



OFFICE OF THE DISTRICT ATTORNEY

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SERVING ARAPAHOE, DOUGLAS, ELBERT AND LINCOLN COUNTIES

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July 2, 2021

Sheriff Tim Norton
Undersheriff Dave Fisher
Elbert County Sheriff's Office
751 Ute Avenue
Kiowa, CO 80117

RE: Officer Involved Shooting on March 18, 2021: CIRT # 2021-001, AC21: 0004925

Dear Sheriff Norton,

As the on-call CIRT Chief Deputy District Attorney for the 18th Judicial District Attorney's Office, I was asked to review the officer involved shooting which occurred on March 18, 2021, at the Kiowa Industrial Park, 8561 Highway 86, Kiowa, Elbert County. Specifically, the conduct of Sgt. Mike Skalisky who discharged a weapon resulting in injury to ■■■ H■■■■■■. The purpose of the District Attorney's Office review of this investigation is to evaluate whether evidence exists to support the filing of criminal charges. This review is not intended to make any determination or recommendation related to law enforcement policies or training, nor is it intended to be an analysis of possible civil liabilities related to any of the parties involved.

SUMMARY

On March 18, 2021, Deputy Eli Jarrett attempted to contact a white Ford F350 for speeding 67mph in a 50mph zone, without license plates, on Highway 86. The driver, subsequently identified as ■■■ H■■■■■■, immediately turned off of the highway and pulled into the parking lot of the Kiowa Industrial Park. By the time Deputy Jarrett was able to turn around and approach the truck, it was empty and Mr. H■■■■■■ fled on foot. Other Deputies responded to the area in an effort to locate Mr. H■■■■■■. Officers began searching the multiple structures, including shipping containers, freight boxes, sheds, and porta-potties around the businesses in the industrial park.

Sgt. Mike Skalisky also responded to assist the other officers who were trying to locate the driver of the Ford F350 who fled on foot. While tactically searching, meaning that he held his duty weapon in hand at the low-ready position, Sgt. Skalisky was startled when he opened a tarp to an enclosed truck box which seemed too small to conceal a person. Mr. H■■■■■■ was hiding in the truck box, balled up in the fetal position, and he had not responded to the verbal orders from officers to come out of hiding. Sgt. Skalisky described being startled by Mr. H■■■■■■ presence and sudden movement. He explained that as he jumped back with both hands clenched, his weapon discharged one round. Sgt. Skalisky later explained that he did not have his index finger inside the trigger-guard while searching. He did not intend to shoot Mr. H■■■■■■, and he explained the

discharge as an involuntary or ‘sympathetic discharge’ resulting from simultaneously clenching and pulling the tarp with his left hand while holding his duty weapon in his right hand.

Sgt. Skalisky did not assert any type of weapon malfunction. Mr. H [REDACTED] was unarmed. Although his unexpected location and movement inside a small truck box, after failing to respond to instructions to come out of hiding, startled Sgt. Skalisky, he did nothing aggressive towards Sgt. Skalisky.

Sgt. Skalisky fired one shot which struck Mr. H [REDACTED] in a downward trajectory running superficially through the side of his abdomen to the thigh, due to Mr. H [REDACTED] being in a fetal position. Sgt. Skalisky immediately radioed for fire to respond to a gunshot wound and began rendering medical aid. Mr. H [REDACTED] was treated at Parker Adventist Hospital and was released the next day.

THE STATUTORY FRAMEWORK FOR INVESTIGATING OFFICER-INVOLVED SHOOTINGS

C.R.S. § 16-2.5-301(1) governs investigations into peace officer-involved shootings. This statute provides, in relevant part:

Each police department, sheriff's office, and district attorney within the state shall develop protocols for participating in a multi-agency team, which shall include at least one other police department or sheriff's office, or the Colorado Bureau of Investigation, in conducting any investigation, evaluation, and review of an incident involving the discharge of a firearm by a peace officer that resulted in injury or death. The law enforcement agencies participating need not be from the same judicial district.

The investigation into this shooting incident was conducted by a multi-agency team consisting of personnel from the Arapahoe County Sheriff's Office, Douglas County Sheriff's Office, Limon Police Department, Parker Police Department and the Eighteenth Judicial District Attorney's Office. The investigators in this case provided the results of the investigation to the District Attorney's Office and there were no difficulties collecting the relevant materials for this review.

C.R.S. § 20-1-114 provides, in relevant part:

The district attorney shall, if no criminal charges are filed following the completion of an investigation pursuant to section 16-2.5-301, C.R.S., release a report and publicly disclose the report explaining the district attorney's findings, including the basis for the decision not to charge the officer with any criminal conduct. The district attorney shall post the written report on its website or, if it does not have a website, make it publicly available upon request. C.R.S. § 20-1-114(1).

This document constitutes a report of the findings of the District Attorney for the 18th Judicial District, and includes the basis for the decision not to charge the involved officer with any criminal conduct.

MATERIALS REVIEWED

- Investigative reports
- Recorded interviews
- Crime scene photographs, including aerial or drone
- Crime scene reports
- Computer aided dispatch reports
- Medical records
- Post-shooting video

FACTUAL SUMMARY

On March 18, 2021, Deputy Eli Jarrett clocked a white Ford F350 going 67mph in a 50mph zone on Highway 86 in Elbert County. The truck he observed speeding did not have front or rear license plates. Deputy Jarrett turned around to attempt to contact the truck. Highway 86 is a single lane in each direction, and by the time he re-established visual on the truck it was parked in the lot at the Kiowa Industrial Park. When Deputy Jarrett drove past the truck, it was occupied by a driver. When he turned around again and came back to the Industrial Park parking lot, the driver was running and Deputy Jarrett aired a description of a white male, 6' tall, 200 lbs, wearing a flannel jacket and jeans. The computer-aided dispatch system also provided this initial description to other officers.

Deputy Tristan Whitlock was headed back to the Sheriff's Office when he saw Deputy Jarrett in the Kiowa Industrial Park and pulled in to assist. Deputy Jarrett communicated that the truck was a suspicious vehicle and he asked dispatch to clear the VIN. He learned that the truck was registered to a woman in Delta, Colorado. Deputy Whitlock provided security to the other officers in the area of the parking lot at the Industrial Park parking lot, while they investigated the truck. Suspecting it was stolen due to the absence of license plates and fleeing driver, Deputy Jarrett asked dispatch to call Delta authorities in an attempt to contact the registered owner.

Sgt. Skalisky and his trainee, Deputy Tracy Geiser, were in the Kiowa Industrial Park on an unrelated personal matter. Sgt. Skalisky was inside one of the businesses when Deputy Jarrett and then Deputy Whitlock pulled into the parking lot. Deputy Geiser had an opportunity to speak with Deputy Jarrett. The suspect description of a white male, 200 lbs, wearing a plaid shirt and blue jeans matched a person of interest "A.C." who had recently bonded out of the Elbert County Jail, according to Deputy Geiser.

Deputy Geiser and Sgt. Skalisky next drove to a location off of County Road 21 to pick up Deputy Geiser's uniform shirts. Skalisky received a radio call that the driver from the Ford F350 ran, and providing information about the truck. They drove back to the Industrial Park to assist the other deputies.

When Sgt. Skalisky arrived, Deputy Dustin Pastore was already there. Sgt. Skalisky asked Deputy Geiser to take up a position to the west side of the businesses and Deputy Pastore got back in his car and drove west on Highway 86, then north on 33, but did not locate the driver. He drove back to 8561 Highway 86.

Deputies Whitlock and Jarrett spoke to some employees at the Industrial Park and they described an individual who ran from the area of the truck. Deputy Whitlock learned from the employees that they did not recognize the truck and that they saw someone walk towards the sheds. They described the man as a Hispanic male, 6 foot tall, 200 lbs, wearing a flannel shirt and jeans. Deputies Whitlock and Jarrett began searching the sheds.

Sgt. Skalisky spoke with the owner of the tarp business to the east side of the complex, and was authorized to search the area. The owner said he saw the male suspect going towards his building before they left for lunch and thought it was maybe a customer, but he was gone when they tried to find him. The owner and other employees did not know who the truck belonged to, and they did not recognize it.

Sgt. Skalisky began searching the area including containers and he was utilizing his weapon mounted flashlight. Searching the area to the east of the businesses, Sgt. Skalisky observed footprints in the snow with a 'honeycomb' tread pattern. He noticed that the two employees who were working in the area were wearing cowboy boots. The honeycomb tread pattern was observed near the cabins and trailers, and he noted that the prints went a few steps in and then disappeared. Sgt. Skalisky checked the perimeter fence and noted that he didn't see any disturbance in the snow. He believed that the suspect was still in the area. He checked the area near a shed and freight boxes that created an alley where he saw the honeycomb footprints again.

Sgt. Skalisky went back to the truck and saw that it was empty and locked. He noted that there was chipped paint by the lock. The whole truck had a bad paint job and the truck bed was blue. He believed the truck had been spray-painted, which heightened his suspicion that the truck was stolen in conjunction with the fact that there were no plates on the truck, and the fact that the driver ran when they arrived in the area. He checked under the truck bed cover and saw a large fuel transfer tank in the bed and no one inside. Sgt. Skalisky was concerned by the appearance of the truck that there may be more involved than only traffic violations.

Sgt. Skalisky was aware of a homicide investigation involving multiple motor vehicle thefts and associated with a group of prison gang members. A suspect known as "A.C." was associated with that situation, was still at large at that time, and was known to be armed. Sgt. Skalisky placed a call to Investigator Greg Jones, who is the lead investigator on the homicide investigation. Investigator Jones indicated he would respond that location. Investigator Jones confirmed this call was made by Sgt. Skalisky related to the investigation, before the shooting at the industrial park.

Sgt. Skalisky also noticed the honeycomb footprint tread pattern, in the mud, at the driver's door of the truck. He believed the driver of the truck was the individual who made the shoe impressions by the sheds and freight boxes. He started to follow the prints in the snow, which were heading east from the truck. He followed the prints to an "alley" created by a shed and freight box which led to what he described as being a "courtyard" being formed by the boxes and sheds. He observed the courtyard and was thinking about locations where someone could hide. He saw a few tarps but they still had snow on them that was undisturbed. He saw another tarp against a shed and saw the prints leading towards that tarp.



The Blue Arrow designates the approximate location of the truck and the orange arrow designates the location where Mr. H██████████ was hiding.

Sgt. Skalisky made announcements “Sheriff’s Office, make yourself known” and “Sheriff’s Office, come out.” He made approximately 5 announcements. He did not hear any response to his announcements. He drew his weapon and lifted up a tarp on the left of the container, towards the shed. He saw that the tarp was covering a desk and saw one footprint inside, but nothing further. He pointed his weapon into the “unknown” area and was using his weapon mounted flashlight. Given the need to use his left hand to open containers, he used his dominant hand to operate his flash light. Considering there was only one print and the small area of the container, no one would be able to fit inside that container.

Sgt. Skalisky then turned his attention to the next object which he described as being the size of a dog kennel. He described it as a demo model of a pickup truck bed that had a roller tarp system over the top of it. For clarity, this will be referred to as the ‘truck box’ which is documented in these photographs in both the closed and opened positions below.



Sgt. Skalisky described thinking at the time that he didn’t even know how to open it. He grabbed the bar that the tarp was on. He had his pistol pointed to the “unknown” area inside the truck box. He pulled the bar up and saw a person inside. Sgt. Skalisky believed that the person moved as he pulled the tarp up. Simultaneously, he “jumped and said “oh fuck.”” As he pulled back, he reported that “the gun went off.” The single shot from Sgt. Skaliski’s handgun struck Mr. H██████████ in the abdomen.

Sgt. Skalisky later explained that he never had his finger on the trigger during the tactical search, and that he is a firearms instructor and knows better than that. He immediately called for the fire

department paramedics and began rendering first aid to Mr. H [REDACTED] by putting on gloves and applying pressure to the wound.

Deputy Geiser heard a single gunshot but at the time he thought someone had dropped something. He didn't immediately recognize it as a gunshot. That is when he heard St. Skalisky calling for the fire department. He started running in that direction but did not know where Sgt. Skalisky was and he began calling out to him. When he located Sgt. Skalisky he was near a truck box and an industrial furnace. The suspect, Mr. H [REDACTED] was on the ground injured. Sgt. Skalisky told Deputy Geiser to put his gun away, to put his gloves on, and to apply pressure to Mr. H [REDACTED] wound. The deputies applied pressure and packed the wound with gauze. Deputy Geiser was able to ask Mr. H [REDACTED] for his first name, due to Deputy Geiser's limited ability to communicate in Spanish. Mr. H [REDACTED] speaks no English. Sgt. Skalisky was 'emotional' and said that Mr. H [REDACTED] had surprised him.

Deputies Whitlock and Jarrett were searching porta-potties, dumpsters, and a shed on the west side of the Industrial Park. Deputy Whitlock heard Sgt Skalisky call for the fire department to respond to a gunshot wound. Deputy Whitlock did not hear a shot but responded to his location. By the time he located Sgt. Skalisky, he and Deputy Geiser were already rendering aid and he assisted them. Deputy Jarrett pointed out a 9 mm shell casing on the ground a few feet away.

Deputy Dustin Pastore heard Sgt. Skalisky air over the radio "I need Fire now for a gunshot wound..." Deputy Pastore ran to Sgt. Skalisky's location, as Sgt. Skalisky was directing officers to get gloves on and render aid. Deputy Pastore helped remove Mr. H [REDACTED] pants, locating a lower abdominal gunshot wound, which Sgt. Skalisky then packed with gauze.

A few days after being released from the hospital, Mr. H [REDACTED] went to the Parker Police Department and consented to an interview with a Spanish speaking officer. Mr. H [REDACTED] reported that he lives in Miami, FL, and that he has a daughter living in Colorado Springs. He and his girlfriend traveled to Colorado to visit and look for employment, because they are considering relocating to Colorado. He had been told of a possible job prospect in Kiowa, doing some type of manufacturing for daily cash payment. Mr. H [REDACTED] had recently purchased the truck in question and had not yet licensed the vehicle.

Mr. H [REDACTED] reported that he was driving on a highway. He recalled the speed limit was 50 mph and he denied speeding. He said that he did see an officer pass him going the other direction but thought nothing of it. He pulled into the group of industrial buildings to find a restroom and ask about job opportunities. After getting out of his truck, he reported that he saw a deputy pull in behind his truck, and that the officer looked in and around the truck. Based on past bad experiences with police, uncertainty about whether officers here in Colorado would speak Spanish, and things he has seen on TV involving bad interactions between law enforcement and minorities, he said that he decided to find a place to hide. He walked around the various buildings and found a box covered with a tarp in which to hide.

He said that he heard footsteps and voices but did not understand what was being said. He recalled the tarp being lifted and a loud bang. He was in pain and he was scared, and thought he was dying. He recalled seeing police officers around him and then woke up in the hospital, where he was told he had been shot.

According to medical records, Mr. H■■■■■■ injury was consistent with a downward angled gunshot wound to the abdomen exiting and then reentering the thigh. The injury was characterized by Dr. Snyder as a non-critical flesh wound because it missed vital organs. A laparotomy, exploratory surgery of the path of the gunshot wound to his abdomen, and irrigation of the bullet track was performed. The bullet path was described as a tangential course through the abdominal wall, but superficial to the peritoneal cavity. No neurological or vascular damage was caused and no deeper injury was found. X-rays revealed metal objects consistent with bullet fragments from his right lower abdominal quadrant to his right upper quadrant of his right proximal thigh. There was a large scar present after his surgery.

The investigation determined that Sgt. Mike Skalisky had significant prior training and experience for his position with the Elbert County Sheriff's Office. He had been in that position for 7 years (since June of 2014). He received POST certification between January and May of 2014 at the Arapahoe Community College. He served in the military from 2010 to 2016, then 2018 to 2021 in the reserves as a member of the National Guard. He attended Medic-EMT school, combat medic school, and LPN school. As a patrol sergeant, he was responsible for supervising patrol deputies and responding to calls. He had been promoted to sergeant in 2019. He had been on the SWAT team for 5-6 years after attending Utah County SWAT training in 2016. He has been a firearms instructor for handguns and patrol rifles since 2019, and he assists with firearms training for the Elbert County SWAT team.

The investigation related to the handgun used that day documented that Sgt. Skalisky carries a Glock 34. It was a 9mm handgun that was issued to him by the Elbert County Sheriff's Office. The handgun was equipped with a weapon mounted flashlight (TRL1-HL) and has a Trijicon RMR (red dot sight).

APPLICABLE LAW

The ethical obligation of prosecutors and the policy of the District Attorney's Office is to only prosecute a case when 1) there is a good faith basis to believe the individual to be prosecuted has committed the crime, and 2) there is a reasonable likelihood of conviction at trial. This is a higher standard than the probable cause standard used by police officers making initial charging and arrest decisions. The decision whether to pursue a criminal charge, therefore, is based on the reasonable likelihood of conviction standard. Criminal liability is established when there is a good faith basis to believe the individual committed the crime, and there is sufficient evidence to prove all of the elements of the crime beyond a reasonable doubt, to include the criminal conduct and the criminal mental state. Additionally, the prosecution must disprove any statutorily recognized justification or defense beyond a reasonable doubt. A bad outcome, even when a serious injury occurs, does not always amount to sufficient evidence to prove criminal charges to a unanimous jury beyond a reasonable doubt. Generally, in order to establish criminal behavior a prosecutor must have evidence to establish both a voluntary action and a specific criminal mental state. In the situation of an accidental discharge, the relevant possible mental states are defined in C.R.S. §18-1-501:

“Voluntary act” means an act performed consciously as a result of effort or determination, and includes the possession of property if the actor was aware of his physical possession or control thereof for a sufficient period to have been able to terminate it.

“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.

Two offenses are identified from the Colorado Criminal Code as potentially applicable assuming that both a voluntary act and criminal negligence mental state could be adequately supported by admissible evidence:

C.R.S. §18-3-204, Assault in the Third Degree applies where a defendant “[W]ith criminal negligence causes the person bodily injury to another by means of a deadly weapon...”

C.R.S. §18-12-106(1)(b) Prohibited Use of Weapons applies where a defendant “[W]ith criminal negligence he discharges a firearm...”

Ordinarily, the District Attorney’s review of an officer involved shooting event is guided by the statutes pertaining to the affirmative defenses applicable to use of force by peace officers, specifically C.R.S. § 18-1-707:

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 serious bodily injury or death 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.

Additionally, with respect to offenses relating to firearms, officers have an additional affirmative defense stated in C.R.S. § 18-12-101(2):

It shall be an affirmative defense to any provision of this article that the act was committed by a peace officer in the lawful performance of his duties.

ANALYSIS AND CONCLUSION

The question here is not so much the appropriate voluntary use of force but the criminal ramifications of an unintended, accidental discharge of a firearm. In many civilian accidental discharge situations, the proof of a mental state might be derived from the reason the firearm was

introduced in the first instance. For example, showing off a weapon while intoxicated or drawing on a friend as part of an internet challenge could suggest an evidentiary inference of criminal negligence. In a law enforcement situation, however, the firearm is standard equipment and has an appropriate and lawful use. That does not, however, preclude a careful examination of the reasons for deploying the firearm prior to the unintended discharge.

Whether the deployment of a firearm, meaning removal of the firearm from the holster, constitutes evidence of a use of force, in and of itself, is unlikely. An analysis is appropriate to consider whether the decision to conduct a tactical search—with his firearm drawn and utilizing his weapon mounted flash light—to explore the area for a traffic violator was arguably excessive. In this particular instance, however, it is necessary to consider other information that influenced Sgt. Skalisky's decision making.

Sgt. Skalisky reported, and other witnesses corroborated, that he had additional concerns about a local investigation of a homicide. This homicide was related to several stolen cars and involved members of a prison gang. A person of interest, A.C., who had been recently released from the Elbert County Jail and fit the initial suspect description, was known to be armed. With this information in mind, Sgt. Skalisky's conduct of a tactical search appears more reasonable. Given the import of these concerns, it is appropriate to assess whether those were legitimate concerns that Sgt. Skalisky had prior to the shooting. The investigation showed that this claimed concern was corroborated by the fact that he called Investigator Jones to respond to the Kiowa Industrial Park, prior to the shooting.

Involuntary discharges of firearms may occur as a result of a sympathetic contraction which results from a loss of balance or the startle reaction. (See e.g. Evaluation of New York City Police Department Firearm Training and Firearm-Discharge Review Process, Rostker, et al, 2008; Involuntary Firearms Discharge: Does the finger obey the brain? Heim, Niebergal and Schidrbleicher, Police 1, Feb 1, 2006.) This type of sympathetic contraction has been particularly noted in situations where one side of the body mimics the action of the other side of the body. (See Further Analysis of the unintentional Discharge of Firearms in Law Enforcement, O'Neill, Applied Ergonomics, et al, vol 68, 1018; and Involuntary Muscle Contractions and the Unintentional Discharge of a Firearm, Enoka, Law Enforcement Executive Forum 2003.) As pertinent here, Sgt. Skalisky was grasping the metal frame of the tarp cover with his left hand while holding his firearm in the right hand. He was then startled by the presence and movement of Mr. H [REDACTED] who had not responded to his verbal instructions as he searched, and he then clenched both hands. Sgt. Skalisky maintains that although he did not have his finger in the trigger guard, this sympathetic clenching reaction may have been sufficient for his index finger to move into the trigger guard and depress the trigger.

Given the insufficient evidence to prove both a voluntary action and the requisite mental state of criminal negligence, assault in the third degree is not an appropriate charge as the evidence would be insufficient for the likelihood of a conviction beyond a reasonable. The only weapon related charge C.R.S. § 18-12-106(1)(b), prohibited use of weapons, requires the same proof of a voluntary act and a criminally negligent mental state. As noted above, peace officers in the performance of their duties have an affirmative defense to that charge. There is no strict liability offense (meaning a charge without a mental state required, like many traffic offences) for an unintended or accidental weapon discharge in the Colorado Revised Statutes.

In light of the insufficient evidence for a likelihood of conviction beyond a reasonable doubt, and the inability to prove that this shooting was the product a conscious voluntary act or even to establish the least culpable of mental states, charges are not warranted based on the evidence. There is not a reasonable likelihood of success at trial and, therefore, no criminal charges are recommended.

Ann B. Tomsic

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Chief Deputy District Attorney