



**Second Judicial District**  
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## Decision Letter

October 21, 2002

Contact: Lynn Kimbrough, 720-913-9025

Gerald Whitman  
Chief of Police  
Denver Police Department  
1331 Cherokee Street  
Denver, CO 80204

RE: Investigation of the wounding of David Jerome Smith, dob 5/15/60, DPD# 267047, by Officer Kimberly Markell, #99027, on August 27, 2002 in the 1500 block of Broadway, Denver, Colorado.

Dear Chief Whitman:

The investigation and legal analysis of the shooting of David Jerome Smith have been completed, and I conclude that under applicable Colorado law no criminal charges are fileable against Officer Kimberly Markell. My decision, based on criminal-law standards, does not limit administrative action by the Denver Police Department where non-criminal issues can be reviewed and redressed, or civil actions where less-stringent laws, rules and legal levels of proof apply. A description of the procedure used in the investigation of this shooting by a peace officer and the applicable Colorado law is attached to this letter. The complete file of the investigation will be open to the public at our office at the conclusion of the criminal prosecution of David Jerome Smith. At that time, any interested party is welcome to review the investigation and my decision in greater detail.

### SYNOPSIS

On August 27, 2002, at approximately 2:40 a.m., officers were dispatched to the bus-stop shelter in the 1500 block of Broadway on a report of a black male threatening individuals passing

by with a knife. At that location, Officers Kim Markell and Benny Aloia were confronted by David Jerome Smith, who threatened them with a knife. After repeated efforts to de-escalate the confrontation, Smith turned his knife threats into an attack by jumping from the bus-stop bench and rapidly closing distance toward Officer Aloia. As he attacked Officer Aloia, Officer Markell fired five shots at him from her service pistol. Smith, still armed with the knife, then attempted to flee. Officer Aloia chased Smith and, after a struggle, took him into custody. It was then determined that Smith had been shot in the foot. He was transported by ambulance to Denver Health Medical Center for treatment. The medical staff determined that Smith had a bullet fragment in the second toe of his right foot.

## **STATEMENT OF INVESTIGATION**

This investigation involves the shooting of David Jerome Smith by uniformed Denver Police Officer Kimberly Markell, 99027 (Officer Markell). Investigators took written statements from all eye witnesses and ear witnesses to this shooting incident. Video-taped statements were taken from Officer Kimberly Markell, Officer Benny Aloia, and citizen witnesses Billy Secrease, Bobby Grabau and William Hargett. Written statements were also provided by all Denver police officers who responded to the scene and who were involved in the follow-up activities. The facts derived from these statements provide a clear picture of this shooting incident.

On August 27, 2002, at approximately 2:40 a.m., officers were dispatched to the 1500 block of Broadway on a report of a black male (later identified as David Jerome Smith) in the bus-stop shelter threatening individuals passing by with a knife. Officer Kimberly Markell was the first to arrive. She saw Smith standing in the north end of the bus shelter next to a large black bag. There was no one else present in the area. She trained her spotlight on Smith, then cautiously approached him. Smith immediately began placing his hands into the front area of his pants. As she began giving verbal commands to Smith, Officer Benny Aloia arrived. As Aloia approached, Smith reached into his jacket pocket and came out with a seven-inch pocket knife with the blade fully engaged. The officers drew their service pistols and continued verbal efforts to gain compliance and de-escalate the now life-threatening encounter. Smith jumped up on the bench in the bus shelter while pointing and waving the knife at the officers. Smith appeared to be focused on Officer Markell as Officer Aloia attempted to get him to calm down and drop the knife. Smith continued to threaten the officers with the knife and refused to comply. Officer Aloia holstered his weapon to see if this would possibly calm Smith and to prepare to use his mace, if Smith continued his threat with the knife.

With Smith continuing to refuse to drop the knife and surrender, Officer Aloia attempted to deploy mace at him. His canister was defective. Officer Markell continued to train her service pistol on

Smith and handed her mace canister to Officer Aloia. Officer Aloia deployed mace at Smith. While still holding the knife, Smith reached for his face. Officer Aloia was poised to move in on Smith if the opportunity presented itself. It did not. Rather than dropping the knife, Smith quickly leaped from the bench toward Officer Aloia while continuing to waive the knife. Officer Aloia drew his weapon and attempted to move backward to create separation from Smith and his knife. At this same instant, Officer Markell fired five shots at Smith. Although unknown to the officers at the time, Smith was struck by a bullet fragment in the second toe of his right foot.

Smith, still armed with the knife, ran across Broadway, with Officer Aloia in pursuit. He then ran south bound a short distance, then ran back across Broadway to the bus shelter. After a struggle with Smith at that location, Officer Aloia took him into custody. Other Denver police officers were arriving at the scene as Smith was taken into custody. The officers called for an ambulance when they determined Smith had been shot. He was transported to Denver Health Medical Center for treatment for a gunshot wound to the foot. The medical staff determined that he had a bullet fragment in the second toe of his right foot.

In compliance with the officer-involved shooting protocol, Officer Markell's service pistol was taken by Denver Police Department Crime Laboratory personnel for testing. Officer Markell's weapon is a Glock 17, 9mm semi-automatic pistol. The weapon's magazine has a 17-round capacity and the weapon can be carried with one round in the chamber. Officer Markell was carrying the weapon fully-loaded with an 18-round capacity at the time of the shooting. The weapon was loaded with department issued 9mm Speer Luger ammunition. At the time of recovery, the weapon had one round in the chamber and 12 rounds in the magazine. This is consistent with having fired five rounds. This is further confirmed by the recovery of five spent-shell casings at the scene.

Smith was armed with a silver folding knife with a blue handle with two fish painted on it. This weapon was recovered in the open position at the scene by crime-laboratory personnel. The knife had an over-all length of 7 inches and a 3.5-inch blade.

Charges against David Jerome Smith of assault in the first degree on a peace officer and two counts of felony menacing are currently pending in Denver District Court. He is also charged with felony menacing in a separate case involving a citizen victim who was menaced by him prior to the police being called. Smith has been arrested more than 20 times in Denver and the metro area. This includes

multiple arrests for the following crimes: drug crimes, trespass, theft, assault, robbery, false reporting, menacing, disturbing the peace, and threats.

## LEGAL ANALYSIS

Criminal liability is established in Colorado only if it is proved beyond a reasonable doubt that someone has committed all of the elements of an offense defined by Colorado statute, and it is proved beyond a reasonable doubt that the offense was committed without any statutorily-recognized justification or excuse. While knowingly or intentionally shooting another human being is generally prohibited as assault in Colorado, the Criminal Code specifies certain circumstances in which the use of force and deadly physical force is justified. Because the evidence establishes in this case that Officer Markell shot Smith, the determination whether her conduct was criminal is primarily a question of legal justification.

Section 18-1-707(2) of the Colorado Revised Statutes defines the circumstances under which a peace officer can use deadly physical force in Colorado. In pertinent part, the statute reads as follows:

- (2) A peace officer is **justified** in using deadly physical force upon another person ... 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 the arrest or to prevent the escape** from custody of a person whom he reasonably believes:
    - 1. Has committed or attempted to commit a felony involving the use or threatened use of a deadly weapon; or
    - 2. Is attempting to escape by the use of a deadly weapon.

Section 18-1-901(2)(e) of the Colorado Revised Statutes defines the term “Deadly weapon” as follows:

(2)(e) “**Deadly Weapon**” means any of the following which in the manner it is used or intended to be used is capable of producing death or serious bodily injury: (I) A firearm, whether loaded or unloaded; (II) **A knife**; (III) A bludgeon; or (IV) Any other weapon, device, instrument, material, or substance, whether animate or inanimate.

Also pertinent to the facts and circumstances of this case is Section 18-3-202 (1)(e), Assault in the first degree, of the Colorado Revised Statutes, which reads as follows:

(1) A person commits the crime of assault in the first degree if:

(e) With intent to cause serious bodily injury upon the person of a peace officer or firefighter, he or she threatens with a deadly weapon a peace officer or firefighter engaged in the performance of his or her duties, and the offender knows or reasonably should know that the victim is a peace officer or firefighter acting in the performance of his or her duties.

In reference to the pertinent section of the “Assault in the first degree” statute in which the victim is a peace officer, in *People v. Prante*, 177 Colo. 243, 493 P.2d 1083 (1972), the Colorado Supreme Court stated:

“The General Assembly recognizes that peace officers are placed in a position of great risk and responsibility, so to invoke a special punishment for an assault upon a peace officer acting in the scope of his official duties is neither arbitrary, capricious, nor unreasonable.”

Therefore, the question presented in this case is whether, at the instant Officer Markell fired the shots that wounded Smith, she reasonably believed that Smith was directing or was about to direct deadly physical force against her or a third person or was attempting to escape by the use of a deadly weapon. In order to establish criminal responsibility for an officer knowingly or intentionally causing injury to another, the state must prove beyond a reasonable doubt that the officer doing the shooting

either did not really believe in the existence of these requisite circumstances, or, if she did hold such belief, that belief was, in light of all available facts, unreasonable.

## CONCLUSION

Smith had menaced individuals passing by with a knife prior to the police being dispatched to contact him. Smith drew his knife on the officers. The officers made repeated efforts to de-escalate the confrontation in the face of the life-threatening conduct by Smith. At no time during this confrontation did Smith give any indication of an intent to comply and surrender. To the contrary, he refused to drop the knife and instead attacked the officers. The officers employed an intermediate level of force by deploying mace at Smith in an effort to gain compliance and to avoid the use of a greater degree of force. It was only at the point Smith turned his threat with the knife into an attack by the closing of distance that Officer Markell fired at him in an effort to stop the attack.

Based on the totality of the facts developed in this investigation, as summarized in this letter, there is no reasonable likelihood of proving beyond a reasonable doubt that Officer Markell committed any criminal act. Officer Markell was justified in using the degree of force used under the circumstances of this case. Therefore, I conclude that under applicable Colorado law no criminal charges are fileable against Officer Markell in the wounding of Smith.

As in every case we handle, any interested party may seek judicial review of our decision under C.R.S. 16-5-209.

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Very truly yours

**Original Hard Copy is signed**

Bill Ritter, Jr.  
District Attorney

cc:

Officer Kimberly Markell

Officer Benny Aloia

David Bruno, Attorney at Law

Wellington Webb, Mayor

All City Council Members

Tracy Howard, Manager of Safety

Dave Abrams, Deputy Chief

Mary Beth Klee, Deputy Chief

Dan O'Hayre, Division Chief

Armedia Gordon, Division Chief

Steve Cooper, Division Chief

Juan Maldonado, Division Chief

Tim Leary, Captain, Crimes Against Persons Bureau

Jon Priest, Lieutenant, Homicide

Martin Vigil, Homicide Detective

Michael Martinez, Homicide Detective

Marco Vasquez, Commander

Chuck Lepley, First Assistant District Attorney

Lamar Sims, Chief Deputy District Attorney

Henry R. Reeve, General Counsel, Deputy District  
Attorney

Justice William Erickson, Chair, The Erickson  
Commission