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January 19, 2021

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

RE: Investigation of the shooting death of Mac McPherson (06-17-98) which occurred on September 15, 2020, in the 2400 Block of S. Colorado Boulevard in Denver, Colorado. Denver Police Department General Offense #2020-556834.

Dear Chief Pazen,

The investigation and legal analysis of whether the officer-involved shooting death of Mac McPherson was legally justified is complete. I conclude that under applicable Colorado law no criminal charges are warranted against Denver Police Corporal Robert Krelle (Badge #13036), Denver Police Corporal Antony Gutierrez-McKain (Badge # 13068) and Denver Police Officer Dennis Liss (Badge #20016). This letter will be posted on our website and our file will be available for interested members of the public to review.¹ My decision, based on criminal law standards, does not limit administrative action by the Denver Police Department, in which non-criminal issues can be reviewed, or civil action where less stringent laws, rules and legal levels of proof apply.

STATEMENT OF FACTS

On September 15, 2020, at approximately 10:30 p.m. Corporal Robert Krelle and Officer Dennis Liss were in a marked Denver Police Ford Interceptor. Officer Liss transferred to Denver from the Chicago Police Department in March of 2020 and was nearing the end of his field training period. Corporal Krelle was Officer Liss' field training officer. Officer Liss was driving the vehicle and Corporal Krelle was in the front passenger seat. Both were dressed in Denver Police

¹ Parties interested in reviewing the file should visit our website at www.denverda.org/records-request/. Our officer-involved protocol is available on our website at <https://www.denverda.org/wp-content/uploads/2017/10/DENVER-DA-OFFICER-INVOLVED-SHOOTING-PROTOCOL-2017-.pdf>

Department uniforms. The partners were just finishing a call near South Sherman Street just south of East Evans Avenue.

Around the same time, Corporal Antony Gutierrez-McKain was finishing a call in the 1600 block of South Santa Fe Dr. He also was in a marked Denver Police Ford Interceptor. Corporal Gutierrez-McKain was dressed in a Denver Police Department uniform.

At 10:34 p.m., the Denver Combined Communications Center received a call on the non-emergency line from a female caller at the apartment complex at 2499 S. Colorado Blvd. This address is on the west side of the street. This caller told the operator that she was calling on the behalf of her brother, brother-in-law and grandfather. The caller further reported that her brother, brother-in-law and grandfather were just in contact with a man with a handgun which fell out of his pants. This man appeared drunk and was trying to hug the men. They were concerned that the male with the handgun was going to hurt himself because he seemed distressed. The brother-in-law also spoke with the operator and reported the man with the gun was a white male, in his 30's, 5'09" to 5'10", with a medium build, wearing a blue T-shirt and jeans. He was not someone whom they recognized.

The dispatcher issued an alert for officers to respond to the call of a person with a gun. Corporal Krelle and Officer Liss responded to the call. Corporal Gutierrez-McKain also responded to the call. The information from the 911 caller was related to these police officers, so they were aware of the report of a gun being involved. When officers arrived at the apartment complex, an unknown bystander standing on his balcony told the officers that the man they were looking for was to the northeast of complex. Corporal Gutierrez-McKain observed the male fitting the description given by the dispatcher on the east side of S. Colorado Blvd., walking northbound (north of 2499 S. Colorado Blvd.). The male was staggering and appeared to be intoxicated. This person was later determined to be Mac McPherson.

The officers then observed Mr. McPherson cross S. Colorado Blvd. from the east side of the street to the west side of the street in the 2400 Blk of S. Colorado Blvd. The officers re-entered their vehicles and exited the parking lot of the complex and responded, travelling approximately 700 feet to the north. There they attempted to contact Mr. McPherson. Mr. McPherson was on the sidewalk in front of a small strip mall. Since he was believed to be armed officers initiated a "high risk" contact utilizing the police emergency lights. Officer Liss parked their vehicle in the southbound lanes of S. Colorado Blvd., facing north-west. When Corporal Krelle and Officer Liss exited their vehicle they were positioned to the east of Mr. McPherson. Corporal Gutierrez-McKain parked his vehicle in the southbound lanes of S. Colorado Blvd facing north. When Corporal Gutierrez-McKain exited his vehicle he was positioned to the south of Mr. McPherson. When he was contacted, Mr. McPherson turned back toward Corporal Krelle and Officer Liss. Mr. McPherson placed his hands in the air slightly above shoulder level with his elbows at his side.

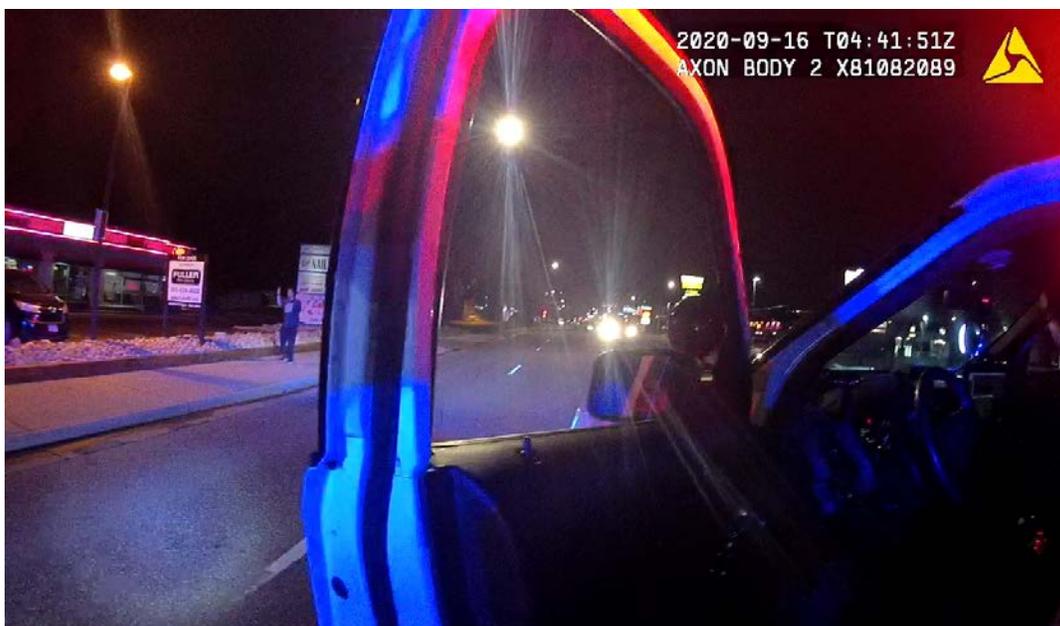


Figure 1. Still from Ofc. Liss' body-worn camera footage showing Mr. McPherson near the time he was first contacted.

The encounter was captured on the three officers' body-worn cameras:²

Krelle: *Hey Bro put your hands up.*
Liss: *How ya doing Sir? Put your hands up. Put your hands up. Got on, uh put your hands, uh on your head, behind your head, turn around, face away from me,*
McPherson: *Why?*
Liss: *Get on the ground!*
McPherson: *Why?*
Liss: *'Cuz I said so.*

[Ofc. Krelle moves to the front of the police vehicle, using the corner of the hood as partial cover]

McPherson: *Why?*
Liss: *Do it!*
McPherson: *What'd I do?*
Liss: *Hey, put your hands up,*
McPherson: *What'd I do?*
Liss: *Put your hand up*
McPherson: *No. What'd I do?*
Liss: *Face away from me.*

[Mr. McPherson drops his hands to his waist]

² The transcript is an approximate translation. The actual body-worn camera footage from all three officers should be viewed for a complete record of this interaction,

Krelle: Hey Get your hands up! You're gonna get shot! Get your hands up!

[Mr. McPherson raises his hands again, with his elbows at his side.]

McPherson: What'd I do?

Krelle: Somebody said you had a gun. Now get on the ground!

McPherson: What'd I do?

Krelle: Get on the ground!

McPherson: What'd I do?

Krelle: Get on the ground! Now!

McPherson: No. What'd I do?

[Mr. McPherson starts to walk towards Corporal Krelle.]



Figure 2. A still from Corporal Krelle's body-worn camera showing Mr. McPherson walking towards Corporal Krelle.

Krelle: Don't walk over here!

McPherson: No. What'd I do?

Krelle: Get on the ground! Now!

McPherson: What'd I do?

Liss: Get on the ground!

Krelle: Tony, Tony, I need less lethal here.³ Get on the ground!

Liss: Get on the ground!

[Mr. McPherson continues to walk toward Corporal Krelle.]

³ Examples of a “less lethal” option include, among other things: a 40 mm launcher (a single round or multi-launcher that fires 40 mm specialty impact munitions); a TASER; Chemical agents and munitions; or, a PepperBall® system. Though not asked in his interview, Corporal Krelle most likely was referring to 40 mm launcher.

Krelle: If you walk over here I'm gonna shoot you, do you understand that?!
McPherson: No, please don't.



Figure 3. A still from Corporal Krelle's body-worn camera footage that shows Mr. McPherson after he approached Corporal Krelle.

Gutierrez-McKain: Get down on your knees!
Krelle: Get on your knees right now!
Liss: Get on the ground!
McPherson: What'd I do?
Liss: Don't you – put your hands on your head.
Krelle: Get on the ground right now!
McPherson: What'd I do?
Krelle: Get on the ground, I'll tell ya about it, get on the ground right now.
McPherson: [Turning then walking back to sidewalk] What'd I do?



Figure 4. A still from Corporal Krelle's body-work camera that shows Corporal Krelle illuminating Mr. McPherson's waistline. The grip of his gun can be seen on the right side of his waist.

Krelle: He's got something in his pocket.

Liss: I see it, it's a gun.

[Mr. McPherson steps on to the sidewalk.]

Krelle: Get on the ground, right now!

McPherson: There is a gun in my pocket.

[Mr. McPherson turns to face the officers and reaches for the gun in his right front pocket.]

Liss: Don't grab the gun!

Gutierrez-McKain: Get on the ground!



Figure 5. A still from Corporal Krelle's body-worn camera that shows Mr. McPherson reaching for his gun.



Figure 6. A still from Corporal Krelle's body-worn camera that shows Mr. McPherson pulling his gun out of his pocket.

After Mr. McPherson acknowledged that he had a handgun, he reached in his right front pocket and pulled out a black handgun. Corporal Krelle, Officer Liss and Corporal Gutierrez-McKain fired their duty weapons at Mr. McPherson. Both Corporal Krelle and Officer Liss shot six times; Corporal Gutierrez-McKain shot one time. Mr. McPherson was struck by several rounds. As he fell his body twisted and several more rounds struck Mr. McPherson. Corporal Krelle radioed that there was an officer-involved shooting which started supervisors to the scene. The approximate time between when the officers stopped to contact Mr. McPherson to the time the officers fired their weapons was 60 seconds.

Officers immediately began life saving measures including placing a tourniquet on Mr. McPherson's leg. They continued with first aid until a Denver Health Medical Center (DHMC) ambulance arrived on scene. Paramedics transported Mr. McPherson to DHMC but he was pronounced deceased at 11:22 p.m.

When supervisors arrived the three officers were sequestered from each other and their body-worn cameras were removed.

Pursuant to protocol, homicide detectives responded to investigate the incident. It took some time for them to identify Mr. McPherson because his family lived out-of-state and he had never been arrested. Due to this difficulty, detectives were not able to notify Mr. McPherson's family of his passing until September 21, 2020.

INVOLVED OFFICERS

Corporal Robert Krelle

Corporal Robert Krelle made a statement on September 18, 2020. He did not view any body-worn camera footage or any other video of this incident prior to his interview. Corporal Krelle has worked for the Denver Police Department since 2013. He worked for six years as a Jefferson County Deputy Sheriff prior to joining the Denver Police Department. On the evening of the shooting, Corporal Krelle was acting as a field training officer with Officer Dennis Liss, who was new to the Denver Police Department.

Corporal Krelle described seeing Mr. McPherson walking southbound on Colorado Blvd. and using his spotlight to illuminate Mr. McPherson. Corporal Krelle could see very clearly that Mr. McPherson matched the description given by the 911 caller: he was a white male in his late 20s or early 30s, wearing blue jeans and a blue t-shirt with some kind of design. Mr. McPherson was stumbling as he walked, thus appearing to be intoxicated. Corporal Krelle felt that there was a very good chance that this was the person about whom called. When the officers approached Mr. McPherson, Corporal Krelle pulled his gun out of his holster due to the nature of the call. He immediately saw that Mr. McPherson had a pocketknife on his left front pocket. The pocketknife had a clip that allowed it to hang on the pocket that made it visible.

During the interaction, Corporal Krelle asked Corporal Gutierrez-McKain about getting a "less lethal" option such as a 40mm launcher to try to incapacitate Mr. McPherson. Corporal Krelle also indicated he was aware that the stores behind Mr. McPherson were closed and there was no one in the area.

Corporal Krelle told investigators what occurred in the moments before firing his weapon:

And his hands again were still just barely at waist-level and he -- he said, yeah, I have a gun. And he turned and then his hands disappeared and then -- then I apologize. I think with the time distortion, all of this is going to be really quick, but he turns. His hands disappear. I start to hear gunshots and I see his whole body and his arm kind of do this forward motion, which I know just from training in firearms myself, and again, just experience in general and in a training environment, that that is without a doubt the motion of drawing a firearm. I recognize that very clearly.

So, when I saw his forward motion, I was very fearful he was drawing the firearm that he was reported to have had, and that's when I fired. I don't know how many rounds, maybe three or four. But I fired because I believe that Corporal Gutierrez and Officer Liss were about to be shot because he was drawing that firearm.

Officer Dennis Liss

Officer Dennis Liss was interviewed on September 18, 2020. He did not view body-worn camera footage or any other video of this incident prior to his interview, nor did he speak with any witnesses. Officer Liss started with the Denver Police Department in March of 2020. Prior to that he was a police officer with the Chicago Police Department for approximately four years.

Officer Liss described that he knew that behind Mr. McPherson there was a vacant parking lot with only one parked car in it; there were no people in the area who could have been struck by gunfire. He described what occurred immediately prior to firing his gun.

And at this time, I told the suspect again, "put your hands up." The suspect then put his hands up, and at this point, I could see – I don't know if when he – I think when he lifted his hands his shirt rose up and I could see the black handle of a handgun that appeared to look exactly like the handgun that I have, which is a Glock model. It has a black handle. It has factory stippling on the handle. I can see the magazine coming out of the buttstock of the handle. It was just a standard magazine. ... So at that point, I seen the firearm and I related to the other officers that he has – he has a gun in his pocket; I yelled that out.

And at that point, I – I kept yelling to the suspect to keep his hands up. And at that point, the suspect lowered his right hand and he placed it on the handgun, at which time I was in fear that the suspect was going to remove the handgun and shoot and kill either me or my partners, at which time I discharged my firearm until the suspect was down.

Corporal Antony Gutierrez-McKain

Corporal Antony Gutierrez-McKain was interviewed on September 18, 2020. He did not view body-worn camera footage or any other video of this incident prior to his interview, nor did he speak with any witnesses. Corporal Gutierrez-McKain joined the Denver Police Department in 2013. Prior to that he was Jefferson County Deputy Sheriff for approximately one year.

Corporal Gutierrez-McKain described knowing there was no one behind Mr. McPherson who could have been injured if he had to fire his gun. He described what occurred immediately prior to when he did fire his gun.

So Officer Liss has said that, you know, he sees the gun. I see the gun; I've confirmed that with my own eyes. I can see he does have the gun. The situation has become extremely dangerous. He's – he's drunk. He's belligerent. He's not listening to our commands and now it is confirmed he is armed with a handgun. We're trying

to get this male to listen to us, give us verbal – we're giving verbal commands to just stop it. To get down on the ground, but it's becoming very dangerous very fast. My concern being that if he would reach for that pistol, it would -- it would create a change of situation for us.

So after Officer Liss tells the subject or tells the rest of the officers, I see the gun; I see the gun, I confirm it with my eyes, Corporal Krelle asks the subject, "sir, do you have a gun" – or something like that. "Do you have a gun on you, sir"? And the male immediately brings his hand down and he starts to reach for the handgun. And it seems like time slowed down for me. I just see his hand slowly reaching for that – that pistol. And my fear is that he's going to draw that pistol out and start shooting at the police officers directly in front of him, who would be Corporal Krelle and Officer Liss.

I watch as he –he puts his hands on the butt of the pistol and is starting to pull the gun out of his pocket. I have my handgun trained on him and I remember discharging my firearm two times, shooting for center mass to stop him from drawing that handgun out and shooting at my partners. I was in fear for -- God, their lives, you know, serious bodily injury or their lives, that this man would be able to successfully draw this weapon out. Again, he's not listening to commands. He's belligerent. I don't know what his mindset is, but he's not listening to the police and I was scared to death that he was going to pull that gun out and start shooting at recruit Officer Liss, who was just right in front of him, as well as Corporal Krelle.

When asked to describe what Mr. McPherson did that caused him to describe Mr. McPherson as "belligerent," Corporal Gutierrez-McKain stated:

He was pacing back and forth even after we told him to stop, to get down on the ground, keep his hands where we can see them, he was – he was pacing back and forth. At one point, he starts to walk towards Corporal Krelle as – even though he's telling him to stop – or we're telling him to stop, to stop moving. And he's – he's asking us, "well, what did I do wrong? Why are you stopping me?" As he's pacing back and forth in the lane of traffic. He's on the sidewalk. He's in the lane of traffic. He's back on the sidewalk, he's just going back and forth completely disregarding our commands.

WITNESSES

Lay Witness H.B.⁴

Lay witness H.B. was Mr. McPherson's roommate. H.B. related to investigators that Mr. McPherson was upset after having an argument with his girlfriend. H.B. does not recall what time Mr. McPherson left their residence the evening of the shooting because he was sleeping. H.B. recounted that Mr. McPherson was struggling the last couple of months prior to the shooting. He

⁴ I use initials for civilian witnesses in order to maintain their privacy.

was depressed over losing his job and was drinking a lot. Mr. McPherson carried a Glock handgun for protection because he had been badly beaten a couple of years ago.

Lay Witness O.S.

Lay Witness O.S. was one of the men Mr. McPherson encountered at the apartment complex prior to the shooting. O.S. told investigators that around 10:00 p.m., he was loading up items in a vehicle in front of his apartment at 2499 S. Colorado Blvd. with his brother-in-law, lay witnesses S.A. and K.V. (O.S.'s grandfather). O.S. heard shouting and screaming coming from north of the apartment complex. He could tell there was some type of conflict. He stated the shouting and screaming could have been coming from a nearby hookah bar.

O.S. observed a white male walking southbound on S. Colorado Blvd on the west sidewalk. The male approached them while they were in front of the apartment complex. As the male approached them, O.S. observed a handgun fall out of the male's pants onto the ground. The handgun was a black, semi-auto and looked like a Glock.

This male was really drunk. O.S. stated that he could smell alcohol and the male's speech was slurred. The male appeared to be depressed and emotional. The male kept telling him that he loved him and kept saying he was not a bad person and was asking them for a hug. O.S. stated he remembers the male told him his name was "Mac." He gave the male a hug. O.S. believed the male talked to him for about two minutes before he picked up the handgun and put it in the front of his pants. O.S. asked "Mac" about the handgun, but "Mac" ignored him. According to O.S., "Mac" also had a silver pocketknife in his left front pocket.

O.S. stated he thought the male was going to hurt himself because he was drunk and depressed. O.S. went into his sister-law's apartment and told her what happened, and she called non-emergency number for police. About 5 to 10 minutes after she called the police, O.S. saw police cars and the ambulance north of the apartment complex. He did not hear any gunshots.

Lay Witness S.A.

Lay witness S.A. was one of the people Mr. McPherson encountered at the apartment complex prior to the shooting. S.A. told police investigators he was at his sister's apartment at 2499 S. Colorado Blvd. to hang out and to pick up some books. After loading the books into his car and then moving the car across the street, S.A. returned to the apartment complex to find his brother-in-law and his grandfather speaking with Mr. McPherson. S.A. described Mr. McPherson as sweaty, dirty and with stretched out clothes. He noted Mr. McPherson seemed "a little off," as if he were under the influence of something. He was slurring his words, saying he wasn't a bad person and asking for a hug or to shake their hands. He had a little blood on his lip. He was holding his pants "like there was something in there." S.A. thought that whatever was in there was in his waistband. S.A. also saw a pocketknife in Mr. McPherson's pocket. S.A.'s grandfather tried to ignore the male, but his brother-in-law was being nicer and engaging with him.

Later, S.A.'s brother-in-law told him that the male had a gun that fell out of his pants that he picked up. The male apologized stating that he was sorry, and that he wasn't a bad guy. S.A. and his

brother-in-law told his sister who then called 911 on behalf of S.A. and her husband. They went to the patio but could not see Mr. McPherson. After they went inside, they could hear the sirens and hear some people outside talking.

CRIME SCENE

This shooting took place in front of 2401 South Colorado Blvd., a single-story small strip mall business structure on the west side of the street with a parking lot between the building and the street. All businesses located within the strip mall were closed at the time of the shooting. One vehicle was parked in the parking lot. South Colorado Blvd. is a six-lane street with a stacking lane in the middle. The scene encompassed the west sidewalk, curb line, and the farthest west southbound lane of South Colorado Blvd.

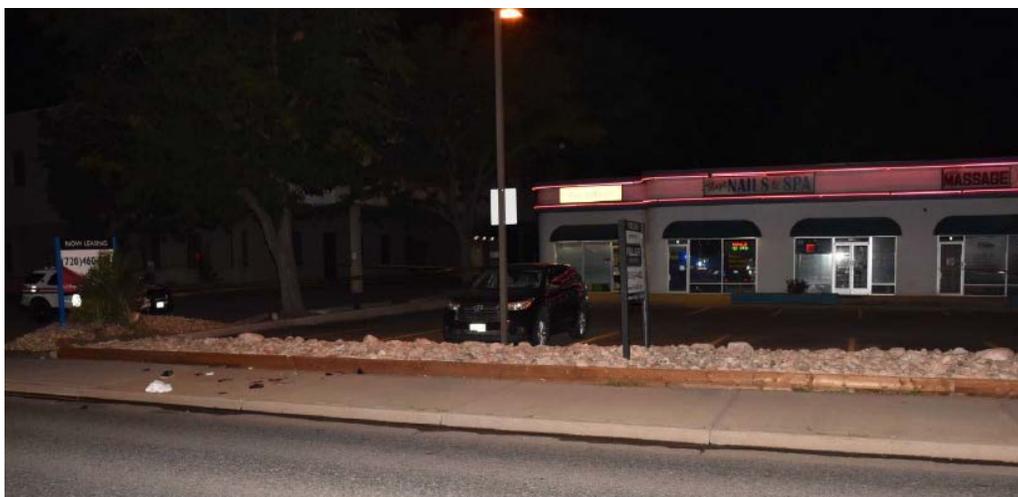


Figure 7. The scene was in the southbound lanes of S Colorado Blvd and the sidewalk in front of 2401 S Colorado Blvd.



Figure 8. The scene was in the southbound lanes of S Colorado Blvd. and the sidewalk in front of 2401 S Colorado Blvd.

One spent cartridge case and one live round of ammunition were observed on the west sidewalk of South Colorado Blvd. as well as suspected blood, evidence of medical intervention, personal items, a black shoe, and possible bullet defects. A search of the strip mall was conducted and several possible defects were observed on the exterior surface of the building. These defects include one penetrating bullet defect located in the door frame of Unit F and several penetrating bullet defects located just under business signs attached to the building. One vehicle, a 2014 black Toyota Highlander 4-door sport utility vehicle, was possibly struck during the incident. The only damage that was observed to the exterior of the vehicle was a possible penetrating bullet defect located in the front-passenger side bumper.

Mr. McPherson's black firearm was located on the ground along the west curb line of South Colorado Blvd., in front of 2401 South Colorado Blvd. Upon collection it was determined to be a Glock 17 Gen 4 9mm semi-automatic firearm with a magazine in the frame. There were no live rounds of ammunition in the chamber of the firearm. However, the magazine contained four live rounds of FC 9mm ammunition (the magazine capacity was 17 rounds). Mr. McPherson's black and silver colored folding knife was located nearby on the ground along the west curb line of South Colorado Blvd.



Figure 9. Mr. McPherson's belongings, medical intervention equipment, and blood on the sidewalk. Mr. McPherson's black Glock 17 handgun is in the street.



Figure 10. Mr. McPherson's handgun. The magazine was loaded with four live rounds. The chamber was empty.

Thirteen spent cartridge cases were located on the ground around two marked Denver police vehicles in the middle of the southbound lanes Colorado Blvd, southeast of the strip mall, both facing northwest. Some spent cartridge cases were located on top of both vehicles. The number of recovered cartridge cases was consistent with the ammunition counts when the officers' weapons were unloaded.



Figure 11. Thirteen spent shell casings were recovered around the police vehicles which was consistent with the ammunition counts when the officers' weapons were unloaded.

Officer Weapon Unloads

Corporal Robert Krelle

A Crime Scene Investigator unloaded Corporal Robert Krelle's duty firearm. Corporal Krelle's duty weapon was a Smith & Wesson Model M&P 9mm handgun. Corporal Krelle carried a total of three magazines. The magazines held seventeen Speer 9mm Luger rounds. Corporal Krelle stated he "tops off" his magazine located in his duty weapon, so his duty weapon had a total of eighteen rounds in it. The Crime Scene Investigator located one live round in the chamber of Corporal Krelle's duty weapon and eleven rounds in the magazine located inside of his duty weapon. Based on the magazine count and Corporal Krelle's statement, Corporal Krelle is believed to have fired six rounds.

Officer Dennis Liss

A Crime Scene Investigator unloaded Officer Dennis Liss's duty firearm, a Glock 21 .45 Caliber. Officer Liss carried a total of three magazines. The magazines held hold thirteen .45 CAL., Winchester rounds. Officer Liss stated he "tops off" his magazine located in his duty weapon, so his duty weapon had a total of fourteen rounds. The Crime Scene Investigator located one live round in the chamber of Officer Liss's duty weapon and seven rounds in the magazine located inside of his duty weapon. Based on the magazine count and Officer Liss's statement, Officer Liss is believed to have fired six rounds.

Corporal Gutierrez-McKain

A Crime Scene Investigator unloaded Corporal Gutierrez-McKain's duty firearm which was a Glock 17 .9 mm. Corporal Gutierrez-McKain carried a total of three magazines and the magazines held seventeen Speer 9mm Luger rounds. Corporal Gutierrez-McKain stated he "tops off" his magazine located in his duty weapon, so his duty weapon had a total of eighteen rounds. The Crime Scene Investigator located one live round in the chamber of Corporal Gutierrez-McKain's duty weapon and sixteen rounds in the magazine located inside of his duty weapon. Based on the magazine count and Corporal Gutierrez-McKain's statement, Corporal Gutierrez-McKain is believed to have fired one round.

POSTMORTEM EXAMINATION

On September 16, 2020, a pathologist at the Denver Office of the Medical Examiner performed a postmortem examination of Mr. McPherson. Denver Crime Lab criminalists, Denver Police detectives and a Denver District Attorney Office representative attended the postmortem examination.

The examination found that significant medical intervention was present. There was also a black, combat type tourniquet high on Mr. McPherson's left thigh which was applied by officers after the shooting. Mr. McPherson had numerous minor bruises on his arms and legs as well as bruising on the inside of the lips, consistent with possible blunt force trauma.

The Denver Medical Examiner determined that Mr. McPherson died as a result of multiple gunshot wounds to the torso and extremities. These gunshot wounds include:

- A gunshot wound to his right shoulder that traveled right to left across his body;
- A gunshot wound to his upper right chest that traveled downward, slightly right to left into his torso;
- A gunshot wound to the left side of his torso;
- A grazing gunshot wound to his left elbow;
- A set of three gunshot wounds to his left thigh that traveled front to back, right to left and slightly upward. There were two exit wounds associated with these gunshot wounds and bullet fragments were recovered from inside the leg;
- A gunshot wound to his upper back that travelled right to left and slightly downward; and,
- A gunshot wound to his right back that travelled downward and right to left.

Toxicological results revealed that Mr. McPherson's blood alcohol concentration was .259 g/ml.⁵ He also had cannabinoids in his blood.

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.

Use of Force by a Peace Officer

The justification for a peace officer's use of physical force is described in **Colo. Rev. Stat. § 18-1-707 - Use of physical force in making an arrest or in preventing an escape:**

(1) Peace officers, in carrying out their duties, shall apply nonviolent means, when possible, before resorting to the use of physical force. A peace officer may use physical force only if nonviolent means would be ineffective in effecting an arrest, preventing an escape, or preventing an imminent threat of serious bodily injury or death to the peace officer or another person.

(2) When physical force is used, a peace officer shall:

- (a) Not use deadly physical force to apprehend a person who is suspected of only a minor or nonviolent offense;
- (b) Use only a degree of force consistent with the minimization of injury to others;
- (c) Ensure that assistance and medical aid are rendered to any injured or affected persons as soon as practicable; and

⁵ In Colorado a person is driving under the influence or "DUI per se" when he is driving with a blood alcohol content of 0.08 or more. Colo. Rev. Stat. § 42-1-102.

(d) Ensure that any identified relatives or next of kin of persons who have sustained serious bodily injury or death are notified as soon as practicable.

(3) A peace officer is justified in using deadly physical force to make an arrest only when all other means of apprehension are unreasonable given the circumstances and:

(a) The arrest is for a felony involving conduct including the use or threatened use of deadly physical force;

(b) The suspect poses an immediate threat to the peace officer or another person;

(c) The force employed does not create a substantial risk of injury to other persons.

(4) A peace officer shall identify himself or herself as a peace officer and give a clear verbal warning of his or her intent to use firearms or other deadly physical force, with sufficient time for the warning to be observed, unless to do so would unduly place peace officers at risk of injury, would create a risk of death or injury to other persons.

(4.5) Notwithstanding any other provision in this section, a peace officer is justified in using deadly force if the peace officer has an objectively reasonable belief that a lesser degree of force is inadequate and the peace officer has objectively reasonable grounds to believe, and does believe, that he or another person is in imminent danger of being killed or of receiving serious bodily injury.

Colo. Rev. Stat. § 18-1-707

These justifications are “affirmative defenses.” This means that a person accused of a crime for using force need not 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 would find beyond a reasonable doubt that Corporal Krelle, Corporal Gutierrez-McKain and Officer Liss all acted without lawful justification?**

Here, while all three officers acted independently each was faced with exactly the same scenario and the application of the facts to the legal principles involved is identical.

These officers faced a dangerous situation almost immediately upon contact with Mr. McPherson. While responding, the officers received information that an intoxicated man was on South Colorado Blvd. with a gun. Upon their arrival, they identified Mr. McPherson as that person. While they had their guns readied due to the nature of the call, the officers first attempted to gain Mr. McPherson’s compliance through nonviolent verbal commands. Admittedly, some of initial commands were different from each other. For example, in the first few seconds of the encounter Mr. McPherson was told to “put your hands up,” to “put your hands on your head,” to put his hands “behind his head,” to “turn around,” and to “face away.” However, as the encounter unfolded the commands consistently became to “get on the ground.” Mr. McPherson was told at least eleven times to get on the ground and he did not comply. When Officer Liss saw the gun in Mr.

McPherson's pants and announced, "I see it, it's a gun," Mr. McPherson confirmed that fact by announcing "I do have a gun." During this fast-moving encounter Corporal Krelle did consider whether a less lethal option such as a 40 mm launcher might be available. However, before that option could be readied Mr. McPherson reached for his waistband and began to pull out his gun. At this point it quickly became apparent that there was an imminent threat of serious bodily injury or death to these peace officers and that nonviolent means would have been ineffective in preventing that threat.

These officers were not necessarily attempting to apprehend Mr. McPherson for an offense but were instead responding to a public safety call. They were attempting to detain Mr. McPherson to determine whether he posed a threat to others or to himself when he began to flourish his handgun. In any case, any possible crime involving a handgun is not a minor offense. The degree of force, while lethal, was used in a manner consistent with the minimization of injury to others. All officers indicated they were aware of their backdrop and there were no other persons on the street that might be struck if they fired their weapons. The officers immediately began to render aid to Mr. McPherson by placing a tourniquet on his leg in an effort to keep him alive. Investigators had a difficult time identifying Mr. McPherson due to the fact that he had never been arrested. Due to this difficulty, detectives were not able to notify Mr. McPherson's mother of his passing until September 21, 2020. However, they did so as soon as they were able.

Subsection (3)(a) of Colo. Rev. Stat. § 18-1-707 is not applicable as these officers did not use deadly force to make an arrest. Instead, the use of force became necessary to prevent an imminent threat of serious bodily injury or death. Colo. Rev. Stat. § 18-1-707(3)(b).

The officers did not announce themselves as police officers. However, it was readily apparent that these officers were members of the police department due to their marked police cars, activated overhead lights, and police uniforms. Corporal Krelle gave warning of their intent to use firearms twice. Colo. Rev. Stat. § 18-1-707(4). While this encounter was quick, there was sufficient time for that warning to be observed.

Finally, these police officers each had an objectively reasonable belief that a lesser degree of force would have been inadequate. Colo. Rev. Stat. § 18-1-707(4).5). These officers were responding to a call of a man with a gun behaving in a concerning manner – concerning enough that citizens called the police. Officers identified the subject of the 911 call as Mr. McPherson. When confronted, Mr. McPherson did not comply with the officers' commands. Officers saw the gun on Mr. McPherson. He confirmed that fact. He continued to disregard their commands and instead Mr. McPherson pulled the gun out of his pocket in a drawing motion. At this point these officers were faced with a person who was not compliant with their commands and who appeared to be drawing a gun on them. They were instantly faced with a lethal scenario, one which an objectively reasonable person would believe presented an imminent threat of serious bodily injury or death. It is also apparent that all three officers actually believed they, or their fellow officers, were in imminent danger of being killed or receiving serious bodily injury.

Use of Physical Force in Defense of Person

In addition to the justification of force by a peace officer provided in Colo. Rev. Stat. §18-1-707, an officer, like all citizens, may avail him- or herself of the affirmative defense of self-defense

under **Colo. Rev. Stat. § 18-1-704 Use of Physical Force in Defense of a Person**. As pertinent to this case, Colo. Rev. Stat. § 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.” Colo. Rev. Stat. § 18-1-704(2)(a).

Here, as noted above, the belief that Mr. McPherson was going to use imminent unlawful physical force upon the officers was a reasonable belief. Furthermore, these officers had reasonable grounds to believe, and actually did believe, that they were in imminent danger of being killed or receiving great bodily injury.

I am acutely aware that Mr. McPherson may have harbored no ill will toward these police officers. Indeed, I understand that Mr. McPherson has members of law enforcement in his family. Mr. McPherson was quite inebriated and may have only been taking his gun out to show or give it to the officers. I have little insight into Mr. McPherson’s state of mind other than he was intoxicated and appeared depressed when he encountered others at the apartment complex. It could be that Mr. McPherson did want something bad to happen to him, or perhaps to the officers. However, his state of mind is ultimately not relevant to my determination, which must be based on the objective facts and whether *these officers’ beliefs* were objectively reasonable based on those facts. The facts show that these officers were quickly presented with an armed, drunk, and uncooperative person who was reaching for a gun. 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 judgements – 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, 396-397 (1989).

While a different outcome might have occurred, to ask these officers to wait and see what happened after Mr. McPherson pulled his gun is unreasonable. Had the gun been fully raised, a single trigger pull could have killed or seriously injured one of these officers. Under these circumstances, I determine that the use of deadly force by Corporal Krelle, Corporal Gutierrez-McKain and Officer Liss was lawfully justified.

Sincerely,

Beth McCann
Denver District Attorney

cc: Deputy Chief Barb Archer; Division Chief Joe Montoya; Commander Mark Chuck; Commander Rick Kyle; Lieutenant Matthew Clark, Sergeant Scott Murphy; Sergeant Brock Ellerman; Sergeant Scott Hagan; Detective Joseph Trujillo; Detective John McGrail; Corporal Robert Krelle; Corporal Antony Gutierrez-McKain; Officer Dennis Liss; Alex Pass, Esq., Attorney for Corporals Krelle and Gutierrez-McKain, and Officer Liss; Kristin Bronson, Denver City Attorney; and, Gregg Crittenden, Interim Director of the Office of Independent Monitor.