



July 24, 2020

Chief Clint Nichols
Commerce City Police Department
7887 E. 60th Avenue
Commerce City, CO 80022

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

Director Dean Williams
Colorado Department of Corrections
1250 Academy Park Loop
Colorado Springs, CO 80910

Re: The investigation into the officer-involved shooting of Vincent Pena, dob 11/29/1981, occurring on May 6, 2020

Dear Chiefs and Executive Director:

The investigation and legal analysis of the officer-involved shooting of Vincent Pena is complete. The 17th Judicial District Critical Incident Investigation Team (CIIT) conducted the investigation into this matter, led by Westminster Police Detective Reggie English and Adams County Sheriff's Detective Marilyn Rush-Lara. The CIIT is comprised of detectives and crime scene technicians from multiple police agencies within the 17th Judicial District, as well as investigators from the Office of the District Attorney for the 17th Judicial District. The individuals working for the CIIT for this particular investigation are employed by agencies other than the three identified as being involved in this incident. The factual findings of the investigation were presented to our office on June 24, 2020. The CIIT presented police reports, videos and transcripts of the interviews of witnesses, along with photographs and diagrams of the crime scene investigation. The Office of the District Attorney concludes that the investigation is thorough and complete.

The District Attorney's review is limited to determining whether criminal charges should be filed against the involved officers. The standard of proof for filing a criminal case is whether there is sufficient evidence to prove any criminal violations beyond a reasonable doubt. In this instance, the prosecution also has the burden to prove beyond a reasonable doubt that the use of

force was not justified under Colorado law. This review does not evaluate the appropriateness of the actions of the involved officers, whether department policies or procedures were followed, or whether the policies, practices, or training at the involved agency were sufficient. That evaluation is left to the agency that employs the involved officers.

Based on the evidence presented and the applicable Colorado law, there is no reasonable likelihood of success of proving any crimes beyond a reasonable doubt to a jury. Therefore, no criminal charges will be filed against the law enforcement officers involved in this incident.

Overview of the Incident

On May 1, 2020, Denver police officers conducted an investigation into a shooting within the City and County of Denver. The victim of the shooting identified Vincent Pena as the suspect. Subsequent investigation led investigators to file criminal charges against Mr. Pena for criminal attempt to commit murder in the first degree, a class 2 felony, and possession of a weapon by a previous offender, a class 5 felony. An arrest warrant was activated on May 2, 2020.

On May 4, 2020, fugitive units for the Denver Police Department and Department of Corrections began searching for Mr. Pena. Denver Police prepared a wanted bulletin for Mr. Pena. The bulletin included photographs of Mr. Pena and his associates, as well as details of his criminal history and the crimes for which he was wanted. This information was distributed to law enforcement in an effort to locate and apprehend Mr. Pena. On May 6, 2020, with the aid of cell site location information from a search warrant issued for Mr. Pena's telephone, investigators were able to identify his phone near the location of 7180 Poplar Street in the City of Commerce City. Investigators responded to the location and conducted visual surveillance. The DOC Fugitive Unit identified a former arrestee in unit #6 of that particular location. While conducting visual surveillance, a male identified as Vincent Pena came out of unit #6 and appeared to work under the hood of a maroon Cadillac Escalade.

Investigators with the fugitive units shared their intelligence with the Commerce City Police Department and the agencies worked together to develop a plan to arrest Mr. Pena. A marked Commerce City patrol vehicle pulled up and parked near the Cadillac where Mr. Pena stood. Two uniformed Commerce City patrol officers stepped out and announced their presence. Mr. Pena fled on foot, running away from the officers. Mr. Pena drew a firearm with his right hand and pointed it over his left shoulder directly at Commerce City Police Officer Andrew Hadley. Mr. Pena fired the gun at Officer Hadley and Officer Hadley returned fire as Mr. Pena continued to run away. Within one second, having observed Mr. Pena's actions, Department of Corrections Parole Officer Mark Kuchyt and Denver Police Detective Matthew Baughman fired their weapons at Mr. Pena, striking and killing him.

Witness Interviews

Investigators from various law enforcement agencies including the Westminster Police Department, Adams County Sheriff's Office, Thornton Police Department, and the Broomfield

Police Department conducted interviews of the necessary witnesses. The following are summaries of the interviews pertinent to this review.

Officer Andrew Hadley: Andrew Hadley is a patrol officer with the Commerce City Police Department. Westminster Police Detective Reggie English and Adams County Sheriff's Detective Marilyn Rush-Lara interviewed him hours after the incident. Officer Hadley's attorney was present on speakerphone during the interview.

On May 6, 2020, Officer Hadley was working a uniformed patrol assignment. He was called out to a briefing regarding the search for a suspect of an arrest warrant in Commerce City. He met with officers from the Denver Police Department and saw a bulletin that identified the suspect as Mr. Pena, along with the crimes for which he was wanted, including attempted first degree murder. Undercover officers reported that they identified Mr. Pena working under the hood of a Cadillac Escalade parked in the parking lot of an apartment complex located at 7180 Poplar Street. During the briefing, the officers developed a plan that involved Officer Hadley and Officer Jarvis, another uniformed Commerce City Police Officer, attempting to arrest Mr. Pena. Following the arrest, the other law enforcement officers in the area would move in to assist.

Officer Hadley drove his marked patrol vehicle into the parking lot with Officer Jarvis riding in the passenger side. Officer Hadley pulled in the parking lot and parked near the Cadillac Escalade, which was backed into a parking stall. Officer Jarvis was first to get out of the vehicle. He yelled "Commerce City Police!" as he approached the person who appeared to match Mr. Pena's description. Mr. Pena ran around the back of the Cadillac, away from Officer Jarvis. Officer Hadley saw a handgun in Mr. Pena's right hand as he ran away from the officers. Officer Hadley yelled, "Gun! Gun! Gun!" Mr. Pena turned back toward Officer Hadley and the two made eye contact. Mr. Pena drew a handgun out across his body, pointing it at Officer Hadley. Mr. Pena fired his gun multiple times at Officer Hadley from a distance of approximately fifteen to twenty feet. Believing Mr. Pena was shooting at him, Officer Hadley was scared for his life. He aimed his firearm at Mr. Pena and returned fire. Mr. Pena continued to run away. Officer Hadley thought he fired three times but did not know if he struck Mr. Pena. He stopped shooting because he no longer had a good line of sight on Mr. Pena. In addition, he heard shots fired from the officers positioned in the approximate area Mr. Pena appeared to be running. Officer Hadley saw two other officers come from the other direction and was concerned of a potential crossfire situation if he continued to fire rounds at Mr. Pena.

Mr. Pena fell to the ground but still held the gun in his hand. Other officers gave Mr. Pena repeated commands to drop the gun. Officer Hadley approached Mr. Pena, handcuffed him, and assessed his injuries while another officer secured his handgun. Officer Hadley was directed to another area while other officers tended to Mr. Pena.

Officer Hadley was equipped with a body worn camera. He believed he had it activated during the incident. He had not observed any video recording from the body worn camera at the time of his interview.

Officer Mark Kuchyt: Mark Kuchyt is employed as an officer with the Colorado Department of Corrections, Division of Adult Parole Fugitive Apprehension Unit. Westminster Police Detective English and Adams County Sheriff's Detective Rush-Lara interviewed him hours after the incident in the presence of his attorney.

On May 5, 2020, Officer Kuchyt assisted with surveillance on a suspect known as Vincent Pena. Officer Kuchyt received a wanted poster that included a photograph of Mr. Pena and other details related to his criminal history. Mr. Pena had active warrants for a parole violation as well as for new criminal offenses of attempted murder and possession of a weapon by a previous offender.

The surveillance of Mr. Pena continued the following day at a location near the intersection of 72nd Avenue and Poplar Street. Officer Kuchyt received information regarding the location of Mr. Pena and positioned himself in an undercover van in the parking lot of an apartment complex. He observed Mr. Pena walk out to a Cadillac Escalade that was parked backed in a parking space. He heard over the radio that fellow officers were contacting Commerce City Police Department to develop an arrest plan. Officer Kuchyt put on his tactical vest to identify himself as a police officer and moved his van to the opposite end of the parking lot from where the marked Commerce City police vehicle approached.

Officer Kuchyt heard someone report over the radio that Mr. Pena was running east. Realizing that Mr. Pena was heading toward his direction, Officer Kuchyt got out of his car and took cover behind another vehicle. Officer Kuchyt drew his weapon because he feared Mr. Pena might be armed given his violent criminal history. He heard gunshots and saw Mr. Pena holding a black handgun, shooting in the direction of the Commerce City police officers. Mr. Pena ran toward Officer Kuchyt with the handgun in his right hand. Fearing for the Commerce City officers' lives, Officer Kuchyt aimed his weapon at Mr. Pena and fired an estimated three or four times from a distance of approximately twenty-five feet. Mr. Pena fell to the ground. Officer Kuchyt held Mr. Pena at gunpoint while other officers approached and removed his handgun.

Officer Matthew Baughman: Matthew Baughman is employed by the Denver Police Department, currently assigned to the Fugitive Apprehension Unit. Westminster Detective English and Adams County Sheriff's Detective Rush-Lara interviewed him shortly after the incident with his attorney present.

Officer Baughman is assigned to a team of investigators who attempt to locate high-profile fugitives wanted for criminal violations. The team receives information regarding the individual sought and works with other law enforcement agencies in an effort to safely apprehend the person. On May 5, 2020, Officer Baughman received a bulletin from a fellow detective that included information regarding Vincent Pena. The information included photographs of Mr. Pena, along with details that he was wanted for the crimes of attempted first degree murder and possession of a weapon by a previous offender. Mr. Pena also had a warrant for a parole violation. The information included references to Mr. Pena's gang association. Based on the information in the report, Officer Baughman believed that Mr. Pena was a dangerous person willing to use violence to evade police contact.

The effort to locate Mr. Pena continued to May 6, 2020, when investigators with the DOC Fugitive Unit received a search warrant for cell phone site location information. The information revealed a cell phone associated with Mr. Pena in the area of 72nd Avenue and Quebec Street in the City of Commerce City. The investigators focused on an apartment known to be the residence of a parolee associated with Mr. Pena. Officers conducting surveillance in the area positively identified Mr. Pena going back and forth between an apartment and a vehicle parked in the parking lot. The investigators involved in the surveillance coordinated with the Commerce City Police Department to set up a perimeter in the area in an effort to contact Mr. Pena.

Officer Baughman put on his tactical gear to identify himself as a police officer and took a position of cover near the courtyard area of the apartment complex. He saw other officers and civilians in the immediate area. He heard the marked Commerce City patrol vehicles enter the parking lot. Almost immediately after the uniformed officers appeared, Officer Baughman heard sounds of rapid gunfire coming from the area. He believed that there was a gunfight involving multiple firearms.

Officer Baughman saw Mr. Pena running toward him. Mr. Pena held a black handgun over his left shoulder as he ran. He was looking backward, firing the handgun at the officers behind him. Officer Baughman had his handgun drawn. He perceived Mr. Pena to be a threat to the other officers and to himself, as well as any other person in the area. He focused his gun on Mr. Pena and fired it multiple times. He estimated that Mr. Pena was twenty to twenty-five feet from him at the time he fired his weapon. Mr. Pena fell to the ground. Officer Baughman remained concerned that Mr. Pena still had the gun and could fire upon the officers standing nearby. He commanded Mr. Pena to show his hands. Another detective held Mr. Pena at gunpoint while Officer Baughman kicked the handgun away and placed handcuffs on Mr. Pena. The officers called for an ambulance and provided emergency medical care to Mr. Pena.

Officer Devin Jarvis: Devin Jarvis works as a uniformed patrol officer for the Commerce City Police Department. Thornton Police Detective Shaun Coleman and Adams County Sheriff's Detective Cole Cockrum interviewed him hours after the incident.

On May 6, 2020, Officer Jarvis partnered with Officer Hadley in a marked patrol car. Both were wearing standard patrol uniforms. Officer Jarvis explained his assignment as assisting Denver and DOC fugitive apprehension teams to arrest a wanted suspect identified as Mr. Pena in the area of 7180 Poplar Street. He rode in the passenger seat of the patrol vehicle as Officer Hadley drove and parked near Mr. Pena's vehicle. Officer Jarvis got out, identified himself as police, and gave verbal commands to Mr. Pena. Mr. Pena ran away. Officer Jarvis thought he saw a gun in Mr. Pena's hand.

Officer Jarvis heard shots fired, but could not see Mr. Pena. He saw Officer Hadley point his weapon toward Mr. Pena and return fire. Officer Jarvis did not fire his weapon because he did not think he could safely shoot with the apartment complex in the backdrop.

Officer Jarvis was equipped with a body worn camera that he activated prior to the incident. At the time of his interview, he had not yet observed any video recording from the body worn camera.

Miry Galvin: Miry Galvin resides at 7180 Poplar, unit #4. On May 6, 2020, Ms. Galvin was outside in the parking lot when she saw a marked police vehicle enter the parking lot and park. She saw two uniformed police officers get out of the vehicle and tell a Hispanic male near a burgundy SUV, "Put your hands up!" The Hispanic male pulled a handgun from the back of his pants and pointed it at the officers. Ms. Galvin turned and ran when she saw the male draw the handgun. She heard three to five gunshots as she ran away.

Other Witnesses: Interviews of other law enforcement officers and neighborhood witnesses did not reveal any additional detail of the shooting incident beyond what is summarized herein.

Scene Investigation

Criminalists from the Westminster Police Department, Broomfield Police Department, and the Adams County Sheriff's Office gathered evidence and processed the scene. The scene was a parking lot of an apartment complex located at 7180 Poplar Street. The apartment building spanned east and west, with eighteen separate units. The front doors to each unit faced north. A sidewalk spanned east and west along the length of the building on the north side. A parking lot existed to the north of the building. The parking spaces were situated so that a vehicle would park facing north or south. There were parking spaces on the north side of the lot and south side of the lot, leaving an open lane for traffic down the center. A number of cars were parked in the lot at the time of the incident.

A maroon Cadillac Escalade was backed into a parking space in front of apartment #6. The front of the Escalade faced north. The doors were open and hood was up. A marked Commerce City patrol vehicle was parked diagonally in the open lane, approximately twenty feet to the west of the Escalade, with the front of the vehicle facing southeast. This vehicle was identified as Officer Andrew Hadley's patrol vehicle. Criminalists found four 9 millimeter shell casings in the open driving lane of the parking lot, just east of the patrol vehicle. These casings were consistent with those fired from Officer Hadley's weapon.

A blue Dodge Grand Caravan was parked at the east end of the parking lot. This vehicle was identified as the undercover van associated with DOC Fugitive Officer Mark Kuchyt. There were eight .40 caliber bullet casings recovered in the open driving lane in the lot. These casings were consistent as being fired from Officer Kuchyt's weapon.

Near the southeast corner of the parking lot, in the grass and sidewalk area near the apartment building, criminalists found seven 9 millimeter casings. These casings were believed to be from Officer Baughman's weapon.

The criminalists found six 9 millimeter shell casings spanning the sidewalk and grass area to the north of the apartment building. These casings were believed to be associated with

Mr. Pena's weapon, leading to the conclusion that Mr. Pena fired his weapon six times. A Glock model 17, 9 millimeter semi-automatic handgun lay in the grass near Mr. Pena's final resting place. The magazine was situated in the handgun at the time of examination. The chamber of the weapon contained one live round. The magazine held seven live rounds. At full capacity, the magazine holds a total of seventeen rounds.

There were a number of bullet fragments from discharged bullets located within the scene. In addition, criminalists found defects in one apartment window and several vehicles parked in the parking lot. These defects were the result of bullets fired from both Mr. Pena and the officers involved in this incident.

Criminalist Brenda Harris conducted the round accountability for the involved officers. Officer Hadley carried a Glock, model G45 9 millimeter semi-automatic handgun. The magazine in the weapon holds seventeen rounds and is equipped with a two round extension, thus holding a maximum capacity of nineteen rounds. Officer Hadley reportedly carried the weapon with the magazine at full capacity and one live round in the chamber, for a total of twenty rounds in his weapon. At the time of examination, there were sixteen live 9mm rounds in the magazine and one in the chamber of the weapon, for a total of seventeen live rounds. In addition, the criminalists recovered four 9mm shell casings in the vicinity of where Officer Hadley fired his weapon, consistent with the conclusion that Officer Hadley's weapon was discharged four times and contained a total of twenty-one rounds. Given this fact, criminalists reloaded the magazine and found it would hold a total of twenty bullets, thus supporting a conclusion that the magazine was loaded with one additional round beyond what Officer Hadley believed it contained.

Officer Baughman carries a Springfield model XDM 9mm semi-automatic handgun. At the time of examination, the weapon contained one live round in the chamber and the magazine held a full capacity of seventeen rounds. Officer Baughman reported that he conducted a magazine exchange immediately after he fired his weapon. The first magazine that he discharged contained ten live rounds, leading to the conclusion that Officer Baughman fired seven rounds from the first magazine. This finding is consistent with the seven shell casings located in the vicinity of where he fired his weapon.

Officer Kuchyt carries a Glock model 23 .40 caliber semi-automatic handgun. At full capacity, his weapon contains fourteen rounds. Upon examination after the incident, the weapon held six total rounds, supporting the conclusion that Officer Kuchyt fired eight times. This conclusion is also consistent with the eight fired .40 caliber casings recovered from the parking lot.

Body Worn Cameras

Commerce City Police Officers Andrew Hadley and Devin Jarvis were the only officers equipped with body worn cameras. These cameras are affixed to the breast area for each officer. The video from these cameras was downloaded and reviewed as part of the investigation.

The recording downloaded from Officer Hadley's body camera is a total of twenty minutes fifty-five seconds. The recording begins when Officer Hadley is driving the patrol vehicle to the identified apartment complex. Once the patrol car arrives, Mr. Pena appears to retreat behind the maroon Cadillac Escalade. Officer Jarvis can be heard announcing "Commerce City Police! Let me see your hands!" Officer Jarvis repeats the command, "Let me see your hands!" Within seconds, Mr. Pena emerges from the rear of the vehicle holding a handgun. Photograph 1 depicts a snapshot image taken from the video recording of Officer Hadley's body worn camera. The red circle indicates the handgun.



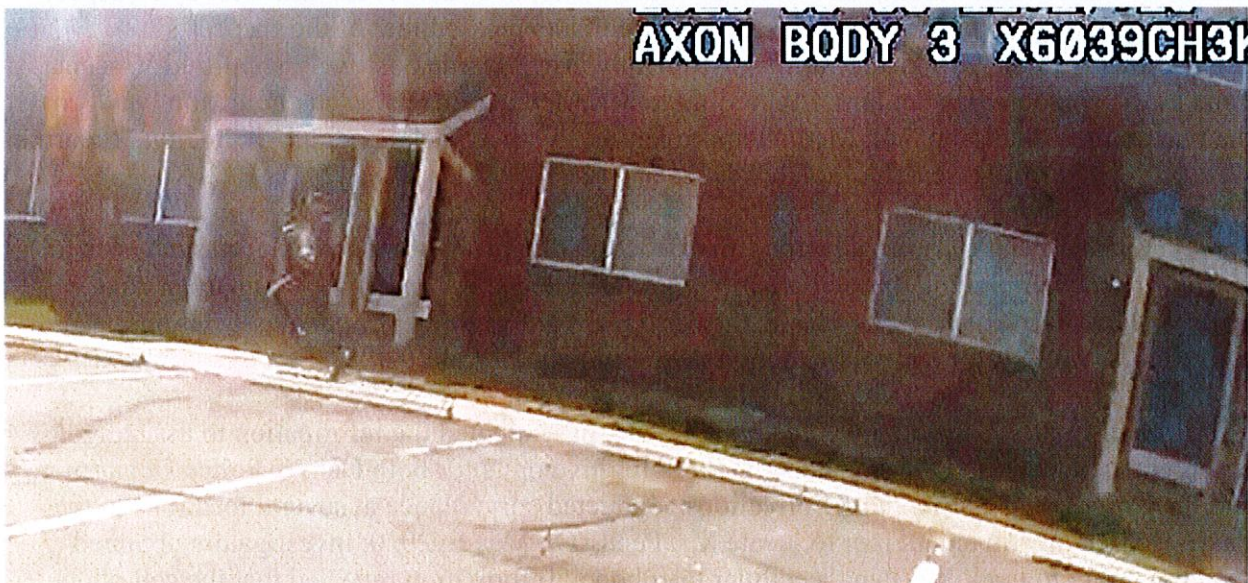
Photograph 1

From this position, Mr. Pena ran eastward down the sidewalk. Officer Hadley pursued him, running parallel in the parking lot. Officer Hadley can be heard saying, "He's running east!" As Mr. Pena continued to run, he turned back at Officer Hadley and fired his weapon. Officer Hadley yells, "Gun!" and returns fire. Photograph 2 depicts a snapshot image from the video recording of Officer Hadley's body worn camera where Mr. Pena turns back and fires his weapon.



Photograph 2

Photograph 3 is another snapshot taken from the video recording of Officer Hadley's body worn camera. This photograph depicts another still frame of Mr. Pena firing his weapon at Officer Hadley. The photograph is zoomed in from the original image.



Photograph 3

The video recording of Officer Hadley chasing Mr. Pena and the two exchanging gunfire continues for a few seconds before Officer Hadley takes cover behind a parked car on the north side of the parking lot. The audio of the recording captures additional shots fired by the officers positioned to the east end of the parking lot. The additional shots come approximately one

second following the last exchange of gunfire between Mr. Pena and Officer Hadley in the parking lot depicted in Photograph 3. The gunfire involving the other officers is not captured on video due to the number of vehicles obstructing the view to the east side of the parking lot. The moments following show Officer Hadley running up to the location of the other officers. From that vantage point, the recording depicts Mr. Pena lying on the sidewalk as officers hold him at gunpoint, commanding him to show his hands. Within the next thirty seconds, Officer Hadley assists with securing the gun from Mr. Pena and getting him medical assistance.

Officer Jarvis's body worn camera recording is twenty-seven minutes and thirty-eight seconds. The recording begins while Officer Jarvis is riding in the front passenger seat of the patrol vehicle. As the officers pull up to the apartment complex and park, Officer Jarvis gets out of the vehicle and shouts "Commerce City Police! Let me see your hands!" Mr. Pena is seen trying to conceal himself at the rear of the maroon Cadillac while the officers shout, "Let me see your hands!" The recording next depicts Officer Hadley running down the open driving lane of the parking lot. Seconds later, multiple shots can be heard, but the video does not capture the actual shooting. Officer Jarvis takes a cover position near the north side of the parking lot while other officers can be heard shouting at Mr. Pena to show his hands.

Background Investigation

During the evening hours of May 1, 2020, Denver Police Officers were dispatched to 4120 N. Adams Street in Denver, Colorado on a report of gunshots. Officers located suspected blood and 9 millimeter shell casings outside the residence. Subsequently, a male identified as Alexander Medina, appeared at the emergency room of a hospital with injuries consistent with gunshot wounds. Mr. Medina disclosed that he was shot at 4120 N. Adams Street by a suspect he initially identified as "Leonard Pena." Mr. Medina expressed fear of the suspect's connections with the "Mexican Cartel." Ultimately, Mr. Medina positively identified Vincent Pena as the person who shot him. According to Mr. Medina, there was an altercation between the two and Mr. Pena shot Mr. Medina multiple times with a black handgun. Numerous firearms were recovered from a search of the residence at 4120 N. Adams Street.

Vincent Pena's criminal history revealed arrests for robbery, aggravated assault with a weapon, vehicular eluding, parole violations, escape, dangerous drugs, resisting arrest, and aggravated motor vehicle theft. His history also reflected a number of gang associations. An active arrest warrant for a parole violation issued in February of 2020.

Investigators created a wanted bulletin and disseminated the information to assisting law enforcement agencies. On May 4 and 5, 2020, fugitive units for both Denver Police Department and the Colorado Department of Corrections conducted surveillance at several locations in the metro Denver area in an attempt to locate Mr. Pena. On May 6, 2020, investigators obtained a search warrant to track Mr. Pena's cellular telephone. Information revealed that the cell phone was located at 7180 N Poplar Street. Investigators further discovered that a parolee was arrested at that location in apartment #6 in early April. During the surveillance activity on the morning of May 6, 2020, the parolee and Mr. Pena were both positively identified as having come out of apartment #6 and accessing a maroon Cadillac Escalade parked directly in front of apartment #6.

Later investigation by the National Integrated Ballistic Information Network (NIBIN) Database revealed that the shell casings collected from the attempted murder were associated with the 9 millimeter shell casings discharged by the gun Mr. Pena possessed in this officer involved incident at 7180 Poplar Street.

Medical Examination Analysis

On May 8, 2020, Dr. Dawn Holmes conducted an autopsy of the male identified as Vincent Pena, date of birth, 11/29/1981. The examination revealed a total of four gunshot wounds. Two of the gunshot wounds were to the right shoulder area. One projectile penetrated the right rear shoulder and was recovered. The wound path was back to front, right to left, and slightly downward. This wound involved the right lung and spine. Another projectile perforated the right shoulder and exited the body. This wound path was front to back, right to left, and downward. This wound involved the right lung and kidney. The trajectory of this wound was consistent with the decedent's right arm being raised and extended at the time of injury. Either of these wounds could have been fatal. A third projectile penetrated the right thigh and was recovered in the large intestine. This wound path was front to back, right to left, and upward. Additionally, Dr. Holmes noted a bullet that grazed the left chest area. None of the wounds presented evidence of soot or stippling indicative of close-range firing. As such, Dr. Holmes described each of the wounds as "indeterminate range."

The decedent's toxicology report revealed positive levels of amphetamine, methamphetamine, and alcohol. Dr. Holmes determined the cause of death to be multiple gunshot wounds; the manner of death to be homicide.

Legal Analysis

As was previously noted, this review is limited to a determination of whether criminal charges should be filed against the involved officers. The decision to file criminal charges involves an assessment of all known facts and circumstances as well as an evaluation of whether there is a reasonable likelihood of conviction at trial under the applicable law. Criminal liability is established when the evidence is sufficient to prove all of the elements of a crime beyond a reasonable doubt. In addition to proving the elements of a crime, the prosecution must also disprove any statutorily recognized justification or defense beyond a reasonable doubt. Consequently, in order to file a criminal charge, the District Attorney's Office must prove beyond a reasonable doubt that any of the involved law enforcement officer's actions were not justified under the circumstances surrounding this incident and the applicable Colorado law.

In this case, there is no question that Officers Hadley, Kuchyt, and Baughman fired their weapons at Vincent Pena. There is also no dispute that Mr. Pena died as a result of gunshot wounds. Given the nature of the gunshot wound injuries, it is unclear which officer(s) actually caused the death of Mr. Pena. However, for purposes of this legal analysis, it is assumed that each of the three involved officers contributed to the cause of death.

Under Colorado law, a law enforcement officer may use an amount of force that is necessary and reasonable to effect an arrest. Additionally, under Colorado law, police officers,

like any other individual, have the right to defend themselves or others from the use or imminent use of unlawful physical force. The right to self-defense is an affirmative defense, meaning that the prosecution must prove beyond a reasonable doubt that the use of force was not justified. The affirmative defense applicable to the officers' use of force at the time of this incident is found under §18-1-707, C.R.S. (2019). The pertinent language reads as follows:

(1) A peace officer is justified in using reasonable and appropriate physical force upon another person when and to the extent that he reasonably believes it necessary:

...

(b) To defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force while effectuating or attempting to effect such an arrest or while preventing or attempting to prevent such an escape.

(2) A peace officer is justified in using deadly physical force upon another person for a purpose specified in subsection (1) of this section only when he reasonably believes that it is necessary:

(a) To defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force....

In *Graham v. Connor*, the United States Supreme Court set forth a “reasonableness standard” in evaluating the use of force by a police officer. Under this standard, the inquiry into an officer’s use of force must (1) take into consideration the totality of the circumstances, including factors such as the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether the suspect is actively resisting arrest or attempting to evade arrest by flight; and (2) be judged from the perspective of an objectively reasonable officer on the scene “in light of the facts and circumstances confronting them, without regard to [his] underlying intent or motivation.” Further, the United States Supreme Court noted, “[t]he 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.”

Here, the involved police officers were engaged in the course of their duties to arrest Mr. Pena, who was wanted for the crime of attempted murder and parole violations. The background investigation of Mr. Pena, along with his past criminal history and gang affiliations, supported the officers’ belief that he was armed and dangerous. The officers tried to safely contact Mr. Pena and take him into custody on his warrants. However, when confronted by uniformed officers, Mr. Pena concealed himself and tried to flee from the officers. Mr. Pena ignored the officers commands to stop and show his hands. As he ran away from the officers, Mr. Pena possessed a handgun in his right hand. The sight of Mr. Pena trying to flee arrest while possessing a deadly weapon supports a conclusion that the officers were concerned for their safety and the safety of the other civilians in the area.

Officer Hadley pursued Mr. Pena on foot. Mr. Pena drew the handgun across his body and pointed it at Officer Hadley. Mr. Pena fired his handgun at Officer Hadley. Officer Hadley explained that he saw Mr. Pena shooting at him. Officer Hadley further stated that he was scared for his life when he returned fire at Mr. Pena.

Both Officer Kuchyt and Officer Baughman heard the gunfire and observed Mr. Pena shooting at Officer Hadley. Officer Kuchyt stated that he aimed his weapon and fired at Mr. Pena because he feared for the lives of the Commerce City Police officers. Likewise, Officer Baughman stated that he fired his gun at Mr. Pena because he perceived Mr. Pena to present an immediate threat to the other officers, himself, and any other person in the area.

The evidence corroborates the officers' statements that they perceived Mr. Pena to present an immediate threat. The video recording from Officer Hadley's body worn camera shows Mr. Pena hiding from the uniformed officers as soon as they get out of the patrol car. While these officers chased Mr. Pena, he drew his weapon over his shoulder and fired it in the direction of Officer Hadley. Officer Hadley returned fire immediately, followed by Officer Kuchyt and Officer Baughman a second later. Criminalists located six 9 millimeter shell casings scattered along the sidewalk where Mr. Pena ran, consistent with Mr. Pena firing his weapon at Officer Hadley six times. As such, the evidence conclusively demonstrates that Mr. Pena knew he was being pursued by police officers engaged in an effort to make his arrest. The evidence further supports a conclusion that Mr. Pena used deadly physical force against the officers in attempting to avoid his arrest.

Given the totality of the circumstances, there is no disputing the officers' reasonable belief that Mr. Pena was armed with a deadly weapon and presented an imminent threat to the officers. Further, there is no evidence to dispute that the officers used a reasonable amount of force against this threat. Mr. Pena's action of shooting multiple rounds at Officer Hadley justified the use of deadly physical force necessary for Officer Hadley to defend himself, and Officers Kuchyt and Baughman to use deadly physical force to defend their fellow officer. Under these circumstances, the prosecution cannot prove that the involved officers were not justified in using reasonable force to protect themselves and the other officers from what they reasonably perceived to be the use of deadly physical force under §18-1-707, C.R.S. (2019).

Conclusion

Therefore, applying the facts of this incident to the applicable law, the evidence does not support the filing of any criminal charges against Officer Andrew Hadley, Officer Mark Kuchyt, or Officer Matthew Baughman for firing their weapons at Mr. Pena and causing his death. Please feel free to contact me if you have any questions or if you believe that further investigation is warranted.

Respectfully,

A handwritten signature in blue ink, appearing to read "D. Young", is written over the printed name.

Dave Young
District Attorney

