

# Report of Attorney General Regarding Criminal Investigation into the Death of Stephon Clark

## *Introduction*

On March 18, 2018, Stephon Clark was shot and killed by Sacramento Police Department officers during an encounter in the vicinity of 29th Street and Ellwood Avenue, in the city of Sacramento. On March 26, 2018, upon the request of Sacramento Chief of Police Daniel Hahn, the California Attorney General agreed to conduct an independent investigation and review of the facts and circumstances surrounding the shooting of Mr. Clark by Sacramento Police Officers Terrence Mercadal and Jared Robinet. As part of that independent review, the Attorney General considered whether the conduct of the officers, under the circumstances, warranted any criminal charges being filed.

This report describes the scope of the investigation that was conducted, provides a summary of the relevant facts and a description of the evidence supporting those facts, sets forth the relevant legal standard, and explains the decision reached regarding whether to pursue criminal charges. The inquiry that is the basis for this report was a narrow one, confined solely to an examination of whether the facts of this case are sufficient to establish, beyond a reasonable doubt, the commission of a criminal offense. The criminal investigation and this report do not evaluate or address law enforcement policies or procedures, nor any issues relating to potential civil liability.

In addition to our office's investigation and review, this matter has also been investigated and reviewed by both the Sacramento Police Department and the Sacramento County District Attorney's Office. The review of evidence and determinations regarding how to proceed based upon that evidence have been independently conducted. The Department of Justice has not discussed or had any input regarding potential charging decisions with the District Attorney's office, and vice versa. However, our investigative efforts have been collaborative. The Sacramento Police Department has been transparent and cooperative in providing access to the evidence it collected, and allowing our agents to participate in various investigative efforts. The Department of Justice has provided the same access to the Sacramento Police Department. This collaboration was done to ensure that both our office and the District Attorney's office had all available information, so that both offices would be in the best possible position to render a fully informed, independent decision.

After a thorough consideration of all relevant evidence and information, the Attorney General concludes that no criminal charges against the officers can be sustained.

## *Items Considered*

Through our investigation and review, the Attorney General's Office examined all reports and digital evidence related to the shooting, including the reports from the Sacramento Police Department (SPD), the Sacramento County Sheriff's Department, the Sacramento County Coroner, the Sacramento District Attorney Crime Lab, the San Diego County Medical

Examiner's Office, and California Department of Justice (DOJ) investigators. The materials reviewed included:

### **Materials from the SPD**

The Attorney General reviewed the entirety of the reports and documents produced or gathered by the Sacramento Police Department, which included interviews with witnesses, on-scene reports, crime scene investigation reports, and forensic lab reports.

The Attorney General also reviewed the digital files collected by the SPD, which included body worn camera recordings, recordings of interviews, and other various reports, photos, and documents.

### **Materials from the Sacramento County Sheriffs Department**

In addition, the Attorney General examined digital information from the Sacramento County Sheriffs Department, including STAR (Sheriff's Tactical Air Resource) helicopter footage and a report from the deputy sheriff who served as an observer in the helicopter.

### **Materials from Sacramento County Coroner**

The Attorney General also received and reviewed the Sacramento County Coroner autopsy report of Stephon Clark, and a consulting pathologist report prepared by Dr. Gregory D. Reiber, M.D.

### **Additional Information Collected by California Department of Justice (DOJ)**

In addition to participating in and reviewing the investigation conducted by the Sacramento Police Department, the Attorney General's office conducted additional investigatory work including additional witness interviews, interviews with SPD of 8 on-scene officers, and witness interviews with family members, and review of cell phone content, all of which was summarized in investigative reports. The DOJ also requested and received an additional coroner's review from the San Diego County Medical Examiner's Office of the Sacramento County Coroner's report of the Stephon Clark autopsy.

## *Summary of Evidence*<sup>1</sup>

On March 18, 2018, Sacramento police officers were dispatched to the area of 29th Street and Ellwood Avenue just before 9:15 p.m., after a neighbor called 911 to report that the windows of three vehicles on the street had been broken into. The neighbor stated that he confronted the male subject, after hearing multiple sounds of a car window being broken. He said he then saw the subject standing right next to one of the damaged vehicles, which belonged to the neighbor. The witness told the dispatcher that the subject fled by hopping over a fence into the sideyard of a nearby residence.

A few minutes later, Officers Mercadal and Robinet responded to the scene and spoke briefly with the neighbor, who confirmed that he thought the subject was still in the yard into which he had seen the subject flee. The neighbor did not know what the subject used to break the vehicle windows but did confirm that the subject appeared to be a male, wearing a hoodie jacket or shirt.

The officers went to the residence pointed out by the neighbor and received permission from the resident to search the backyard. Both officers searched the backyard and were unable to locate the subject. While the officers were searching the backyard, Sacramento County Sheriff's Department helicopter, STAR, responded to the area to assist with locating the subject. Approximately seven minutes later, after the officers had completed their search of the yard, STAR radioed the officers that a male subject wearing a hoodie, later identified as Stephon Clark, was attempting to break a back window of a residence two houses further south from the yard the subject first entered. STAR audio reported seeing the subject at 7570 29<sup>th</sup> Street, looking into a window, picking up something resembling a tool bar, subsequently breaking the back window, and then running. STAR audio then reported the subject in the backyard at 7572 29<sup>th</sup> Street, and looking into another vehicle that was parked between the fence and the front yard before heading further south into the backyard at 7572 29<sup>th</sup> Street, which was later found to be the home of Clark's grandparents. Clark can be seen on the STAR video recording walking towards the front of the driveway and looking into a car window. After STAR alerted Mercadal and Robinet, their body cameras show them running towards 7572 29<sup>th</sup> Street. Robinet overshot the driveway, but Mercadal slowed and spotted Clark towards the back of the driveway.

Footage filmed by STAR reveals the following crucial sequence of events at 7572 29<sup>th</sup> Street. Mercadal can be seen looking down the driveway, and Clark can be seen running towards the back and around the back corner of the house and out of Mercadal's line of vision. Mercadal, who had drawn his weapon as he approached the side yard, pursued Clark and ran past the back

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<sup>1</sup> The officers' body worn cameras (BWC) were operable throughout the encounter, and they captured both video and audio of the events. In addition, the Sacramento County Sheriff's Department helicopter, STAR, responded to the incident, and made video and audio recordings utilizing STAR's on-board video and audio recording system. In addition, BWC evidence captured by other officers who responded to the scene was reviewed. The events captured on the video portion of the BWCs are at some points grainy and details appear, at some points, less clear. However, together the combined electronic evidence provides a basis for reaching conclusions about much of what appears to have occurred that evening. This combined electronic evidence provides the primary basis for the facts set forth in this report, unless otherwise noted.

corner of the house, and then can be seen immediately ducking back around the corner of the house. By this time, Robinet had also reached the corner of the house, with his weapon drawn, also overshooting the corner of the house and similarly ducking back behind the corner. Clark is next seen walking out from under a covered patio in the backyard and moving towards the officers, with his body close to the back of the house. As the officers peer around the corner of the house, Clark is closer and coming towards them, and the officers almost immediately open fire.

Mercadal's body camera audio recording and footage of the same sequence reveals the following. When Mercadal first spotted Clark he yelled, "Hey. Show me your hands. Stop. Stop." And, when he ran past the back corner of the house and made visual contact with Clark, he again yelled "show me your hands" and "gun" as he jumped back behind the corner, out of Clark's line of sight. Robinet had by this time joined Mercadal at the back of the house. On both officers' body cameras, Clark can be seen standing behind a picnic table and facing the officers. The images of Clark at this point are not clear. His hands are not visibly raised above his head. For a brief instant, the body camera footage shows a flash of light. The audio recording from both officers' body cameras detected a voice saying something immediately prior to the officers looking around the corner of the house the second time. While not of great clarity, the voice sounds like it says "fuck you." In their subsequent statements, neither officer indicated they heard Clark say anything. When Mercadal again peers around the corner of the house, his body camera shows that Clark has come around and advanced past the picnic table towards the officers. The body cameras recorded Mercadal yelling, "show me your hands" and "gun, gun, gun" and captured the sound of the officers opening fire. The officers stopped firing after Clark fell to the ground. They continued to yell "show me your hands" after they stopped shooting as Clark lay on the ground.

The officers' body camera recordings additionally establish that, after they stopped firing, the officers requested emergency personnel and maintained a position behind the corner. The officers are heard saying that they should not approach because neither could see one or both of Clark's hands. The body camera recordings capture the officers asking each other if they had been "hit" and discussing that Clark had come at them, and then each of the officers discusses performing a tactical reload of his weapon, and each performs a reload while the other keeps a gun drawn on Clark. There are additional discussions regarding the position Clark was in as he approached them. At one point, Robinet says, "He was still pointing." Later, Mercadal states, "he's still down, he's not moving, we can't see the gun." When Officer Nicholas Tayler arrives on the scene to provide backup and support, he asks "You have the gun?" and Robinet says "We haven't secured it. We are not moving in until we have more." Mercadal says, "We don't have it, do you see it Jared?" Robinet responds, "No, I don't see it." At one point, Officer Cristina Trujillo, who also arrives on the scene, yells toward Clark, "We need to know if you are okay. We need to get you medics, but we cannot go over to help you unless we know you don't have your weapon." Mercadal says "He came up and then he kind of approached us with his hands out and then fell down." Robinet then says "Yeah he was, he was," as his body camera shows Robinet placing both of his arms in a shooting position. When Sgt. John Morris arrives, he says "What did he have on him?" Robinet responds, "Like this" as his body camera appears to show him extending his arms to resemble a shooting position. Robinet continues, "something in his hands, it looked like a gun from our perspective." The body camera recordings also contain

discussions with backup officers regarding the need for a “body bunker” (i.e., a ballistic shield) before they can safely approach Clark.

The audio and video recordings document that eventually officers approached Clark to take him into custody and render medical aid. As officers approached, Robinet can be heard stating “Oh fuck.” The record does not establish why Robinet made this statement. The body camera footage shows that a cell phone is partially visible near Clark’s hand as the officers draw near to him. Efforts to resuscitate Clark were unsuccessful, and he was pronounced dead at the scene by paramedics. No gun was found on or around Clark.

The various audio and video recordings establish that the elapsed time between when STAR video first captures Clark jumping over the fence into the yard at 7572 29th Street to the time shots were fired was approximately 90 seconds. The elapsed time between the first time Officer Mercadal commanded Clark to stop and show his hands to the time Mercadal first saw Clark in the backyard was approximately 11 seconds. The elapsed time between Mercadal ducking behind the corner of the house and Mercadal and Robinet looking back around the corner and seeing Clark approaching them was approximately five seconds. The elapsed time the officers fired their weapons was also approximately five seconds.

Investigation at the scene established that the distance from the back corner of the house to the area behind the picnic table where Mercadal first saw Clark was about 31 feet. Clark was approximately 16 feet away from the officers when he was shot. There was an open pathway out of the back yard along the far side of the house closest to the picnic table. There was also a sliding glass door adjacent to the picnic table. There was no other point of entry into the residence along the back of the house as Clark moved toward the officers before he was shot. Each officer fired a total of 10 rounds.

Once the shooting scene was secured, Mercadal and Robinet were released from further duties at the crime scene and their body worn cameras were muted. Several officers approached Robinet and Mercadal while at the scene. These conversations were not fully captured because the officers muted their microphones at various points. SPD detectives and DOJ agents later questioned each of these officers about these conversations. All of the officers reported that they only spoke with Mercadal or Robinet about their overall well-being.

Detectives from SPD began the investigation into the shooting as soon as the scene was secured. Special Agents from DOJ joined the investigation on March 26, 2018. DOJ agents reviewed all previous reports prepared by SPD, and the agents participated in subsequent investigation and interviews with SPD detectives.

Detectives interviewed Mercadal, Robinet, and civilian witnesses, and gathered and reviewed all body camera contents, video contents, and all radio traffic. Detectives also canvassed the neighborhood, obtaining statements from witnesses of the car break-ins, the resident whose house was vandalized, and others including neighbors who were present when the shooting occurred. Detectives and DOJ Special Agents conducted a number of additional canvasses for witnesses. DOJ Special Agents also reviewed all related body camera content, video content, and radio traffic.

*Statements of Officers Mercadal and Robinet*

Officers Mercadal and Robinet both provided statements to detectives in the early morning hours after the incident. The officers were interviewed individually, and in the presence of counsel. Prior to the interviews, Officer Mercadal was permitted to review his own body camera footage and the body camera footage from Officer Robinet. Officer Robinet was permitted to review his own body camera footage and the body camera footage from Officer Mercadal. Both interviews were recorded and those recordings were reviewed and made part of the investigative file.<sup>2</sup> Both officers recalled meeting with the 911 caller. They also recalled searching the backyard of the first house the subject jumped into after being confronted. Robinet recalled the STAR broadcast indicating that the subject used some sort of bar to break the window at the house next to 7572 29th Street. Mercadal did not recall STAR mentioning the glass being broken, but he did recall the subject being seen in one backyard and then looking at a car in the side yard of 7572 29th Street.

Mercadal stated that, as he pursued Clark into the backyard of 7572 29th Street, when he rounded the back corner of the house and saw Clark, Clark's hands were outstretched in front of his body in a position he characterized as a "shooting" position. Mercadal stated,

When I come around the corner – the corner of the house – I – I left cover and I look and I see that same subject with his hoodie and sweatshirt pulled up and his arms pointed out extended like this. [Mercadal demonstrates what appears to be a shooting position.] At which time I looked and based on the light coming off of my - my tactical light it appeared I thought that he had already shot at me because I saw what I believed to be a metallic reflection or muzzle flash – something coming at me. So I – I was scared. I thought that he had shot at me.

Describing his second look around the corner of the house, Mercadal said,

And I poked my head back out around the corner way further than I should've put it out there and I see that the subject is advancing towards us. [Again, Mercadal can be seen extending both of his arms in a shooting position.] And I see that same bright metallic shining of the light in his hands and I thought he had – was approaching and shooting at us . . . I remember kneeling down on my left knee and returning fire because I believed we were being fired upon.

Mercadal also commented on the "huge gap the subject had made." He noted how dark it was and said he never got a good look at Clark's face. He said he never heard Clark say anything.

In his statement, Robinet indicated that he first saw Clark when he initially ran past the back corner of the house. Robinet stated, "As soon as I turned the corner I saw him punched out like that . . . that's a common firing position." He further described, "I could see that there was

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<sup>2</sup> During their interviews, both officers said they recalled that prior to confronting the suspect, he had been described in dispatch calls as a "male black" wearing black clothing, or a black sweatshirt. While the color of his clothing was described, our review of the evidence does not indicate that Clark's ethnicity was described in any dispatcher broadcast. It should be noted that by the time the officers provided statements, they were aware of Clark's ethnicity.

something in the suspect's hands. I wasn't able to make it out. I saw something reflection of what I thought was a metal object in his hand from the reflection of our – out lights.” Robinet also said when he looked again, he “[s]aw the suspect still standing in that position. Still punched out at us. I honestly was really surprised that I hadn't heard gunshots yet.” Robinet went on to state, “I really felt like that was a gun. His position . . . was something I recognized as a firing position.” Robinet states that both times he saw him, Clark appeared to be in a shooting posture. Robinet did not hear Clark say anything and he (Robinet) did not give any commands. He remembers seeing the cell phone as he approached Clark as he lay on the ground.

### *Forensic Analysis*

Detectives performed a forensic examination of the shooting scene. They recovered all of the expended casings and some bullets. The officers' guns and ammunition magazines were also gathered and examined. Each officer fired 10 rounds, though neither had fired all the ammunition in his weapon. Crime scene investigators also examined the damaged cars and the residence next door to 7572 29th Street, where the sliding glass door was broken. A brick was located in one of the damaged vehicles. Detectives also located a cinder block with glass fragments matching the broken sliding glass door outside the residence next door to 7572 29th Street. DNA results linked Clark to the damaged vehicles and the cinder block located at the broken sliding glass door.

### *Autopsy Report*

The Sacramento County Coroner issued an autopsy report listing Clark's death as being caused by the shots fired by the officers. The autopsy revealed that Clark suffered seven distinct gunshot wounds, with wound entries in the front left thigh, the right side of the neck, the right side of the arm, the right side of the chest, and three entries in the back. The results from tests performed on blood samples taken at the autopsy were positive for ethyl alcohol, cocaine metabolite, and opiates.<sup>3</sup> At the request of the Attorney General, the San Diego County Medical Examiner reviewed the autopsy report and supporting documentation provided by the Sacramento County Coroner's Office. The San Diego County Medical Examiner concluded that the Sacramento County Coroner's investigation “was comprehensive, professional, well documented, and correct in its conclusions. No deficiencies are noted.”

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<sup>3</sup> Stephon Clark's family obtained an independent autopsy from Dr. Bennet Omalu that highlighted the bullet wound entries that entered Clark's back. It is impossible to know from an examination of the wounds alone whether the frontal or rear entries occurred first. That would have to be determined from all the circumstances, including the body worn camera evidence and, significantly, the STAR video footage. This footage shows the first shots were fired when Clark was approaching and facing the officers, not retreating from them. We do not know if the family's independent pathologist had the benefit of the video footage of the incident, or whether the family's pathologist prepared a written report in addition to the letter he released dated May 2, 2018. DOJ investigators asked the Clark family's attorney for a copy of Dr. Omalu's written autopsy report, but it was not provided.

### *Clark's Activities Leading up to the Incident*

Detectives and Special Agents investigated Clark's movements and interactions during the days immediately prior to the encounter with Sacramento Police in search of evidence that might corroborate Clark's commission of the actions documented on the night of March 18, 2018. Clark's phone was forensically examined and the contents revealed communications between Clark and friends and family via phone calls and text messages, as well as internet searches, which provided investigators with some insight into Clark's whereabouts and activities and possible state of mind prior to the shooting. We did not rely on this evidence in determining whether criminal charges against the officers are warranted because it did not directly bear on the central question of the officers' state of mind since they did not know about it.

### *Officers' Personnel Files*

The Attorney General's office was granted access by the Sacramento Police Department to personnel records for both Officers Mercadal and Robinet pursuant to Penal Code Section 832.7(a). In our review of those files, we discovered no relevant information.

### *Legal Analysis*

When the Attorney General's Office evaluates a case for potential criminal charging, it examines all of the facts and evidence available, and it determines, under the applicable law, whether criminal charges can be proven beyond a reasonable doubt to a jury. The reasonable doubt standard of proof is the highest known in the law, and a jury will be instructed in every case that a juror is to find the defendant not guilty if she has a reasonable doubt as to the proof of any element required for conviction. In cases involving officers discharging their weapons and killing a person, we evaluate the evidence to determine whether homicide related charges are warranted, including murder or manslaughter.

California law allows peace officers to use "reasonable force" to effectuate the arrest of a subject, to prevent escape, or to overcome resistance. (Pen. Code § 835a; see also Pen. Code § 196; CALCRIM No. 507.) Section 835a provides:

Any peace officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable force to effect the arrest, to prevent escape or to overcome resistance. [¶] A peace officer who makes or attempts to make an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance.

Thus, under Penal Code Section 835a, an officer "who makes or attempts to make an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance."

In general, for a homicide to be justified, the person who has committed the homicide must have reasonably believed that she or someone else was in imminent danger of being killed or suffering great bodily injury. (CALCRIM No. 505). More specifically, when an officer uses deadly force to counter a perceived attack, the officer must have probable cause to believe that



deadly force is necessary, must also actually believe that deadly force is necessary, and must believe that he or someone else is in imminent danger of death or great bodily injury, under the circumstances. (CALCRIM No. 507.) A police officer is entitled to use reasonable self-defense. It is the reasonable apprehension that one's life is in danger that entitles the use of defense, not necessarily actual danger. (*People v. Jackson* (1965) 233 Cal.App.2d 639, 642, citing *People v. Toledo* (1948) 85 Cal.App.2d 577, 580.) Importantly, it is the prosecution's burden to prove beyond a reasonable doubt that the killing was not justified under all the circumstances. (CALCRIM No. 507.)

Here, the essential question is whether there is a good faith reason to believe, based on all the evidence, that a reasonable jury would discredit the officers' statements that they thought Clark was armed and they feared for their lives, and would instead find beyond a reasonable doubt that the officers acted in a criminally culpable manner. In other words, is there evidence from which a reasonable jury might convict either or both officers of murder or manslaughter? If there is not, we will not bring charges.

Up to the point that the officers were advised that the subject in the hoodie was in the side yard of 7572 29th Street, they had little solid information about what the subject used to break the vehicle windows or the glass of the adjacent residence.<sup>4</sup> When Mercadal actually saw Clark at the side yard, he commanded him to stop and show his hands.<sup>5</sup> Rather than stop, Clark ran away, disappearing deeper into the yard. Consistent with Penal Code section 835a, they pursued Clark.

Our review of the STAR and body camera evidence strongly corroborates the officers' statements that Clark was approaching them when he was shot. Nothing on the video footage indicates that Clark was attempting to surrender. Based on the officers' body camera footage, when the officers ran into the backyard following Clark, they were confronted, upon rounding the corner, with Clark facing them. While not completely clear, the footage is not inconsistent with and does not contradict Officer Mercadal's statement in his interviews that he observed Clark standing with his arms outstretched in what he described as a shooting stance, holding something that was metallic, and from which it looked like light was coming. Robinet described seeing Clark in a similar position. The officers did not fire immediately, but took cover and renewed the command for Clark to show his hands. The footage establishes that Clark advanced toward the officers with his hands still not in the air and not responding to commands to surrender. Under these rapidly evolving circumstances, officers might reasonably perceive that the use of lethal force was necessary to protect themselves or others.

The officers' actions following the shooting tend to support the credibility of their beliefs that Clark was armed. Immediately following Clark falling to the ground, the officers are heard calling to him to show his hands, and they remained behind the corner of the house, rather than approaching Clark, because they cannot see one or both of his hands. In the same vein, the officers each maintained armed surveillance of Clark, while the other officer performed a reload

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<sup>4</sup> The STAR helicopter mentioned some sort of bar to break the house glass, but the objects used to break the windows had not been determined at the time of the police pursuit.

<sup>5</sup> Based on review of Officer Mercadal's body camera, the officer did not advise that he was a police officer; but given that their two patrol units had arrived on the street, and the STAR helicopter was flying above, using its flood light to illuminate the area below, it was reasonable to expect that the command to stop and show hands was coming from an officer.

of his firearm, which would be consistent with a belief that they might need to be ready to respond to any new gunfire. Also, when two officers arrived as backup, Mercadal and Robinet cautioned approaching Clark without some sort of shield or method of protection, further evidencing their actual belief that Clark was armed. They discussed whether or not they were able to see the gun.

The law permits an officer to use the force necessary to neutralize the perceived danger. Both Mercadal and Robinet fired 10 rounds. All of the rounds were fired within an approximate five-second window. In that time-frame, Clark was initially stepping towards the officers, and then he fell to the ground. Here, the STAR video footage shows that the officers stopped firing almost immediately after Clark fell to the ground. Given the rapid sequence of events, the number of rounds does not provide a basis for concluding that the officers' actions were criminal. Similarly, Clark's wounds to the side and back do not suggest any excessive action by the officers, since the STAR video depicts Clark falling forward and twisting to the right, after he is hit.

Of great significance in our evaluation is that we uncovered no evidence in the body camera or STAR recordings, the autopsy, witness interviews, or the crime scene investigation that pointed towards a conclusion that Clark was not approaching the officers when he was shot, or that he was attempting to surrender in any way, or that he was not holding an object—albeit, a cell phone—in his hands.

### *Conclusion*

In sum, we found the most critical evidence to be the following: (1) the officers encountered a rapidly developing situation in which they were pursuing a suspect—Stephon Clark—who had broken the rear sliding glass door of the neighboring residence, and who refused an officer's multiple commands to stop and show his hands; (2) Clark had an object in his hands which we now know to have been a cell phone, and during the encounter the officers repeated spontaneous shouts of "gun"; and (3) at the time of the shooting, Clark had moved from behind the picnic table where he was first seen and advanced to a point within 16 feet from the officers, as established by the STAR video, the body camera footage, and the crime scene measurements.

Under all of these circumstances, and given the applicable law, we conclude that there is a lack of evidence to support criminal charges. Therefore, the Attorney General respectfully declines to file criminal charges in this case.