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February 28, 2024

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

Re: The officer-involved shooting on October 19, 2023, at the intersection of 46th Avenue and Josephine Street in Denver, CO, which injured Ruben Andre Saenz (dob 3/13/87); GO# 23-565812

Dear Chief Thomas,

Our office has reviewed the investigation of the officer-involved shooting on October 19, 2023, in which four Denver Police Officers fired their weapons at Mr. Ruben Saenz, striking and injuring him when he raised a pistol and pointed it at the officers. After reviewing the facts, my conclusion is that the force used by the officers was legally justified.

Mr. Saenz has been charged with seven class 5 felony counts of menacing in Denver District Court Case Number 23CR006126. The full investigation is documented in that case. Some of the facts are reviewed below for the purposes of this letter.

Summary of Facts

On October 19, 2023, at approximately 2:30 p.m., [REDACTED] was driving his pickup truck to the Burger King at 3051 E. 45th Avenue to have lunch. He saw a man in front of him walking with a dog and crossing 45th Avenue. As [REDACTED] turned right into the Burger King parking area, the man pointed a black handgun at him from about ten feet away. The gun was in the man's right hand and the muzzle was pointed at [REDACTED] through his front windshield for a few seconds. The man was looking directly at [REDACTED] but did not say anything. Later, when interviewed by investigators at DPD Headquarters, he said when the gun was pointed at him, "I was scared out of my mind."

[REDACTED] stopped in the parking lot and watched. The man walked west along 45th Ave. and aimed his gun toward the windows on the south side of the Burger King toward the interior of the restaurant. [REDACTED] then called 911 at 2:36 p.m. He described the man as perhaps 40 years old, dark shirt, medium build, unknown race, walking west on 45th Avenue with a dog.

When asked if he knew what kind of gun it was, he told the dispatcher, "It looked like a .45, like a 1911 [semi-automatic], but I don't know."

Inside the Burger King, [REDACTED] was eating. He heard what sounded like rocks hitting a window of the restaurant facing 45th Avenue. He looked and saw a man outside pointing a gun at him through the window, so he dropped to the floor. He later told investigators that he "was scared to death" and "thought he was going to die". The sound he had heard was apparently from gunshots which struck the window and its framing. Later, six bullet defects to the exterior of the window and frame were documented by Crime Scene Unit investigators.



Exterior windows on the south side of the Burger King facing 45th Avenue. Markers A - F show bullet defects.

An employee of the Burger King, [REDACTED] took photographs of the man as he walked westbound on 45th Avenue with the dog. The man was later identified as Ruben Saenz.



As a result of [REDACTED] 911 call, police were dispatched, and five Denver Police Officers responded to the call.

When later interviewed by investigators, Detective Jeffrey Baran (93010) (who was in plain clothes) indicated that when he responded to the area, he saw a man on 45th Avenue walking west toward Josephine Street, with a dog following. This was about a half a mile west of the Burger King and he thought the man fit the description of the suspect. The man (Mr. Saenz) turned and walked north on Josephine Street. Detective Baran drove north on Josephine Street and pulled over to the side of the street. From inside his car, he saw Saenz pull a handgun out of

the bag he was carrying. Detective Baran thought it was a “Baretta” handgun. Saenz then began walking directly toward Detective Baran’s vehicle with the gun in his hand.¹

Upon seeing this, Detective Baran quickly put his protective vest on, and pulled out his handgun. He thought Saenz was approaching the car to shoot at him. When Saenz got near the driver’s door, he peered through the windshield. At that point, Detective Baran opened his car door, got out while pointing his gun at Saenz and said, “*Police! Drop the gun! Drop the gun!*” Saenz replied, “*Fuck that. I’m not doing that.*” He turned and began walking away.

Detective Baran’s keyed his radio to alert dispatch and officers to his location. He kept his microphone keyed so they could hear what was happening. Radio transmissions recorded him saying:

*Get on the ground.
Zebra 41. 46th and Josephine.
The guy pulled out a gun. He’s walking north. He will not listen to me.
Drop the gun! Sir, drop the gun!*

Detective Baran followed Saenz, commanding him to stop and to drop the gun. Saenz refused. Instead, he repeatedly expressed the sentiment “just shoot me”.

Four officers arrived to assist Detective Baran on Josephine Street, just south of the intersection with 46th Avenue North. The officers were: Steven Whiteman (19074), Kirk Malone (22005), Alec Olguin (22033), and Caleb Conner (22067). They arrived in three fully marked police cars and they each were wearing full DPD police uniforms.



Uniformed officers arrived on Josephine St. just south of 46th Ave. North.

¹ It is unlikely that Mr. Saenz knew Det. Baran was a police officer as he approached Det. Baran’s vehicle. Detective Baran was not in uniform and was in an unmarked undercover car that has no emergency equipment, so its appearance is that of a standard black Ford Focus. It has dark tinted windows, so it is difficult to see inside through the side windows.

Body worn camera recordings of the four officers and the detective show that upon reaching 46th Avenue North, Saenz turned left, westbound. He had the gun in his right hand.² He turned to face the officers.



Saenz then began walking backwards in the street, westbound. He continued facing the officers as he walked backwards and spoke to them. The officers followed but did not close the distance on him. They followed at his pace, staying about 10 to 15 yards east of him on 46th Avenue North. All of them were walking in the roadway, except officer Olguin who was on the sidewalk on the north side of the street.³

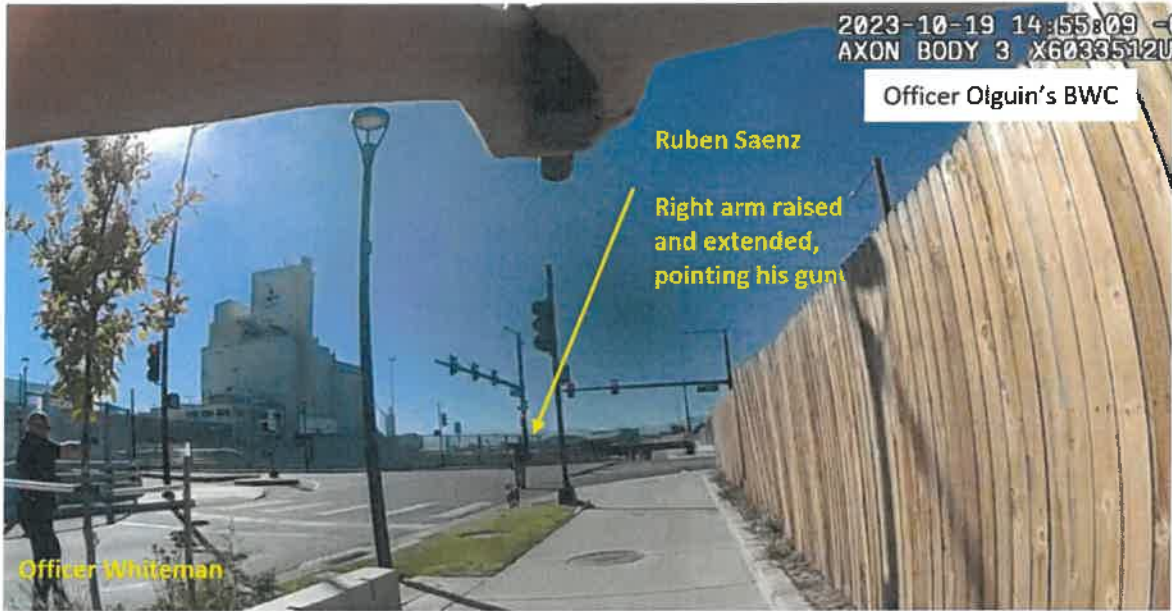
The officers gave numerous commands to Saenz to “Drop the gun.” “Please. Drop it”. “Drop the weapon.” These efforts continued the whole time as they walked west to the intersection at York Street. Multiple times Saenz replied to the officers and expressed phrases like, “You’re going to have to shoot me.” “Shoot me!” “You just shoot me! Please!” “Shoot me!”

He also yelled aggressively at times, and it was hard to discern what he was saying. At one point, Saenz raised the gun from his side and directed it at the officers momentarily. Officer Whiteman immediately told him, “Don’t you point that at me. You point it at me – we are going to shoot you.” Officers also asked Saenz, “How can we help you?” “What do you need?”

As Saenz backed into the intersection at York Street, he was yelling something angrily at the officers. He raised his right arm again but held the gun higher this time. He extended his right arm in front of him and held the gun about head high and pointed it at the officers. (See images from body worn cameras, below, taken at 14:55:09).

² During their interviews, Detective Baran and Officer Whiteman expressed that the manner in which Saenz handled the gun during this incident caused them to think Saenz may have had firearms training and be experienced with handguns.

³ Facing Saenz, from left to right were Officer Conner, Detective Baran, Officer Malone, Officer Whiteman, Officer Olguin.





Enlarged Image from Officer Whiteman's BWC – 14:55:09

Seeing this, four of the five officers fired their weapons.⁴ Twelve shots were fired.

Saenz fell to the ground, dropping his gun. Officers immediately called for an ambulance, Code 10, and approached Saenz. Officer Whiteman used his foot to slide Saenz's gun away toward the curb. He noticed a CO2 cartridge in the grip of the gun. Officers began efforts to save Saenz's life by working to stop the bleeding from his wounds. They applied a tourniquet to his right arm and pressure to other wounds. As they were rendering aid, Saenz said, "*Lord, take me, please!*" The officers spoke to Saenz, encouraging him to stay conscious, and assuring him that help was coming for him. He asked for water which the officers provided. When the ambulance arrived, Saenz was rushed to Denver Health Medical Center.

Other officers arrived. District 2 Supervisors secured the scene and the Officer Involved Shooting protocol was followed. Detective Daniel Andrews was assigned as the lead investigator and Detective Joseph Trujillo was assigned as the secondary investigator. Both are assigned to the Denver Homicide Unit. Investigators from the Colorado Bureau of Investigations and the Colorado State Patrol also responded to the scene and to DPD Headquarters to assist with the investigation.

As part of the investigation, all five of the police officers voluntarily gave recorded interviews at DPD headquarters, separately. Each of them indicated they feared for their safety and that of the other officers during this incident because they believed Saenz was brandishing a deadly firearm and they had no cover for protection from any bullets Saenz might fire. When he raised his gun

⁴ Officer Calcb Conner did not fire because he did not have a safe line of fire considering his proximity to Detective Baran.

in the intersection at York Street and pointed it at the officers, each officer believed Saenz was going to fire upon them.

Injuries

Dr. Evangelina Murray, M.D., indicated that Saenz had suffered “serious bodily injury” because of penetrating gunshot wounds but there was not a substantial risk of death, or serious permanent disfigurement. We do not have access to medical records to describe his injuries. However, it appeared that Saenz suffered gunshot wounds to his right forearm, right shoulder, right arm pit, right abdomen/flank, and right knee.

Handguns and Spent Casings Recovered

Saenz’s gun fell to the pavement when he fell. It was later recovered by investigators from the Denver Crime Scene Unit. It was discovered to be a CO2 gun (BB gun). Inside the grip was a CO2 cartridge which provides the propellant for a projectile when the gun is fired.



12 spent cartridge cases were recovered. All were 9 mm cartridge cases fired by the officers.

The officers’ handguns were unloaded by the Crime Scene Unit and the ammunition counted. The handguns were then submitted to the Denver Crime Lab Firearms Unit for examination and testing. The guns were test fired and the test-fired cartridge cases were microscopically compared to the twelve spent cartridge cases from the scene. All twelve of the spent cases were identified as having been fired in the weapons of the four officers who fired.

The conclusions drawn by the investigators based on these examinations and this investigation are that: Officer Whiteman fired one gunshot; Detective Baran fired two gunshots; Officer Malone fired four gunshots; and Officer Olguin fired five gunshots.

It is not known which of the gunshots resulted in a bullet strike to Mr. Saenz.

Legal Analysis

Criminal liability is established only if it is proved beyond a reasonable doubt that all elements of a criminal offense have been committed without legal justification. The legal justification for the

use of physical force that governs my analysis in this case is set forth in C.R.S. §18-1-704 (1). It states the legal justification for using physical force in self-defense and in defense of another.⁵

C.R.S. §18-1-704 (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.

C.R.S. §18-1-707 also pertains to the use of physical force by peace officers while carrying out their duties. 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) ... [Not applicable – pertains to the use of deadly physical force to make an arrest].
- (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.

I find the requirements of C.R.S. §18-1-707 were appropriately met in this case.

As to C.R.S. §18-1-704 (1), when self-defense or defense of another is an issue in a case, as it is here, Colorado law provides that the accused is not required to prove he or she was justified in using physical force. Instead, the prosecution must show the force used was not justified.⁶

⁵ Note that since death was not caused, physical force, not “deadly physical force”, was used in this incident. Deadly physical force is defined in C.R.S. 18-1-901(3)(d): “Deadly physical force” means force, the intended, natural, and probable consequences of which is to produce death, and which does, in fact, produce death.

⁶ For crimes alleging a culpable mental state of acting intentionally or knowingly, the issue of self-defense or defense of another is handled at trial as an “affirmative defense”, which is a defense that admits the commission of the elements of the charged crime but argues the defendant’s actions were legally justified or excused. This affirmative defense becomes an additional element of the charge at trial, and it is the prosecution’s burden to disprove it by proof beyond a reasonable doubt. For crimes alleging a culpable mental state of acting recklessly, or with criminal negligence or extreme indifference, the evidence of self-defense or defense of another is handled

Thus, the question I consider in deciding whether to bring criminal charges against any of the four officers who fired is: After considering C.R.S. §18-1-704(1), would a jury find that all the elements of a crime can be proved beyond a reasonable doubt against any of the officers?

Based on the facts shown by this investigation, I conclude that a jury would find the use of force by each officer was justified under C.R.S. §18-1-704 (1). My reasons are summarized below.

(1) Did each officer *reasonably believe* Mr. Saenz was imminently about to use unlawful physical force against them? Yes.

Body-worn camera evidence shows Mr. Saenz extending his right arm, at head height, pointing his handgun at the officers just before the officers fired at him. He had directed his gun at the officers a few seconds earlier as he was walking backward, prompting Officer Whiteman to warn him not to do that again or the officers would have to shoot him. About seven seconds later, he raised the gun up high and purposefully pointed it at them as he was yelling something at them. It was reasonable for the officers to believe he was about to use unlawful force and fire upon them.

The officers believed Saenz's gun was a lethal weapon. The radio dispatch advised officers the gun was "possibly a 45-caliber weapon". The officers had no reason to think the gun was not a lethal weapon. Witnesses at the Burger King also believed it was a lethal weapon. Mr. Armstrong said, "I was scared out of my mind." Mr. Avila-Guevara thought he was going to be killed. When officers told Mr. Saenz multiple times to drop the gun, he had ample opportunity to tell them it was only a BB gun, but he did not to tell them. Instead, he implored them to shoot him and refused to drop the gun.

(2) Did each officer *reasonably believe* the degree of force he used was necessary? Yes.

The officers believed that Saenz was about to use potentially deadly force against them. They were directly in front of him, exposed to gunshots if he fired. Their only option for defensive force was to use their handguns. The only other alternative was to not defend themselves and hope they would not be injured or killed.

Only after the shooting was it learned that the gun held by Mr. Saenz was a CO2 gun, which was less likely to cause serious injury to any of the officers. This fact, however, does not change the legal analysis or my decision. This is because long standing Colorado law treats "apparent necessity" and "actual necessity" the same when it comes to the justification statute of C.R.S. §18-1-704. In other words, the law does not require actual danger to justify using force in self-defense or in defense of another. Instead, as explained above, the statute focuses on what was *reasonably believed* by the person who used physical force in defense.⁷

as a "traverse" defense that seeks to refute, or to cast doubt upon, the proof of the mental state element alleged. The prosecution must prove the alleged mental state element by proof beyond a reasonable doubt. See C.R.S. § 18-1-704 (4); *People v Pickering*, 276 P.3d 553 (Colo. 2011).

⁷ See *Beckett v. People*, 800 P.2d 74, (Colo.1990), where the Colorado Supreme Court recognized the long-standing principle of "apparent necessity" under Colorado law and found that the language in Colorado's 1986 statute pertaining to self-defense and defense of another encompassed the principle of apparent necessity. Note that the statutory language considered in *Beckett* was identical to the provisions of C.R.S. § 18-1-704 (1) and (2) that are applicable today. See also: *Young v. People*, 107 P. 274 (Colo.1910).

Conclusion

I find that the actions of all four officers were justified under Colorado law. A criminal charge against any of these officers would not be appropriate.

Sincerely,

A handwritten signature in black ink, appearing to read "Beth McCann", with a long, sweeping horizontal line extending to the right.

Beth McCann
Denver District Attorney

cc: Armando Saldate, Director of Public Safety; Deputy Chief Joe Montoya; Commander Matt Clark; Commander Carlos Aragon; Lieutenant Joel Bell; Sergeant Scott Murphy; Sergeant Scott Hagan; Sergeant Tony Lopez; Detective Daniel Andrews; Detective Joseph Trujillo; Detective Jeff Baran; Officer Steven Whiteman; Officer Kirk Malone; Officer Alec Olguin; Officer Caleb Conner; Sean Lane, Esq.; Paul Sukenik, Esq.; Denver City Attorney Kerry Tipper; Director of the Office of Independent Monitor Lisabeth Pérez Castle; City Council members.