



Decision Statement September 28, 2010

Re: In-Custody Death of Marvin L. Booker on July 9, 2010 at the Van Cise-Simonet Detention Center.

By: Mitchell R. Morrissey, Denver District Attorney

I have reviewed the investigation of the in-custody death of Marvin L. Booker that occurred while he was in custody at the new Van Cise-Simonet Detention Center on July 9, 2010. The evidence shows that the application of the degree of force used by the deputies to control and handcuff Mr. Booker was justified. A review of the totality of the evidence amassed in this investigation supports the conclusion that it was the actions of Mr. Booker that necessitated the use of force at its inception and during its protracted continuation until he was subdued and controlled. To file criminal charges we must believe that we have a reasonable likelihood of proving the charge(s) to twelve jurors, unanimously, at trial, beyond a reasonable doubt, after considering reasonable defenses. The facts of this case do not support the filing of criminal charges. Therefore, I conclude that no criminal charges will be filed against any of the sheriff deputies involved in this incident.

I have viewed, multiple times, the videos of the incident from four separate cameras, including video in slow motion and with the benefit of stop-and-go slow motion. I have reviewed the thorough investigation conducted by the Denver Police Department and the interviews of the people involved. Additionally, I have met with the Assistant Medical Examiner, Dr. John Carver, and have discussed his findings from the autopsy of Mr. Booker. I have visited the location of the incident in the Van Cise-Simonet Detention Center.

This incident occurred in the open-seating area of the new Van Cise-Simonet Detention Center, where forty-six arrestees were waiting to be processed into the jail.¹ Male and female arrestees are not separated or restrained in any manner—if they are cooperative while waiting to be processed. Uncooperative, non-compliant, and hostile arrestees pose a risk to all jail personnel and arrestees in this open-seating area. It is imperative that deputies maintain discipline, order and control in this area and that disruptive or violent arrestees be removed to a secure cell. Failure to do so could have very severe consequences to the safety of all. This is a secure jail facility. Arrestees are required to cooperate and comply with procedures and directions. This is not an environment in which arrestees can disregard directions and do as they please.

It is also important to describe in lay terms the context of use of force in a jail environment. The deputies have the responsibility to insure a safe environment for all arrestees and jail personnel.

¹ See attached photos of the location of the incident.

Arrestees have a responsibility to behave, cooperate and follow the rules. When an arrestee's conduct necessitates the use of physical force by the deputies to carry out their responsibilities, it is not a mutual combat event. There is not supposed to be a fight. Arrestee compliance is not optional, it is mandatory. If physical force is required because of the arrestee's actions, the deputies are supposed to prevail as quickly as possible without injury to them or other arrestees and jail personnel. The potential of injury to the arrestee and the deputies is always present. Use of force by anyone appears violent in varying degrees, regardless of the outcome or justification. Deputies should clearly appear to be overcoming the resistance at all times until the arrestee is fully controlled and order is restored. Attached to this document are the pertinent parts of a number of Colorado statutes that apply and give guidance in justifications for the use of force by deputies in these situations.

Mr. Booker was described, and is shown on the videos of the event, to be non-compliant, hostile, profane, and violent toward the female deputy who was attempting to process him into the facility. Mr. Booker made the specific choice not to follow the deputy's lawful and proper orders, loudly raised his voice and cursed at her—"You F__ing Bitch", ignored her directions, and walked away from her toward the open seating area. Then, for reasons known only to Mr. Booker, he chose to violently resist the female deputy when she tried to contact, control and guide him to the secure cell away from the other arrestees in the open-seating area. It was the combination of these aggressive, non-compliant behaviors by Mr. Booker that drew the attention of other sheriff deputies who came to her aid to control Mr. Booker. His continued hostility, non-compliance and resistance, of necessity, caused the deputies to apply physical force on him in an effort to control him, move him to a secure cell and restore order. The standard procedure is to remove and isolate the arrestee to a cell until their behavior adjusts to permit them to be processed. This application of physical force by the deputies under these circumstances was clearly reasonable, necessary, appropriate and justified.

Deputies know from their training and experience that an immediate show of force (example: multiple officers) in these situations often times results in not having to use force. The involved arrestee quickly complies and order is restored. In this case, even when faced with an immediate show of force, Mr. Booker chose not to comply. Instead, he chose to fight and struggle to prevent the deputies from controlling and handcuffing him. All Mr. Booker needed to do was stop his misconduct. He would have been placed in the cell and the deputies would have returned to their duties.

The deputies were surprised at Mr. Booker's strength and at the difficulty they had in gaining control of him. Based on his autopsy, Dr. Carver commented that Mr. Booker was surprisingly "well muscled like a boxer" and apparently strong. Despite repeated commands and requests of him throughout the incident to stop resisting, to stop struggling, and to allow his hands to be handcuffed, Mr. Booker did not stop resisting and struggling. He continually prevented the officers from gaining control of his hands and arms to handcuff him. The slow motion video shows Mr. Booker's repeated efforts to pull both of his hands and arms free from the deputies' grasps.² Mr. Booker's specific choice to continue struggling against the deputies forced a prolonged struggle. Again, from its inception, all that was required to end this incident peacefully was for Mr. Booker to comply and be handcuffed. It was this prolonged struggle, forced by Mr. Booker's actions, that led to his death.

² The speed of the movements makes it more difficult to discern on the video played at regular speed. The slow-motion video and stop-and-go slow motion allow those actions to be more clearly identified. This capability was important to my review.

If a criminal charge were brought against one or more of the deputies in the death of Mr. Booker, it must be proved that the actions of one or more of the deputies caused Mr. Booker's death. Causation, like other elements of a crime, must be proved to a jury, unanimously, by proof beyond a reasonable doubt. Additionally, the law provides affirmative defenses to acts that would otherwise be criminal. These affirmative defenses must be disproved beyond a reasonable doubt in order to prove a criminal charge. The term "justifiable homicide" describes a death which is justified by the applicable affirmative defense statutes. These laws and principles are important to my review and decision.

In the written Autopsy Report, Dr. Carver documents the injuries to Mr. Booker. He received "abrasions to lower legs from application of 'OPN' (nunchuck) and to right wrist and forearm from application of handcuffs."

In our discussions with Dr. Carver, he indicated there was fine scattered petechial hemorrhaging to Mr. Booker's eyes. He indicated this could have been the result of the carotid control hold (Autopsy Report referred to it as carotid "sleeper" hold) or from other causations. His Autopsy Report states there was "hemorrhage to base of left sternocleidomastoid and left sternohyoid muscles." Dr. Carver indicated this could result from pressure or stretching in that location near the clavicle. These are not life-threatening injuries. His Autopsy Report indicates "there is no external evidence of injury to the neck." Notable by its absence is any injury to Mr. Booker's throat and trachea, which supports the deputy taking care in applying the control hold in a manner not to crush or damage Mr. Booker's wind pipe. Additionally, the slow-motion video shows the deputy first attempted to control Mr. Booker by grasping to control his head, then by attempting to hold his shoulders to the floor to control his upper body, then by attempting to grasp and control his left arm and hand to achieve handcuffing, all of which Mr. Booker successfully countered. Mr. Booker's actions narrowed the deputy's options for gaining control. It was after these failed efforts that the deputy applied the control around his neck. All these actions occurred in rapid succession with the other deputies attempting to control his arms and legs. Deputies are trained and know from experience that, absent an arrestee using a deadly weapon, injury to the deputy is most likely to come from the arms, hands, legs, feet or head. These are also a key to gaining control of the arrestee. The head, not generally thought of as dangerous, can cause serious injury by delivering a "head-butt," inflicting a bite, or delivering a body-fluid projectile.

As to the application of the Taser, Dr. Carver indicated that there was no indication from his autopsy that Mr. Booker had been tased. He would not have known a Taser was used or where it was applied except from reviewing the investigation documents. He is not able to say to what degree, if any, it contributed to Mr. Booker's death.

Also notable by their absence are any injuries to Mr. Booker from blunt force trauma or from impact weapons. This is because, as the video shows, Mr. Booker was not struck, kicked or beaten in any way by the deputies. No strikes were delivered with fists, feet or implements such as an OPN, which can be used both as an instrument of control or impact. The deputy used it only in an effort to control Mr. Booker. The floor or other stationary objects were not used as an impact surface to deliver blows to force submission. In short, this was a grappling by the deputies to gain control and attempt to handcuff Mr. Booker, where restraint was used -- in both senses of the word.

Dr. Carver indicates that the cause of death was “cardiorespiratory arrest during physical restraint.” He then lists the physical restraints to which he is referring. These include weight applied to Mr. Booker’s body, application of a carotid control hold, application of a Taser to Mr. Booker’s thigh, restriction of Booker’s arm movement by cuffing his hands behind his back, and restriction of leg movement by use of an “OPN” device.³ These are all options available to deputies when use of force is required to gain control of a resisting arrestee in the jail facility.

In our meetings with Dr. Carver to discuss his findings, he explained that he could not isolate any one restraint, or any one action by a deputy, that caused Mr. Booker to suffer cardiorespiratory arrest. Conversely, Dr. Carver explained that he could not say with any certainty that the absence of any one of these restraints would have allowed Mr. Booker to live. Also important is the fact that Dr. Carver’s diagnosis of cardiorespiratory arrest “during physical restraint” includes Mr. Booker’s own aggressive actions in the physical resistance, struggle and exertion against the deputies’ efforts to control and handcuff him. He said that his reference to “during physical restraint” included Mr. Booker’s actions and struggling as a contributing factor in his death.

Indeed, Mr. Booker struggled continuously as reported by the deputies, and as seen in the videos. Despite Mr. Booker’s reported muscular condition and strength, Dr. Carver’s autopsy revealed that he was not medically suited for the physical exertion of resisting and struggling with the deputies in the manner that he chose to do. Again, all that was necessary from Mr. Booker throughout this incident was cooperation and compliance. Dr. Carver explained that Mr. Booker had emphysema, an enlarged heart (cardiac hypertrophy) (570 gram heart—approximately twice expected size), and had recently used cocaine. He indicated that the enlargement of his heart would occur over years from causes such as high blood pressure and substance abuse.⁴ Dr. Carver reported that these were “*significant contributing factors*” in Mr. Booker’s death. Dr. Carver indicated that extreme physical exertion with these medical conditions could lead to cardiac arrhythmia and then cardiorespiratory arrest. In light of this, it would be impossible to prove beyond a reasonable doubt that it was the actions or restraints by the deputies that caused Mr. Booker’s death, rather than his own actions in resisting and struggling.

Additionally, even if one or more of the deputies could be proven to have caused the death of Mr. Booker, and that is clearly not possible in this case, to charge one or more of the deputies with a criminal homicide or criminal assault, there must be proof beyond a reasonable doubt that the use of the restraint or restraints was a criminal use of force, rather than a justified use of force. After reviewing the totality of the evidence developed in this investigation, I conclude that no criminal charge can be proved against any of the involved deputies under these facts. In fact, the deputies were justified in using the degree of force used which was reasonable, necessary and appropriate under the specific facts of this case.

³ Dr. Carver was able to view the videos of the event and the interviews of the deputies. After his release of the Autopsy Report on August 20, 2010, the slow-motion video was produced and he then viewed it. He saw the physical restraints employed during the struggle and he saw the physical struggle by Mr. Booker against the deputies.

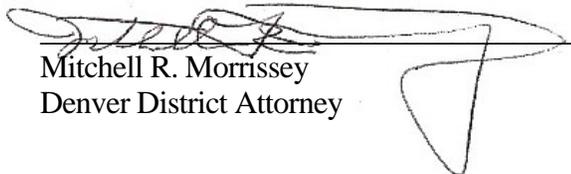
⁴ Mr. Booker’s numerous arrests over the past 33 years include a number of arrests related to possession of controlled substances.

One of the female deputies was taken to Denver Health Medical Center for leg injuries received during this incident. She was diagnosed with bruising to both knees and a sprained right knee. She was treated for the injuries and released.

The death of Mr. Booker is a tragic event for all those impacted by it, which includes, among others, the family and friends of Mr. Booker who clearly loved him, the involved deputies who were attempting to fulfill the difficult responsibilities of their service as well as their families and friends, the Denver Sheriff Department and its personnel, and the City government. Tragically, Mr. Booker's actions and choices resulted in his death. I have no doubt the two female and three male deputies involved in this incident would have preferred to have an uneventful shift at the jail. There are no winners in these situations.

The Denver District Attorney's Office is independent of the Denver City government and the involved agencies. The Denver Sheriff Department and the Denver Manager of Safety have jurisdiction to determine any non-criminal issues related to the procedures, policies and tactics employed by the deputies. Those are administrative policy and training issues in which the Denver District Attorney's Office has no jurisdiction and is not involved.

The release or viewing of evidence or the investigation case materials in this in-custody death, from this point forward, should be addressed to the Office of the Denver City Attorney, which is the City agency that consults with and advises the Denver Police Department and Denver Sheriff Department on those issues. Since criminal charges will not be filed, the Denver District Attorney's Office does not receive and maintain an investigative case file.



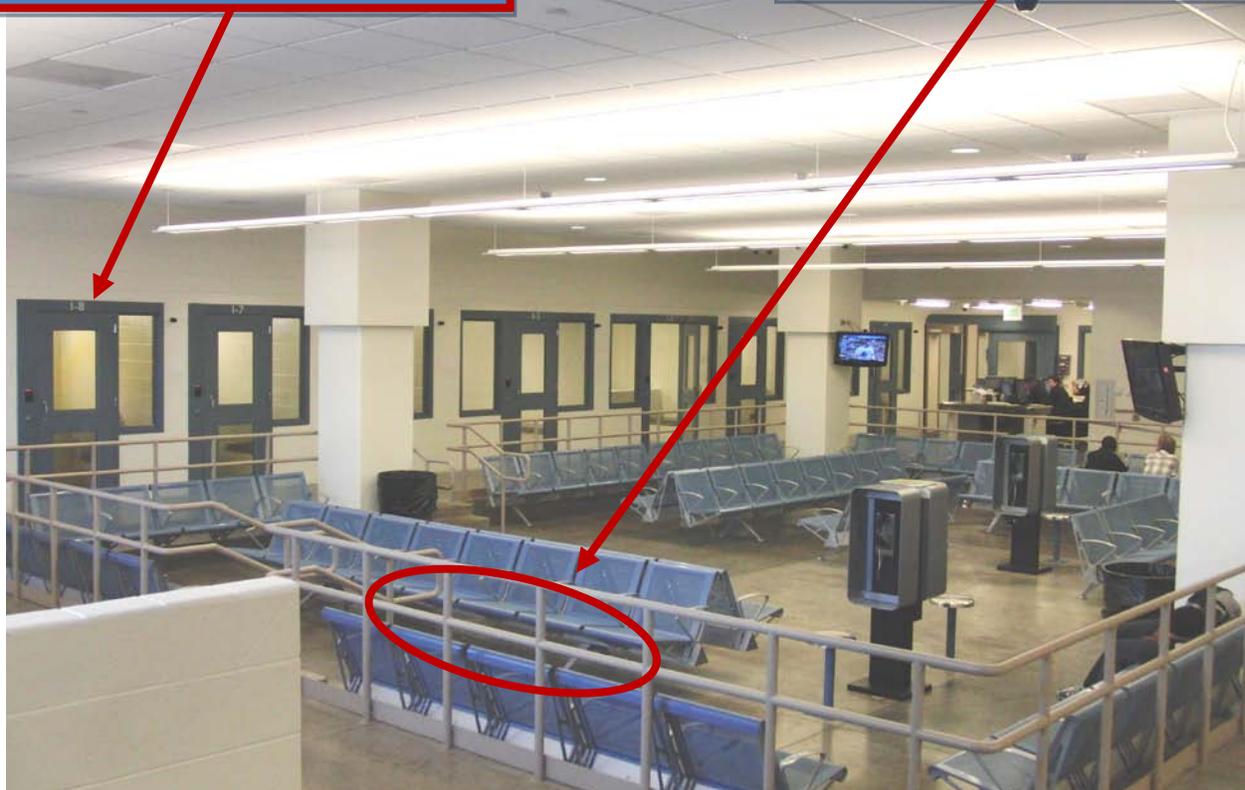
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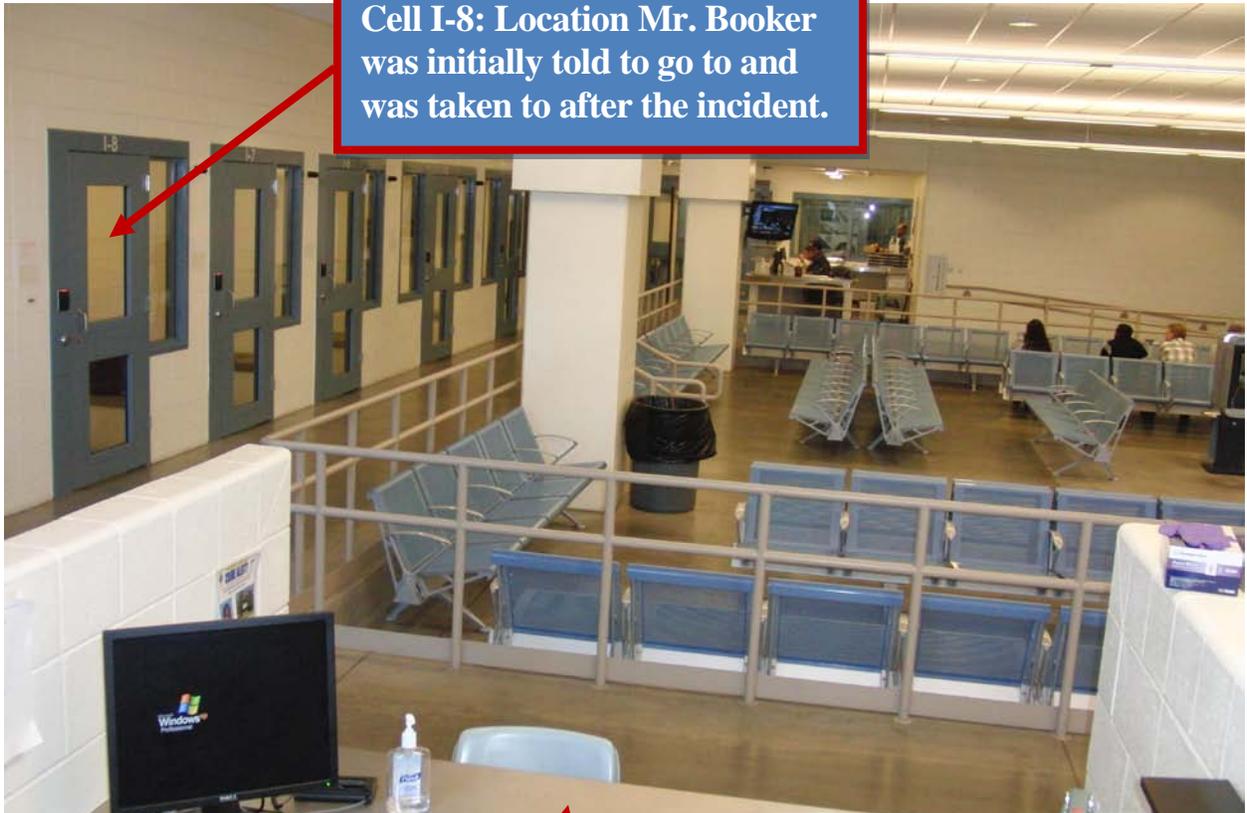
**Van Cise – Simonet Detention Center
Intake - Open Seating Area**



Cell I-8: Location Mr. Booker was initially told to go to and was taken to after the incident.

Location of the incident in the open-seating area.





Cell I-8: Location Mr. Booker was initially told to go to and was taken to after the incident.

View from desk of the female Intake Deputy who was processing Mr. Booker into the jail.

Location of the incident in the open-seating area.



Pertinent Colorado Statutes

The following are provisions of the Colorado Revised Statutes that are applicable to the issues presented by this in-custody death investigation.

Definitions

§ 18-1-501. Definitions

The following definitions are applicable to the determination of culpability requirements for offenses defined in this code:

- (1) "Act" means a bodily movement, and includes words and possession of property.
- (2) "Conduct" means an act or omission and its accompanying state of mind or, where relevant, a series of acts or omissions.
- (3) "Criminal negligence". A person acts with criminal negligence when, through a gross deviation from the standard of care that a reasonable person would exercise, he fails to perceive a substantial and unjustifiable risk that a result will occur or that a circumstance exists.
- (4) "Culpable mental state" means intentionally, or with intent, or knowingly, or willfully, or recklessly, or with criminal negligence, as these terms are defined in this section.
- (5) "Intentionally" or "with intent". All offenses defined in this code in which the mental culpability requirement is expressed as "intentionally" or "with intent" are declared to be specific intent offenses. A person acts "intentionally" or "with intent" when his conscious objective is to cause the specific result proscribed by the statute defining the offense. It is immaterial to the issue of specific intent whether or not the result actually occurred.
- (6) "Knowingly" or "willfully". All offenses defined in this code in which the mental culpability requirement is expressed as "knowingly" or "willfully" are declared to be general intent crimes. A person acts "knowingly" or "willfully" with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists. A person acts "knowingly" or "willfully", with respect to a result of his conduct, when he is aware that his conduct is practically certain to cause the result.
- (7) "Omission" means a failure to perform an act as to which a duty of performance is imposed by law.
- (8) "Recklessly". A person acts recklessly when he consciously disregards a substantial and unjustifiable risk that a result will occur or that a circumstance exists.

§ 18-1-901. **Definitions.** (d) "**Deadly physical force**" means force, the intended, natural, and probable consequence of which is to produce death, and which does, in fact, produce death.

Self Defense Statutes (Affirmative Defenses to Acts that would otherwise be criminal.)

§ 18-1-703. Use of physical force--special relationships

(1) The use of physical force upon another person which would otherwise constitute an offense is justifiable and not criminal under any of the following circumstances:

(b) A superintendent or other **authorized official of a jail**, prison, or correctional institution **may, in order to maintain order and discipline, use reasonable and appropriate physical force when and to the extent that he reasonably believes it necessary to maintain order and discipline**, but he may use deadly physical force only when he reasonably believes it necessary to prevent death or serious bodily injury.

[Note: By definition, "**Deadly Physical Force**" was **not used** in this case. The force used by the deputies in this incident was physical force not "... force *the intended, natural, and probable consequence of which is to produce death ...*"]

§ 18-1-704. Use of physical force in defense of a person

(1) Except as provided in subsections (2) and (3) of this section, 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.

§ 18-1-707. Use of physical force in making an arrest or in preventing an escape

(1) Except as provided in subsection (2) of this section, 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:

(a) To effect an arrest or to prevent the escape from custody of an arrested person unless he knows that the arrest is unauthorized; or

(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 or while preventing or attempting to prevent such an escape.

§ 18-8-803. Use of excessive force

(1) Subject to the provisions of section 18-1-707, a peace officer who uses excessive force in pursuance of such officer's law enforcement duties shall be subject to the criminal laws of this state to the same degree as any other citizen, including the provisions of part 1 of article 3 of this title

concerning homicide and related offenses and the provisions of part 2 of said article 3 concerning assaults.

(2) As used in this section, "excessive force" means physical force which exceeds the degree of physical force permitted pursuant to section 18-1-707. The use of excessive force shall be presumed when a peace officer continues to apply physical force in excess of the force permitted by section 18-1-707 to a person who has been rendered incapable of resisting arrest.

Statutes related to Homicide

§ 18-3-101. Definition of terms

As used in this part 1, unless the context otherwise requires:

(1) "Homicide" means the killing of a person by another.

(2) "Person", when referring to the victim of a homicide, means a human being who had been born and was alive at the time of the homicidal act.

(2.5) One in a "position of trust" includes, but is not limited to, any person who is a parent or acting in the place of a parent and charged with any of a parent's rights, duties, or responsibilities concerning a child, including a guardian or someone otherwise responsible for the general supervision of a child's welfare, or a person who is charged with any duty or responsibility for the health, education, welfare, or supervision of a child, including foster care, child care, family care, or institutional care, either independently or through another, no matter how brief, at the time of an unlawful act.

(3) The term "after deliberation" means not only intentionally but also that the decision to commit the act has been made after the exercise of reflection and judgment concerning the act. An act committed after deliberation is never one which has been committed in a hasty or impulsive manner.

§ 18-3-102. Murder in the first degree

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

(a) After deliberation and with the intent to cause the death of a person other than himself, he causes the death of that person or of another person; or

(b) Acting either alone or with one or more persons, he or she commits or attempts to commit arson, robbery, burglary, kidnapping, sexual assault as prohibited by > section 18-3-402, sexual assault in the first or second degree as prohibited by > section 18-3-402 or > 18-3-403 as those sections existed prior to July 1, 2000, or a class 3 felony for sexual assault on a child as provided in > section 18-3-405(2), or the crime of escape as provided in > section 18-8-208, and, in the course of or in furtherance of the crime that he or she is committing or attempting to commit, or of immediate flight therefrom, the death of a person, other than one of the participants, is caused by anyone; or

(c) By perjury or subornation of perjury he procures the conviction and execution of any innocent person; or

(d) Under circumstances evidencing an attitude of universal malice manifesting extreme indifference to the value of human life generally, he knowingly engages in conduct which creates a grave risk of death to a person, or persons, other than himself, and thereby causes the death of another; or

(e) He or she commits unlawful distribution, dispensation, or sale of a controlled substance to a person under the age of eighteen years on school grounds as provided in > section 18-18-407(2), and the death of such person is caused by the use of such controlled substance; or

(f) The person knowingly causes the death of a child who has not yet attained twelve years of age and the person committing the offense is one in a position of trust with respect to the victim.

(2) It is an affirmative defense to a charge of violating subsection (1)(b) of this section that the defendant:

(a) Was not the only participant in the underlying crime; and

(b) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and

(c) Was not armed with a deadly weapon; and

(d) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article, or substance; and

(e) Did not engage himself in or intend to engage in and had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious bodily injury; and

(f) Endeavored to disengage himself from the commission of the underlying crime or flight therefrom immediately upon having reasonable grounds to believe that another participant is armed with a deadly weapon, instrument, article, or substance, or intended to engage in conduct likely to result in death or serious bodily injury.

(3) Murder in the first degree is a class 1 felony.

(4) The statutory privilege between patient and physician and between husband and wife shall not be available for excluding or refusing testimony in any prosecution for the crime of murder in the first degree as described in paragraph (f) of subsection (1) of this section.

§ 18-3-103. Murder in the second degree

(1) A person commits the crime of murder in the second degree if the person knowingly causes the death of a person.

(2) Diminished responsibility due to self-induced intoxication is not a defense to murder in the second degree.

(2.5) Deleted by Laws 1996, H.B.96-1087, § 12, eff. July 1, 1996.

(3)(a) Except as otherwise provided in paragraph (b) of this subsection (3), murder in the second degree is a class 2 felony.

(b) Notwithstanding the provisions of paragraph (a) of this subsection (3), murder in the second degree is a class 3 felony where the act causing the death was performed upon a sudden heat of passion, caused by a serious and highly provoking act of the intended victim, affecting the defendant sufficiently to excite an irresistible passion in a reasonable person; but, if between the provocation and the killing there is an interval sufficient for the voice of reason and humanity to be heard, the killing is a class 2 felony.

(4) A defendant convicted pursuant to subsection (1) of this section shall be sentenced by the court in accordance with the provisions of > section 18-1.3-406.

§ 18-3-104. Manslaughter

(1) A person commits the crime of manslaughter if:

(a) Such person recklessly causes the death of another person; or

(b) Such person intentionally causes or aids another person to commit suicide.

(c) Deleted by Laws 1996, H.B.96-1087, § 13, eff. July 1, 1996.

(2) Manslaughter is a class 4 felony.

(3) This section shall not apply to a person, including a proxy decision-maker as such person is described in > section 15-18.5-103, C.R.S., who complies with any advance medical directive in accordance with the provisions of title 15, C.R.S., including a medical durable power of attorney, a living will, or a cardiopulmonary resuscitation (CPR) directive.

(4)(a) This section shall not apply to a medical caregiver with prescriptive authority or authority to administer medication who prescribes or administers medication for palliative care to a terminally ill patient with the consent of the terminally ill patient or his or her agent.

(b) For purposes of this subsection (4):

(I) "Agent" means a person appointed to represent the interests of the terminally ill patient by a medical power of attorney, power of attorney, health care proxy, or any other similar statutory or regular procedure used for designation of such person.

(II) "Medical caregiver" means a physician, registered nurse, nurse practitioner, or physician assistant licensed by this state.

(III) "Palliative care" means medical care and treatment provided by a licensed medical caregiver to a patient with an advanced chronic or terminal illness whose condition may not be responsive to curative treatment and who is, therefore, receiving treatment that relieves pain and suffering and supports the best possible quality of his or her life.

§ 18-3-105. Criminally negligent homicide

Any person who causes the death of another person by conduct amounting to criminal negligence commits criminally negligent homicide which is a class 5 felony.