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October 17, 2014

Chief John Hutto
Fort Collins Police Services
2221 Timberline Road
Fort Collins, CO

Re: Opinion Concerning FCPD #14-15202

Dear Chief Hutto:

The criminal investigation surrounding the October 5, 2014 death of Tino Martinez has been completed and submitted to my office for an opinion. As District Attorney, I am required to determine whether any criminal law violations were committed by any person during this incident. The scope of this review is criminal in nature and necessarily limited by Colorado Statutes to determine whether any criminal charge is legally fileable and provable beyond a reasonable doubt. My review also includes determining if the degree of force used by Officer Peter DeKraker was justified under pertinent Colorado statutes.

In addition to having a representative from my office respond to the scene and assist in the interview with Officer DeKraker, our investigation has included a review of the reports from Fort Collins Police Services, case No. 14-15202, photos and videos taken of the scene, dispatch and communication records, witness statements and interviews, and a Use of Force Summary prepared by Detective Gary Trujillo, the lead detective. Larimer County's Critical Incident Protocol was in place and followed during this investigation.

In determining whether the degree of force used by DeKraker was legally justifiable, my review is based on whether the following Colorado statute involving the use of force was violated.

Section 18-1-704 of the Colorado Revised Statutes provides:

- (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 may be used only if a person reasonably believes a lesser degree of force is inadequate and:*

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(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...

The definition of “deadly physical force” is set forth in C.R.S. 18-1-901(3)(d). It reads:

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

The following is a summary of the facts of this case:

On October 5, 2014, at approximately 3:45 p.m., Fort Collins Police dispatch received two separate calls from concerned citizens advising that there was a male “sprawled out” on the second floor landing at the apartments located near the intersection of West Drake Road and South Shields Street in the city of Fort Collins.

At 3:47 p.m., information was aired by dispatch indicating that there was a male sprawled out on the second floor landing at the Cimarron Square apartments wearing dark colored pants, and that he was visible from Shields Street. At that same time, Officer Peter DeKraker was coming off a lunch break and was in the immediate vicinity. Officer DeKraker was in uniform and driving a marked patrol car. Officer DeKraker took the call and proceeded to the area of the apartments.

Officer DeKraker crossed South Shields Street, going east from the vicinity of the Western gas station on Raintree Drive, and parked on Davidson Drive. Officer DeKraker first inspected the building to the south of Davidson Drive, but realized the building was not configured the way dispatch had reported since it did not have stairways visible from the west. Officer DeKraker got back into his vehicle and drove north, into the parking lot to the south of building L. Building L is located on the southeast corner of the intersection of South Shields Street and West Drake Road and is a two story, multi-family apartment building with two external stairways on the west side of the building.

Officer DeKraker left his vehicle and walked north, along the west side of building L. Officer DeKraker noticed a bicycle lying on the sidewalk at the foot of the northern most stairway and then saw a male sprawled out on the second floor landing. Officer DeKraker aired that he was at the location at 3:58 p.m.

Officer DeKraker proceeded approximately halfway up the stairway and attempted to contact the male. Officer DeKraker observed that the male was lying on his back with his feet just over the edge of the landing and his head to the back of the landing. Officer DeKraker saw some swaying movements from the male and heard him moan. The male was breathing but appeared to be either unconscious or asleep. Officer DeKraker also observed a backpack in the immediate vicinity of the male.

Officer DeKraker attempted to rouse the male, even tapping him on his foot. The male awoke and Officer DeKraker informed the male that he was there to check on his welfare. Officer DeKraker asked the male a number of questions concerning his health, including whether he had consumed drugs or alcohol. The male denied taking any drugs or alcohol but would not answer questions concerning prescription drugs. During this interaction, the male was seated at the top of the stairs on the second floor landing.

Approximately midway through his contact with Mr. Martinez, a resident of an apartment on the third floor walked down the stairway past Mr. Martinez and Officer DeKraker. This resident was interviewed following the incident and indicated that he overheard the police officer asking Mr. Martinez welfare questions and Mr. Martinez responding that he wasn't causing any trouble.

Officer DeKraker asked the male for identification. The male indicated he did not have an ID. The male initially did not want give his name to the officer, but eventually did provide Officer DeKraker with his name, Tino Martinez, and a date of birth of 04/11/1987.

Officer DeKraker asked Mr. Martinez if the bicycle at the bottom of the stairs was his. Mr. Martinez initially denied that he owned the bicycle; however, he later told the officer to just lock up the bike. Believing that the bicycle may be stolen, Officer again asked Mr. Martinez if he owned the bicycle and Mr. Martinez stated that he did not own the bicycle but that it came with him.

During Mr. Martinez's contact with Officer DeKraker, Mr. Martinez would at times look down, not answer Officer DeKraker's questions or respond in any way. Mr. Martinez became more agitated, was swaying from side to side, and became fidgety with his hands and had them in his pockets. Officer DeKraker asked him to slowly remove his hands from his pockets, and he did. At one point, Mr. Martinez stood up and put on the backpack. Mr. Martinez told Officer DeKraker that he was going to go into his brother's apartment, which was accessed off the landing. Mr. Martinez began to walk in a circle toward the apartment door. Based upon actions and demeanor of Mr. Martinez, and the officer's suspicion that the bicycle may be stolen, Officer DeKraker told Mr. Martinez to sit back down and take off the backpack. Mr. Martinez did sit back down, but he did not take of the backpack as directed.

Because of Mr. Martinez's actions, Officer DeKraker backed down the stairs a couple steps to create distance and requested that dispatch send backup officers. Officer DeKraker gave dispatch Mr. Martinez's name and date of birth at 4:04 p.m.

During his interview, Officer DeKraker recalled Mr. Martinez making statements asking the Officer why he wasn't dealing with the assault that was going on behind him. Officer DeKraker indicated he took a very quick glance toward Shield Street, and saw nothing.

Officer DeKraker again asked Mr. Martinez to remove the backpack. Mr. Martinez asked if it was ok to move his hands and was told, "yes." As Mr. Martinez was removing the backpack from his shoulders, he turned away from Officer DeKraker. Mr. Martinez then turned back to Officer DeKraker with a black revolver in his hand and began moving toward Officer DeKraker with the gun extended.

During his interview, Officer DeKraker described recognizing it was a revolver, noticing that there were bullets in the cylinder, and realizing his life was in danger. Officer DeKraker recalled getting into a "combat stance", which made him smaller, and backing down the stairway. Officer DeKraker described Mr. Martinez lunging toward him with the gun extended and firing. Officer DeKraker described hearing the gun shot, seeing smoke, and feeling the bullet strike him in the shoulder.



Though having been shot, Officer DeKraker remembers drawing his service weapon, moving backwards to get away from Mr. Martinez's weapon and returning fire. Numerous eye and ear witnesses to the shooting were interviewed by Fort Collins police officers. A juvenile who lived in the area told police officers that he was in the parking lot near building L at the time of the shooting. He stated he heard shots and looked up to see the officer and a male very close together. He stated that he saw the officer fall backwards over a bicycle and into the grass. The officer then drew his gun and shot the other male.

Officer DeKraker assessed his own condition, realized that he had been shot and was in pain, but was still functioning. Officer DeKraker also looked at Mr. Martinez to determine if he was still a threat. Officer DeKraker saw that Mr. Martinez was attempting to crawl to the north. He saw blood on the ground, and that Mr. Martinez's revolver was now lying on the cement, away from Mr. Martinez. Officer DeKraker secured the revolver in his waistband. At 4:07 p.m., Officer DeKraker aired that shots had been fired and he had been hit. Other officers arrived shortly thereafter.

Mr. Martinez received first aid at the scene and was transported to Medical Center of the Rockies. Surgery was attempted, however he was pronounced deceased on the operating table. An autopsy was performed by Forensic Pathologist Dr. James Wilkerson. Doctor Wilkerson determined the cause of death was a single gunshot wound to the lower chest/upper abdomen. A projectile consistent with a .40 caliber bullet was recovered from Mr. Martinez's body during the autopsy.

Officer DeKraker was also transported to the hospital and received treatment for the gunshot wound to his shoulder. Although the bullet did not penetrate Officer DeKraker's ballistic vest, it struck Officer DeKraker with such force that it punched a hole in his shoulder.

Officer DeKraker was armed with a Glock 22, .40 caliber semi-automatic handgun. According to Officer DeKraker, he loaded each magazine with 15 rounds of Speer .40 caliber ammunition. After placing a magazine in his weapon, he would rack the handgun, placing one round in the chamber and leaving fourteen rounds in the magazine. After firing his weapon during this incident and determining that the threat was reduced, he performed a tactical reload, placing a full magazine in his weapon and placing the magazine he removed into his left front pants pocket. An examination of Officer DeKraker's weapon and magazines revealed that he had fired four rounds.

Mr. Martinez shot Officer DeKraker with a .38 caliber Ruger LCR revolver. This weapon has a capacity of five rounds. An examination of the weapon revealed four spent casings and one live Federal hardball .38 caliber cartridge. Seven additional rounds of the same type were located in Mr. Martinez's backpack. Mr. Martinez shot Officer DeKraker with one round, which struck Officer DeKraker in the right shoulder area. The round struck the strap portion of Officer DeKraker's ballistic vest and was recovered from the vest.

A thorough examination of the scene was conducted by the Fort Collins Police Department. Four spent .40 caliber Speer cartridge cases were found in the grass in the area of the shooting. Also found was evidence of three projectiles striking the building. One of the projectiles penetrated through the building and was located in an adjacent building. No physical evidence was found to indicate whether Mr. Martinez fired one shot or four.

At the time of this contact, Mr. Martinez had two active warrants for his arrest. Both warrants were for failure to comply with the terms and conditions of his probation sentences. One case involved a felony conviction for trespass. The other case involved a misdemeanor conviction for harassment. Mr. Martinez had a previous felony conviction for menacing from 2007 and had previously been charged with felony assault, menacing, and possession of a weapon by a previous offender in 2009.

Had Mr. Martinez survived, sufficient evidence exists which would have warranted charging Mr. Martinez with Attempted First Degree Murder of a Peace Officer, a Class 2 Felony; First Degree Assault on a Peace Officer, a Class 3 Felony; and, Possession of a Weapon by a Previous Felony Offender, a Class 5 Felony.

Based on the totality of circumstances, I have determined that Officer DeKraker acted in a lawful, professional, and justifiable manner. Officer DeKraker responded to calls from citizens indicating a need to check on the welfare of an individual who might be injured or otherwise in need of assistance. Tino Martinez responded by brandishing a weapon and shooting Officer

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DeKraker at a very close range. Officer DeKraker reacted to this attempt on his life in an appropriate and fully justified manner. Officer DeKraker should be commended for his efforts to serve the public and his quick reactions to save his own life.

Sincerely,



Clifford E. Riedel
District Attorney