



INTEROFFICE MEMORANDUM

TO: STAFFING/REVIEW TEAM

DATE: April 6, 2004

FROM: RICHARD SCRUGGS  
Assistant State Attorney

RE: Police Shooting Closeout Memo  
Case No.: 62-03-11-27-004

SUBJECT	Officer Reyneri Hernandez
VICTIM	Denzel Smith-Graham
INJURIES	Gunshot Wound to Right Side of Chest
DATE & TIME	November 27, 2003 @ approx 5:40 pm
LOCATION	2150 NE 169th Street, North Miami Beach
WEAPON	Glock .40 caliber pistol
LEAD	Det. Michael Stein, NMBPD
CASE#	NMBPD #2003 1127 10
SAO CASE#	62-03-11-27-004

### **OVERVIEW OF FACTS**

On November 27, 2003, at approximately 5:33 pm, North Miami Beach Police received a 911 call from an individual reporting a black male with a gun in the area of 2150 NE 169th Street. The caller reported that the black male was wearing black jeans and a white shirt and was last seen in the alley behind the apartment building located at the aforementioned address. Officer Reyneri (Rey) Hernandez was one of two units dispatched to the scene. He parked his police vehicle behind 2150 NE 169th Street, exited the vehicle, and began to walk through a narrow passageway on the east end of the building looking for the suspect with the gun. (See Attachment # 1, Crime Scene Sketch.) At the end of the passageway, on the left, is an open stairwell leading from the ground floor to the third floor of the apartment building. (See Attachment # 2, Crime Scene Sketch.) When Officer Hernandez, with his weapon drawn, reached the stairwell, he saw a 6'2" black male, weighing 168 pounds, with black jeans and a white shirt on the second floor, holding what appeared to be a semi-automatic pistol.

Officer Hernandez immediately aimed his weapon at the individual and shouted something to the effect of "Police, drop the weapon." When the individual turned toward Officer Hernandez, Hernandez fired one shot from his Glock .40 caliber pistol, striking the individual in the right chest. The black male, who was pronounced dead on the scene, was 16-year-old Denzel Smith-Graham and what appeared to be a semi-automatic pistol was, in fact, a BB gun.<sup>1</sup>

### **WITNESS STATEMENTS**

#### **The 911 caller**

Antonio Zaccour lives at 2191 NE 168th Street, which is the apartment building directly behind the apartment building located at 2150 NE 169th Street where the shooting occurred. The two apartment buildings are separated by an alleyway which is also used as a parking lot for the two buildings.

At approximately 5:30 p.m., Mr. Zaccour was sitting outside of his ground floor apartment watching the football game which was on the television in his living room. He was sitting outside because his wife would not allow him to smoke inside. Zaccour has stated that he was startled by a figure which he first saw from the corner of his eye. He turned toward the figure and saw a muscular built black teenager, approximately six feet tall, with a black pistol in his left hand. The person was dressed in a white football-type jersey with a number on it and black pants. Almost immediately, the male turned and headed down a passageway toward the alley between the two apartment buildings. Zaccour followed him down the passageway at a distance and observed the male crossing the alleyway and entering the passageway on the east side of the 2150 NE 169th Street apartment building. Zaccour lost sight of the male at this point;

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<sup>1</sup> A BB gun is considered to be a weapon, Depasquale v. State, *supra*; and may, under certain circumstances, be considered a deadly weapon, See Dale v. State, 703 So. 2d 1045 (Fla. 1997) and Florida Jury Instruction 15.1.

however, 4 to 5 minutes later, he saw the same male walk back into the alleyway, turn east, and then walk away from both apartment buildings while placing an object in the right rear pocket of his pants. Zaccour did not see the object but suspected that it was the pistol. Zaccour then called 911 to report what he had observed. Mr. Zaccour also stated that he never clearly saw the male's face and could not identify him. Zaccour's native language is Spanish and he has some difficulty with English. The police dispatch employee who answered his call did not speak Spanish; therefore, only fragmentary and confusing information was given by Mr. Zaccour:

THE DISPATCHER: North Miami Beach police.

MR. ZACCOUR: Yeah, thank you. I call, live in 2191 Northeast 168th Street.

THE DISPATCHER: 160 street.

MR. ZACCOUR: 168.

THE DISPATCHER: 168th Street. What apartment?

MR. ZACCOUR: Apartment 5.

THE DISPATCHER: What's the problem?

MR. ZACCOUR: I got a living in my - - right here watching the game and the black guy come in with a gun.

THE DISPATCHER: Okay, where?

MR. ZACCOUR: Right here in my apartment.

THE DISPATCHER: Who was the black guy?

MR. ZACCOUR: The black guy see me going back to the back, the back here in the alley.

THE DISPATCHER: Where is he now?

MR. ZACCOUR: I don't know.

THE DISPATCHER: What did he do with the gun?

MR. ZACCOUR: He may be coming to me an assault.

THE DISPATCHER: And shout.

MR. ZACCOUR: No, he no shout. He have the gun in the hand.

THE DISPATCHER: He had a gun in the hand.

MR. ZACCOUR: Yes.

THE DISPATCHER: What do you speak, Spanish?

MR. ZACCOUR: Yeah.

THE DISPATCHER: Did he threaten you with the gun?

MR. ZACCOUR: In the moment he see me move, he's going back and going to the alley.

THE DISPATCHER: But he came into your apartment, inside?

MR. ZACCOUR: Pardon me?

THE DISPATCHER: Did he come inside?

MR. ZACCOUR: Yeah - - no, he no coming inside.

THE DISPATCHER: What's your name?

MR. ZACCOUR: Antonio.

\* \* \*

THE DISPATCHER: What is he wearing?

MR. ZACCOUR: White shirt, black pants. He's running to the back of the building, I have an alley.

THE DISPATCHER: Long pants? Are they black long pants.

MR. ZACCOUR: Black pants and white shirt.

THE DISPATCHER: Okay. And he ran to the - what color is the gun?

MR. ZACCOUR: Black.

THE DISPATCHER: Black gun?

MR. ZACCOUR: Yes.

THE DISPATCHER: And he ran. Why did he run?

MR. ZACCOUR: He come in, he see me, he's going back to the alley in the building and going in the other back.

THE DISPATCHER: What other back?

MR. ZACCOUR: In the other back of the building. We have any building this come here.

THE DISPATCHER: What color is that building?

MR. ZACCOUR: The back building is yellow, light yellow.

THE DISPATCHER: Okay. We're going to send a police out.

MR. ZACCOUR: Okay.

THE DISPATCHER: We're going to send out a Spanish-speaking officer.

MR. ZACCOUR: Thank you. Bye-bye.

As a result of this call, the following dispatch is given over the radio:

328, attention 328.  
A 38, 2191 Northeast  
168th Street. Complainant  
saw a black male with  
a gun in the alleyway.

Subject was last seen  
Wearing a white shirt, black  
Pants, with a black gun.  
Subject is running into  
The alleyway near the rear  
Of the light yellow building.  
[2150 NE 169th Street]

### **POLICE OFFICERS**

#### **Officer Richard Slusher (Unit 328)**

Officer Slusher stated that on November 11, 2003, at approximately 5:33 pm he received a call from dispatch about a man with a gun, wearing black jeans, and a white shirt last seen heading towards a light yellow apartment complex (2150 NE 169th St.) in the alleyway.

Officer Slusher stated that Officer J. Randazzo was dispatched as his back-up; however, Officer Rey Hernandez was closer to the area and took the back-up from Officer Randazzo. Officer Slusher stated that he arrived in the area from NE 168th Street and drove into the alleyway behind 2150 NE 169th Street. Officer Slusher stated that he drove east through the alley and did not observe anyone fitting the description of the person described over the police radio. Officer Slusher further stated that he then drove out to West Dixie Highway and stopped in front of 2191 NE 168th Street where he observed a black male wearing black pants and a white shirt who appeared to be in his thirties.

As he was speaking with the black male, the complainant (Zaccour) walked up to him. Officer Slusher was advised by Zaccour that the person he was speaking to was not the person seen with the gun. While speaking with Zaccour, Officer Slusher heard a gunshot. He then radioed that shots had been fired and ran to the area from which he had heard the shot. As he arrived at the northeast corner of the 2150 NE 169th Street building, he observed Officer Rey Hernandez in a low ready position with his duty weapon out. Officer Slusher also observed the victim on the steps in the stairway, with a black handgun on the stairway landing.

Officer Slusher recalled that Officer Hernandez said "Rick, he pointed a gun at me." Officer Hernandez then radioed for back-up assistance and fire rescue. Shortly after this call for help, supervisors arrived on the scene and Officer Hernandez was taken from the scene.

### **Officer Samuel Simon (Unit 328)**

Officer Simon is in his first phase of training and is assigned to Field Training Officer Richard Slusher. Officer Simon and Officer Slusher are assigned to the afternoon shift. On November 27, 2003, Officer Simon began his shift at 5:00 pm. Once the shift began, Officer Simon and Officer Slusher began their shift by reviewing some training material. A call was then dispatched to Officer Slusher and Officer Simon. The call was a "38" (suspicious person). Additional information was provided to the patrol units that the suspicious person was a black male with a black handgun wearing a white shirt and black pants. The police units were dispatched to the alleyway between NE 21 Avenue and NE 22 Avenue between NE 168th Street and NE 169th Street. The officers entered this alley and drove east. Officer Simon and Officer Slusher were looking for the subject in this area. Once they got to the end of the alley, Officer Slusher made a right hand turn onto NE 22 Avenue and then another right turn onto NE 168th Street. As they approached the first building on the north side of the street, Officer Simon observed a black male wearing a white shirt and black pants. Thinking that this was possibly the suspect, the officers parked and got out of their vehicle. At that moment, another person came running up to them and identified himself as the "complainant". Officer Slusher asked the "complainant" if this was the person that he was calling about. The "complainant" told the officers that it was not. The "complainant" said that the person was back in the alley and was wearing a white shirt with either black letters or black numbers on it.

As Officer Slusher and Officer Simon were talking to the "complainant", a gunshot was heard. Officer Slusher and Officer Simon ran to the side of the 2150 building, through an alleyway, and into a passageway. Officer Simon stated that he observed Officer Hernandez and heard Officer Hernandez tell Officer Slusher, "He had pointed a gun at me". Officer Simon also heard Officer Hernandez request fire rescue, crime scene and a supervisor on his police radio. Officer Slusher and Officer Simon then took a "ready stance" on the subject. Officer Slusher approached the stairs and took a position on the landing between the first and second level. Officer Simon saw a gun on the landing at the subject's feet. Because there was no more of a threat, Officer Simon holstered his weapon, and secured the area. Officer Simon remembered that Officer Allen Daise arrived on the scene along with fire rescue and that Officer Daise used his ASP baton to move the firearm a few inches so that fire rescue would not trip or kick the firearm, possibly causing it to discharge.

### **Corporal Richard Gauvreau**

Corporal Gauvreau stated that he heard a call go out over the police radio regarding a man with a gun. Shortly after hearing the call dispatched, Corporal Gauvreau stated that he heard Officer Slusher advise of shots fired, he then heard Officer Rey Hernandez say "Give me

the air". After hearing these transmissions over the police radio, Corporal Gauvreau went to the scene.

Upon arrival at the scene, Corporal Gauvreau walked up to Officer Hernandez and asked him if he had fired his duty weapon. Corporal Gauvreau was told by Officer Hernandez that he had fired his weapon. Corporal Gauvreau ordered Officer J. Randazzo to transport Officer Hernandez to the North Miami Beach Police Department. Corporal Gauvreau then assisted in securing the crime scene and in making proper notifications regarding this incident.

Corporal Gauvreau stated that Chief Berger arrived on the scene approximately one (1) hour after the shooting. Corporal Gauvreau observed Chief Berger speaking with Mr. Michael Doddo, IUPA attorney for Officer Hernandez. Corporal Gauvreau stated that he walked into the scene with Chief Berger and Mr. Doddo in order to show them the crime scene (stairwell area). Once inside the crime scene, Corporal Gauvreau and the other two men saw a spent shell casing. Chief Berger told Corporal Gauvreau to cover the casing in order to preserve the evidence. Corporal Gauvreau saw a plate approximately twenty (20) feet away from the casing and covered the casing with that plate. Corporal Gauvreau stated that Chief Berger and Mr. Doddo then walked south through the scene towards the rear alley of the building.

### **Officer Aymee Gonzalez**

Officer Gonzalez stated that while working on the date of this shooting, she heard an officer announce over the police radio that shots had been fired. Upon hearing this transmission, Officer Gonzalez went to the area of 2150 NE 169th Street to assist the officer advising of this incident. Once upon the scene, Officer Gonzalez assisted in securing the crime scene.

After erecting crime scene tape and assisting with securing the crime scene, Officer Gonzalez was ordered by Corporal Gauvreau to secure the area next to victim on the landing of the stairwell between the first and second floor of the 2150 NE 169th Street building. Officer Gonzalez saw a gun on the landing in the corner by the wall and railing. Officer Gonzalez later observed a spent shell casing on the sidewalk to the east of the victim's body. Officer Gonzalez noticed the spent shell casing a short time after taking her post on the stairway and while shining her flashlight around the area.

While at her security post, Officer Gonzalez observed Chief W. Berger, Corporal R. Gauvreau, and Mr. Michael Doddo walking through the crime scene. She told the group to be careful of the spent shell casing on the sidewalk to the east of the stairway. Chief Berger pointed to a paper plate in the crime scene and had Corporal Gauvreau place the plate on top of the spent shell casing. Officer Gonzalez stated that Chief Berger and Mr. Doddo walked south through the crime scene and she lost sight of them. Officer Gonzalez did not observe any other evidence on the scene, and other than the plate, nothing was moved or touched on the crime scene until Homicide Investigators and Crime Scene Technicians arrived to process the scene.

### **Officer Allen Daise**

On November 27, 2003, Officer Daise was on routine patrol and heard a call go out as he was leaving the station. The call was for a "38" (suspicious person). Information was relayed over the police radio that the suspicious person was a black male in the alleyway with a gun. The dispatcher gave the address as 2150 NE 169th Street in the rear alleyway.

Officer Daise left the station once he heard Officer Hernandez radio for backup. Officer Daise drove his police vehicle to the front of 2150 NE 169th Street. He then heard Officer Hernandez on the radio state that he was on the east side of the building. He observed Officer Hernandez walking toward NE 169th Street and Officer Slusher standing on the second level of the stairs next to the victim. Officer Daise ran up to the second level next to Officer Slusher and saw the victim lying on the stairs. The victim was lying on his left side with his face down. Officer Slusher pointed to a gun which was on the first level of the staircase leading to the second set of stairs. The gun was next to the first step on the landing. Officer Daise then got on the radio and asked the dispatcher if rescue was enroute. Approximately one (1) minute later, rescue arrived on the scene and began treating the victim. He remembers three rescue personnel were on the scene. As rescue personnel were attending to the victim, a male firefighter "slightly" struck the gun with his left foot. The gun moved approximately one inch or two. Officer Daise told fire rescue personnel, "Watch out for that gun. He then moved the gun an additional two (2) to three (3) inches toward the railing on the east side of the landing so that rescue personnel could treat the victim.

### **Officer Reyneri (Rey) Hernandez (Unit 331)**

Officer Reyneri Hernandez gave a voluntary sworn statement on December 8, 2003. Officer Hernandez heard police dispatch at approximately 5:30 pm sending units to check out a suspicious black male with a gun, dressed in a white shirt and black pants. Hernandez also recalled that the male was last seen running in the alleyway behind the 2191 NE 168th Street apartment building. Originally, Hernandez was not assigned to the call; however, due to his near-by location on 163rd Street and 15th Avenue, and due to what he perceived to be the serious nature of the call, he decided to take the back-up to Officer Slusher.

He pulled into the alleyway between the 2191 NE 168th Street apartments and the 2150 NE 169th Street apartments. Upon arrival in the alleyway, he got out of his vehicle and began looking for the subject. He decided to walk down the passageway on the east side of the 2150 NE 169th Street building to see if the subject had gone in that direction. He waked down the passageway with his gun drawn until he reached the open stairway on his left side. Officer Hernandez explained what happened next:

I arrived in the alleyway looking for the subject or somebody matching that description. I didn't see anybody matching that description.

I then went ahead and I parked my vehicle. I advised via radio that I would be checking the 2150 building.

That building has been documented on numerous occasions for gang activity, narcotics activity, and I believe weapons violations as well.

I exited my vehicle. I began walking northbound on the westernmost part of the building.

As I rounded the corner, I had my weapon in hand. I remember that I passed in front of the stairwell, eastern stairway, and as I looked up, to my left, over my left shoulder I observed black pants, white shirt, and a handgun in the subject's hands.

The handgun at that point was facing north. And the subject was in the middle landing between the first and second floor of the apartment complex.

I don't remember exactly what step the subject was on. I believe he was a little bit higher up than the landing and he was pointing the gun in a northerly direction. I remember there was – I believe there was one or two heads in the downward position as they were walking – it appeared as if they were walking westbound on the stairs, which means they would be looking like if they were walking down the stairs.

The gun I remember was pointed north and directly at the level of the head of the two – it looked like females, black females, but I really couldn't decipher at that point. I could see the back and the left side of their face as they were going down. Upon noticing that, I immediately raised my weapon up to where the subject was and I began yelling: "Police, drop the gun, drop the gun, drop the gun." That was preceded by one or both females yelling out and running. I didn't see them again.

I remember yelling very loudly because I was not expected to see that. I was not expecting to see the firearm at that point. I remember yelling very loud because I was afraid, the subject had a gun in his hand.

The subject then – I remember the firearm turning to the right, which is where I was at. Continued yelling. And I remember the firearm. Before I realized what was going on, the firearm was pointing directly at me.

And I just remember thinking to myself, my God, I'm going to get shot, this guy is going to kill me.

And I remember pulling the trigger. I heard a low pop. And my initial reaction when I heard the pop was that I thought the subject had gotten his shot off first.

I continued to watch the subject and I noticed his reaction. He jerked and he gave a low yell. And then he staggered backwards into the steps. Tumbled back.

I heard him murmur something at that point. It sounded like he said, it's not real. That's the best that I could recollect. And then I heard him gasping. He turned – I believe he turned face down on the stairs.

When questioned about whether or not he realized that the subject was a teenager and how far apart they were, Officer Hernandez stated:

I don't remember what his face looks like, I never got that high. I was, what you call it, tunnel vision on the gun.

I remember the gun swinging to the right, him stepping back, and the gun going from north to east, to where I was, in a downward trajectory.

The gun, from the angle where I was at, the gun at the one point I felt it on my chest. You know when you got that tingling sensation like somebody is going to hit you and you anticipate it, that's the kind of sensation I had. I felt like he was going to shoot me dead on.

Approximately how far do you think you were from where you were standing to where the victim was?

I don't know. I was pretty close. Maybe eight feet. Is that fair to say?

Finally, Officer Hernandez was asked to provide as much detail as he could concerning anything that heard the subject say:

[After he was shot and had dropped the gun]... What I recall from his murmur was something to the extent it's not real and [he] just collapsed.

### **FAMILY MEMBERS**

#### **Donald Reginald Graham**

Donald Reginald Graham, the biological father of Denzel Smith-Graham, stated that he had a ten-year relationship with Denzel Smith-Graham's mother and that they had two children. Mr. Graham stated that he didn't see his son very often. He spoke to him on the telephone about 1 ½ weeks before the shooting. He described his son as a very shy kid. He attended Miami Beach Senior High School and was in the 11th Grade. Mr. Graham said that his daughter, Diarra Latisha Graham, had told him that Denzel was playing with a BB gun earlier on the day of the shooting. Ms. Graham told Denzel to come inside the house but he refused to listen to her and continued playing with his friends.

### **Diarra Latisha Graham**

Diarra Latisha Graham told her brother Denzel on the afternoon of the shooting to stay in the house, but he would not listen to her. Diarra saw a small “toy” black gun in Denzel’s possession. He showed her the gun and even pointed it towards her. He pulled the trigger while the gun was pointed at her. He then started to laugh and informed her “the gun is fake.” When Diarra asked Denzel where he got the gun, he told her that his friend had given it to him.

### **THE BOYS PLAYING IN THE YARD**

There were three young boys playing in the yard of 2150 NE 169th Street at the time of the shooting. They were north of the stairwell where Denzel was shot.

#### **I. M.**

I.M. was eleven years old and was playing in the yard in front of the stairwell where he saw Denzel sitting on the steps to the second floor. Denzel was on the steps for approximately 15 minutes before the police arrived and never left. Denzel had BB gun and was pointing it toward the floor in the direction of the passageway, clicking the trigger; however, I.M. noticed that the BB gun was empty since no BBs were coming out. I.M. also saw three girls at the bottom of the steps on the ground floor. He knew these girls as R.E., A.F., and perhaps a girl named Keisha. “Keisha” was never further identified or located. I.M. was playing with two other young boys, M. S. and P.S.L., with M.S. swinging P.S.L. around in a circle. Suddenly he saw the officer coming up what I.M. calls the back alley with his hand on his holster. As the officer reached Denzel, he pulled his gun from his holster, pointed it at Denzel, and said “put your weapon down.” At that point, I.M. stated that he saw Denzel get up and turn left toward the railing on the stairs. I.M. then started running and heard a gunshot. He did not see Denzel getting shot.

#### **M. S.**

M. S. is a 13-year-old and was playing in the front yard of the apartments with P.S.L. and I.M. He heard a gunshot and “ran for his life” to his own apartment. He did not see Denzel, the officer, or any events related to the shooting.

#### **P.S.L.**

P.S.L. is a 6-year-old boy who was playing in the front of the apartment building with M.S. who was swinging P.S.L. around in a circle. I.M. was also there. He saw Denzel on the steps with the BB gun and R. E. and A. F. on the second floor landing above and behind Denzel (as opposed to the ground floor where I.M. stated that he saw them).

P.S.L. saw and heard the officer telling Denzel to “drop the gun”, “put your hands up.” He never saw Denzel point the BB gun at the officer. At first, P.S.L. was certain that the sequence of events was:

- (1) the police officer shouts drop gun/put hands up
- (2) gunshot
- (3) Denzel says that it is a “fake gun”
- (4) Denzel falls to the steps.

Later in the interview, P.S.L. seemed to become confused and made several contradictory statements including that Denzel told the officer that the gun was “fake” before the officer shot him, and that the officer shot Denzel even before he said “drop the gun” and “put your hands up.”

### **THE GIRLS ON THE STEPS AND THEIR PARENTS**

#### **R.E.**

R.E. is a minor female who is 12 years old. She was a friend of Denzel Smith-Graham and saw him often. On the afternoon of the incident she and her friend A.F. were sitting on the steps with Denzel joking and talking. She stated that she had been on the stairwell with Denzel for an hour before the police arrived and that Denzel had never left the stairwell to go the alleyway behind the building. According to R.E., she was sitting on the first landing of the stairwell with her back to the passageway which Officer Hernandez would soon walk down. Denzel was in front and above her on the steps to the second landing. Her friend A.F. was slightly to the right and below her on the steps leading to the ground floor.

R.E. testified that as the three of them were talking, a police officer appeared on the ground level in the passageway behind her. Simultaneously, Denzel was attempting to put the BB gun back in his pants pocket because he had just removed it to get his cellular telephone out of his pocket in order to call his girlfriend. According to R.E., Denzel had not been playing with the BB gun before this time and had only briefly removed it from his pocket in order to get his cellular telephone. Furthermore, in R.E.’s opinion, the BB gun did not look real. She was shown a photograph of an identical BB gun; however, she was not sure if it resembled the BB gun she saw. R.E. only heard the officer shout “freeze” and did not hear him identify himself as police. Then, according to R.E., Denzel said “don’t shoot, don’t shoot, it’s not real.” As he was saying that, he raised his arms up toward his face and dropped the gun onto the first landing. Then, with Denzel’s hands covering his face, the police officer fired one shot at Denzel, causing him to collapse. R.E. did not see where the bullet struck Denzel; however, she stated that his

right foot was on the first landing with his left foot on the steps leading to the second landing, which would mean that he was turned slightly to the right in relation to the police officer.

After Denzel collapsed, R.E. saw the police officer run back down the passageway in the direction from which he had come. However, R.E. also stated that she covered her eyes as Denzel collapsed and immediately ran down the steps toward her apartment. We were unable to clarify these two statements any further because R.E. became emotionally upset near the conclusion of her statement. She was truly a traumatized young girl and, therefore, it was decided to not question her further. Instead, we decided to offer her mother counselling services for R.E.

### **Rachelle Tolliver**

Ms. Tolliver is the mother of R.E. and was in her apartment at 2150 NE 169th Street at the time of the shooting. She stated that R.E. was very upset and crying the night of the incident and did not tell her (Tolliver) exactly what she had seen until the next day. Ms. Tolliver stated that R.E. then told her the same version of events as is contained in her sworn statement and in this memorandum.

### **Ghislaine Nelcisse**

Ms. Nelcisse is the grandmother of R.E. She was in her second floor corner apartment immediately west of the stairwell in the kitchen cooking. She heard a loud voice shout "put your fucking gun down." Then she heard a voice say, "no, don't shoot, don't shoot, don't shoot, it's not a gun, it's a baby (BB) gun." Then she heard a single shot.

As she was looking for R.E., she went on her balcony and saw a police officer in front of her building saying "Oh my God, Oh my God, I killed somebody, I killed somebody, Oh my God."

### **A.F.**

A.F. is a 13-year-old female and a friend of R.E. On the day of the shooting, she was on the stairs with R.E. and Denzel Smith-Graham. She believes that she and R.E. first saw Denzel on the stairwell approximately 15 minutes before the shooting. She never saw him leave the stairwell and go toward the alley behind the building. He had gotten a plate of food from a neighbor and was sitting on the steps eating. After Denzel finished his plate of food, A.F., R.E. and Denzel were laughing and telling jokes. Denzel was on the steps leading to the second floor landing above the two girls, who both were on the stairs just a few steps above the ground. According to A.F., Denzel reached into his pocket to get his cellular telephone to talk to his girlfriend "when the gun accidentally came out instead of just the phone." She was surprised and scared because it looked like a "regular police gun." The BB gun then fell on the landing and

Denzel bent over to pick it up. At that precise moment, the police officer appeared and shouted "freeze!" Denzel then dropped the BB gun, turned around, and told the police "don't shoot, don't shoot, it's not real." At that point, according to A.F., the police officer fired one shot and ran away. After the shot, she also ran away.

She is certain that Denzel had already dropped the BB gun and told the officer that it was not real before the shot was fired. She also is certain that he had his hands up as if to surrender when he was shot. Finally, she is certain that R.E. was on the bottom of the steps with her near the ground and that R.E. was not on the first landing in front of Denzel.

### **Lisa Casimir**

Ms. Casimir is the 21-year-old sister of A.F. She was home in their apartment at 2150 NE 169th Street when the shooting occurred. She confirmed that almost immediately after the shooting, A.F. told her exactly the same version of events as is contained in her sworn statement and in this memorandum.

### **PERSONS RESIDING IN THE APARTMENTS AND RELATED WITNESS**

Several area canvasses were conducted by North Miami Beach Police during the week after the incident. Approximately 55 interviews were conducted; however, only a few individuals were able to provide any relevant information.

### **A.G.**

A.G. is a 15-year-old male who lives at 2150 NE 169th Street and was a good friend of Denzel Smith-Graham. A.G. stated that shortly before 6:00 pm on Thanksgiving Day, Denzel came to A.G.'s apartment door and was given a plate of food by A.G.'s mother. While at the door, Denzel also asked A.G. to loan him (Denzel) the BB gun that A.G. had obtained from one of his friends, Shaughn Bedminister. A.G. at first refused, but finally gave in and allowed Denzel to take the BB gun to the stairwell.

A.G.'s mother confirmed that she gave a plate of food to Denzel and that he had gone to the stairwell to eat. She did not know that A.G. gave Denzel the BB gun. She also stated that she noticed that Denzel had a telephone when he got his plate of food. She heard the gunshot approximately 5 minutes later.

A.G. also stated that he had first obtained the BB gun from Shaughn Bedminister a few weeks before. He also stated that during the same few weeks period, Denzel had kept the BB gun on at least one other occasion. During that same time period, A.G. and Denzel would shoot BBs from the gun, firing it from their apartments' balconies and from the stairwell where Denzel was shot.

### **Shaughn Bedminister**

Shaughn Bedminister is a 29-year-old, unemployed male who lives with his father and his stepmother. He stated that A.G. "is like a cousin to him," and that Denzel Smith-Graham was "like a brother." According to Bedminister, he found the BB gun lying on the ground on NW 159th Street at an unrecalled time before Thanksgiving and that he often carried the BB gun inside his pocket with his shirt over it as if he was carrying a real gun. Bedminister stated that he carried the BB gun for "protection," and that it was especially effective at night because you could not tell that it was a BB gun instead of a 9mm pistol. He confirmed that he had occasionally loaned the BB gun to A.G. and that he knew that, on occasion, A.G. loaned the BB gun to Denzel.

### **L.S.**

L.S. is a 15-year-old female who lives at 2150 NE 169th Street and who was interviewed on television about the shooting incident. Purporting to be an eyewitness, L.S. told Channel 10 reporter Glenna Milberg that, when the officer came down the passageway and saw Denzel with the BB gun, the officer shouted "put the gun down." Then, according to L.S., Denzel said "the gun is fake," put both of his hands up in the air in the position of surrender, dropped the gun on the landing, then turned to walk up the stairs to the second floor landing. L.S. stated that at this point, the officer shot Denzel. Understandably, this television interview caused great concern in the community and remains a source of knowledge for many individuals that both the SAO and North Miami Beach Police Department have spoken to.

As with all other civilian witnesses, L.S. and her mother were subpoenaed to the State Attorney's Office to give a sworn statement. During this statement, L.S. admitted that she was in her apartment with her family eating dinner when she heard a gunshot. L.S. also admitted that she had no direct knowledge of the events surrounding the shooting and was not an eyewitness to anything. Instead, she testified that she based what she said on television upon what she had heard people say in the community.

L.S.'s mother also gave a sworn statement and confirmed that L.S. was at home that evening and did not witness the shooting.

### **CRIME SCENE**

Denzel Smith-Graham was wearing a white t-shirt, black and blue jeans with white sneakers. The pants had a Fat Albert cartoon figure located on the right rear pocket. There were no numbers or numerals on either side of the t-shirt. He was lying on the second level of the stairwell located on the northeast corner of the building. He was on his left side with his head facing west (up the steps) and his face facing north. His right hand was positioned downward at

his side with his hand cupped. There was a baseball cap several inches west (above) Denzel's head with the words "Denzel" and "Yugi" written in what appeared to be a black marker on the inside flap of the visor. No cellular mobile telephone was recovered.

A black BB gun was on the landing mid-level between the first and second floor. There was a paper plate in the passageway east of the stairwell and a single shell casing was recovered underneath.

### **MEDICAL EXAMINER**

The medical examiner determined that Denzel Smith-Graham was 6'2" in height and weighed 168 pounds. The cause of death was a gunshot wound to the right chest. The entrance gunshot wound was on the right side of the chest located 21 inches below the top of the head and 9 1/2 inches to the right of the anterior midline. It is behind the mid – auxiliary line. The projectile penetrated the right side of the chest, penetrated and fractured the lateral right eighth rib. It perforated the right lower lobe of the lung, the thoracic aorta, and the left upper lobe and left lower lobe of the lung. The projectile then fractured the left scapula and came to a rest in the soft tissues of the left upper back.

The projectile direction with the body in anatomic position is right to left, slightly anterior to posterior and upward.

The associate medical examiner was asked if he could determine the position of the right arm and hand from the results of the autopsy. More specifically, he was asked if he could determine if the right arm and hand were raised in a surrender-like position, placed all the way down to the side, or positioned somewhere in between. He stated that in his opinion, based on the path of the projectile and the striking of the particular ribs, organs, and scapula, the victim's right arm and hand position would have been most consistent with being raised approximately midway between down at his side and up near his head or face in a surrender-like position.

### **LEGAL ANALYSIS**

Florida Statute 776.05 states:

A law enforcement officer, or any person whom the officer has summoned or directed to assist him or her, need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. The officer is justified in the use of any force.

(1) Which he or she reasonably believes to be necessary to defend himself or another from bodily harm while making the arrest....

Florida Statute 776.012 provides that:

[A] person is justified in the use of deadly force only if he or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself....

Whether one takes the legal position that Officer Hernandez was attempting to make an arrest when he confronted Denzel Smith-Graham (Florida Statute 776.05), or, like any other individual, was justified in the use of deadly force (Florida Statute 776.012), the issue remains the same: Did Officer Rey Hernandez reasonably believe that deadly force was justified to defend himself or prevent imminent death or serious bodily injury.

The undisputed facts are as follows:

(1) At approximately 5:30 p.m. on November 27, 2003, Antonio Zaccour made a 911 call to North Miami Beach Police Department reporting a black male, wearing black pants and a white shirt, with a gun. The black male was reported to be in the alleyway behind 2150 NE 169th Street

(2) Officer Reyneri Hernandez responded to the 911 call, parked his vehicle in the alleyway behind 2150 NE 169th Street, got out of his vehicle, and began walking down the narrow passageway at the east end of the apartment building located at the aforementioned address

(3) Denzel Smith-Graham was on the steps leading to the second floor, just above the first landing. He had a black BB gun which resembled a semi-automatic pistol and he was talking to R.E. and A.F.

(4) Family members were aware that Denzel had the BB gun on the day of the shooting and that Denzel had actually pointed it at his sister earlier in the day.

(5) The BB gun was so realistic that the person who owned the BB gun, Shaughn Bedmisister, carried it around for protection because he believed that it looked like a 9mm pistol.

(6) In the preceding few weeks, Denzel and A.G. had fired the BB gun from the same stairwell where he was shot on Thanksgiving day.

(7) I.M., M.S., and P.S.L. were young boys playing in the yard of the apartment building near where Denzel was talking to R.E. and A.F.

(8) Officer Hernandez fired one shot from his Glock .40 caliber pistol which struck Denzel Smith-Graham in the right chest and killed him.

Obviously, these undisputed facts alone do not answer the question of whether or not Officer Hernandez was legally justified in using deadly force. That determination must be made by focusing on the few seconds between Officer Hernandez's first sighting of Denzel Smith-Graham and the firing of his weapon. More specifically, the analysis must focus on these critical areas:

Where was the BB gun when the Officer first saw the victim?

Where exactly were R.E. and A.F. when the Officer first arrived and what was their ability to see and hear what occurred?

What was the ability of I.M. and P.S.L. to see and hear what occurred?

What did the Officer say to the victim?

What did the victim say to the Officer?

What movements did the victim make with the BB gun?

Was it reasonable to believe that the BB gun was a real semi-automatic pistol?

Starting with the last question first, the BB gun unquestionably looked like a semi-automatic pistol as can be seen in photograph which is Attachment 3 to this memorandum. A BB gun is also considered to be a weapon, Depasquale v. State, *supra*; and may, under certain circumstances, be considered a deadly weapon, See Dale v. State, 703 So. 2d 1045 (Fla. 1997) and Florida Jury Instruction 15.1. The only obvious differences are the plug at the bottom of the pistol grip where the BBs are loaded and the diameter of the aperture at the end of the pistol where the BBs exit.

However, Officer Hernandez may or may not have known what type of weapon it actually was even if the victim told the officer before he shot. The uncertainty is caused by the split second that Officer Hernandez had to respond and the fact that he would have had to make an instantaneous determination of whether or not to believe what he was being told. It is not inconceivable that a suspect with a real semi-automatic pistol could attempt to deceive a police officer.

Officer Hernandez stated that he shouted "Police, drop the gun, drop the gun." I.M. stated that the officer shouted "put your weapon down," while P.S.L. stated that the officer shouted "drop the gun, put your hands up." On the other hand, both R.E. and A.F. stated that the officer simply shouted "freeze" and did not identify himself as a police officer and did not order Denzel to drop the gun. All of the witnesses were in a position to clearly hear a shouted command; therefore, these differences are most likely explained by individual recollections of a traumatic and shocking event. Nevertheless, it is certain that Officer Hernandez shouted some type of command to Denzel causing him to respond.

Officer Hernandez stated that Denzel Smith-Graham responded by turning slightly to the right toward the officer and pointing the pistol at him. I.M. stated that Denzel was sitting down and then stood up and turned to his left in response to Officer Hernandez's commands. P.S.L. stated that he never saw Denzel point the pistol at the officer; however, he was unable to offer any details about Denzel's movements.

The statements of R.E. and A.F. about Denzel's response to Officer Hernandez are troubling and require close analysis.

Both R.E. and A.F. stated that Denzel inadvertently removed the BB gun from his pocket as he was attempting to retrieve his cellular telephone. They also state that Denzel never had the BB gun out and was not playing with it. After Officer Hernandez shouted "Freeze," according to both R.E. and A.F., Denzel dropped the BB gun, raised his hands either to cover his face (R.E.) or as if to surrender (A.F.) and said "don't shoot, don't shoot, it's not real." At this point, both girls stated that the officer fired one shot and ran away.

The two girls' version of events is partially corroborated by Ghislaine Nelcisse, R.E.'s grandmother, who stated that she heard a loud voice shouting, "put your fucking gun down," and heard another voice say "no, don't shoot, don't shoot, it's not a gun, it's a baby (BB) gun." The girls' stories are also supported by R.E.'s mother and A.F.'s sister, who stated that the two girls have given the same version of events from the outset.

Nevertheless, several inconsistencies exist which at least challenge the two girls' version of events. R.E. stated that she was sitting on the first landing with Denzel directly in front of her and with Officer Hernandez directly behind her on the ground level in the passageway. This positioning would mean that Officer Hernandez fired his weapon in very close proximity to R.E. and could have only barely missed her. No other witness supports R.E. in this regard. Officer Hernandez, as well as A.F. and I.M., who was playing in the front yard, all place R.E. on the bottom of the steps near the ground next to A.F. The weight of the evidence supports the placement of R.E. on the lower steps thus creating a serious challenge to her version of events.

P.S.L., who was also playing in the front yard, places both girls on the steps above Denzel. There is no corroboration for this unlikely placement of the two girls.

The statements of R.E. and A.F. are in conflict with the statement of I.M. I.M. says that he saw Denzel on the steps playing with the BB gun, pointing it down, and clicking the trigger moments before Officer Hernandez arrived, while R.E. and A.F. say that Denzel was not playing with the gun.

The statements of R.E. and A.F. are also in conflict with P.S.L. who initially stated that Officer Hernandez ordered Denzel to drop the gun and put his hands up before the gunshot, and that, after the shot, Denzel said that the gun was not real. As previously discussed, the sequence of events according to R.E. and A.F. was completely different with Denzel being shot after he had dropped the gun, and had told Officer Hernandez that the gun was not real.

The failure of the crime scene technicians to locate and recover a cellular telephone also casts doubt on the statements of R.E. and A.F. Denzel's having a cellular telephone in his pants pocket along with the BB gun is critical to the two girls' version of events. Denzel may well have had a telephone; however, the fact that one was not recovered at the scene of the shooting would cause serious issues for cross examination should the two girls be called as witnesses in a criminal prosecution.

Additionally, the opinion of the medical examiner given to this writer also tends to cast doubt on the statements of R.E. and A.F. After the two girls gave their sworn statement, the medical examiner was asked if the path of the projectile through Denzel's body was consistent with his hands being up either near his face or in a position of surrender. The medical examiner could not exclude this possibility; however, his opinion is that the path of the projectile would be more consistent with Denzel's hand being midway between near his head and down at his side. It could therefore be argued in any criminal prosecution that it would be most consistent with Denzel holding the BB gun in his right hand pointing it in a direction in front of him.

It is the opinion of the undersigned that Denzel Smith-Graham did not intend to threaten Officer Hernandez and likely did not intend to point the BB gun at him. Most likely, upon hearing Officer Hernandez's shouted command or commands, Denzel turned toward the sound. However, as previously discussed, given the conflicting nature of the witnesses' statements and the physical evidence, precisely what happened next cannot be determined with certainty beyond a reasonable doubt.

In a prosecution of Officer Hernandez, the State would have to prove beyond a reasonable doubt that Officer Hernandez's version of events was incorrect, and that the version of R.E. and A.F. was what actually occurred. Given the discrepancies concerning the actual location of R.E. on the stairwell, the statement of the medical examiner concerning the most likely placement of Denzel's hand, and the failure to find a cellular mobile telephone at the scene, it is the opinion of this writer that the burden of proof beyond a reasonable doubt cannot be met in any criminal prosecution of Officer Hernandez.

Unfortunately, we may never know exactly what happened in the stairwell of 2150 NE 169th Street. The statements of the witnesses are simply too contradictory to prove any version beyond a reasonable doubt. What makes this tragic event almost unbearable is the likelihood that Denzel Smith-Graham was most likely not the black male with the gun who was the subject of the 911 call. All of the witnesses at the apartment complex account for Denzel's time before the shooting such that there was no time for him to leave the stairwell, go to the apartments where the 911 caller lived, and walk down the alleyway between the two apartment buildings. Furthermore, the 911 caller was certain the man with a gun that he saw had a football type jersey on with numbers. Denzel had on a white t-shirt with no numbers.

**CONCLUSION**

In conclusion, after analysis of all of the disputed and undisputed facts, prosecutors cannot argue with a legal certainty that Officer Hernandez was unreasonable, beyond a reasonable doubt, in believing that Denzel Smith-Graham was armed and posed an immediate threat of death or serious bodily injury to Officer Hernandez. The shooting is undeniably tragic; however, one cannot overlook the fact that Officer Hernandez had a split second encounter with a person fitting the description of the subject of the 911 call, armed with what appeared to be a black semi-automatic pistol. Accordingly, it is the opinion of the undersigned that no criminal charges should be filed against Officer Reyneri Hernandez concerning the shooting of Denzel Smith-Graham.

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Richard Scruggs  
Assistant State Attorney

# **ATTACHMENT**

**1**

# **ATTACHMENT**

**2**

# ATTACHMENT

3