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

RE: Investigation of the shooting of Heber Gonzalez, DOB 08/10/1990, in which Denver Police Officer Samuel Bailey fired shots on September 26, 2020, in the area of N. Vine St. and E. 37th Ave. in Denver, Colorado.

Dear Chief Pazen,

The investigation and legal analysis of the shooting of Heber Gonzalez, in which shots were fired by Denver Police Officer Samuel Bailey, has been completed. I conclude that under applicable Colorado law no criminal charges are warranted against this officer. 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.

STATEMENT OF FACTS

On September 26, 2020 at approximately 1:39 p.m., Officer Samuel Bailey responded to the area of Race and 37th Avenue after a citizen, L.P.¹, reported that a man with a large knife or machete was waving the weapon in the air and threatening people.² Officer Bailey approached the area and pulled over mid-block, facing westbound on the north side of 37th Avenue between Gaylord and Vine Streets. He activated his body-worn camera. As Officer Bailey emerged from his vehicle, he saw Mr. Gonzalez on the southwest corner of Vine and 37th Ave. As he exited his police car, he called to Mr. Gonzalez to drop the weapon. Mr. Gonzalez, without saying a word, immediately began sprinting at Officer Bailey with a machete raised in his right hand. As Mr.

¹ In order to maintain their privacy, I identify civilian witnesses solely by their initials.

² 911 caller L.P. reported that a man, later identified as Heber Gonzalez, was waving a large butcher knife near the park where children were present.

Gonzalez neared Officer Bailey, the latter discharged his weapon seven times, striking Mr. Gonzalez two to three times.³ Mr. Gonzalez was within only a few feet of Officer Bailey when he swerved and then fell to the ground. Officer Bailey immediately called for an ambulance, administered aid to Mr. Gonzalez, and directed other officers to check the area to ensure that no one was injured as a result of this incident. As other officers responded and the scene was secured, Officer Bailey was sequestered from other officers to protect the integrity of the investigation.



Photograph of the scene. Officer Bailey's car is the patrol car at the center of the photo. The machete is on the ground near the curb, at marker 13.

911 caller L.P. agreed to be interviewed at the Denver Police headquarters. She stated to detectives that she saw a man with a "big old sword" in front of her house. The man had a strange look on his face. L.P. got into her vehicle and began to follow him and noted that the man had pulled the sword from his pants and was waving it around. She called the police because she was afraid for the safety of the children in the nearby park, as the man was walking toward that location. L.P. stated that a short time later, a police officer arrived. The man with the sword then ran toward the police officer with the knife in his hand, and the police officer shot him.

Mr. Gonzalez's wife, J.G., agreed to be interviewed at Denver Police headquarters. She stated that Mr. Gonzalez began acting strangely shortly after he finished his parole supervision in May of this year. She reported that she had not seen her husband since September 23, 2020. She reported that she first saw Mr. Gonzalez on September 26 around 1:00 p.m. He was acting

³ Because of medical privacy laws, the Office of the District Attorney does not have access to Mr. Gonzalez's medical records.

strangely, rolling his hand into a cylinder and holding it up to his eye as if it were a spyglass. When she asked him what he was doing, he shushed her, telling her he was trying to listen to someone who was not physically present. She told him to leave the residence. Once he left the residence, she went outside to look for him, and she noticed that the shed in their back yard was open, and a machete that they had recently purchased was missing. She then heard several gunshots and got into her car to look for him. She saw several officers around her husband, who was on the ground. She also saw the machete on the ground next to her husband. When asked whether Mr. Gonzalez used controlled substances, J.G. said that she was not sure, but that Mr. Gonzalez's brother had told her that he was indeed using drugs.



Photo of the machete carried by Mr. Gonzalez. Detectives determined that the blade measured 10.75 inches.

Witness A.K. provided a videotaped statement. She stated that she and her husband (S.S.) were sitting in their van, which was parked on 37th Avenue. All of a sudden, a man carrying a "huge machete" walked past them. Both she and S.S. were afraid that he would injure them, so A.K. and S.S. closed their van door. The man walked back and forth past the van for a period of time; he was behaving as if he were waiting for someone. An officer arrived and stopped his police car. The officer attempted to speak with the man with the machete, but the man raised the "big ass knife" over his head and "charged" the officer. A.K. stated that the incident happened quickly and if the officer hadn't shot, the man would have "chopped him up." After the shooting, the officer administered first aid. He and other responding officers "did everything by the book." A.K. specified that the officer "didn't do anything wrong" and that he was "protecting himself."

She further stated that she was glad that the officers showed up because she was “scared to death.”

A.K.’s husband, S.S., likewise provided a formal statement to the police. He stated that he was in the van with A.K. when A.K. drew his attention toward a man holding a “big sword, or black machete” in his right hand. This man appeared to be looking for someone and was “quite scary looking.” When the officer arrived, the officer got out of his patrol vehicle and said something to the effect of “stop.” Instead, the man “charged the officer” with the sword up, “ready to chop the guy.” The officer fired but the man “kept running, kept coming.” He was nearly to the officer when he dropped to the ground. S.S. stated that he believed the officer “would have been dead” if the man had reached the officer. When the man dropped to the ground, the officer holstered his weapon; called for help on his police radio; and reassured the man with the knife that help was coming. S.S. said that the officer was “professional, nice and polite” with the man. When asked how he knew that the officer was indeed a police officer, S.S. stated that he knew because the officer was wearing a uniform and driving a marked police car.

K.H-H was also interviewed. He stated that he is the owner of the vehicle that was behind Mr. Gonzalez when Officer Bailey discharged his weapon. He was visiting his neighbor when he noticed a man walking west on E. 37th Avenue. He was on the neighbor’s porch when he heard a loud commotion. He looked toward the southwest corner of E. 37th and Vine St. and saw that a police officer had just exited his patrol car. The officer had his weapon drawn and was repeatedly telling the man to “drop it.” The man then went directly at the officer at a fast pace; K.H-H then heard six to eight gunshots. He saw the man fall to the ground, but the man continued to move and attempt to stand up. The officer did not fire any more rounds at this point; rather, he began to remove the man’s shirt and called for a medical kit. Sometime after this incident, K.H-H went to his car and noticed that his car had been struck.

M.H-H., K.H-H.’s wife, provided a statement by telephone. She indicated that she saw a man walking on 37th Avenue near Vine St. She later learned from a family member (not K.H-H.) that this man was carrying a machete, but she stated that she did not personally observe this. She believed, however, that he was under the influence of something. She got to the family vehicle and sat in the front passenger seat. A family member was seated in the back seat on the driver’s side. Another family member was standing outside of the car on the passenger side. M.H-H. then heard yelling followed by six to eight gunshots. She initially believed that it was the man who was shooting, but then saw an officer standing over that man. She stated that as police officers arrived, she drove home. She later realized that her vehicle had been struck by gunfire.

Homicide detectives from the Denver and Aurora Police Departments, as well as members of the Denver District Attorney’s Office, were called to conduct this investigation. Detectives located seven spent shell casings at the scene. Mr. Gonzalez’s clothing had been cut off and left behind after he was transported to the hospital. Other evidence of that medical intervention also remained behind. Detectives observed that one of Officer Bailey’s rounds hit K.H.-H.’s vehicle, which was parked behind Mr. Gonzalez’s location. No one in that vehicle was injured. Testing by the Denver Crime Lab revealed that all seven rounds were fired by Officer Bailey’s weapon.

Mr. Gonzalez underwent several surgeries at the hospital. Once they were able to do so, detectives interviewed him. He stated that he was in the hospital because he ran after a police officer. He made no other statements. Prosecutors with the Denver District Attorney's Office charged Mr. Gonzalez with First Degree Assault, Felony Menacing, and Possession of a Weapon by a Previous Offender. His case number is 20CR5697.

OFFICER BAILEY'S STATEMENT

Aside from Officer Bailey, no police officers witnessed the shooting itself. Officer Bailey was interviewed three days after this incident. He had not viewed his body-worn camera footage, nor had he spoken with any other officers. He stated that he responded to a call of a man with a knife near the park, which he knew from prior experience was a popular gathering place for families. He arrived at the location of the call and observed the man with the knife, later identified as Mr. Gonzalez, on the southwest corner of 37th Avenue and Vine. He stated that Mr. Gonzalez "had the knife out. It was in his right hand. His right hand was like down like about mid-leg, and then the knife stretched across [his lower torso]." At this moment, Officer Bailey was alone, with no cover officers. He made the decision to speak to Mr. Gonzalez without cover officers because he "did not want to risk [Mr. Gonzalez] going in that park and hurting or injuring children or other families or potentially make it into a hostage situation." Further, in the past, he had successfully been able to establish rapport with other similarly armed individuals and felt that he could do the same here. Having made that decision, Officer Bailey parked his car and activated his body-worn camera. He stated:

[a]s I stepped out of the vehicle, [Mr. Gonzalez] observed me and instantly raised the knife above his head and charged at me in a dead sprint. It threw me off because he never said a word. He did not make a sound. He didn't do anything except identify me and charge me immediately. And I – I described it at the scene, and I'll say it again, his eyes were completely dead. I've never seen expressionless eyes like that.... I gave him commands to drop the knife. I – he continued to advance.

Officer Bailey then invoked the Tueller Drill.⁴ He said:

I know the [Denver Police] Department operates off of the Tueller Drill at the 21-foot mark. I allowed him to come a little closer than that simply because again, I was hoping he would change, kind of move in a different manner. Something – obviously would keep me from having to engage him. As he closed, I recognized that I was not going to be able to avoid engaging him.

⁴ The Tueller Drill tested the rapidity with which a suspect with a knife could reach his victim. It was determined that at 21 feet, the time it would take to reach the victim was 1.5 seconds.



Still shot from Officer Bailey's body-worn camera footage. K.H-H's family car is the black car behind Mr. Gonzalez.

Officer Bailey remembers firing three shots, although the evidence shows that he discharged his weapon seven times. He stated that he first fired his weapon when Mr. Gonzalez was approximately twelve to fifteen feet away. When Officer Bailey fired his last shot, he estimated that Mr. Gonzalez was only four to five feet away. He stopped firing when he “saw a distinct reaction in him and I could recognize by his body posture and the way he was going [that] he was no longer a threat.” Mr. Gonzalez fell to the ground. “His hand went above his head still with the knife. The knife fell I’d say three to four inches past his hand. I moved up on him. I kicked the weapon free.” Officer Bailey immediately began to render first aid.

As cover officers arrived, Office Bailey “directed them to [his] line of fire, to ensure that there was no other individuals that had been struck or anything of that nature.” When asked why he shot Mr. Gonzales, Officer Bailey replied “[b]ecause he is presenting a lethal threat to me. I’m concerned that he could turn - he’s already showing lethal intent to me. He could turn and run into the park and again, I expected it to be occupied. I don’t want him to be engaging somebody else.” When asked what Officer Bailey believed was Mr. Gonzalez’s intent when the latter ran at him with the knife, Officer Bailey said “I believe he was attempting to kill me, sir.”

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 using physical force in self-defense is described in C.R.S. § 18-1-704. As pertinent to this case, C.R.S. § 18-1-704 (1) states:

... a person is justified in using physical force upon another person in order to defend himself or a third person from what he reasonably believes to be the use or

imminent use of unlawful physical force by that other person, and he may use a degree of force which he reasonably believes to be necessary for that purpose.

Deadly physical force “may be used only if a person reasonably believes a lesser degree of force is inadequate and the actor has reasonable ground to believe, and does believe, that he or another person is in imminent danger of being killed or of receiving great bodily injury.” C.R.S. § 18-1-704(2)(a).

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:

(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 that:

[a] peace officer is justified in using deadly⁵ 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 the 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...

(III) otherwise indicates ... 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 Officer Bailey acted without lawful justification?**

⁵ Colorado law defines “deadly physical force” as force that actually causes death, 18-1-901(2)(d)(e), C.R.S. Since Mr. Gonzalez survived his wounds in this case, deadly force was not used with respect to him. However, because I conclude that the officer was justified in using deadly physical force, I also conclude that he was justified in using non-deadly physical force, which involves a lower standard.

In examining the reasonableness of the use of deadly physical force, I consider the totality of the circumstances and the facts known to the officer at the time of the incident. After a thorough review of the evidence, I conclude that a jury would find that Officer Bailey had lawful justification to fire at Mr. Gonzalez in self-defense. When he emerged from the patrol vehicle, Officer Bailey hoped to have a conversation with Mr. Gonzalez to encourage him to drop the knife peacefully. Instead, without saying a word, the man charged the officer immediately and without hesitation. As Mr. Gonzalez sprinted toward the officer, he had a very large knife raised over his head. Multiple witnesses believed that Officer Bailey was in danger of being killed. Officer Bailey personally believed the same. When faced with this lethal threat, Officer Bailey reasonably believed that no lesser amount of force would be adequate to defend himself.

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 Supreme Court of the United States has commented 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, Officer Bailey was forced to make a split-second judgment, and his decision to shoot Mr. Gonzalez in self-defense was justified under Colorado law.

Sincerely,



Beth McCann
Denver District Attorney

cc: Denver Police Department Deputy Chief Barb Archer; Denver Police Department Commander Mark Chuck; Denver Police Department Major Crimes Lieutenant Matthew Clark; Denver Police Department Major Crimes Sergeants Scott Hagan, Brock Ellerman, and Scott Murphy; Denver Police Department Homicide Detectives Jamie Sisneros and Eric Bueno; Denver Police Department Officer Samuel Bailey; Denver City Attorney Kristin Bronson, and Denver Office of the Independent Monitor Nicholas E. Mitchell.