



OFFICE OF THE DISTRICT ATTORNEY  
TWENTIETH JUDICIAL DISTRICT

Michael T. Dougherty, District Attorney

August 6, 2020

**Re: Investigation of the shooting of Antoinio Armstrong on July 10, 2020, involving Police Officers Nathan Miller and Brian Macchione, of the Longmont Police Department, in the area of 600 Martin Street in Longmont, Colorado.**

Dear Acting Public Safety Chief Spendlow:

The investigation and legal analysis of the non-fatal shooting of Antoinio Armstrong involving Longmont Police Department Officers Nathan Miller and Brian Macchione has been completed.

The Critical Incident Team for the 20th Judicial District, also known as the Boulder County Investigation Team ("BCIT"), investigated this case. This multi-agency team is designated to investigate use-of-force incidents in which any law enforcement officer within the 20th Judicial District uses physical or deadly force against a person while acting under the color of official law enforcement duties. This definition and team protocol are broader than that required by state law. I want to acknowledge the Longmont Police Department ("LPD") for immediately notifying the BCIT following the incident. By doing so, LPD enabled the BCIT to quickly respond and conduct an extremely thorough investigation. Consistent with Boulder County protocol, LPD did not participate in the investigation involving the officer-involved shooting.<sup>1</sup>

The investigation in this instance was conducted for the purpose of determining whether criminal charges are warranted for any of the officers related to the non-fatal shooting of Antoinio Armstrong (DOB: 08/28/1993) on July 10, 2020, within the City of Longmont. The investigation and review of this incident does not evaluate nor review the appropriateness of police tactics, or whether policies and procedures were followed.

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<sup>1</sup> LPD Detectives remained involved only in the investigation into potential domestic violence or other charges against Mr. Armstrong for his actions prior to law enforcement's use of force. Consistent with protocol and statute, LPD remained legally responsible for enforcing any criminal violations committed in Longmont which took place prior to the officers using force against the individual.

My decision, based on criminal law standards, does not limit administrative action by the Longmont Police Department or any civil actions where less-stringent laws, rules, and levels of proof would apply. The authority and role of the District Attorney's Office is to determine whether Officer Miller and/or Officer Macchione committed a criminal offense that can be proven beyond a reasonable doubt.

## **BACKGROUND**

The BCIT completed a very thorough investigation into this incident and generated detailed reports and documentation. The file is voluminous and includes transcripts of witness interviews, numerous reports, and media files. The media files contain recorded interviews, police communications, photographs, and video recordings related to the incident.

A review of the reports and documentation filed with my office has been completed and I, along with members of my staff, have been fully briefed regarding this incident by Team Commanders in charge of the investigation. I conclude that, under the applicable Colorado law, no criminal charges can or should be filed against Officer Miller or Officer Macchione.

My findings, analysis, and conclusions of law with respect to Officer Miller and Officer Macchione's use of force in this incident are as follows:

## **SUMMARY OF DECISION**

Applying the applicable statutes to the facts presented through this investigation, Officers Miller and Macchione are not subject to criminal prosecution for their actions. In all cases, including those involving law enforcement officers, the District Attorney's Office criminal filing standard requires that there be a reasonable likelihood of conviction in order to bring criminal charges against an individual(s). As in other cases prosecuted by this office, this legal and ethical requirement guides our analysis.

The evidence establishes that, at the time Officers Miller and Macchione discharged their service weapons, it was reasonable for both officers to believe that Mr. Armstrong was armed with a firearm and that the officers or bystanders were in imminent danger. Officer Miller and Officer Macchione both fired their weapons at Mr. Armstrong after seeing him brandish what appeared to be a firearm and point it at officers. Additionally, based on Colorado law, the physical force that Officers Miller and Macchione used in response was both reasonable and appropriate under the circumstances.

Officers were responding to a potential harassment call at 600 Martin Street, apartment A-3. The reporting party informed police dispatchers that Mr. Armstrong had "a 9mm in his back pocket" and that he would not leave the victim's residence.

Mr. Armstrong refused to comply with instructions from the responding police officers. Instead, Mr. Armstrong pulled a gun from his waistband and pointed it at the police officers. Specifically, Officer Miller observed Mr. Armstrong pull a gun from his waistband and raise up

his arm to point the gun in officers' direction. The item appeared to be a 9mm handgun, consistent with the earlier information relayed to dispatchers. After Officer Miller fired his weapon in defense of himself and others, Mr. Armstrong then crouched between two vehicles and officers lost sight of him. Officer Macchione, who had just arrived on scene, observed Mr. Armstrong still holding what appeared to be a semi-automatic firearm as he crouched behind a vehicle with his arm outstretched. The gun was pointed toward several officers who were taking cover behind a vehicle. In an attempt to defend himself and others, Officer Macchione fired two rounds from his rifle.

The weapon in Mr. Armstrong's possession was later revealed to be a BB gun; no firearm was recovered from the scene. However, the BB gun was all black, did not have a colored plastic tip, and was modeled after a Beretta semi-automatic handgun. It is designed to look like an actual gun. Certainly, that is how it was used by Mr. Armstrong – both in his interactions with the police and his earlier interactions with the occupant of apartment A-3, Dawn Marie Bisgard.

Police also located a second BB gun in Mr. Armstrong's backpack, this one styled after a revolver. Ms. Bisgard stated that Mr. Armstrong always had the guns and she had seen the revolver just a couple of days earlier. Ms. Bisgard believed both to be real firearms based on how they looked as well as how Mr. Armstrong represented them. The reporting party ensured police knew about the presence of a firearm prior to their interaction with Mr. Armstrong.

Officer Miller was unaware that the weapon in Mr. Armstrong's possession was a BB gun at the time that he fired five rounds from his service weapon and he reasonably believed his actions were necessary to stop an imminent threat of death or serious injury to himself and other officers on scene. Officer Macchione was equally reasonable in the belief that Mr. Armstrong was pointing a firearm at officers and that discharging two rounds from his service rifle was necessary to prevent imminent death or serious injury to himself or the other officers on scene. Neither officer violated the criminal laws of Colorado. Rather, both officers responded as authorized by the laws of Colorado and consistent with the reasonable defense of themselves and others.

### **DETAILED STATEMENT OF FACTS**

Ms. Bisgard and Mr. Armstrong had previously dated but had not seen each other for nearly a year before Mr. Armstrong returned to Colorado and contacted Ms. Bisgard in May of 2020. Ms. Bisgard allowed Mr. Armstrong to stay at her apartment for one night but had been trying to get him leave ever since. Late in the evening of July 9, 2020, Dawn Marie Bisgard was inside her apartment, located at 600 Martin Street, #A-3, with Mr. Armstrong and her young child. Ms. Bisgard and Mr. Armstrong were arguing about Mr. Armstrong leaving her apartment. Ms. Bisgard began speaking with a friend, Ryan Miller, on Facebook video. Mr. Miller and Ms. Bisgard were eventually able to convince Mr. Armstrong to leave the apartment with his items. As soon as Mr. Armstrong was out of the apartment, he began pounding on the door and calling and texting Ms. Bisgard demanding to be let back in. Ms. Bisgard called a Lyft for Mr. Armstrong but he refused to leave. Ms. Bisgard believed that Mr. Armstrong had firearms in his possession and was scared that Mr. Armstrong would kill her if he got back inside the apartment. Ms. Bisgard did not want to call police, so Mr. Miller called them on her behalf.

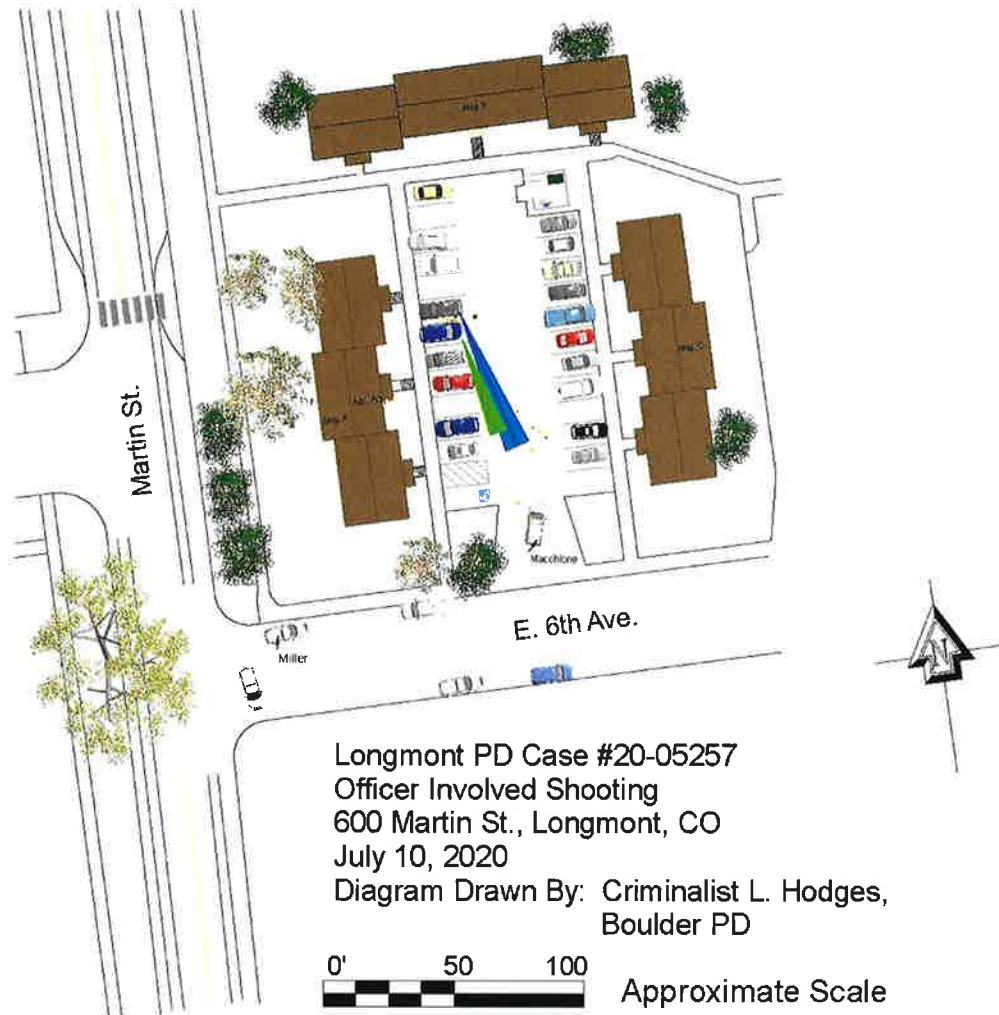
On July 10, 2020, at approximately 1:10 am, LPD Dispatch received a call on their non-emergency line stating that a man was harassing a woman at an apartment at 600 Martin Street in the City of Longmont. The caller, Mr. Miller, stated that the female was locked in her apartment and the male, who he described as a “wannabe boyfriend,” would not leave. Mr. Miller made a second call a few minutes later stating that the male had “a 9mm in his back pocket.” That information, as detailed below, was communicated to the police officers who responded to the call for assistance.

Officers arrived at the Stonehedge Apartments, located at 600 Martin Street, at approximately 1:22 am. The apartment complex has multiple entrances and parking lots located on both Martin Street and 6<sup>th</sup> Avenue. Officer Nathan Miller parked his service vehicle on the corner of 6<sup>th</sup> Avenue and Martin Street, just south of the apartment complex, and entered the western-most parking lot on foot. Three additional officers, Thomas “Tommy” Thompson, Kurtis Hampton and Jeffrey Davis were pulling up to the scene as Officer Miller was entering the complex. The parking lot is surrounded on its west, north, and east sides by apartment buildings, with six units on each side. Here is an overhead photo of the complex:



As he walked north into the complex, Officer Miller observed a black male adult (later identified as Mr. Armstrong) standing on the doorstep of apartment A-3, which was one of the center units in the building on the west side of the complex. Officer Miller asked Mr. Armstrong his name, whether he lived there, and whether he had any guns on him. Mr. Armstrong responded to all of Officer Miller’s questions, stating that his name was Antoinio, that he did live at the apartment, and that he did not have any guns on him. Officer Miller asked Mr. Armstrong to put his hands on his head and walk down to the sidewalk to speak with him. Mr. Armstrong initially complied and began to walk away from apartment A-3 toward Officer Miller’s position on the sidewalk as Officer Hampton approached. The officers and Mr. Armstrong ultimately congregated on the sidewalk, near a dark blue Honda parked on the west side of the parking lot. The officers did not have their weapons drawn. There was a white Kia south of the blue Honda. To the north of the Honda was an empty parking spot, followed by a maroon SUV, a grey Toyota

truck, a blue Ford SUV, and a finally a grey Dodge SUV. A diagram of the scene follows:



When Mr. Armstrong got to the sidewalk, Officer Miller again told him to put his hands on the back of his head. Mr. Armstrong lowered his hands and asked, “yeah...did I do anything wrong?” Officer Hampton responded that they would talk to him in a second and just wanted to make sure that he did not have any weapons on him. Based on the nature of the call, officers wanted to confirm that Mr. Armstrong was not armed prior to conducting their investigation into the underlying harassment or domestic violence call.

By this point, Officers Thompson and Davis had arrived to find the conversation between Officer Miller, Officer Hampton, and Mr. Armstrong already in progress. Mr. Armstrong was positioned two or three feet north of Officers Hampton and Miller, who were standing on the sidewalk facing him. Officers Thompson and Davis were standing in the parking lot south of the white car. A photograph depicting the parties’ locations immediately before Mr. Armstrong brandished the gun follows:



Mr. Armstrong started to turn to his right and stated, “But uhhh...I’m just...” As Officers Miller and Hampton approached Mr. Armstrong and tried to reach for his hands, Mr. Armstrong pulled back and reached toward his waistband. Mr. Armstrong quickly lifted his shirt with his left hand and reached for the butt of a gun with his right hand. Officer Miller said “Stop!” and Mr. Armstrong then, almost immediately, turned to his right, facing Officer Miller, Officer Hampton, Officer Thompson, and Officer Davis, and pulled the gun out of his waistband and pointed it towards the officers. Officers yelled, “Gun! Gun! Gun!” and “Drop the gun! Drop the gun!” Mr. Armstrong started to run eastbound, while still pointing the gun toward all four officers. Mr. Armstrong’s right arm, holding the gun, was fully extended out horizontally, parallel to the ground, and the barrel of the gun was pointed directly at the area all four officers were standing. Officers described the handgun as consistent with a 9mm semi-automatic handgun and observed it to be black in color and devoid of any markings, patterns, or colors which would normally indicate the item was a BB gun or other type of simulated firearm.

As he got to the nearest vehicle, the maroon SUV, Mr. Armstrong ran east around the north side of the vehicle, obstructing officers’ view of his location and movements. At the same time, Officer Miller backpedaled toward the center of the parking lot. Officer Miller and Mr. Armstrong came around the cars and ended up facing each other in the parking lot. While moving backwards in a southeastern direction, Officer Miller fired five rounds from his service weapon, a 9mm Glock 17. Officer Miller then took cover behind a white Kia, which was the southern-most vehicle on the west side of the parking lot, and four parking spots south of where officers had lost sight of Mr. Armstrong. At 1:24 am, Officer Miller reported shots fired over the radio, prompting an emergency response from additional officers.

All four officers ended up grouped behind the white Kia, unable to see Mr. Armstrong. The officers heard a clicking sound coming from Mr. Armstrong's direction. Officer Miller did not know whether the sound was a firearm malfunctioning or whether it was active gunfire that sounded muffled due to Officer Miller having just fired his service weapon. The other officers reported that it sounded like banging a firearm on the ground, shooting an empty revolver, or a misfiring gun.

As Officer Brian Macchione was responding to the original call, he heard gunshots as he was turning eastbound onto 6<sup>th</sup> Avenue from Martin Street. Officer Macchione pulled his vehicle into the center of the parking lot, just southeast of the area where the officers were sheltering behind the white Kia. Officer Macchione believed that one of the officers behind the Kia may have been injured because the officers were grouped so closely together that he thought they were rendering aid to one of the police officers on scene.

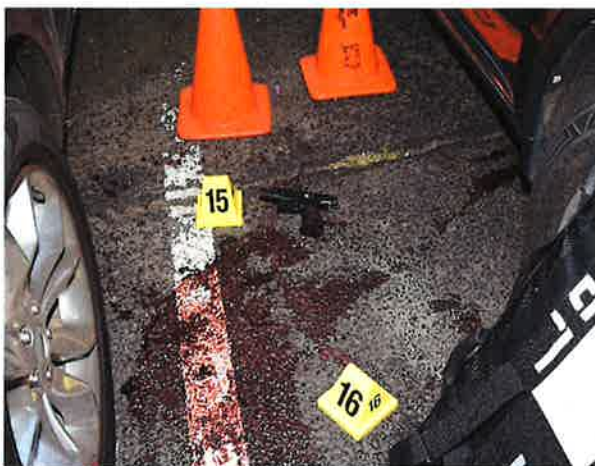
Officer Macchione could see Mr. Armstrong crouched on the ground between two cars with a gun in his right hand. Mr. Armstrong's arm was extended and the gun was pointed in the direction of the group of officers behind the Kia. Officer Macchione feared that Mr. Armstrong would fire the gun at the officers or turn and shoot at Officer Macchione. Officer Macchione grabbed his Smith & Wesson .223 rifle and fired two shots through the open driver's side window of his vehicle at approximately 1:24 am. Photos of Officer Macchione's vehicle and his view of the scene follow:



Over the next several minutes, additional units arrived and a contact team was formed to render emergency medical aid to Mr. Armstrong. Mr. Armstrong remained concealed between two vehicles on the western side of the parking lot and officers could not clearly see whether he still had weapons in his possession. Officer Macchione eventually moved to the east side of the parking lot to try to get a clear view of Mr. Armstrong. From that vantage point, he saw Mr. Armstrong transition the gun from his right hand to his left hand and raise it up to his left temple and pull the trigger. Officer Macchione heard the same clicking noise he had heard before but still did not know whether the gun was empty or malfunctioning.<sup>2</sup> Officers repeatedly called for Mr. Armstrong to show them his hands and demonstrate that he no longer held the gun. Mr. Armstrong raised his left hand, but officers could never get a clear view of both of Mr.

<sup>2</sup> It was not until one of the officers got into the ambulance with Mr. Armstrong and could see BBs lodged under the skin on his forehead that officers began to realize that the clicking sound was Mr. Armstrong firing a BB gun.

Armstrong's hands at the same time. Eventually, it became clear that Mr. Armstrong could not move his right arm. Officers directed him to position his right arm on his chest so they could see that both of his hands were empty. Once officers were able to see that Mr. Armstrong did not have anything in his hands, officers approached from the east side of the parking lot and grabbed him by the legs to pull him out from his location between the vehicles. Officers located a weapon on the ground near where Mr. Armstrong had been laying prior to officers pulling him toward the center of the parking lot.



#### **Medical Diagnosis:**

Officers verified that Mr. Armstrong did not have any other weapons on his person and then immediately allowed paramedics to begin treating Mr. Armstrong. Mr. Armstrong reported that he had been shot in the right hand. After observing what appeared to be a gunshot wound to Mr. Armstrong's upper back, EMS personnel made the immediate decision to transport Mr. Armstrong from the scene via ambulance. Mr. Armstrong was transported to Longs Peak Hospital but subsequently airlifted to Medical Center of the Rockies ("MCR") in Loveland.

Mr. Armstrong did not sign an authorization to release his medical records. Due to HIPAA, the records cannot be obtained without such a release. The BCIT worked with hospital staff to obtain an administrative release of certain biographical information consistent with HIPAA. The administrative records are five pages long and consist of billing and insurance information, admission/discharge dates, and very limited information regarding Mr. Armstrong's course of treatment. The administrative records note the presence of multiple gunshot wounds, a fractured right radius, damage to the arteries in the right arm, a fracture to the right iliac wing and lacerations to the left side of Mr. Armstrong's neck and ear, which appeared consistent with a grazing gunshot wound. The administrative records also reveal that Mr. Armstrong underwent a colectomy and surgery to repair a damaged artery in his right arm. Mr. Armstrong also presented for treatment with the self-inflicted injuries to his left temple and several BBs that had gathered together to form a lump in his forehead.

Without medical records or a statement from Mr. Armstrong, the BCIT was unable to ascertain a complete list of Mr. Armstrong's injuries. Based on a review of body camera footage and the recovered clothing, it appears that Mr. Armstrong suffered a "through and through"



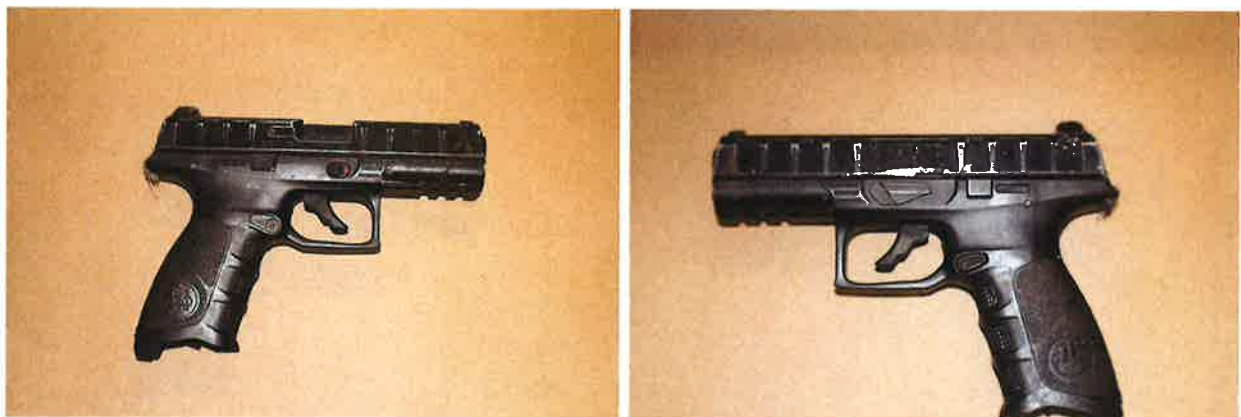
gunshot wound going from his right forearm to his right bicep and a gunshot wound to the right rear hip. Both of these injuries are consistent with the administrative records from the hospital and the defects to Mr. Armstrong's jacket, pants, and underwear. The body camera footage also shows possible gunshot wounds to Mr. Armstrong's upper back and right upper arm. These injuries were not specifically referenced in the administrative records and could not be conclusively seen in the defects to Mr. Armstrong's clothing. Mr. Armstrong's jacket had multiple defects in addition to the ones explained by the through and through injury to his right arm. The t-shirt underneath, however, did not have any apparent defects. Members of the BCIT attempted to place trajectory rods in the jacket to explain the additional defects but were not able to make any conclusions based on the available information.

During an emergency surgery on July 10, 2020, a 9mm bullet was recovered from Mr. Armstrong's torso. Five BBs were removed from Mr. Armstrong's forehead without surgical intervention. Mr. Armstrong was transferred to the ICU in stable condition following surgery. Mr. Armstrong was released from the hospital on July 28, 2020.

### **Scene Preservation and Search Warrants:**

After the scene was secured and Mr. Armstrong had been transported for treatment, members of the BCIT took steps to preserve and document the scene. Photographs and video were taken before evidence was collected or disturbed. Members of the team also generated diagrams and maps showing where the officers, Mr. Armstrong, and relevant pieces of evidence were located before, during, and after the shooting. The BCIT conducted a thorough search of the scene and collected several pieces of evidence.

The BCIT recovered the black Beretta BB gun, modeled to appear identical to a Beretta 9mm APX handgun. The gun had writing on the side indicating its caliber, but lacked a plastic tip or any other coloring or markings to demonstrate to an observer that it was a BB gun. The BB gun was recovered from the west side of the parking lot at 600 Martin Street, between two vehicles in the immediate area where Mr. Armstrong was approached by the contact team.



The BCIT also located and collected five 9mm cartridge cases in the center of the parking lot, consistent with Officer Miller's statement that he discharged his service weapon while backpedaling in a southeasterly direction. The location of these cartridge cases is, also,

consistent with the viewing of the body-worn camera videos. The BCIT also located and collected two .223 cartridge cases from the scene. One was recovered from the running board on the driver's side of Officer Macchione's service vehicle and the second was recovered from the parking lot just to the west of the vehicle itself. The location of these .223 casings is consistent with the statement from Officer Macchione. The location of these .223 cartridge cases is, also, consistent with the viewing of the body-worn camera videos.

Police also recovered three spent 9mm bullets from the scene. Two 9mm bullets, one covered in apparent blood, were located on the ground in the same area where Mr. Armstrong was first found by the contact team. The third was lodged in a stroller stored in the back of a grey Dodge SUV that had been parked to the north of Mr. Armstrong's location. Officers also observed defects consistent with bullet holes to three vehicles to the north of Mr. Armstrong's location, the grey Dodge SUV, a blue Ford SUV, and a white Jeep SUV.

The BCIT also recovered Mr. Armstrong's clothing. Mr. Armstrong's black jacket had been removed by medical personnel at the scene. Officers collected the jacket and one white shoe that had been near the initial point of contact with Mr. Armstrong. The second white shoe, along with Mr. Armstrong's t-shirt, pants, socks, and underwear were recovered from the hospital.

Members of the BCIT also canvassed the apartment complex and neighboring homes for any witnesses or home security footage covering the parking lot. None of the individuals witnessed the incident, although several heard gunshots, sirens, and/or the police response. Officers were able to locate one neighbor with a home security camera, but it did not capture or contain any relevant footage.

Police located a black backpack sitting near the front door of Apartment A-3. A black cell phone was plugged into an external wall outlet nearby. Officers also located a black duffle bag inside a dumpster enclosure in the northeast corner of the parking lot. The duffle bag was consistent with one Mr. Armstrong had been known to carry. Officers seized all three items and obtained court-authorized search warrants to examine any evidence inside. Although the reporting party had only referenced a single 9mm handgun, later interviews indicated that Mr. Armstrong had a loaded revolver that he always kept inside the duffle bag. Police searched the backpack and duffle bag recovered from the scene. Police recovered an additional BB gun inside the backpack, this one modeled after a revolver. BBs are pushed into the front of what appears to be a standard "bullet" and loaded into the cylinder, making the gun appear similar to a firearm even when the cylinder is opened.



**Interviews with Officers Nathan Miller, Brian Macchione, Kurtis Hampton, Tommy Thompson, and Jeffrey Davis:**

The BCIT interviewed fifteen law enforcement officers who responded to Stonehedge Apartments on July 10, 2020. Most of these officers had responded after shots had been fired and were only involved in securing the scene or serving on the contact team assembled to render aid to Mr. Armstrong. Under the law, the officers were not required to provide statements to the BCIT. However, all of the officers involved provided voluntary statements.

The interviews with the first responding officers and the officers who discharged their firearms were recorded on video and are summarized below. Relevant information from the remaining interviews is included in the statement of facts above.

**Officer Nathan Miller**

Prior to his arrival at 600 Martin Street, Officer Miller knew the call was a disturbance involving a female who wanted a male to leave her apartment. Officer Miller was the third unit assigned to the call after the initial officers confirmed with dispatch that the male was reportedly armed with a firearm. Officer Miller released his rifle from its cage in his patrol vehicle before making contact with any of the individuals involved in the call. Given that it was a third-party calling police and not the victim herself, Officer Miller made a conscious decision to leave the rifle in the car because the presence of a firearm had not yet been directly confirmed. He approached the apartment and observed Mr. Armstrong standing on the steps near the door to apartment A-3. Mr. Armstrong was initially compliant with commands to put his hands up and walk toward officers. Officer Miller had a flashlight out but had not yet drawn his service weapon. Mr. Armstrong became non-compliant when he was asked to turn around. Officer Miller had observed Mr. Armstrong in a loose t-shirt and jacket. Although he had tried to scan for potential weapons, Officer Miller believed that he would be better able to see a firearm if Mr. Armstrong turned his back. Officer Miller became concerned when Mr. Armstrong refused to turn all the way around. Officer Miller reached for Mr. Armstrong's hand to immobilize him. As soon as Officer Miller touched Mr. Armstrong's hand, Mr. Armstrong pulled back and reached for his waistband with his left hand. Mr. Armstrong lifted his shirt and put his right hand on the butt of a gun. When Mr. Armstrong pulled the gun from his waistband, he was only about an arm's length away from Officer Miller.

Mr. Armstrong started backpedaling and turned behind a car. Officer Miller feared for his life and the life of his fellow officers as he backed toward the center of the parking lot. In this interview, Officer Miller also expressed concern that Mr. Armstrong could shift his focus back to Ms. Bisgard inside the apartment. When Officer Miller and Mr. Armstrong converged in the parking lot, Officer Miller fired what he believed to be four shots from his firearm while moving east through the parking lot and then ran behind a white car for cover. Officer Miller stopped firing his gun once he saw Mr. Armstrong fall to the ground. As he was running for cover, Officer Miller saw Mr. Armstrong near the painted white line between two spots. He was laying partially on his side, raised up on one arm, and crawling back between two vehicles. Officer Miller was peeking around the car trying to get a visual on Mr. Armstrong. He saw Mr. Armstrong looking out from behind a car four or five parking spots away but could not get a clear look at Mr. Armstrong. Officer Miller heard a clicking noise coming from Mr. Armstrong's direction and was not sure whether it was Mr. Armstrong firing an empty firearm or if it was an active firearm that just seemed muffled because he had just discharged his own firearm.

Officer Miller heard two rifle rounds from behind him and turned to see Officer Macchione standing in the driver's side door frame of his unmarked patrol car. Officer Miller ultimately followed Officer Macchione to the east side of the parking lot where they were able to use additional vehicles for cover as they tried to get a good visual on Mr. Armstrong. Officer Miller heard Officer Macchione say that Mr. Armstrong had a gun and was trying to shoot himself in the head. Mr. Armstrong was laying on his back on the ground between two vehicles. Multiple officers gave Mr. Armstrong commands to show his hands.

A sergeant told Officer Miller to go get a ballistic shield out of his car. When Officer Miller returned, the sergeant removed Officer Macchione and had Officer Miller take his place issuing commands to Mr. Armstrong. It became clear that Mr. Armstrong's right arm was injured, so officers instructed him use his left hand to move his right arm onto his chest. Once officers got a clear view of both of Mr. Armstrong's hands, they came in to render aid. Officer Miller was on one side of the shield, the sergeant was in the middle, and a second patrol officer was on the other side as they approached Mr. Armstrong. The other officer grabbed Mr. Armstrong by the leg and pulled him into the center of the parking lot to render medical aid. Just as Officer Miller was about to go hands on to render aid or search Mr. Armstrong, Officer Thompson pulled him away from the scene and walked him over to a patrol car.

#### Officer Brian Macchione

Officer Macchione was in his service vehicle working on paperwork when he heard the initial call come in over the radio. He believed the call might have been stalking-related based on the information provided to dispatch and started driving toward 600 Martin after dispatch confirmed that a male involved in the call may have been armed with a firearm. Officer Macchione was driving with his windows down and heard several gunshots as he was pulling onto 6<sup>th</sup> Avenue from Martin Street. Officer Macchione was not sure whether the shots had been fired by an officer, the suspect, or both. As Officer Macchione pulled into the parking lot, he saw officers grouped together behind the southern-most car in the parking lot and thought they were rendering aid to an injured officer based on how close together they were. Officer Macchione saw Mr. Armstrong behind a car twenty to thirty yards away, crouched down with his arm

extended and a gun pointed at officers. Officer Macchione feared for the other officers' lives. He worried that Mr. Armstrong would be able to get a clean angle to start shooting at officers behind the car. Officer Macchione also feared for his own life because all Mr. Armstrong had to do was turn by roughly a foot to have a direct shot at Officer Macchione. Officer Macchione also expressed fear for the safety of the woman in the apartment, Ms. Bisgard. Officer Macchione stepped down from the driver's side of his car and fired two rounds from his service rifle through the open window of his vehicle. Mr. Armstrong ducked or laid down behind the car and Officer Macchione lost sight of him. Officer Macchione ran around behind another car on the east side of the parking lot, trying to get a line of sight on Mr. Armstrong. As he did so, Officer Macchione heard a clicking noise that sounded like a gun malfunctioning. Officer Macchione was able to get where he could see that Mr. Armstrong's left hand was empty, but that he had a gun in his right hand. Officer Macchione gave several commands for Mr. Armstrong to drop the gun. In response, Mr. Armstrong moved the gun from his right hand to his left hand and raised it up to his left temple. Officer Macchione watched as Mr. Armstrong pulled the trigger and heard the same clicking sound. Officer Macchione called out to his fellow officers that Mr. Armstrong was trying to shoot himself in the head. Mr. Armstrong switched the gun back to his right hand and Officer Macchione observed it fall to Mr. Armstrong's side. Officer Macchione continued to call out for Mr. Armstrong to show officers his hands. Mr. Armstrong would show his left hand but would not raise his right hand. Officer Macchione knew the gun was somewhere on Mr. Armstrong's right side. At that point, a sergeant arrived and learned that Officer Macchione had fired his rifle so had another officer take his place.

#### Officer Kurtis Hampton

Officer Hampton was the secondary unit dispatched to the initial disturbance at 600 Martin Street along with Officer Davis, who was the primary officer. Officer Hampton was able to call the female inside apartment A-3 as he was driving to the scene. She confirmed that she had seen the male with a firearm and sounded terrified as she spoke with Officer Hampton. Officer Hampton ended the call as he was walking toward the apartment complex. He saw Officer Miller make contact with Mr. Armstrong and start issuing commands. Mr. Armstrong was initially compliant and started to walk toward Officers Miller and Hampton. The officers wanted to detain Mr. Armstrong in order to make sure he did not have any weapons and to complete their investigation.

Officers ordered Mr. Armstrong to put his hands behind his head. Mr. Armstrong's body language changed and he seemed to be considering his options. He looked like he might run. Both officers moved forward to reach for Mr. Armstrong's hands. As they did, Mr. Armstrong reached down for his waistband, pulled out a gun and pointed it at them before going between two cars. Officer Hampton estimated that Mr. Armstrong was less than ten feet away when he pointed the gun at them and that while he was pointing the gun with one hand, his hips were turning and he was trying to get himself to cover behind a car while the officers were still out in the open. Both officers pulled their service weapons and Officer Miller yelled, "gun!" Officer Hampton saw Mr. Armstrong run between two cars and believed Officer Miller followed him. Officer Hampton feared for Officer Miller's safety and decided not to follow them through the cars because it was a tight, dangerous space. Officer Hampton also wanted to make sure he was in a position to render aid if Officer Miller got hurt. Officer Hampton took cover behind a white

car and waited for Mr. Armstrong to appear on the other side of the cars. While he was moving to cover, Officer Hampton heard an unknown number of gunshots and believed they came from Officer Miller based on their location.

Officer Macchione then arrived on scene and parked south east of their location. Officer Hampton heard the rifle fire twice. He knew it had been fired by Officer Macchione because he could hear Officer Macchione talking and recognized his voice. Officer Hampton maintained his location on the trunk of the car looking out into the parking lot while Officer Davis stayed up near the car's engine. Officer Hampton described hearing a noise that he believed was Mr. Armstrong banging a gun on the ground. Officer Macchione repeatedly ordered Mr. Armstrong to show officers his hands and kept saying something like, "I need to see your other hand." Officer Macchione then reported that Mr. Armstrong was trying to shoot himself in the head. Officer Hampton stayed where he was until he saw the contact team pull Mr. Armstrong out from between the cars and then he ran up and helped officers search Mr. Armstrong so that medical could respond.

#### Officer Tommy Thompson

Officer Thompson was on patrol, parked in a parking lot, at the time he heard the original call come out over dispatch. Once dispatch confirmed there was potentially a firearm involved, he began to make his way to 600 Martin Street. Once he arrived, he saw Officers Miller and Hampton in contact with Mr. Armstrong. He could not initially hear the conversation, but it looked like Mr. Armstrong was being compliant. Officer Thompson stopped just short of the other officers. He stood behind a car in the parking lot because Officers Miller and Hampton were next to each other on the sidewalk and there was not a lot of room for another officer. He estimated that Officers Hampton and Miller were two to three feet from Mr. Armstrong, while he was ten to twelve feet away. He heard the officers tell Mr. Armstrong they were going to pat him down for weapons and watched as Mr. Armstrong lowered his hands and appeared to look around for somewhere to escape. Mr. Armstrong asked if he did anything wrong and the officers said they would answer his questions later. Mr. Armstrong dropped one hand down and lifted his shirt while grabbing something with his other hand. Mr. Armstrong then lifted his arm and pointed it straight out at officers.

Officer Thompson moved west toward the apartment building and saw Mr. Armstrong and Officer Miller both run in the same direction eastbound through the parked cars. He saw the muzzle flash from Officer Miller's gun and heard gunshots. Officer Thompson believed Mr. Armstrong was returning fire. Officer Thompson fell on the stairs near the apartments and lost sight of Mr. Armstrong and Officer Miller. Officer Thompson then took cover behind a white car and observed Officer Davis nearby. Officer Thompson heard ten to fifteen clicks coming from Mr. Armstrong's direction and described them as the sound an empty revolver would make if someone continued to try to fire it. Officer Thompson looked back and saw Officer Macchione pull into the parking lot and noticed that Officers Miller and Hampton were also behind the white car with them. Officer Thompson heard a single rifle shot from Officer Macchione's direction. As other officers arrived, they reported that Mr. Armstrong was on the ground between two cars, with his head facing toward building A and that he was trying to shoot himself in the head. Officers gave Mr. Armstrong repeated commands for roughly five minutes before they were able

to make contact and pull him from between the cars.

Officer Thompson saw Officer Miller standing above Mr. Armstrong and it looked like he was about to begin a pat down. Officer Thompson decided to pull Officer Miller away from the scene because he knew Officer Miller had fired his weapon. He tapped Officer Miller on the shoulder and took him over to a patrol car. Officer Thompson removed Officer Miller's vest to make sure he was not injured. A sergeant then came over and had them each partner with to an uninvolved officer since they had been involved in the discharge of a firearm.

#### Officer Jeffrey Davis

Officer Davis was at LPD headquarters when the initial call came out. As he was responding to the scene, he got a call from his sergeant which distracted him from the initial contact Officer Miller had with Mr. Armstrong. Officer Davis heard Officer Miller tell Mr. Armstrong to keep his hands where they could see them and watched as Officer Miller advanced forward to check Mr. Armstrong for weapons. Mr. Armstrong took a few steps back and looked as though he were going to run. Mr. Armstrong then reached for his waist and ran east between cars. Officer Davis saw Officer Miller run the same direction while yelling, "drop the gun!" Officer Davis then saw Officer Miller backpedaling through the parking lot while firing an unknown number of shots from his service weapon. Officer Davis took cover behind a car. After Officer Miller discharged his service weapon, Officer Davis heard several clicking sounds and was not sure if Mr. Armstrong was trying to clear a malfunction or reload the gun. Officer Davis heard a car pull up and looked up to see Officer Macchione. After he turned away, he heard two rifle shots coming from Officer Macchione's direction. Other officers continued to arrive and relayed that they could see the suspect's feet between two cars. Officer Davis heard several officers giving Mr. Armstrong commands before the contact team ultimately pulled him out from between the cars. Officer Davis was instructed to follow Mr. Armstrong to the hospital, where he met with another officer and collected Mr. Armstrong's property. Officer Davis stayed at the hospital until Mr. Armstrong was airlifted to MCR, at which point he collected Mr. Armstrong's clothing and returned to LPD headquarters.

#### **Interview with Antoinio Armstrong and the other civilian witnesses**

In every BCIT investigation, the Team seeks to interview all of the witnesses in order to ensure that the investigation is complete. In this investigation, it was hoped that the Mr. Armstrong would agree to be interviewed. The purpose of the interview would be to develop more information about his earlier interactions with Ms. Bisgard, his possession of the two guns, his pulling the gun on the police officers, and the actions of the officers in response.

The BCIT and the District Attorney's Office sought to interview Mr. Armstrong. Mr. Armstrong, through his legal counsel, was invited to provide a statement but he declined to be interviewed in connection with this incident.

However, the BCIT interviewed several additional witnesses, including EMS and fire department personnel, neighbors, lay witnesses, and relatives. The interviews with Ryan Miller and Dawn Marie Bisgard are summarized in relevant part below. Relevant information from the

remaining interviews is included in the statement of facts above.

### Ryan Miller

Late in the evening of July 9, 2020, Ryan Miller saw Ms. Bisgard logged into Facebook and sent her a message asking how she was doing. Mr. Miller had previously lived in the same mobile home park with Ms. Bisgard and Mr. Armstrong in Broomfield. He knew that Mr. Armstrong had problems with a prior girlfriend at the mobile home park. Mr. Miller did not realize Ms. Bisgard and Mr. Armstrong were dating because he had not spoken to Ms. Bisgard in over a year.

Mr. Miller and Ms. Bisgard began speaking over Facebook's video call application at roughly 11:00 pm. Ms. Bisgard told Mr. Miller that Mr. Armstrong was starving her and making her homeless. Ms. Bisgard was crying and her makeup was not done, which was unusual because she was usually very put together. Mr. Miller, who was near Denver at that time, grew concerned for Ms. Bisgard and attempted to get a ride to Longmont to check on her. He was unable to get a ride and was unable to drive himself because he had been drinking. Mr. Miller asked Ms. Bisgard to go downstairs and give the phone to Mr. Armstrong. Mr. Miller then told Mr. Armstrong that if he did not leave the apartment, Mr. Miller would come over and fight him. Mr. Armstrong ultimately left the apartment. A few moments later, Ms. Bisgard called Mr. Miller again because Mr. Armstrong was banging on the door and trying to get back in and she was scared.

Mr. Miller called the LPD non-emergency line and told a dispatcher that Mr. Armstrong was harassing Ms. Bisgard. Ms. Bisgard had denied any physical violence, but Mr. Miller did not believe her, so he told police dispatchers that he feared Mr. Armstrong was beating Ms. Bisgard. Mr. Miller then called police a second time after Ms. Bisgard told him that Mr. Armstrong was armed. Mr. Miller provided information about the 9mm in Mr. Armstrong's back pocket as he did not want officers to get injured.

### Dawn Marie Bisgard

Ms. Bisgard and Mr. Armstrong met in 2019 and began dating at that time. Mr. Armstrong convinced her to sell her trailer and move with him to Chicago. Ms. Bisgard sold the trailer but did not receive as much money as they had hoped. She and Mr. Armstrong spent all the money on hotels, food, and Ubers in Colorado. After the money from the sale of her trailer was spent, Mr. Armstrong told her that if there was no more money, he was gone. Mr. Armstrong left and Ms. Bisgard did not see him again for nearly a year. Mr. Armstrong returned in May of 2020 and Ms. Bisgard let him stay with her for one night. Ms. Bisgard indicated that she had been trying to get Mr. Armstrong to leave ever since.

During the evening of July 9, 2020, Ms. Bisgard and Mr. Armstrong were arguing about Mr. Armstrong leaving the apartment. Around midnight on July 10, 2020, Ms. Bisgard was on Facebook video chat with her friend Ryan Miller. Ms. Bisgard was upstairs with her child while Mr. Armstrong was downstairs. Ms. Bisgard went downstairs so Mr. Miller could tell Mr. Armstrong to leave her home. Ms. Bisgard picked up Mr. Armstrong's backpack and went to



place it outside, hoping Mr. Armstrong would follow. Mr. Armstrong grabbed the backpack and left the apartment. Ms. Bisgard locked the door after him. For the next half hour, Mr. Armstrong banged on the door and repeatedly texted and called her asking to come back inside. Ms. Bisgard was relieved he was outside. She feared that Mr. Armstrong would kill her if he got back into the apartment and stated that was the angriest Mr. Armstrong had ever been with her. Ms. Bisgard ordered a Lyft for Mr. Armstrong and set its destination as the Longmont Police Department, but Mr. Armstrong did not get in the car. Ms. Bisgard received a call from one of the police officers, who told her they would come talk to her in a moment. A few minutes later, while she was back on the phone with Mr. Miller, she heard gunshots and believed that Mr. Armstrong was firing into her apartment.

Ms. Bisgard gave members of the BCIT access to her phone in order to document and photograph the contents. Beyond establishing a timeline, the information on the phone is not relevant to the BCIT investigation.

Ms. Bisgard knew that Mr. Armstrong always carried a black backpack and a large black duffle bag. She told police he carried a silver revolver in the duffle bag and a handgun in his pocket. She believed both of these weapons to be actual firearms. Mr. Armstrong never told her otherwise and never corrected her perception that these were real firearms. Ms. Bisgard had last seen the revolver a couple of days before July 10, 2020, when Mr. Armstrong had opened the cylinder to show her that it was fully loaded. Ms. Bisgard stated that she did not like guns, did not know anything about them, and did not know why Mr. Armstrong had them. She stated that Mr. Armstrong had never pointed them at her or directly threatened her.

### **Body-Worn Camera Videos:**

Although not yet required by law, uniformed officers with LPD utilize body-worn cameras that have both audio and video recording capabilities. The body-worn cameras are constantly running during an officer's shift but do not store video or audio unless they are manually activated. The cameras are activated when an officer touches the on/off button in the center of the device and cannot be remotely activated. Once a camera is activated by the officer, it records and saves both video and audio until it is manually deactivated. The cameras also save the 30 seconds of video recorded immediately prior to the camera's activation; there is no audio during this 30 second period, however.

All of the additional officers who responded to the scene also had their body cameras activated. Relevant information from those body camera videos is included in the statement of facts above. All of the relevant recordings will be posted on the District Attorney's website and made available to the general public.

Many of the events recounted in this letter were captured on video and/or audio from body cameras. A brief summary of the body camera footage for the first responding officers and the officers who discharged their firearms follows. The summary is not verbatim and portions of the audio can be heard in multiple videos. The videos are, generally, consistent with the information provided by the officers as well as the examination of the crime scene.

### Officer Miller's body camera

Officer Miller's body camera video starts as he walks toward the complex. Officer Miller comes around the corner into the apartment complex and shines a flashlight at Mr. Armstrong, who is standing on the steps in front of an apartment. Officer Miller asks him to put his hands up. Mr. Armstrong complies and then Officer Miller asks, "you have any guns on you, man?" to which Mr. Armstrong replies, "no guns." Officer Miller asks Mr. Armstrong to put his hands on his head and walk down to the sidewalk. Mr. Armstrong walks toward Officer Miller. As Officer Miller continues to issue commands, Mr. Armstrong drops his hands and asks whether he did anything wrong. Officers Miller and Hampton state that they will talk to him in a second and just want to make sure he does not have any weapons on him. Mr. Armstrong turns to his right and both officers start to advance toward him. Mr. Armstrong backs up, brandishes what appears to be a gun and extends his right arm to point the gun at officers. Mr. Armstrong turns and starts to run eastbound behind a maroon SUV. Officer Miller also runs east and fires five shots as he is moving backward through the parking lot in a southeastern direction. Officer Miller announces, "shots fired" over the radio as he moves behind a white vehicle for cover. A few seconds later, Officer Miller looks out from behind the trunk of the vehicle and a white shoe is visible north of the maroon SUV.

The body camera captures the sound of a car pulling into the parking lot and brakes squeaking. There are several popping noises and Officer Miller says, "he's shooting something." The officers communicate that no one can see Mr. Armstrong and Officer Macchione responds, "I got eyes on, don't move." Two rifle rounds can be heard, followed by a groan. Officers then issue repeated commands for Mr. Armstrong to show both hands. After more than five minutes, Officer Miller states, "there's his other hand." Officer Miller and two other officers then gather behind a ballistic shield and move west toward Mr. Armstrong. Officers make contact with Mr. Armstrong and pull him toward the center of the parking lot by his right leg. Officers then ask where Mr. Armstrong is hurt and pat him down for weapons as Officer Miller is pulled away from the scene by Officer Thompson.

### Officer Macchione's body camera

Officer Macchione's body-worn camera was off as he drove to the scene and, once he heard gunshots, his focus was on assessing the scene and protecting officers. Officer Macchione activated his body camera shortly after he discharged his rifle, although his actions are captured on the body-worn camera recordings of other officers. Officer Macchione's body camera begins as he is moving behind a white truck on the east side of the parking lot trying to get a clear view of Mr. Armstrong. Officer Macchione repeatedly tells Mr. Armstrong he needs to see both hands. Officer Macchione then relays several pieces of information to fellow officers, before stating, "he's trying to shoot himself in the head" and then, "he dropped it." Officers then give Mr. Armstrong more than a dozen commands to show his other hand before Officer Macchione is asked to step off his post once a sergeant learned he had fired his service rifle.

#### Officer Hampton's body camera

Officer Hampton's body camera begins as he drives to the scene. The audio on Officer Hampton's camera catches the tail end of the above-referenced phone call with Ms. Bisgard as he walks into the complex. Officer Hampton catches up with Officer Miller as he is instructing Mr. Armstrong to put his hands up and turn around. After Mr. Armstrong lowers his hands, both officers start to advance toward him. Mr. Armstrong pulls back before reaching for his waistband. Mr. Armstrong extends his arm and points what appears to be a gun at officers. Officer Hampton runs behind a white car for cover as five gunshots are heard. Several small clicks or pops can be heard on the video, followed by two rifle shots and several more small pops. Officer Hampton remains behind the white car until he is instructed to get a drone from his vehicle. Officer Hampton checks his vehicle and the drone is not there, so he runs back to the parking lot and takes cover behind a second patrol vehicle with a ballistic windshield which had pulled into the parking lot next to Officer Macchione's vehicle. Officer Hampton remains behind that vehicle until Mr. Armstrong is contacted. Officer Hampton then assists in rendering medical aid until he is asked by a paramedic to move the patrol cars out of the parking lot so that an ambulance can get to Mr. Armstrong.

#### Officer Thompson's body camera

Officer Thompson's body camera footage begins as he is driving to the scene. Officer Miller is already speaking with Mr. Armstrong as Officer Thompson approaches on foot. Officer Thompson stops just south of a white car while Officer Hampton continues north and stands just west of Officer Miller. Officers Hampton and Miller advance toward Mr. Armstrong, who steps back and begins to run north around a red SUV. Officer Thompson briefly runs up the steps to an apartment in building A and then takes cover on the south side of the white car. Officer Miller runs east between two vehicles and out of camera range. Five gunshots are heard as Officer Thompson calls out "Code 10" over the radio. Officers Hampton, Davis, and Miller can all be seen taking cover behind the white car. Officer Thompson maintains his location behind the hood of the white car until he goes to remove Officer Miller from the scene after officers have made contact with Mr. Armstrong.

#### Officer Davis's body camera

Officer Davis's body camera footage begins as he is approaching the apartment complex on foot. Officers Thompson and Hampton can be seen ahead of Officer Davis, who is the fourth officer to arrive. Officer Davis takes a position near the trunk of the same white car Officer Thompson is standing behind. Once Officer Davis is positioned near the white car, Mr. Armstrong is no longer visible in Officer Davis's video. Officer Davis remains south of the white car until Mr. Armstrong is reached by the contact team.

## LEGAL AUTHORITY

Criminal liability is established in Colorado only if it is proven beyond a reasonable doubt that someone has committed all of the elements of an offense defined by Colorado statute, and further proven 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 by statute as an assault or attempted homicide in Colorado, the Criminal Code specifies certain circumstances in which the use of physical force by a peace officer is justified. The investigation establishes that one round from Officer Miller's 9mm handgun struck Mr. Armstrong in the right hip. A second round struck Mr. Armstrong in the right arm. Although not conclusive, the right arm injury is consistent with being struck by Officer Macchione's service rifle, which had significantly more power and range than Officer Miller's handgun. In addition to his self-inflicted injuries, Mr. Armstrong also had additional wounds to the upper back, right arm, left ear and neck; these injuries could have been caused by either officer's service weapon.

Officer Miller and Officer Macchione both knowingly fired their weapons at Mr. Armstrong after seeing him brandish what appeared to be a firearm and point it at officers. Officers Miller and Macchione both feared that they themselves, their fellow officers, or occupants of nearby apartments could be shot by Mr. Armstrong, causing serious injury or death. The determination of whether the officers' conduct was criminal is primarily a question of legal justification. Although much of the analysis will be the same for both officers, their conduct must be assessed separately; a finding that one officer's actions were justified does not impact the analysis for the other officer because the information must be assessed based on what each officer independently knew or believed at the time he fired his weapon. In other words, the conduct of each officer must be independently analyzed for the purpose of determining whether criminal charges can and should be filed.

C.R.S. § 18-1-707 defines the circumstances under which a peace officer can justifiably use physical force in Colorado.<sup>3</sup> In pertinent part, the statute 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:
  - 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

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<sup>3</sup> The recent passage of Senate Bill 217 has changed several statutes and laws regarding officers' use of force. The quoted statute is the version that was in effect on July 10, 2020. The passage of Senate Bill 217 does not change the applicable legal analysis in this case. If Senate Bill 217 had been in effect at the time of the incident, it would not change the conclusion of the legal analysis. The officers conduct was justified and appropriate under both versions of the law.

escape.

C.R.S. 18-1-707.

In this case, officers did not have sufficient information to effect an arrest of Mr. Armstrong when they made contact with him on the sidewalk. Officers were in the early stages of their investigation and did not know whether any criminal activity had occurred prior to Mr. Armstrong brandishing a firearm at the officers. As such, C.R.S. § 18-1-707, which governs the level of force permitted to effect an arrest or prevent an escape from custody, does not apply. The officers' conduct in this case is governed by C.R.S. § 18-1-704, which provides in relevant part:

(1) ...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.

(2) Deadly physical force<sup>4</sup> may be used only if a person reasonably believes a lesser degree of force is inadequate and:

(a) The actor has reasonable ground to believe, and does believe, that he or another person is in imminent danger of being killed or of receiving great bodily injury....

C.R.S. 18-1-704.<sup>5</sup>

The analysis under C.R.S. 18-1-704 is the same for law enforcement officers as for any other individual. 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. Silva, 987 P.2d at 909; see also Sanchez v. People, 820 P.2d 1103 (Colo. 1991) (person asserting self-defense may act on appearances rather than reality; question is whether the person's conduct was reasonable under the circumstances as he or she perceived them to be). It has long been held by the Colorado Supreme Court that:

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

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<sup>4</sup> Deadly physical force is defined by C.R.S. § 18-1-901(3)(d) as, "force, the intended, natural, and probable consequence of which is to produce death, and which does, in fact, produce death." Mr. Armstrong, fortunately, survived. As such, the force used by the officers in this case does not meet the statutory definition for deadly physical force.

<sup>5</sup> The relevant language from C.R.S. § 18-1-704 did not change with the recent passage of Senate Bill 217.

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, therefore are: whether at the time the officers used physical force, each reasonably believed that he and or one of the other officers present were being subjected to or were about to be subjected to the imminent use of unlawful physical force; and furthermore, that his 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 use physical force to defend himself or another and stop the threat that Mr. Armstrong presented. The answer to that question is a resounding yes.

## LEGAL ANALYSIS

In this case, the actions of Officer Miller and Officer Macchione were legally justified under Colorado law. At the time both officers discharged their service weapons they were justified in using physical force by C.R.S. § 18-1-704(1). The subsection provides that an officer may use physical force where he or she reasonably believes that such force is necessary to protect himself or another from imminent death or serious bodily injury. Under Colorado case law, the facts must be viewed as they appeared to the officers at the time; future developments are irrelevant to the legal analysis. Specifically, whether the gun was later determined to be real or loaded, the legal analysis is required to focus on what was known to the officers at the time of the incident.

At the time Officer Miller discharged his service weapon, he had observed Mr. Armstrong brandish what appeared to be a firearm and raise his right arm in order to point it at officers. None of the officers had their service weapons unholstered prior to Mr. Armstrong pointing the gun in their direction. Officer Miller had to make a split-second decision in order to protect himself and his fellow officers. Even if Officer Miller had more time to assess the situation, there was nothing about the gun's appearance that would have alerted Officer Miller that it was not a semi-automatic handgun. The BB gun Mr. Armstrong pointed at the officers was modeled after a Beretta APX 9mm handgun and meant to appear identical to a real firearm. In his voluntary interview, Officer Miller expressed a belief that no one would brandish a gun in such a manner unless they intended to use it. He further expressed a fear that if he hesitated, he or another officer would be shot and potentially killed by Mr. Armstrong. Such a reaction was entirely reasonable under the circumstances.

Officer Macchione's actions were equally reasonable, justified, and appropriate. Less than 90 seconds had elapsed between the time when Officer Miller began speaking to Mr. Armstrong and when Officer Macchione fired his service rifle. As such, although Officer

Macchione arrived after the initial group of officers, he did not have the benefit of additional information. As he approached the scene, Officer Macchione heard gunshots, but did not know whether they came from a police officer or suspect. The officers at the scene radioed in, "shots fired," and "Code 10," but did not provide any additional information. Officer Macchione then saw several officers grouped together behind a car and believed that one of them had been injured. As he pulled into the center of the parking lot, Officer Macchione observed Mr. Armstrong crouched down behind a car with his right arm extended, pointing what appeared to be a firearm at the officers behind the car.<sup>6</sup> Even with the additional illumination provided by Officer Macchione's headlights, there was still nothing that could have indicated that the item in Mr. Armstrong's hand was a BB gun. The officers at the scene all reported hearing a clicking noise. While the initial officers could not see Mr. Armstrong, they believed the sound was from an empty or misfiring gun, or was active gunfire that appeared muffled because the noise from Officer Miller's shots had affected their hearing. Mr. Armstrong was only a few parking spots north of the officers, and Officer Macchione feared that they could be shot or killed at any moment. Based on his position in the parking lot, Officer Macchione stated that he also feared for his own life because Mr. Armstrong could just as easily turn and fire a direct shot at Officer Macchione. Such a fear was objectively reasonable based on the circumstances as they appeared at the time and, therefore, Officer Macchione was justified in discharging his service rifle.

After viewing the evidence in the case as a whole, the actions of both Officer Miller and Officer Macchione were legally justified under the applicable statutory provisions and not subject to criminal prosecution.

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<sup>6</sup> Mr. Armstrong had a through and through gunshot wound to his right arm; the extent of the damage was consistent with being struck by a round from Officer Macchione's service rifle. There was no corresponding injury elsewhere on Mr. Armstrong's body. Further, Mr. Armstrong can be heard groaning after Officer Macchione fires his weapon, indicating he was in fact struck by a rifle round. The nature and location of the injury is consistent with Mr. Armstrong being shot while his arm was extended, as explained by Officer Macchione.

## CONCLUSION

We find in our review of this incident that no conduct by Officer Miller or Officer Macchione rises to the level of a criminal offense. It is the conclusion of my office that, based on the applicable law and the facts and circumstances of this case, that law enforcement's actions during this incident were legally justified as set forth in C.R.S. § 18-1-704. Therefore, because Officer Miller and Macchione were both legally justified in their use of reasonable and appropriate physical force in response to an imminent risk of death or great bodily injury to themselves and their fellow officers, their conduct did not violate any criminal statutes. As a result, my office will not be filing criminal charges against either Officer Miller or Officer Macchione.

These cases are important to the officers and civilians involved, as well as to our community as a whole. I appreciate the cooperation provided by the Longmont Police Department and the extremely thorough investigation conducted by the BCIT.

I will be releasing this letter to the public, along with the video presentation prepared by the Boulder County Investigation Team. Our office will, also, post these materials on the District Attorney's website. Pursuant to our policy, the Longmont Police Department will become the custodian of records related to this case. Any future records inquiries will be directed to the Longmont Police Department. Please contact me if you require further information.

Sincerely,



Michael Dougherty  
District Attorney  
20<sup>th</sup> Judicial District