

Beth McCann
District Attorney
Second Judicial District



201 W. Colfax Ave. Dept. 801
Denver, CO 80202
720-913-9000

Beth.McCann@denverda.org

November 21, 2023

Ron Thomas
Chief of Police
Denver Police Department
1331 Cherokee Street
Denver, CO 80204

Re: Investigation of the officer-involved shooting and wounding of Steve Calderon (dob 3-30-2006) in the 5100 Block of E. Martin Luther King Blvd., Denver, CO, on June 7, 2023; GO# 2023-302123

Dear Chief Thomas,

Our office has reviewed the investigation of the officer-involved shooting that occurred on June 7, 2023, in the 5100 Block of East Martin Luther King Jr. Boulevard in Denver, Colorado. The shooting occurred when Steve Calderon, a seventeen-year-old juvenile, fired two bullets from his semi-automatic handgun, one of which struck Officer Andrew Niccum (17051) who was pursuing Calderon to arrest him. Officer Niccum fired eight shots in return, two of which struck Calderon and injured him. Calderon was then arrested at the scene. He has been charged with attempted murder of the officer and other serious charges.¹ This letter is to inform you of my conclusion that Officer Niccum's use of force was justified by C.R.S. §18-1-704 and C.R.S. §18-1-707.

Summary of Facts

On June 7, 2023, at approximately 7:26 to 7:27 p.m., the "Shot Spotter" system in Denver detected seven gunshots fired in the Cherry St. / Dexter St. alley behind 3240 N. Cherry Street, in Denver. Officer Andrew Niccum (17051) and Officer John Wickiser (19022) responded to the alley, arriving there very quickly. Officer Niccum noticed at least one spent cartridge case in the alley.² A witness got the officers' attention and said he saw the person who fired the gunshots. He described the shooter as a black male with a slim build, wearing red pants, and he was with a black

¹ Denver District Court Case Number 23CR015078

² DPD Crime Scene Unit investigators later recovered 6 spent cartridge cases from this alley. The cases were later examined by the Firearms Unit of the Denver Crime Laboratory and were microscopically identified as having been fired in Calderon's gun which was also recovered after this officer involved shooting.

female.³ The witness said they left the alley on foot and went eastbound on Martin Luther King Jr. Boulevard.

Officers Niccum and Wickiser, both assigned to District 2, got into their police vehicle and began to search the area, believing the suspect may not be far away if he was traveling on foot. Officer Niccum was driving. The police vehicle was a white fully marked DPD Chevrolet Tahoe SUV. The officers soon observed a man and woman riding together on a scooter eastbound on Martin Luther King Boulevard next to the south curb. The male was wearing long red pants and matched the description given by the witness from the alley. This male was Steve Calderon. Officer Niccum activated the overhead emergency lights and signaled for Calderon to stop. Calderon stopped momentarily, and the female got off the scooter. As the officers got out of the vehicle, Calderon fled, riding the scooter east on MLK Blvd., then northbound on Elm Street.

The officers followed Calderon in the police SUV, catching up to him on Elm Street, whereupon Officer Niccum commanded him to stop. Instead, Calderon reversed direction and fled on the scooter, going back southbound on Elm Street, then eastbound along MLK Blvd. The officers followed in the police vehicle, but Calderon abandoned the scooter and ran. He turned north, running in the grass yard between two residences, heading to the east-west alley that passed behind (north of) the residences.⁴

Officer Niccum continued east on MLK and turned north on Forest Street to get to the alley. He stopped the police SUV at the east-west alley where it intersects Forest Street. Calderon was in the alley to his left, west of the SUV. Both officers got out of the SUV. Calderon began to run back toward the grass area between the two residences again, to head south toward MLK. Officer Niccum ran toward him, closing the distance between them.⁵

Officer Niccum saw that Calderon was now carrying a black handgun in his right hand. Officer Niccum's body-worn camera was recording. On the video, Calderon's gun is visible. Officer Niccum yells, "*Drop it, Motherfucker.*" Then he pulls his own gun out and yells: "*I'm going to shoot you! Drop it! Drop it! Drop it!*". Calderon obviously hears these commands -- he looks directly at the officer as he runs from the alley onto the grass, and he yells something.⁶ Calderon then turned toward Officer Niccum, raised his gun, and assumed a shooting stance.

³ Security camera video was obtained later. It showed two people walking in the alley near the location of the gunshots approximately thirty-three seconds after the last shots were fired. One of them was wearing long red pants. That person is Calderon.

⁴ This is the east-west alley that is north of Martin Luther King Jr. Blvd., and south of East Thrill Place.

⁵ At the same time, Officer Wickiser ran south on Forest Street then west at MLK Blvd, hoping to cut off Calderon as he ran south. He heard the shots being fired but did not see the shooting. He then assisted in arresting Calderon.

⁶ Officer Niccum said in his interview that Calderon yelled back to him "I don't have it" or similar words.



Calderon with a gun in his right hand.



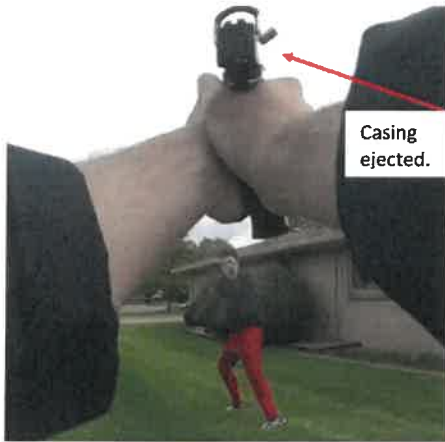
He raises the gun with both hands as he stops.

Calderon extended both arms, using both hands to aim the gun, and fired at Officer Niccum.



The first shot by Calderon. The smoke cloud from his gun is visible.

Officer Niccum immediately fired back, rapidly firing multiple shots. Even as Calderon began to move away, he kept aiming his gun at Officer Niccum. He fired a second shot although it is difficult to perceive on the body camera video.



Casing ejected.

Officer Niccum's first shot.



Calderon continues aiming.



Drum magazine

Calderon then pivots to his right, turning his back to Niccum as he moves away. He removed his left hand from the gun but kept holding it in his right hand. Apparently struck by one or more of Officer Niccum's shots, he began to fall. However, he did not drop the gun to brace his fall with his right hand. Instead, he maintained his grip on the gun, and tucked his right arm under his body as he rolled on the ground onto his right side. He was facing Officer Niccum again and he still had the gun. Officer Niccum fired his last shot. Calderon then withdrew his right hand and released the gun. In total, ten shots were fired in just over two seconds. Two were fired by Calderon and eight by Officer Niccum.



Drum magazine

Calderon turns.



Slide retracting

Officer Niccum's final shot.

Officer Niccum and Officer Derek Martinez (18056), who had also come to the alley to assist, approached Calderon to arrest him. Officer Wickiser ran from the south to assist. Calderon was not compliant, but Officers Martinez and Wickiser were able to place handcuffs on him. Then they began checking him for injuries. Paramedics soon arrived and provided assistance. He was transported to DHMC by ambulance.

Investigation

The Denver protocol for Officer Involved Shootings was followed, and the investigation of this shooting was conducted by the Denver Police Department in conjunction with the Colorado Bureau of Investigation and the Colorado State Patrol. Denver Police Department Homicide Detectives Neil Baker (04026) and Joseph Trujillo (00042) were assigned as primary and secondary investigators, respectively. The investigation is reported under DPD GO #2023-302123.

Firearms / Cartridge Cases / Number of Shots

The gun used by Calderon was recovered on the grass. It was a black Taurus 9mm semi-automatic handgun. Attached to it was a large capacity circular drum magazine. The gun and magazine were examined by the Crime Scene Unit. No bullets remained in them. A second, smaller magazine was found near Calderon on the grass. It was loaded with five 9mm bullets.

Ten gunshots can clearly be heard on the shot spotter audio concerning this incident. The weapons unload procedure by Crime Scene Unit showed that Officer Niccum fired eight rounds. This means that Calderon fired two shots. However, only seven spent cartridge cases were found by the Crime Scene Unit at the shooting scene on MLK Blvd. These recovered cartridge cases were examined by the Denver Crime Laboratory Firearms Unit and compared to the handguns fired at the scene. One case was microscopically identified as having been fired in Calderon's gun. Six were identified to Officer Niccum's gun.

Injuries

One of Calderon's shots struck Officer Niccum on the front of the duty belt he wore, striking a magazine he carried on his belt. The bullet penetrated the metal magazine, destroying it, and causing the bullets it contained to come loose. The magazine prevented the bullet from penetrating Officer Niccum's abdomen and causing serious injury, but the impact bruised his abdomen.

It appeared that Calderon was struck by two bullets: One to his left thigh, and one to his back which passed through him and exited his abdomen.⁷

Legal Analysis

Criminal liability is established only if it is proved beyond a reasonable doubt that all 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 statutory justifications for using physical force that govern my analysis are set forth in C.R.S. §18-1-704 and in C.R.S. §18-1-707.⁸

⁷ We do not have access to Calderon's medical records to provide more detailed information.

⁸ These statutes also govern the use of "deadly physical force". However, note that deadly physical force was not used in this case. C.R.S. 18-1-901(3)(d) states: "'Deadly physical force' means force, the intended, natural, and probable consequences of which is to produce death, and which does, in fact, produce death."

As pertinent to this case, C.R.S. §18-1-704 states:

- (1) ... 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.
- (2) Deadly physical force may be used only if a person reasonably believes a lesser degree of force is inadequate and:
 - (a) 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....

The justification of the use of physical force by peace officers while carrying out their duties is described in C.R.S. §18-1-707. As pertinent to this case, C.R.S. §18-1-707 states:

- (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 injury 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
 - (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 of death or serious bodily injury 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 or 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.

Under Colorado law, when the facts of a case on trial raise an issue of self-defense, as would be raised in this case, the person charged does not have a burden to prove that he or she acted within the justification for self-defense. Instead, the prosecution must show the self-defense justification does not apply by proving all the elements of the crime beyond a reasonable doubt.

Accordingly, the question I consider in deciding whether charges should be filed against Officer Niccum in this case is: Would a jury following the court's instructions about justifications for using physical force conclude there is proof beyond a reasonable doubt that Officer Niccum committed all the elements of a crime? Based on my review, I conclude a jury would not find any criminal culpability by Officer Niccum.

In his interview with investigators, Officer Niccum described being in fear for his life in the critical moments before and during the shooting. Body worn camera video clearly shows he had reasonable grounds for that fear. When Calderon ignored his commands to drop the gun and turned toward him, raising the gun at him, Officer Niccum was justified to immediately fire in self-defense. However, note that Officer Niccum did not use physical force until after Calderon fired.

Also note that Calderon could have avoided this shooting by abandoning the gun earlier when being pursued by the officers, but instead he chose to keep it. Moreover, he could have dropped the gun when Officer Niccum commanded him to as he ran from the alley onto the grass. Instead he chose to keep it so he could turn and fire at Officer Niccum. This is significant proof of intent.

Then, after firing his first shot, Calderon continued to aim at Officer Niccum and fired a second shot. Even though Calderon was out of bullets after his second shot, Officer Niccum had no way of knowing that. Perhaps Calderon did not realize it either, because he kept hold of his weapon, even as he fell to the ground and rolled over facing Officer Niccum again. Since Calderon's intention was obviously to shoot Officer Niccum, I find that Officer Niccum reasonably believed that each of the shots he fired was necessary to defend himself.

In assessing reasonableness in this context, the United States Supreme Court has stated:

The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.... With respect to a claim of excessive force, the same standard of reasonableness at the moment applies... even if it may later seem unnecessary in the peace of a judge's chambers....

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), pp. 396-397.

Also noted by the US Supreme Court: *“It stands to reason that, if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended.”* Plumhoff v. Ricard, 572 U.S. 765 (2014), p.777.

Conclusion

I find that the force Officer Niccum used was reasonable and each of his shots was justified by C.R.S. 18-1-704 and C.R.S. 18-1-707. No criminal charges against him are appropriate.

Sincerely,

A handwritten signature in black ink that reads "Beth McCann". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Beth McCann
Denver District Attorney

cc: Armando Saldate, Director of Public Safety; Deputy Chief Joe Montoya; Commander Matt Clark; Commander Layla DeStaffany; Lieutenant Joel Bell; Sergeant Scott Murphy; Sergeant Scott Hagan; Sergeant Tony Lopez, Jr.; Detective Neil Baker; Detective Joseph Trujillo; Officer Andrew Niccum; Bradley Hansen, Esq., Attorney for Officer Niccum; Denver City Attorney Kerry Tipper; Director of the Office of Independent Monitor Lisabeth Pérez Castle.