USSC guide law enforcements use of force. *Tennessee v. Garner* directed that deadly force may not be used unless it is necessary to prevent the escape and when the officer has probable cause to believe that the suspect poses a significant threat of death or serious injury to the officer(s) or others. *Graham v. Connor* went even further providing the tools to analyze the use

of force by law enforcement. The court ruled the use of force must be analyzed using the “objective reasonableness” standard. In explaining the standard, the court stated “the Fourth Amendment reasonableness inquiry is whether the officers’ actions are objectively reasonable in light of the circumstances confronting them, without regard to their underlying intent or motivation. The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with 20/20 vision of hindsight, and its calculus must embody an allowance for the fact that police officers are often forced to make split second decisions about the amount of force necessary in a particular situation.”

In *Graham v. Connor*, the court also laid out specific factors (Graham Factors) that officers should consider when weighing the decision to use force. First, the severity of the crime involved. Next, whether the suspect poses an imminent/immediate threat to the officer or others. Lastly, whether the suspect is actively resisting arrest or attempting to evade arrest by flight.

The court also acknowledged that officers are often asked to make decisions in situations there are tense, uncertain and rapidly evolving. With this consideration in mind the court noted that the totality of circumstances must be considered when evaluating an officer’s use of force. When using this to analyze a use of force incident, the court directed that the analysis is not to consider information learned after the incident has ended, but consideration must focus on the information known to the officer at the time force was used.

The *Graham v. Connor* case is the sole template to be used when analyzing police use of force. This case serves as the cornerstone for police training on use of force and is the foundation for police policies and procedures on use of force. My analysis of the event on April 30, 2024, examined the facts known to the involved officers at the time that deadly force was used, and whether a “reasonable officer faced with similar circumstances” would act in a similar manner. It is my professional opinion, based upon my experience and training, that a reasonable officer when faced with the circumstances that Officers Fuss, Faivre and Schilb were confronted with, would have responded in a similar manner. Furthermore, in my opinion, the actions of Officers Fuss, Faivre and Schilb were consistent with contemporary police training, practices and policies. My conclusions are counter to those of Mr. Stoughton. To provide the greatest clarity as to why my conclusions differ, it is necessary for me to rebut much of the support reasoning Mr. Stoughton used when reaching his conclusions.

The objective facts support that Officers, Fuss, Faivre and Schilb were all aware that an occupant(s) of the involved Infiniti had fired shots at the officers twice before the pursuit occurred. Each officer, when questioned independently following the shooting, articulated that they were aware that they had been shot at and that the occupants (Ms. Castro and Mr. Vigil) of the Infiniti were believed to have a firearm. The officers stated in their interviews that they believed that the occupants had committed the crime of Attempted Murder, which is a felony crime.

Officer Schilb’s use of deadly force against Ms. Castro was clearly within the lawful use of force. Officer Schilb stated in his interview that he was aware of the prior gunshots which he believed to have been fired at him and Officers Fuss and Faivre. He also stated that as he exited his vehicle after the pursuit, that he heard gunshots, and saw that Ms. Castro had a firearm in her waistline as she came up from the driver's side of the Infiniti. BWC shows Ms. Castro turning in a manner that could indicate an immediate threat to the officer. Given the totality of the circumstances, prior shots fired at officers, high speed pursuit to flee police, hearing gunshots, seeing the suspect armed with a handgun, compressed time in a kinetic environment, Officer Schilb’s decision to use deadly force was consistent with the guidelines set forth under *Graham v. Connor*. A reasonable officer when faced with these similar circumstances, would have reasonably believed that a serious crime had been committed (shooting at the police), Ms. Castro posed an immediate threat to the officers (armed with a handgun and previous shots fired) and she was actively attempting to escape by flight and presented an imminent danger to the public (high speed vehicle pursuit to escape police, previous shots fired and armed with a handgun, and no indications of attempting to surrender to the police). A reasonable officer would have believed that the use of deadly force was appropriate. His decision comported with current police training, practices and policies.

Officer Fuss stated that as he exited his vehicle and confronted Ms. Castro, he saw “something black” in her hand but according to his own statement, he did not know what it was and could not identify it as a firearm. Officer Fuss further stated that he saw Ms. Castro “bailing out” of the Infiniti and starting to run. He stated that he was concerned with her getting away into the surrounding neighborhood and presenting a danger to the public. Officer Fuss stated that he “truly believed that Ms. Castro's intent was either to get away from us or shoot us until she got away.” As with Officer Schilb, Officer Fuss had direct knowledge of gun shots being fired at them (a serious felony crime), saw something black in the hand of the suspect, had been involved in a high-speed pursuit, and observed the suspect attempting to flee on foot. Given the totality of these observations, a reasonable officer could conclude that Ms. Castro presented an immediate threat of serious injury or death and that deadly force was justified. In United States Supreme Court case *David v. Freels* (1976), The court found “that it is not necessary that the danger that gave rise to the belief actually existed; It is sufficient that the person resorting to self-defense at the time involved reasonably believed in the existence of such a danger, and such reasonable belief is sufficient even where it is mistaken.” This further supports that the totality of the circumstances that Officer Fuss faced prior to the use of deadly force would lead a reasonable officer to believe that Ms. Castro presented an immediate danger of serious injury/death and deadly force would be authorized.

Mr. Stoughton drew a different conclusion regarding Officer Fuss’s actions. While acknowledging that a reasonable officer would have believed that Castro was armed and trying to escape, he then stated, “Without a specific reason to distinguish the **intention** to flee from the **intention** to fire on officers, no reasonable officer could assume, under ambiguous circumstances, that Ms. Castro had the **intention** to cause serious bodily injury or death to officers or others.” He goes on to say, “Although a reasonable officer in Officer Fuss’s position could have concluded that Ms. Castro had the ability and opportunity to cause serious bodily injury or death, a reasonable officer would not have concluded, based on the available evidence, that Ms. Castro **intended** to do so. Under such circumstances, a reasonable officer in Officer Fuss's position could not have concluded that Ms. Castro presented an imminent threat of serious injury or death that justified the application of deadly force.

Mr. Stoughton’s reasoning for his finding is that Officer Fuss did not properly assess the **intent** of Ms. Castro. This is a flawed analysis and falls outside the parameters as set forth by the United States Supreme Court in *Graham v. Connor*. Nowhere in the court’s ruling does it suggest or require that an officer accurately assess the intent of a suspect. To determine the accuracy of an officer’s assessment of intent would require a hindsight review and this is exactly what the court was trying to avoid. To support his assessment and findings, Mr. Stoughton goes to great lengths to explain threat and risk, as well as the considerations of Ability, Opportunity and Intent.

Mr. Stoughton writes that it is essential to distinguish between threat and risk to understand and evaluate police use of force. He defines threat as an imminent danger to a legitimate governmental interest and risk, at best, is described as a potential threat. He then explains, **risk** is the presence of at least one but not all of three of the prerequisites of threat (**ability, opportunity, intent**) and the potential for the remaining factors to materialize.

These are concepts that are a part of police training on officer safety and use of force. Unfortunately, Mr. Stoughton does not acknowledge that the terms threat and risk are frequently used interchangeably. When a recruit is receiving instruction in the police academy, instructors may refer to a man with a gun as a risk or threat. Officers are taught to treat both equally as they both present a danger to their safety and that of the public.

Mr. Stoughton also states that it is “Well known and generally accepted in policing that a subject presents an imminent **threat** when the subject reasonably appears to have **the ability, opportunity and intention** to cause a particular type of harm, serious bodily injury or death.” Here you can see that Mr. Stoughton used the words risk and threat interchangeably. It is correct that officers do receive training on the concept of risk analysis and Ability, Opportunity, and Jeopardy (Intent). Mr. Stoughton uses the word intent whereas officers are taught the concept of jeopardy. He defines intent as the subjects perceived mental state and their apparent desire to cause the identified harm. I would note that Mr. Stoughton frequently refers to the National Consensus Policy and Discussions Paper on

Use of Force promulgated by the International Association of Chiefs of Police. He writes that this was a result of a collaborative effort among 11 of the most significant law enforcement leadership and labor organizations in the United States. In that report, it states, “the use of commonly employed terms and phrases, even though well intended, can cause unexpected and unnecessary consequences for the officer and agency.” (National Consensus Policy and Discussions Paper on Use of Force p.7). As a member of that committee, I can attest that nowhere in that paper does it suggest or recommend that intent of the suspect be a determining factor in the appropriate use of force.

The courts have been clear that officers are not mind readers, are not equipped with crystal balls and not required to forecast the behavior of a subject. While evaluating intent may be an aspect of determining if an officer is experiencing jeopardy, it is that final determination of jeopardy that is the ultimate consideration. The officer’s ability to explain why they believed they were in fear for their safety from serious bodily injury or death (jeopardy) will factor into the reasonableness of their decision to use force, not whether they accurately assessed the intent of the subject.

When limiting the analysis of Officer Fuss’s action to the *Graham v. Connor* standards, and understanding the critical difference between jeopardy and intent, it is my opinion that a reasonable officer would have believed that Ms. Castro had the ability, opportunity and created jeopardy for the officer and others, that would support the use of deadly force. It is my opinion that Officer Fuss’s actions were consistent with current police training, practices and policy.

Officer Faivre explained that as his vehicle came to a stop positioned next to the Infiniti, he saw Ms. Castro and Mr. Vigil “just grabbing and reaching all over the car” and he saw the driver Ms. Castro, reach down and pick something up while the passenger, Mr. Vigil, spun around in his seat and moved towards the back behind the center console. Then both the driver and passenger started to exit the vehicle. Officer Faivre, who was positioned behind his driver’s side door, stated that he observed that Ms. Castro was out of the vehicle, and he couldn’t see what was in her hands. Officer Faivre stated that based upon being shot at previously, knowing that the occupants of the car were likely armed and presented an imminent threat to himself, the other officers and public, he engaged Ms. Castro with deadly force. Almost simultaneously, Officer Faivre observed Mr. Vigil exiting the vehicle through the same window as Ms. Castro. Officer Faivre stated that he also couldn’t see his hands. For the same reasons mentioned before, he also engaged Mr. Vigil with deadly force. Officer Faivre stated that he shot at both parties until they were no longer a threat. He stated that he paused, reassessed the potential threat, moved to the other officers and then approached the suspects. He stated that once that they (officers) had ensured they were no longer in danger, they began rendering aide to Ms. Castro. Officer Faivre stated that they believed Mr. Vigil had a non-survivable injury and didn’t make an attempt to provide care to him.

As with the other involved officers, Officer Faivre believed that he had been shot at by the occupants of the Infiniti (a serious felony crime), believed that they were armed and presented an immediate threat of serious bodily injury or death, and were actively trying to escape and posed an imminent threat to officers and the public. In his interview, Officer Faivre stated on several occasions that he was in fear of his own safety and that of the other officers (jeopardy). When faced with the same circumstances as Officer Faivre, I am confident that a reasonable officer would have felt justified in using deadly force. It is my professional opinion, that Officer Faivre’s actions were consistent with current police training, practices and policies.

While I believe that the District Attorney (DA) King arrived at the correct conclusion, I feel compelled to disagree with some of her statements in her letter to Interim Chief Reeves. It is apparent in reading her letter that she is overly reliant on Mr. Stoughton’s report which misapplies critical concepts in police use of force. She makes reference to Mr. Stoughton’s characterization that the incident involved “ambiguous circumstance”. Applying the *Graham v. Connor* standard provides great clarity to the incident. In this incident, two occupants of a possible stolen vehicle fired a weapon at police officers on two occasions, fled at high speed and when interdicted, made no attempt to comply with the officers, rather continued in the actions to resist and escape the police. Additionally, the reliance on

misusing intent for jeopardy is critical. As DA King writes, information known after the fact supports the belief that Ms. Castro and Mr. Vigil were not a threat. That is a blatant divergence from the USSC guidance on evaluating reasonableness of police use of force.

Lastly, to address the concern of TPD's definition of Imminent. The National Consensus Policy and Discussions Paper on Use of Force specifically notes that the terms immediate or imminent threat are used interchangeably on a regular basis. Thus, it is common in police training, practices and policies for both these terms to be seen. TPD's attempt to provide a better understanding is not nearly as problematic as the DA's experts attempt to differentiate between imminent threat and imminent risk. This is underscored by the DA stating that both she and the expert believed that Officer Faivre's perception of an imminent threat and decision to shoot were not reasonable at the time that he used deadly force.

There is no question that the events surrounding the incident on April 30th, 2024, were challenging. However, I am confident that the actions taken by Thornton Police Department Officers Fuss, Faivre and Schilb, were consistent with those that a reasonable officer, when faced with similar circumstances, would have taken. Each officer was able to articulate specific information that meets the standards as set forth by *Graham v. Connor*. All officers believed that a serious crime had been committed, the suspects were believed to be armed and presented an imminent threat of causing serious bodily injury or death and the suspect were actively attempting to escape the police and presented an imminent danger to the officers and public. The application of any other analysis to the actions of the involved officers use of force is disingenuous to the officers, Thornton Police Department, policing profession and is counter to the guidance provided by the United States Supreme Court.