

# DANIEL P. RUBINSTEIN

## DISTRICT ATTORNEY



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TWENTY-FIRST JUDICIAL DISTRICT ATTORNEY'S OFFICE  
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November 6, 2020

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Lead Detective  
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555 Ute Ave.  
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This letter is notification to the Critical Incident Response Team (CIRT), and the involved parties, Corporal Stephen Gianinetti, Officer Sara Young, and Deputies Brandon Barry and Justin Rolbiecki, of the decision not to file charges against the officers and deputies in the matter of the officer involved shooting of Kurt Phelps, DOB 11/21/1967, on August 29, 2020. Because Mr. Phelps did not survive the encounter, no charges will be filed against him. Had Mr. Phelps survived, I would have filed felony charges against him, as detailed below.

At approximately 1100 hours on August 29, 2020, the 21st Judicial District Critical Incident Response Team (CIRT) was activated at the request of the Fruita Police Department (FPD) and Mesa County Sheriff's Department (MCSO) to investigate an officer-involved shooting which occurred that morning at approximately 1011 hours. The Grand Junction Police Department (GJPD), the Palisade Police Department (PPD), the Colorado Bureau of Investigation (CBI), and the 21st Judicial District Attorney's Office (DA's Office) were represented during this Critical Incident Response Team investigation. The MCSO and the FPD were present as department liaisons, however per CIRT protocol were not participants in the investigation.

The following is a summary of my findings of fact and conclusions of law based upon the information gathered in this investigation.

Anne Moore called 911 to report her neighbor, Kurt Phelps, was trespassing on her property at 1225 M 3/4 Road, Loma CO. Anne stated Kurt had a handgun tucked inside his back waistband and he had possibly fired a shot towards her a few days prior. While she reported the earlier incident about possible shots when she reported the August 29<sup>th</sup> trespassing, she had not previously reported the shots incident. During her 911 phone call, she reported that Mr. Phelps was presently sitting slumped over against a fence post in front of her residence.

MCSO Deputies and Fruita Police Officers responded to this call. MCSO Lt. Fogg was first on scene with Fruita Officers Young, Sharrar (officer in training) and Corporal Gianinetti.

MCSO Deputies Barry, Rolbiecki and Schreiner (officer in training) arrived several minutes later.

#### **STATEMENT OF OFFICERS ON SCENE:**

##### **Lt. Fogg:**

Lt. Fogg arrived first, with two Fruita units arriving behind him. He was approximately 10 yards away on the driver's side of his vehicle, with the door open using it for cover. Fruita officers were on the passenger side of his vehicle with the door open, using it for cover. He observed Mr. Phelps sitting with his back against a fencepost located on Anne Moore's property. Mr. Phelps was motioning for officers to move closer to him. Officer Young was giving Mr. Phelps commands, and at one point Mr. Phelps complied and stood up. Lt. Fogg reported that it was immediately obvious, based upon Mr. Phelps movements, that he was intoxicated. Lt. Fogg also noticed a pistol in the back waistband of Mr. Phelps pants when Mr. Phelps stood up.

Mr. Phelps was told numerous times not to reach for the gun. Mr. Phelps was making comments like "you didn't do your homework." Mr. Phelps was told to put his hands on his head and started to put one hand up one time, but then put it down and continued to ignore commands. Mr. Phelps appeared to take a deep breath, reached around behind his back and then pulled the pistol. Lt. Fogg described that as Mr. Phelps brought the pistol around his front, shots rang out and Mr. Phelps slumped down onto the ground. Mr. Phelps eventually honored the commands to show his hands while on the ground and he was detained in handcuffs. Lt. Fogg then patted Mr. Phelps down and located what he believed was a .22 Derringer style revolver from Mr. Phelps pocket.

Lt. Fogg described that he had his duty pistol out and aimed at "center mass" on Mr. Phelps during the incident, but did not fire. He described that there were no other options at the point that Mr. Phelps grabbed his gun.

##### **Officer Sherrar:**

Officer Sherrar described the same incident as Lt. Fogg. Some additional details that he described include the following: The officers had information that Mr. Phelps had shot at the residence of the property the day before. During the interaction, Mr. Phelps appeared to be intoxicated and agitated. When Mr. Phelps was told to keep his hands away from his gun he responded "which one?" Officer Sherrar described that it was "nerve-racking" to see someone with a gun, and "scary" to see anyone with a gun, knowing they could use it on you.

##### **Officer Young:**

Officer Young described the incident similarly to the others. Some additional information from her perspective is as follows: She has training in Crisis Negotiation and Crisis Intervention. Given the cover position she had, she took a less-lethal bean bag shotgun. When she saw him stand up, she observed a large black-handled pistol in his waistband. When she saw that she retreated to gain cover. She heard many other statements from Mr. Phelps including hearing him say "do your homework," "I've been down this road before," and most significantly when she took one big step to her left to attempt to use the bean bag rounds, she heard Mr. Phelps say "I'm gonna

shoot you before you shoot me.” Mr. Phelps then reached behind his back. She observed that at this point there was a gun in his right hand. She remembered throwing down the less-lethal shotgun and drawing her service pistol while thinking that “this is...we are no longer less-lethal. And I thought he was going to shoot me.” Officer Young described that she does not know if she fired her gun, but pulled the trigger.

**Cpl Gianinetti:**

Cpl Gianinetti was acting as Field Training Officer of Officer Sharrar on August 29, 2020. He arrived on the property and Lt. Fogg was already there. They decided to get closer and followed Lt. Fogg’s vehicle up to do so. Cpl. Gianinetti instructed Officer Young to get her less-lethal shotgun. When they contacted Mr. Phelps he could not see a gun, but was aware that the reporting party had indicated there was a gun in Mr. Phelps waistband. Cpl. Gianinetti recalled that Lt. Fogg was trying to convince Mr. Phelps to stand up and come to them, and Mr. Phelps was refusing and continued to yell “do your homework.” Cpl. Gianinetti also recounted that he was aware that this may have started around a water rights issue, and that the reporting party had stated that Mr. Phelps had shot at them a few days earlier.

Cpl. Gianinetti moved at that point to have a better angle, due to shooting left-handed, and his position. At that point, Mr. Phelps got up and was walking towards them. He was stumbling and appeared intoxicated. Cpl. Gianinetti reported that Lt. Fogg, and several deputies were yelling at Mr. Phelps to keep his hands up, and not to touch the gun “or you’ll be shot.” In response to the commands to put his hands on his head, Mr. Phelps started to put his hands up, but then said “no, no, we’re not going to do this.” Cpl. Gianinetti reported that Mr. Phelps reached behind his back first, but did not retrieve his weapon, but after more commands not to reach for the weapon, Mr. Phelps said “Hey, we already tried that, that’s not going to work. We tried that.” Mr. Phelps then bladed towards Cpl. Gianinetti, grabbed the gun and turned towards him. Cpl. Gianinetti reported that it was at that time that he fired his weapon on time.

Cpl. Gianinetti described that Mr. Phelps was “fixated on Lt. Fogg the entire time” and that was who he thought Mr. Phelps was “going for.” He did not believe that Mr. Phelps could have gotten a shot off at him, but believed that he could have shot Lt. Fogg, Officer Young and the others by the vehicle. When asked if he believed Lt. Fogg, or Officer Young could have been shot, suffered death or serious bodily injury, he responded “I absolutely did.” After Ms. Phelps went down, they approached Mr. Phelps and Cpl. Gianinetti watched Lt. Fogg pat Mr. Phelps down and find a second gun. At that point they began to “render aid.” They called for an ambulance. Officer Young performed CPR while Cpl. Gianinetti searched Mr. Phelps body for bullet holes.

During his interview, Cpl. Gianinetti stated that some of the factors that contributed to his decision to shoot were the potential menacing charges against Mr. Phelps against his neighbor, Mr. Phelps’s intoxication level, and the fact that Mr. Phelps had shot at the neighbors recently. He also referenced Mr. Phelps seeming erratic, angry and unwilling to comply with orders.

**Deputy Rolbecki:**

Deputy Rolbecki had a trainee with him. He reported that he was pretty far out when the initial call came in, and he responded to the address along with his trainee, Deputy Shreiner, as well as Deputy Barry. He was aware that the subject had made a threat to neighbors and was armed.

He reported that at the point that he arrived on scene, Lt. Fogg had already approached the subject and Deputy Rolbecki got out of his vehicle and grabbed his patrol rifle. He and his trainee went to the passenger side of Lt. Fogg's vehicle and took a position by the open passenger door. Lt. Fogg was addressing the subject, later identified as Mr. Phelps, who stood up and was stumbling towards them at a distance of 10 to 15 yards. Because Mr. Phelps was reported to have a gun, Deputy Rolbecki opted to continue with his rifle, rather than switch to a Taser. He also reported that the distance was too great to get a good connection with the Taser. Deputy Rolbecki reported that at one point Mr. Phelps turned around and Deputy Rolbecki was able to see a handgun in Mr. Phelps' waistband. Deputy Rolbecki recalls Lt. Fogg ordering Mr. Phelps to put his hands on his head as well as to get down on his knees. Mr. Phelps refused both stating "I'm not going to do that."

Deputy Rolbecki recalls Mr. Phelps putting his hands behind his back initially, but not grabbing the gun. He further recalls, similar to Officer Sherrar, that when Lt. Fogg told Mr. Phelps not to grab for his gun, Mr. Phelps responded "which one?" Deputy Rolbecki reported that Mr. Phelps was bladed away from him and then started turning his body and there was a gun in his hand. It appeared to Deputy Rolbecki that Mr. Phelps was trying to point it. It was at that point that he discharged his rifle. He reported that at the point he fired he feared that if Mr. Phelps continued in that motion he was going to either shoot or hurt him or the other officers and deputies on scene. He further reported that it was his "belief that if [he] did not act at that point [Mr. Phelps] would've caused someone serious bodily injury or death." Deputy Rolbecki, in explaining his decision to fire, also described Mr. Phelps as agitated and non-compliant. He described that Mr. Phelps had already raised the gun up to waist height at the point that he decided Mr. Phelps was trying to point it at them.

Deputy Rolbecki also reported the life-saving efforts that the others described immediately after Mr. Phelps went down.

#### **Deputy Barry:**

Deputy Barry arrived when the others were already there. He heard over the radio that the subject, Mr. Phelps, was being non-compliant and had a gun. He grabbed his patrol rifle and approached Lt. Fogg's vehicle to see where he could be the most useful. His immediate assessment when he arrived was that he had the right tool. He saw a female Fruita officer (Officer Young) with a less-lethal shotgun, assessed that they were too far for Taser to be appropriate, described Taser use in this situation as dangerous, and that he had the rifle which was needed to cover the officer with the less-lethal shotgun. Deputy Barry described Mr. Phelps as "irate" and repeating "you should have done your homework." Deputy Barry observed what appeared to be a 1911 style handgun on Mr. Phelps.

Deputy Barry also reported that Deputy Tafoya (not on scene) relayed over the radio that he recognized Mr. Phelps name, and that Mr. Phelps had a traumatic brain injury and was suicidal. Deputy Barry reported that Mr. Phelps stood up and paced around, but was "wobbly." Deputy Barry reported that at one point Mr. Phelps reached behind his back and everyone tensed up and yelled "don't do it." Mr. Phelps did not grab the gun at that time. After that incident, "everybody kind of took a breath." At that point, Deputy Barry reported that they were working towards compliance, getting the gun away from him and getting him into handcuffs. Lt. Fogg was making

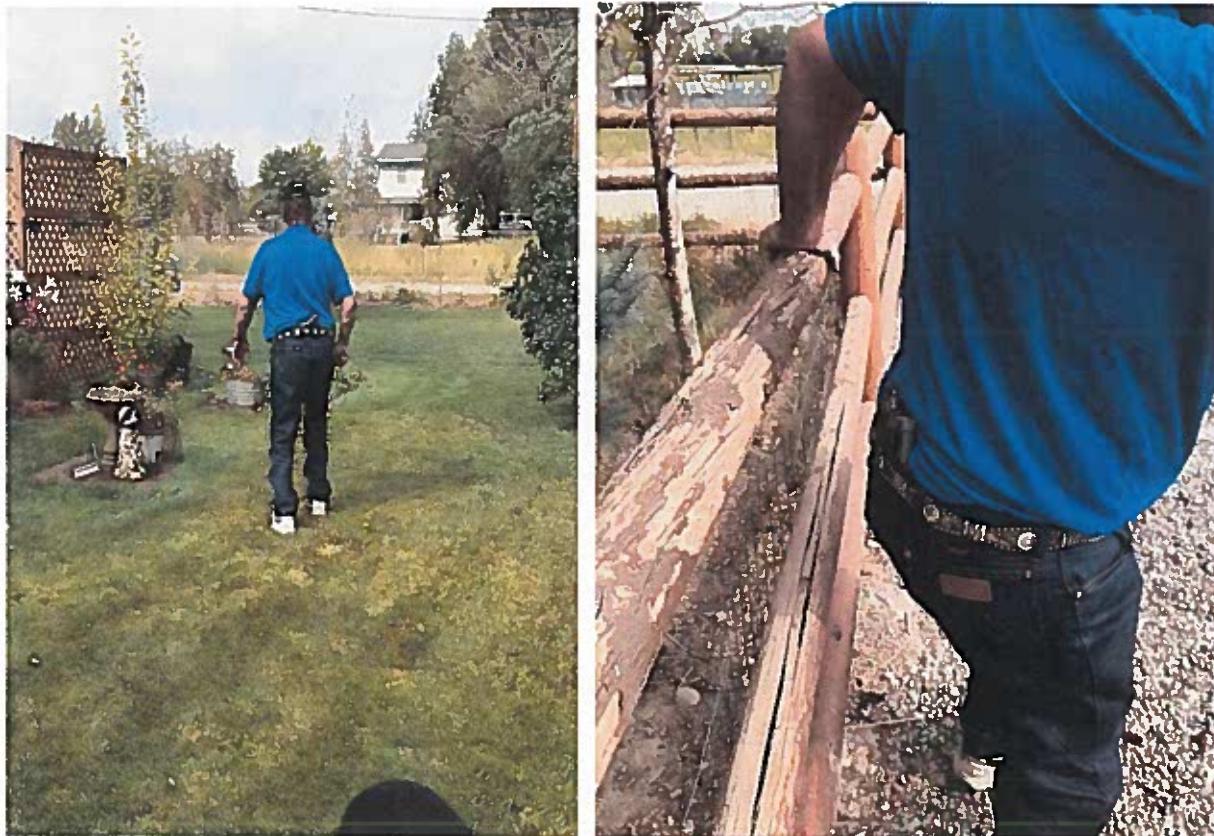
commands that Mr. Phelps claimed he was not physically able to do. As Mr. Phelps approached, Deputy Barry switched from his rifle to his handgun. Deputy Barry described his decision to shoot as follows:

"So at this point, you know, he's still super -- he starts ramping himself up after he says that he can't move that way. You can see that he is mad. Then he reaches behind himself a second time, and he grabs that gun, and he swings it around. And I was like, oh, shit. And I was scared so -- and I -- so I engaged him as he's bringing that gun all the way around. Looked like he was intending to use it. And, you know, I didn't doubt it. So I engaged. I fired my weapon until he fell down, and I followed him down until he was laying down onto the -- and his hands were -- you know."

Deputy Barry described that they waited to see if Mr. Phelps would raise the pistol towards them again, and when he did not, they approached, Deputy Barry kicked the pistol away from Mr. Phelps and they began "lifesaving ... protocol."

**Anne Moore:**

Prior to calling the police Ms. Moore photographed Mr. Phelps on her property with the handgun in his waistband.



**AUDIO RECORDING OF INCIDENT**

No law enforcement officers on scene were equipped with body-worn cameras, vehicle

cameras or other video recording devices. Officer Young and Officer Sharrar activated audio recording devices during the incident.

Lt. Fogg can be heard talking to Mr. Phelps for several minutes. Mr. Phelps is asked to come to where the officers are. Lt. Fogg tells him the officers do not want to come to him because he has a gun. Mr. Phelps is told by the officers that they are aware he is armed and that they are trying to work out whatever the problem may be.

Mr. Phelps can be heard yelling “do your homework” several times. Lt. Fogg continually tries to convince Mr. Phelps to stand up and walk to them.

Officer Young tells Mr. Phelps, “we know you have a brain injury” and also tries to get Mr. Phelps to comply with verbal commands.

During the encounter, Mr. Phelps is told by officers:

“keep your hand away from that gun;”

“don’t do that or you’re gonna get shot;”

“hands on your head,

don’t touch the gun;”

“don’t do it;”

“keep your hands up;”

“we don’t want to shoot you, so turn around for us okay Turn around so we can get that gun off your back;”

“there you go, turn around we’re gonna come up and get that gun off you.”

Mr. Phelps responds, “We’ve already been there done that” and Lt. Fogg responds, “we’re gonna do it again so we can get that gun off you. Do not grab that gun, we do not want to shoot you, so do what we ask”. Several officers yell “Don’t do it” as several gunshots shots are fired for about one to two seconds.

After the shooting, officers tell Mr. Phelps to put his hands to his side so they can provide aid to him.

## **AUTOPSY:**

On 8/30/20 at 8:00 a.m., Dr. Daniel Lingamfelter performed an autopsy and concluded that Kurt Phelps died of multiple gunshot wounds. During the autopsy, Dr Lingamfelter advised that Mr. Phelps had seven gunshot wounds, some of which were exit wounds. Two bullets were

recovered during the autopsy. A bullet removed from the left shoulder area of Phelps appeared consistent with a 9mm. A bullet recovered from the right hip area appeared consistent with a .223. Several of the gunshot wounds appeared to contain entrance and exit wounds. The wounds were located on Kurt's upper legs and torso area. Mr. Phelps had alcohol in his system with a vitreous BAC level of .376 g/dL and an anetmortem BAC of .281 g/dL.<sup>1</sup>

## CALL HISTORY

1215 M ¾ Road, Loma, CO 81524, registered to Kurt Phelps: Seven (7) calls for service including three follow-ups, two welfare checks, one civil, and one medical for 'falls.' The calls were between 12/2/2018 and 8/28/2020.

- 18-40027, 12/2/2018 @ 1242 hours: Follow up from a theft reported by (David) Shay McCormick (ref 18-40020). Shay believed Mr. Phelps stole his dog during the night.
- 19-00448, 3/28/2019 @ 2122 hours: Fall call to Lower Valley Fire. Hunter Peacock reported his friend fell and hit his head.
- 20-8279, 3/20/2020 @ 1715 hours: Alicia Gutierrez (SMH SW) requested a welfare check on Mr. Phelps. He made vague comments and said he "wouldn't make it until Monday." Alicia called Mind Springs. They said call LE. Mr. Phelps refused to talk to law. Said he just wanted to vent. Requested co-responders, however, it was too far west and out of their jurisdiction.
- 20-9199, 4/1/2020 @ 1350 hours: Civil called in regarding watering land and runoff on neighbor's property. Discussed easement, trespass issues, and civil court with Bill Moore.
- 20-24957, 8/27/2020 @ 1618 hours: Social worker from Denver area called a Welfare check on Mr. Phelps because he was acting erratic and said he was "going to go out in style." Deputies Tafoya and Pratt responded.
- 20-24962, 8/27/2020 @ 1716 hours: Mr. Phelps called about the Welfare from an hour prior. He wanted to apologize for the language he used.
- 20-25043, 8/28/2020 @ 1124 hours: Doctor from Denver area called again about Mr. Phelps' behavior "escalating and becoming more aggressive and erratic".

1217 M ¾ Road, Loma, CO 81524, registered to (David) Shay McCormick: Three calls, including a theft, Civil, and follow-up. The theft was about Ms. McCormick's missing dog in 2018.

20-12988, 5/12/2020 @ 1402 hours: Civil called in by Ms. McCormick. Per Ms. McCormick, he was out of town and the Moore family called to tell him Mr. Phelps flooded his yard with irrigation water. Ms. McCormick believed Mr. Phelps turned off or disconnected his phone. Follow up called in five hours later regarding the same issue.

## RECENT CALLS INVOLVING MR. PHELPS

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<sup>1</sup> Under either version of testing of his blood alcohol level, he was several times higher than the legal limit to drive under the influence.

A social worker from the Denver area, Bryn Dunham (303-724-6159), called the Sheriff's Office on 8/27/2020 around 1618 hours requesting a welfare check on Mr. Phelps. Ms. Dunham said she'd worked with Mr. Phelps for the last few years and she was worried because he made odd comments over the phone. Ms. Dunham told dispatch that Mr. Phelps had mental disabilities and that Mr. Phelps made the statement he "was going to go out in style". Ms. Dunham also noted that Mr. Phelps told her "not to send anyone after him." Call notes showed that Ms. Dunham knew Mr. Phelps had weapons in the home.

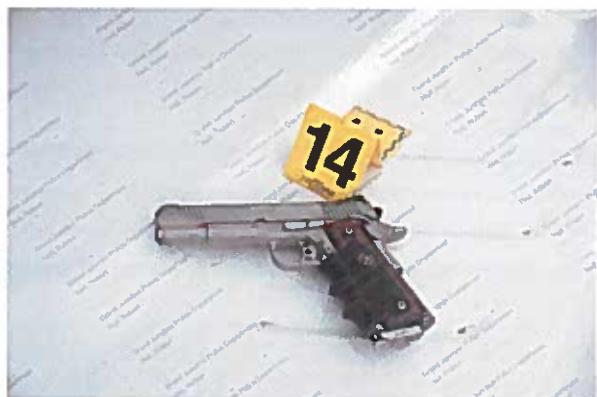
Per Ms. Dunham, Mr. Phelps was upset because he was trying to call her and couldn't get through on the phone. Mr. Phelps was a client of her department since he was a child, but she'd only been working with him the last few years.

MCSO Deputies Pratt and Tafoya contacted Mr. Phelps on 8/27/2020 related to this welfare check request. Mr. Phelps was contacted at the address and told the deputies he had been drinking. He also stated he had a concealed weapons permit, is highly trained, and works for the government at night. Mr. Phelps also talked about having disputes with his neighbor about irrigation water. Mr. Phelps stated he was not suicidal and there were no indications he was a danger to himself or others at this time.

A medical provider for Mr. Phelps, Doctor Tyler Buckner, was also contacted during this investigation. Dr. Buckner is a hematology specialist from the Denver area and he called the Sheriff's Office about Mr. Phelps the day prior to the shooting (08/28/2020 reference MCSO incident 20-25043). Per call notes, Doctor Buckner said he had questions about the prior welfare check and he also had additional concerns about Mr. Phelps. Deputy Pratt entered notes that the Doctor was concerned that Mr. Phelps's behavior was escalating and becoming more "aggressive and erratic". Doctor Buckner expressed concerns that Mr. Phelps was experiencing neurological issues that were impacting his behavior. Doctor Buckner planned to follow-up with adult protective services.

#### **CRIME SCENE:**

When the crime scene was processed, Mr. Phelps had already been removed by the paramedics. Six spent 9mm Hornaday shell casings were located in the roadway. One spent Winchester .45 shell casing was found in the roadway. One spent .223 Hornaday shell casing was found north of the fence, but off of the roadway. One spent bean bag casing was removed from the less-lethal shotgun. The officers and deputies guns corroborated who fired, with the exception of Officer Young. She was unsure if she fired. Her weapon had a round missing from it, however there were no spent casing at the scene for the caliber of her gun, so it is unclear if she fired. Additionally the two guns that were on Mr. Phelps were located: a Kimber 1911 with a loaded magazine with 7 rounds of S&B .45 auto; and, a North American Arms .22 Magnum 5 shot revolver, with 5 spent rounds in the cylinder.



## APPLICATION OF THE LAW

Colorado law permits deadly physical force to be used if a person reasonably believes that a lesser degree of force is inadequate, and the actor has reasonable grounds to believe, and does believe, that he or another person is in imminent danger of being killed or receiving great bodily injury. C.R.S. § 18-1-704(2). There is no special exception or permission under this statutory justification for law enforcement officers to utilize deadly force, although the nature of the job puts them in situations more likely to present the decision process of using appropriate and justifiable use of force at varying levels.

Here, two officers, and two deputies fired or attempted<sup>2</sup> to fire weapons. Their use or attempted use of deadly physical force against Mr. Phelps, as described above, was authorized under the theory of self-defense and the defense of the other law enforcement personnel with whom they were working. In Colorado, deadly physical force used in self-defense has two equally important components. The first is a subjective component requiring that the actor himself, here Officer Young, Cpl. Gianinetti, and Deputies Barry and Rolbiecki, actually believed that they and the other law enforcement personnel were in imminent danger of death or great bodily injury, and that deadly force was required. The second component is an objective component; that the actor's actual belief was also a reasonable belief.

According to each of their interviews they described the following, respectively:

- Officer Young stated that she observed him grab his gun and raise it towards the officers. She remembered throwing down the less-lethal shotgun and drawing her service pistol while thinking that "we are no longer less-lethal. And I thought he was going to shoot me."
- Cpl. Gianinetti described that Mr. Phelps was "fixated on Lt. Fogg the entire time" and that was who he thought Mr. Phelps was "going for." He did not believe that Mr. Phelps could have gotten a shot off at him, but believed that he could have shot Lt. Fogg, Officer Young and the others be the vehicle. When asked if Lt. Fogg, or Officer Young could have been shot, suffered death or serious bodily injury, he responded "I absolutely did." Cpl. Gianinetti

<sup>2</sup> Officer Young was unsure if she fired. Her weapon had one round missing, however no spent shell casing matching the caliber of her weapon was located on scene. Because a person must have a justification for the use or the attempted use of deadly force, I am making findings about her justification to either use deadly force or to attempt to do so.

referenced, during his interview, that some of the factors that contributed to his decision to shoot were the potential menacing charges against Mr. Phelps against his neighbor, Mr. Phelps's intoxication level, and the fact that Mr. Phelps had shot at the neighbors recently. He also referenced Mr. Phelps seeming erratic, angry and unwilling to comply with orders

-Deputy Rolbiecki reported that when Lt. Fogg told Mr. Phelps not to grab for his gun, Mr. Phelps responded "which one?" Deputy Rolbecki reported that Mr. Phelps was bladed away from him and then started turning his body and there was a gun in his hand. It appeared to Deputy Rolbecki that Mr. Phelps was trying to point it. It was at that point that he discharged his rifle. He reported that at the point he fired he feared that if Mr. Phelps continued in that motion he was going to either shoot or hurt him, or the other officers and deputies on scene. He further reported that it was his "belief that if [he] did not act at that point [Mr. Phelps] would've caused someone serious bodily injury or death." Deputy Rolbecki, in explaining his decision to fire, also described Mr. Phelps as agitated and non-compliant. He described that Mr. Phelps had already raised the gun up to waist height at the point that he decided Mr. Phelps appeared to be trying to point it at them.

-Deputy Barry described that Mr. Phelps had been ramping himself up, and getting mad, just prior to grabbing his gun and swinging it around towards the officers and deputies. He explained that he was scared so he "engaged [Mr. Phelps] as he's bringing that gun all the way around. Looked like he was intending to use it. And, you know, [he] didn't doubt it. So [he] engaged."

This subjective belief is also evident from the reactions each had. The officers and deputies did not fire as long as Mr. Phelps put his hands behind his back without grabbing the weapon, however, as soon as he modified his behavior and quickly grabbed the gun and started towards pointed the gun at the officers, they all reacted simultaneously.

Turning now to the objective reasonableness of this belief, it is readily apparent that any jury would conclude that it is reasonable that a person would believe that they are in imminent danger of being killed or that someone else is in such danger of being killed by another in this situation. They were all dispatched out there due to a call from a woman stating that he had a gun and was agitated. They were further told that he had fired at the neighbor in the days leading up to this. While out there, Mr. Phelps was making statements that demonstrated he was getting progressively more angry and aggressive. Mr. Phelps appeared intoxicated, unreasonable and uncooperative with commands. Information had been provided from Deputy Tafoya that Mr. Phelps had a traumatic brain injury and was suicidal. This would have increased the risk of a suicide by cop situation to any reasonable observer.

Finally, it is appropriate to consider whether the deputies and officers have specialized training that would allow them to make decisions more calmly, or otherwise be able to assess threats properly, without mental distortion due to stress. In the present instance, the investigation revealed that the training and experience for Cpl. Gianinetti and Deputies Barry and Rolbiecki. It is described for each respectively:

Cpl. Gianinetti: Is a shift supervisor and a Field Training Officer.

Deputy Barry: Has been a Field Training Officer for 10 years and is on the negotiations unit

Deputy Rolbiecki: Is a Field Training Officer and spent 4 years in the United States Marine Corps.

This additional training assists in their assessment of the reasonableness of the decision. Because each made an independent decision to shoot, and yet they all acted simultaneously, the actions of each can be used as one factor in assessing the reasonableness of their use of force.

My assessment of Mr. Phelps actions leads me to believe that had he survived this encounter, we would have filed charges of first degree assault on a peace officer (F3), C.R.S. § 18-3-202(1)(e), criminal attempt to commit first degree assault (F4), C.R.S. § 18-3-202(1)(a), and menacing (F5), C.R.S. § 18-3-206.

In summary, the officers and deputies responded to a call of a man yelling at his neighbors and being armed with a gun. They were all informed that he had fired his gun at them recently. They all clearly saw the weapon, made repeated attempts to negotiate a peaceful surrender, and he refused to comply with commands to keep his hands off of the gun. He appeared intoxicated, unsteady and was not making sense. They all saw Mr. Phelps reach behind his back, grab the gun and begin to bring it around to point it at the officers. This added to the fact that they all responded concurrently and similarly to the threat, and that their recount is corroborated by each other's statements leads me to the conclusion that the actions of Officer Young, Corporal Gianinetti, Deputy Barry and Deputy Rolbiecki fall squarely within the use of deadly force in self-defense or defense of others justification. Accordingly, this matter is not appropriate for criminal prosecution.

Respectfully,



Daniel P. Rubinstein  
District Attorney