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July 2, 2019

Paul Pazen
Chief of Police
Denver Police Department
1331 Cherokee Street
Denver, CO 80204

RE: Investigation of the shooting death of David Litton DOB 6/19/78, in which Denver Police Corporal Dan Felkins (badge #93016) and Denver Police Officers Brian Holm (badge # 13020) and Adam Van Volkinburg (badge #17008) fired shots on February 25, 2019, at 1200 N. Galapago, Denver, Colorado.

Dear Chief Pazen,

The investigation and legal analysis of the shooting death of David Litton, in which shots were fired by Denver Police Officers Dan Felkins, Brian Holm, and Adam Van Volkinburg, has been completed. I conclude that, under applicable Colorado law, no criminal charges are warranted. The facts show that the force used by the officers was legally justified and not unlawful under Colorado law. My decision, based on standards of criminal law, does not limit administrative action by the Denver Police Department where tactical issues may be reviewed, or civil actions where less-stringent laws, rules and legal levels of proof apply. This letter will be posted on the Denver District Attorney's Office website, and our file will be available for interested citizens to review.

STATEMENT OF FACTS

On February 25, 2019, at approximately 10:01 p.m., Denver Police Officers responded to 1200 N. Galapago on the report of a disturbance in apartment 421. The 911 caller, C.E.¹, stated that she heard loud yelling, banging, and cussing coming from that apartment. The male occupant of the apartment was threatening to shoot someone. It sounded to C.E. that the male was yelling at

¹ I use initials to maintain the privacy of the citizen-witnesses.

a female or a child, and she could hear that person crying. A separate 911 caller, who wished to remain anonymous, reported that she believed a person was physically abusing a child in apartment 421.

Officers Cristofano, Lippert, and Russell were the first to arrive. They heard a male yelling in apartment 421, saying something to the effect of “don’t make me kill you in front of your kid.” They heard what sounded like a shotgun being “racked.” In anticipation of a possible barricade, officers evacuated the neighboring apartments, called for more officers, and took up position in the hallway of the fourth floor. Officers Van Volkinburg and Holm were behind a shield in the long hallway.

Sergeant Troy Sandoval was able to make telephone contact with the individual last known to reside in the apartment, Mr. Litton. Sergeant Sandoval noted that Mr. Litton, who identified himself as “Staff Sergeant Litton,” was slurring his speech and appeared to be heavily intoxicated. Sergeant Sandoval asked Mr. Litton numerous times to come out to discuss the matter. Sergeant Sandoval assured Mr. Litton that he was not under arrest, and that he wanted to shake Mr. Litton’s hand to thank him for his service. Mr. Litton responded by saying at least twice “how about I just come out there and shoot you in the chest?” This statement concerned Sergeant Sandoval, particularly in light of Mr. Litton’s prior military training. Sergeant Sandoval responded, saying “You’re not going to shoot anybody. You’re going to come out of the house unarmed. You’re going to put whatever weapon you have down, and you’re going to come out of that front door and this is going to end in a good way. We’re all going to talk about this and we’re going to figure this out.” Sergeant Sandoval said this loudly so as to communicate the potential threat to other officers.

While Sergeant Sandoval was on the phone with Mr. Litton, Officer John Russell was able to take a position on the exterior stairs of a building to the north of the apartment. From this vantage point, and with the assistance of binoculars, Officer Russell was able to watch the interior of apartment 421. He saw a white male, later identified as the decedent, David Litton, moving around inside the apartment. When he heard over the radio that officers were going to call Mr. Litton, Officer Russell saw him pick up his phone and talk into it. Officer Russell heard over the radio that Mr. Litton had a gun, but Officer Russell at that time could see Mr. Litton’s hands, which held no weapons. He communicated this fact to the officers on scene. Mr. Litton appeared to be intoxicated, as he was stumbling around the apartment. Officer Russell then saw Mr. Litton put on a ball cap with an Army logo on it; pick up a black handgun from the coffee table; and approach the door to the apartment. Officer Russell communicated this to other officers on scene. He then lost sight of Mr. Litton.

Sergeant Sandoval heard the apartment door open, and he saw Mr. Litton emerge into the hallway. He was holding a black semiautomatic handgun. Officers began to scream commands to Mr. Litton, ordering him to put the gun down. Mr. Litton continued to advance toward the officers behind the shield. Sergeant Sandoval stated in his interview:

[Litton] turns and puts [the gun] behind his back. When he’s walking up to us, I’m – I start screaming at that point ‘he cannot get close to us! He cannot get close! We have to shoot if he gets close! Do *not* let him get close!’ He continues walking ... man, he got really goddamn close – and I said – when he got that

close, I said 'we – we can't let him get close. We have to shoot....' And I'm screaming this so that they can hear, and everyone can hear. At that point, I hear Felkins and – and the other two officers fire.... I don't curse very often, but this – I was pretty upset at this point... I was pissed off that he didn't listen to any of these commands. I was pissed off that he came out and he forced these officers, and all of us, to make this decision.... Not pissed off enough to cloud my judgment, but just, you know, to show my frustration.

When asked how close Mr. Litton came to the officers, he said "I'd probably say ten, fifteen feet.... Unfortunately, with his – his prior training in the Army, I don't know what his marksmanship was, but I knew he had prior training with a handgun. I didn't want him to get close. And he got way too close for comfort. For ten to fifteen feet, man? God. He could have done a head shot, you know, even intoxicated."

Corporal Daniel Felkins was at the District One police station when officers requested a ballistic protective shield. He obtained the protective gear and made his way to 12th and Galapago to deliver it and to provide additional cover. Ultimately he took a position at the end of the hallway, armed with a rifle. In his interview, Corporal Felkins stated:

I was in the foyer in front of the elevators behind a corner, with a good vantage point to [the door of apartment 421]. Sergeant Sandoval was behind me. At this point, he was in contact with the suspect. He was talking to him. He had asked him multiple times to come out.... By the end of the conversation, the sergeant indicated that the man threatened to come out with a gun and shoot us all and hung up and said he was coming out. And he – I remember him being upset about that. So I maintained my vigil on the door. Eventually, the door opened. A man walked out... I clearly saw in his right hand a black automatic handgun. He was holding it by the pistol grip.... He didn't point it at us ... but he did have it, holding it in a fashion that he could have, at any time, pointed and shot.... And he put his right hand behind his back and would not show us the hands – whoever was talking to him at the time – it was not me – but who – one of those officers, designated talkers, was giving him orders, giving him commands, 'drop the gun.'... He was refusing to comply. He started walking down the hallways towards the shield man and the rifleman at the next apartment. I remember the sergeant saying 'do not let him get too close.'... It got to the point where I thought he was way too close to that shield man, and all he would have to do was pull the gun out and in a hook, shoot that officer and that shield wouldn't have been effective. I felt the officers' lives were in danger, and the mere fact that he has – was still in possession of a gun, I thought it – you know, I was in danger too. At that point I decided to fire. And I fired one round center mass.... I believe I hit him in the midsection. I believe that's what caused him to double over, and he eventually fell to the ground. I didn't feel the need to fire after that.

When asked how close Mr. Litton was to the officers behind the shield when Felkins shot, he estimated five feet. He added "at the point I fired, I remember thinking, I gave him too much ground. I gave him too much." When asked what was his concern at the moment that he fired the round, Felkins replied "that he was going to shoot those officers behind the shield."

At the time of the shooting, Officer Brian Holm was in the apartment immediately next to apartment 421, the occupants having evacuated and given consent to use that space. He was staged in the doorway of the apartment; there were a number of other officers behind him in the apartment. Officer Adam Van Volkinburg was in the hallway next to Officer Holm and behind the shield. Officer Holm had a clear view of Mr. Litton and his gun as the latter advanced down the hallway. Officer Holm indicated that Mr. Litton had a blank look on his face, and described the situation as “intense.” Officer Holm was aware of Mr. Litton’s prior military experience, and stated “[Mr. Litton] was given countless opportunities to stop and comply and he – he continued to advance on us. And – and based on what I knew from [Sergeant Sandoval] alluding to his military training and as close as he was getting to the [apartment where officers were staged], I felt that we were in serious jeopardy of getting shot at by him, and that’s when I – I fired I believe one round and then the suspect went down.”

Officer Adam Van Volkinburg was staged in the hallway behind the shield. In the moments before he fired his weapon, he knew that Mr. Litton had possibly charged a shotgun inside the apartment. He was aware that Mr. Litton had threatened to shoot someone in the apartment, and that a child remained in the apartment. Commanding officers had tasked Officer Van Volkinburg with making commands to Mr. Litton inside the apartment. Officer Van Volkinburg ordered Mr. Litton to come out with his hands up. He yelled that Mr. Litton should “come out with his hands out and come out and speak with us. We would be able to end things peacefully and discuss whatever was going with him.” As the encounter progressed, Officer Van Volkinburg could hear Sergeant Sandoval ask why Mr. Litton would come out and shoot at officers. After hearing this statement, Officer Van Volkinburg “gathered that [Mr. Litton] was making statements about shooting at us.” Officer Russell then aired over the radio that Mr. Litton had retrieved a handgun and was at his apartment door. Officer Van Volkinburg described the next moments:

[Mr. Litton] exits and almost walks straight out and then very deliberately turns toward us down the hall. At this point, he turns toward us, and he’s got a black – what appeared to be a black polymer striker-fired pistol in his right hand.... As he turns and starts to walk toward us, and he just kind of slides that pistol from out by his side, just to kind of behind his lower back, right buttock thigh area, and he’s holding it and starts to walk down the hallway. At that point, I – I was saying to drop the gun. ‘Stop walking. Drop the gun.’ Things of that nature... He closed the gap from approximately the twenty to twenty-five feet from apartment to apartment, down to what I would estimate at probably six to seven feet from us, and he was just intent on continuing walking toward us. And I thought at that time – while he was walking down, I thought there was potential that maybe he would listen, maybe he would see what we had set up out there and maybe he would stop what he was doing. I wanted to afford him every opportunity to drop that gun and solve this in another way. He did not listen to any of the commands given. He continued walking toward us and basically, he got to a point where, to me, I mean it felt like he was almost right on top of us.... At that point, I perceived a threat to myself, to my life, the officer above me, Officer Holm, who was out in the hallway with me with his rifle. I felt like we were both very vulnerable at that point. Officer Holm more than me, just because

I was down on a knee with a shield covering a large portion of my body, but I felt there was a pretty – there was a very, very significant threat to Officer Holm, myself, there's other officers down at the end of the hallway. And one of my biggest concerns was that I felt like maybe two more steps and he would be able to turn and swing and draw the pistol out quicker than we were potentially capable of reacting, and there was – there was several officers in that apartment behind us.... I fired my pistol. I could see that [Mr. Litton] had been hit, and it appeared to me that the threat had resolved. I stopped firing.

Paramedics had been called to stand by. After Mr. Litton, while armed, advanced on officers, he was shot nine times. Officers ensured that the scene was safe, then immediately pulled Mr. Litton to an area where the paramedics could assume Mr. Litton's care, however, he was pronounced deceased approximately ninety minutes after the first call came out.

Officers entered the apartment and located Mr. Litton's son, E.L. Officers noted that E.L. had bloodshot eyes consistent with having been strangled. E.L. later told his mother that indeed Mr. Litton had strangled him the night he was shot. E.L. was able to flee to the bathroom and lock himself in, with Mr. Litton attempting to break down the door. During their search of the apartment, officers noted a hole in the door; this was consistent with E.L.'s statement.

All officers involved in the shooting were sequestered from one another in the moments after the shooting. They did not watch body worn camera, nor did they speak with others about what had transpired that evening. The statements given by officers were consistent with one another in all material respects.

Detectives ordered testing of the shell casings left behind at the scene. Detectives, with the assistance of Denver Crime Lab forensic scientists, determined that Officer Van Volkinburg had fired seven rounds. Officer Holm discharged two rounds. Corporal Felkins discharged one round.

Chief Medical Examiner Dr. Caruso conducted the autopsy approximately nine hours after Mr. Litton passed away. Dr. Caruso determined that Mr. Litton had received nine gunshot wounds, four of which hit Mr. Litton's torso. Two of the shots hit Mr. Litton's thighs, while two rounds caused only grazing wounds. One round hit Mr. Litton's left arm. The decedent's blood alcohol level was measured to be 0.03; no drugs were detected in his system.

LEGAL ANALYSIS

Criminal liability is established only if it is proved beyond a reasonable doubt that all of the elements of an offense defined by a statute have been committed and it is proved that the offense was committed without legal justification as set forth in Colorado statutes.

The justification for a peace officer's use of physical force while attempting to make an arrest is described in C.R.S. § 18-1-707. As pertinent to this case, C.R.S. § 18-1-707 (1) states:

... a peace officer is justified in using reasonable and appropriate physical force upon another person when and to the extent that he reasonably believes it necessary:

- (a) To effect an arrest ... unless he knows that the arrest is unauthorized; or
- (b) To defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force while effecting or attempting to effect such an arrest

C.R.S. § 18-1-707(2) states:

A peace officer is justified in using deadly physical force upon another person for a purpose specified in subsection (1) of this section only when he reasonably believes that it is necessary:

(a) To defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force; or

(b) To effect an arrest, or to prevent the escape from custody, of a person whom he reasonably believes:

- (I) Has committed or attempted to commit a felony involving the use or threatened use of a deadly weapon; or
- (II) Is attempting to escape by the use of a deadly weapon; or
- (III) Otherwise indicates, except through a motor vehicle violation, that he is likely to endanger human life or to inflict serious bodily injury to another unless apprehended without delay.

These justifications are “affirmative defenses.” This means that a person accused of a crime for using force does not need to prove that he or she was justified in using the force. Instead, the prosecution must prove, to a unanimous jury, that the force was *not* justified. Accordingly, the question I must consider is: **Is there enough evidence of criminal conduct that a jury could find, beyond a reasonable doubt, that Officers Felkins, Holm, and Van Volkinburg acted without lawful justification? At the time they used deadly force, did they reasonably believe they were about to be subjected to the imminent use of unlawful physical force and was this belief objectively reasonable?**

CONCLUSION

The question presented in this case is whether, at the instant Officers Felkins, Holm and Van Volkinburg fired their weapons, the legal justifications for using deadly physical force as set forth in C.R.S. § 18-1-707(1) and § 18-1-707(2) were applicable. I conclude that they were. The officers were aware that Mr. Litton had threatened an occupant of apartment 421 in the minutes prior to their arrival. Once on scene, several officers heard what sounded like a gun being “racked.” Officers overheard Sergeant Sandoval indicate that Mr. Litton had a gun was threatening to shoot officers. Mr. Litton was asked repeatedly to disarm and come out of the apartment. Instead, he emerged from his apartment and clearly displayed a black semiautomatic

handgun in his right hand. He then steadily approached officers, refusing commands to drop his weapon. As he narrowed the distance between himself and the police officers, Felkins, Holm and Van Volkinburg fired nearly simultaneously and in fear that Mr. Litton would shoot and kill the officers present in that hallway. When the three officers shot Mr. Litton, they had reasonable grounds to believe, and did believe, they and other officers were in imminent danger of being killed or of receiving great bodily injury. They also reasonably believed that less-than-deadly force was inadequate to defend themselves in these circumstances.

Numerous courts have declined to force officers to determine (and then use) the least amount of force necessary to stop the threat an officer faces. Illinois v. Lafayette, 462 U.S 640 (1983). As stated in Scott v. Henrich, 39 F.3d 912 (9th Cir. 1994):

[r]equiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgment. In the heat of battle with lives potentially in the balance, an officer would not be able to rely on training and common sense to decide what would best accomplish his mission ... and choose that option and that option only. Imposing such a requirement would inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves. It would also entangle the court in endless second-guessing of police decisions made under stress and subject to the exigencies of the moment. *Id.* at 915.

The United States Supreme Court has instructed regarding assessing the reasonableness of an officer's beliefs when using physical force:

The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation.

Graham v. Connor, 490 U.S. 386 (1989) at pp. 396-397.

Under these dangerous circumstances, Officers Felkins, Holm and Van Volkinburg made split-second judgments, and their decisions to shoot Mr. Litton in self-defense and in defense of others were justified under Colorado law.

Sincerely,



Beth McCann
Denver District Attorney

cc: Denver Police Corporal Dan Felkins; Denver Police Officer Brian Holm; Denver Police Officer Van Volkinburg; Barb Archer, Deputy Chief of Police; Commander Mark Chuck, Major Crimes; Commander Mark Fleecs, District 4; Lieutenant Matthew Clark, Major Crimes; Sgt. Scott Murphy; Sgt. Thomas Rowe; Sgt. Brock Ellerman; Detective Bruce Gibbs; Detective Eric Bueno; Troy Riggs, Executive Director of Department of Public Safety; Kristin Bronson, City

Attorney; Assistant District Attorney Ryan Brackley; John Davis, Defense Attorney; and Nicholas E. Mitchell, Office of the Independent Monitor.