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August 15, 2017

Clinton Nichols  
Interim Chief of Police  
Commerce City Police Department  
7887 E 60th Avenue  
Commerce City, Colorado 80022

Re: Investigation of the shooting of Isaac Lesperance-Torres 11/10/1972, DPD #454993, on Feb. 21, 2017 in which Commerce City Police Department Officers David Adams, Badge #4233, and Jonathan Brascetta, Badge #4138, fired shots on Isaac Lesperance-Torres at 7203 E. 47<sup>th</sup> Ave., Denver, Colorado.

Dear Chief Nichols:

The investigation and legal analysis of the shooting and wounding of Isaac Lesperance-Torres during which shots were fired by Commerce City Police Officers David Adams and Jonathan Brascetta, has been completed. I conclude that under applicable Colorado law no criminal charges are fileable against Officer Adams or Officer Brascetta. My decision, based on criminal law standards, does not limit administrative action by the Commerce City Police Department, in which non-criminal issues can be reviewed or civil actions where less-stringent laws, rules and legal levels of proof apply.

#### **STATEMENT OF FACTS**

In the early morning hours of February 21, 2017, Commerce Police Department officers responded to the Romantix store at 4810 Pontiac Street, Commerce City, regarding a report of a suspicious vehicle in the parking lot. Prior to attempting contact with the suspicious vehicle, the officers learned that the vehicle was registered to Isaac Lesperance-Torres and that he had an active warrant in Adams County for attempted first degree murder stemming from a home invasion armed robbery in which he shot an individual during the offense. At the time, Lesperance-Torres also had an active warrant for his arrest for a bond revocation on a narcotics case. A photo of Lesperance-Torres was obtained and distributed to officers on scene.

At approximately 5:20 a.m., while several officers were maintaining surveillance of the building, a male matching Lesperance-Torres' description exited the building and began running south away from the store. Officer Adams, who was en route to the store, activated his emergency lights and drove in the direction that other officers had indicated Lesperance-Torres was heading. Several Commerce City police officers set up a perimeter around that general location.

Ultimately, Lesperance-Torres jumped a fence into the parking lot of a trucking company at 7203 E. 47<sup>th</sup> Avenue and into the City and County of Denver, Colorado. He ran underneath a metal staircase next to a dumpster that was surrounded on two sides by walls. Officer John Wakinshaw, who had been chasing Lesperance-Torres, went around the fence and observed him hiding under that staircase.

Officer Sergio Castillo and Sergeant Jeremy Jenkins maintained a position near the west side of the staircase. Officer Wakinshaw originally went to the east side of the staircase but left that position to try to locate a bean bag shotgun from one of the officers' patrol cars, but was unable to locate one.



View from the west side of the staircase, looking toward the staircase under which Lesperance-Torres was hiding. Officer Wakinshaw, Officer Castillo, Sergeant McCoy, and Sergeant Jenkins were positioned near this location.

Officer Adams and Officer Brascetta also went to the east side of the staircase and maintained a position there behind the wall on that side of the staircase. Officer Adams took the high position, standing over Officer Brascetta, who took the low position. They were about 5-6 feet away from where Lesperance-Torres was hiding under the staircase, and they were only able to see his foot, which was protruding from under the solid metal staircase.



View from the east side of the staircase under which Lesperance-Torres was hiding.

All of the officers were dressed in the uniform of the Commerce City Police Department. The officers repeatedly yelled to Lesperance-Torres that he was under arrest. Lesperance-Torres was ordered multiple times to come out from under the staircase, but he did not comply. Officer Castillo advised Lesperance-Torres that they would be required to use their Tasers if he did not come out. Another officer told Lesperance-Torres that there was a canine unit on its way and he should come out.

Lesperance-Torres refused to come out from under the staircase, and told the police, "I'm not coming out, you guys need to leave me alone." When Lesperance-Torres stated "well, I'll just kill myself," Officer Castillo observed Lesperance-Torres move his left hand and saw that he had a silver firearm in his hand. Officer Castillo yelled, "he has a gun," then deployed his Taser gun at Lesperance-Torres. The Taser gun was not effective. As Officer Castillo was putting the taser on the ground, he heard 6 to 7 gunshots.

Officer Jenkins was also on the west side of the enclosure and also tried to talk Lesperance-Torres into coming out. Lesperance-Torres refused and Officer Jenkins saw him produce a handgun and point it at him. Lesperance-Torres was illuminated by the officer's flashlight. Officer Jenkins saw Lesperance-Torres's gun muzzle flash and felt a bullet pass by his left ear and over his left shoulder. Officer Jenkins retreated but was not able to return fire because of the officers on the eastside of the enclosure.



View from under the staircase towards the west where Officer Wakinshaw, Officer Castillo, Sergeant McCoy, and Sergeant Jenkins were positioned.

After shooting in the direction of Officer Jenkins, Lesperance-Torres paused 1-2 seconds, then shot 2-3 more times. None of the officers were hit. Officers commanded Lesperance-Torres to stay down and to drop his weapon. Lesperance-Torres looked out from under the stairwell toward the east at Officers Adams and Brascetta, but only a small area of his body was exposed. When he pulled his left hand up to point the handgun at the officers, both Officer Adams and Officer Brascetta fired their weapons at Lesperance-Torres.

Lesperance-Torres then retreated under the staircase, yelling that he had been shot in the hand and leg and was in pain. He indicated that although he was wearing a bulletproof vest, he thought he had been shot in the chest. He dropped his gun, which lodged under his left arm. He did not reach for it.

Specifically, as to the exchange of gun fire with Lesperance-Torres, Officer Adams stated:

Towards the end, he specifically made a statement that ah “well, I’ll just kill myself” or some statement to that effect. And ah, I think for another second, officers told him to come out and then I remember the officers that were on the opposite side say that they saw a gun. Again, I couldn’t see anything, I could still just see his foot. Nope, I mean there was no, those officers didn’t take any action other than saying that they had seen a gun, so it was assumption just based on the fact that they had a better visual and he wasn’t threatening them at that point. So, a very short amount of time goes by after the point where it was said that he had a gun, um, very shortly after that I mean a matter of seconds, I heard a shot and then subsequently another shot and I knew that it had just come from under the stairs and I knew that none of the other officers had fired their weapon. Very, well, right away my first thought was that he had shot himself and killed himself. But then, quickly after that he pulled his foot in and I couldn’t see anymore of him. After another second or couple of seconds, the suspect poked his head out from under the stairwell, kind of looking at Officer Brascetta and I. I looked out and I really could only see from what I remember, like very top portion of his chest, almost just his neck up and then almost at the same time I saw his hand reach out and he had a gun in his hand and he fired at Officer Brascetta and I fired at him, I mean everything was returned fire and I fired and he sort of retreated under the staircase again.<sup>1</sup>

And then at that point, he pulled his hand out from underneath him and he had the gun in his hand and he went to point it at the officers that were on the west side and at that point, I fired my weapon again at him. I fired one more shot, I felt that he was raising his weapon towards the other officers, I felt that if I didn’t take action he was gonna hurt or kill them, easily kill them, so at that point, Officer Brascetta and I fired our weapons and we struck him. At that point, he dropped the gun, started complaining of pain, saying that he had been shot, so he dropped the gun.

About his decision to fire his weapon, Officer Brascetta stated:

[H]e was telling us that he wasn’t gonna come out, um, he wasn’t moving, I could still see his feet and um, at one point, um, ah, Officer Jenkins says, like “dude you need to come out, come out and just let’s, let’s get this figured out,” and he says, “I’m not coming out, I’m gonna shoot myself.” And it seemed like almost instantaneously after that I heard a gunshot, um, that came from in front of me. Then, I heard a round hit like brick and then ringing of the metal staircase. So at that time, for a split second, I thought he did shoot himself because he had announced that, but then I heard more gunshots, while he didn’t, he didn’t actually shoot himself, now I’m thinking he, cuz we can’t see him or the gun, he doesn’t have the advantage point of us, I’m thinking he’s shooting at the other officers across the way.

So he was coming out from under the staircase and ah, Officer Adams and I are still holding, ah, ya know the best place that we can and I see the guy lean forward out from under the stairs. Ya know I can see his shoulders, his arms, everything is like pointed in our direction and the fact that I thought he was shooting at the other officers, I didn’t

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<sup>1</sup> The subsequent scene investigation did not confirm that Lesperance-Torres fired a shot in the direction of Officers Adams and Brascetta.

know if anybody was hit or if they had to retreat or whatever. Ah at this time, now his attention is focused on me and Officer Adams and I was afraid that one of us was gonna get killed. So at that point, I made the decision to fire at him. Um, I remember 1-2 shots.

A subsequent search and a forensic analysis of the crime scene and the physical evidence found at the scene revealed that each officer fired his weapon 2 times, and Lesperance-Torres fired his weapon 4 times. There were numerous ballistic impact marks in the wall that the officers were using as cover to the west of the staircase, and in the fence across from that wall and adjacent to where the officers were standing.



Photo depicting bullet impact marks –designated with alphanumeric markings - on the concrete wall surrounding the dumpster and in front of where the Officers were standing.

After the shooting ended, officers could not enter the space to extricate Lesperance-Torres because it was a tight space and he was under the staircase. Lesperance-Torres was also still in

possession of the handgun, which was under his shoulder, near his hand. However, he did not reach for it.

Eventually, Lesperance-Torres crawled out from under the stairs and was taken into custody. No force was used during this process. The officers observed that he was wearing a blue vest with Velcro straps on the side, which appeared to be a bulletproof vest. Because Lesperance-Torres had been shot and was in pain, he was transported to the hospital. His injuries were not fatal.

Police found two semi-automatic handguns and several spent shell casings under the staircase where he had been hiding. One of the guns, a Kel-Tec .9mm pistol was loaded with a magazine containing 3 live .9mm Ruger rounds. There was one live .9mm Ruger round in the chamber and one spent shell in the chamber, indicating a firing malfunction. Also found under the staircase was a Ruger .9mm handgun that had been reported stolen on January 10, 2017. While the Ruger handgun was not loaded, and did not contain a magazine, a magazine loaded with 8 .9mm Ruger rounds was found near the handgun.



The police obtained a warrant to search Lesperance-Torres' truck, during which time they discovered a homemade Improvised Explosive Device in the vehicle and several firecrackers.

Lesperance-Torres was originally charged with three counts of attempted murder on a peace officer, and two counts of possession of a weapon by a previous offender. Additional charges were subsequently filed.

### **LEGAL ANALYSIS**

Criminal liability is established in Colorado only if it is proved beyond a reasonable doubt that someone has committed all of the elements of an offense defined by Colorado statute, and it is proved beyond a reasonable doubt that the offense was committed without any statutorily-recognized justification or excuse. While knowingly or intentionally shooting another human being is generally prohibited as assault or homicide in Colorado, the Criminal Code specifies certain circumstances in which the use of physical force or deadly physical force by a peace officer is justified. The evidence establishes that Isaac Lesperance-Torres' injuries resulted from shots fired by Officer Adams and/or Officer Brascetta, so the determination of whether their conduct was criminal is primarily a question of legal justification.

C.R.S. § 18-1-707 defines the circumstances under which a peace officer can justifiably use physical force and deadly physical force in Colorado. In pertinent part, the statute reads as follows:

- (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.**
- (2) A peace officer is justified in using **deadly physical force** upon another person ... 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;  
or
  - b. To effect the arrest or to prevent the escape from custody of a person whom he reasonably believes:
    - i. Has committed or attempted to commit a felony involving the use or threatened use of a deadly weapon; or
    - ii. Is attempting to escape by the use of a deadly weapon; or
    - iii. Otherwise indicates, except through a motor vehicle violation, that he is likely to endanger human life or to inflict serious bodily injury to another unless apprehended without delay.

In addition, an officer may justifiably rely on the Colorado law regarding self-defense which is applicable to all citizens.

18-1-704 of the Colorado Revised statutes sets forth the law which allows a citizen to use force in defense of himself or another citizen. It provides, in pertinent part,

- (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.**

Section 18-1-901(2)(d),(e) of the Colorado Revised Statutes define the terms “Deadly weapon” and “Deadly physical force” as follows:



**“Deadly weapon”** means any of the following which in the manner it is used or intended to be used is capable of producing death or serious bodily injury: (I) A **firearm**, whether loaded; (II) A knife; (III) A bludgeon; or (IV) Any other weapon, device, instrument, material, or substance, whether animate or inanimate.

**“Deadly physical force”** means force, the intended, natural, and probable consequences of which is to produce death, and does, in fact, produce death.

Colorado law defines “deadly physical force” as force that actually causes death. Since Isaac Lesperance-Torres survived his wounds in this case, deadly physical force was not used. Force that does not cause death is “physical force”. The officers in this case believed that circumstances were present that would justify the use of deadly physical force under C.R.S. 18-1-707(2)(b); namely, that Lesperance-Torres had an active warrant for attempted first degree murder stemming from a home invasion armed robbery where he had shot another individual during the offense; that he was attempting to escape by use of a gun, as evidenced by his decisions to arm himself and to fire the gun at the officers; and that he was likely to endanger others if he escaped with the gun unless apprehended without delay. Nevertheless, as this is not a deadly physical force encounter, the issue in this case centers on the question whether the use of physical force by Officer Adams and Officer Brascetta was justified and whether the nature of the force used was appropriate. The test is whether the nature and degree of force used is objectively reasonable after considering the totality of the circumstances.

Officers are entitled to rely on the doctrine of “apparent necessity” so long as the conditions and circumstances are such that a person would reasonably believe, erroneously or not, that action was necessary. See, *People v. La Voie*, 155 Colo. 551, 395 P.2d 1001 (1964), *People v. Silva*, 987 P.2d 909 (Colo. App. 1999). It is immaterial whether the suspect was actually trying to injure the officers or another, so long as a reasonable person, under like conditions and circumstances, would believe the appearances were sufficient to require the action taken.

It is fundamental that the law of self-defense, which is emphatically a law of necessity, involves the question of one’s right to act upon appearances, even though such appearances may prove to have been deceptive; also the question of whether the danger is actual or only apparent, and as well the fact that danger is not necessary, in order to justify one in acting in self-defense. Apparent necessity, if well grounded and of such a character as to appeal to a reasonable person, under like conditions and circumstances, as being sufficient to require action, justifies the application of the doctrine of self-defense to the same extent as actual or real necessity. *Young v. People*, 107 P. 274, (Colo. 1910).

The issues are, therefore: whether at the time Officer Adams and Officer Brascetta discharged their firearms, they reasonably believed that they and the officers positioned to the west of Lesperance-Torres were being subjected to or were about to be subjected to the imminent use of unlawful physical force while attempting to affect an arrest, and furthermore, that their actions in defending against that force were objectively reasonable. Alternatively phrased, the question is whether a reasonable officer, confronted with the same facts and circumstances, could have concluded that it was necessary to discharge his firearm to defend himself or another and stop the threat that Isaac Lesperance-Torres presented.

## CONCLUSION

In this case, the actions of both Officer Adams and Officer Brascetta are legally justified under C.R.S. 18-1-707(1)(a), C.R.S. 18-1-707(1)(b) and 18-1-704 (1). They were pursuing an individual who had a warrant for attempted first degree murder. When Isaac Lesperance-Torres was trapped, he raised his pistol and fired it at uniformed police officers. Officers Adams and Brascetta returned fire immediately. Officers Adams' and Brascetta's response stopped the threat and may have saved their lives and the lives of the other officers who were attempting to apprehend Lesperance-Torres. At the time, they reasonably believed they were defending themselves and other officers from the use of deadly physical force. Their actions of using a firearm to take Isaac Lesperance-Torres into custody and to defend themselves and other officers were objectively reasonable and, given the facts of this case, the only true option they had – less lethal options were already unsuccessful.

The Denver Police Department is the custodian of record related to this case. All matters concerning the release of records related to administrative or civil actions are controlled by the Civil Liability Division of the Denver Police Department. As in every case we handle, any interested party may seek judicial review of my decision under C.R.S. § 16-5-209.

Sincerely,



Beth McCann  
Denver District Attorney

cc: Police Officer Adams, Commerce City Police Department; Police Officer Brascetta, Commerce City Police Department; Robert White, Denver Chief of Police; David Quinones, Deputy Chief of Police Operations; Matt Murray, Deputy Chief of Police Administration; Barb Archer, Commander of Investigative Support; Lieutenant Matthew Clark, Major Crimes; Lieutenant Adam Hernandez, Major Crimes Division; Ryan Brackley Assistant District Attorney.