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April 4, 2012

Chief Wendy Rich-Goldschmidt
Colorado State University Police Department
750 S. Meridian Avenue
Fort Collins, CO 80523

Re: Opinion on Officer Involved Shooting Incident with Felix H. Keil on March 21, 2012.

Dear Chief Rich-Goldschmidt:

The criminal investigation surrounding the March 21, 2012 shooting of Felix H. Keil's vehicle has been completed and submitted to my office for an opinion. As District Attorney, I am required to determine whether the actions of Officer William Nichols were justified under pertinent Colorado statutes. The scope of this investigation is criminal in nature and necessarily limited by Colorado Statutes to determine whether any criminal charge is provable beyond a reasonable doubt and whether there is a reasonable likelihood of conviction by a court or jury.

In addition to having representatives from my office at the scene and participating in the interview of Officer William Nichols, our investigation has included a review of reports, witness statements and findings from Fort Collins Police Services, Case No.12-4016, reports from Colorado State University Police, Case No.12-735, and information from Larimer County Sheriff's Office Case, No. 12-1896. Larimer County's Critical Incident Protocol was in place and followed during investigation of this use of force incident.

My report is based on whether the following Colorado statutes involving the use of force and discharge of a weapon were 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 is 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:*

(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.

Section 18-12-106 of the Colorado Revised Statutes provides:

- (1) A person commits a class 2 misdemeanor if:*
- (a) He knowingly and unlawfully aims a firearm at another person; or*
 - (b) Recklessly or with criminal negligence he discharges a firearm ...*

Section 18-12.107.5 of the Colorado Revised Statutes provides:

- (1) Any persons who knowingly or recklessly discharges a firearm ... into any motor vehicle occupied by any person, commits the offense of illegal discharge of a firearm.*
- (2) It shall not be an offense under this section if the person who discharges a firearm in violation of subsection (1) of this section is a peace officer ...acting within the scope of such officer's authority and in the performance of such officer's duties.*

The shooting involved in this case did not result in the death of Mr. McKean, therefore; Section (2) of C.R.S. 18-1-704 dealing with deadly physical force is inapplicable to this case.

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

On March 21, 2012 at 11:15 p.m., Officer Mark Cutter with Fort Collins Police Services observed a blue 2008 Toyota Tacoma pickup truck, bearing Colorado license plate 295-VVE, driving erratically and speeding at Mathews Street and Magnolia Street. Officer Cutter observed the vehicle driving southbound on Mathews Street at a very high rate of speed, and not stopping at stop signs. Officer Cutter attempted to complete a traffic stop on the vehicle at Peterson Street and Mulberry Street, and the driver failed to stop and continued driving at a high rate of speed. The vehicle registered to Felix Keil with an address out of Bailey, Colorado. A Be On the Lookout (BOLO) message was sent to patrol officers, including those at the Colorado State University (CSU) Police Department regarding the vehicle.

While sitting at the intersection of Peterson Street and Mulberry Street, at approximately 11:26 p.m., Officer Cutter observed a vehicle traveling northbound on Peterson Street approaching the

rear of his vehicle at a high rate of speed. Officer Cutter believed the vehicle was not going to stop in time and was going to rear-end his vehicle. At the last minute, Officer Cutter stated the vehicle swerved to the right side of his vehicle and passed him. Officer Cutter described the vehicle as the same vehicle he attempted to stop previously. Officer Cutter described the driver as a white male, with facial hair, approximately 30 years old.

Officer Cutter did not feel that the driver was purposely aiming his vehicle at him when he swerved around him, but he felt that the male was trying to bait him into some type of pursuit or police action.

Officer Cutter once again attempted to initiate a traffic stop on the vehicle by activating his lights and siren, and the driver of the vehicle failed to stop. Officer Cutter discontinued the traffic stop and the vehicle was last seen traveling south on Whedbee Street. At approximately 11:33 p.m. Officer Cutter observed the same vehicle stopped in front of the apartment complex at Olive Street and Peterson Street. Upon approaching the vehicle, he recognized the same male driver. Officer Cutter turned on his overhead lights and turned his spotlight into the vehicle. Officer Cutter did confirm that it was the same driver he saw previously. As Officer Cutter began to get out of his patrol vehicle, the vehicle again fled at a high rate of speed southbound on Peterson Street.

At that time, Officer Cutter contacted a male who got out of the vehicle. That male was identified as Michael Harry Lobalzo. Lobalzo told Officer Cutter that he just met "Felix" 1-1/2 days ago, and was not sure why he was driving like that. When Lobalzo was asked if Felix was drunk or on drugs, he said that he wasn't sure, but felt that he was driving crazy and asked him multiple times to stop. When asked why Felix didn't stop for the police he said he was not sure and just thought that he was driving "crazy".

At approximately 11:35 p.m., Colorado State University Police Officer in training Josiah Thiemann and CSUPD Officer Paul Ashe, who were working as a two officer car, observed the vehicle traveling southbound on Whedbee Street, then turn westbound on Prospect Road. Officer Thiemann observed the vehicle fail to stop for the red light at Prospect Road and South College Avenue. The vehicle turned north on South College Avenue, then turned westbound on Lake Street. Officer Ashe observed the vehicle pass a vehicle on the left, going into the oncoming lane of traffic at approximately Centre Avenue and West Lake Street. Officer Ashe also observed the vehicle fail to stop for a stop sign at Centre Avenue and West Lake Street. The vehicle then turned northbound on Meridian Avenue at which time officers lost sight of the vehicle. They spotted the vehicle again going westbound on Pitkin Street. At that time, Officer Ashe stated the driver began obeying traffic laws.

As the vehicle approached the intersection of Pitkin Street and South Shields Street, Colorado State University Police Officer in training Chuck Richards and CSUPD Officer William Nichols were approaching the intersection from the south. Officers Richards and Nichols observed the vehicle stopped between other stopped vehicles at this intersection. Officer Nichols directed Officer Richards to stop the patrol car, which he did near the north side of the intersection of Pitkin Street and South Shields Street. Upon the vehicle stopping, Officer Nichols exited the patrol car to attempt contact with the driver and to prevent him from driving further. At approximately 11:39 p.m., as Officer Nichols approached the vehicle with his gun drawn, the vehicle jumped the curb and accelerated directly towards him. Officer Nichols was wearing his full police uniform and got out of a marked patrol vehicle. Officer Nichols was struck by the right front side of the vehicle knocking Officer Nichols back, causing his handgun to discharge and to fall out of his hand.

The vehicle continued driving south on Shields Street after striking Officer Nichols. Officers from the Colorado State Police Department and Fort Collins Police Services pursued the vehicle as he led them on a high speed chase reaching speeds in excess of 100 miles per hour. The driver, Felix Keil was later taken into custody by Larimer County Sheriff's Deputy Jaelyn Knudsen. Officer Mark Cutter positively identified Mr. Keil as the driver of the blue 2008 Toyota Tacoma pickup truck, and Officer Nichols' duty weapon was found wedged between the hood and the windshield of the truck.

During the course of the investigation, it was determined that CSUPD Officer Nichols was preparing to use deadly force, however, did not intentionally pull the trigger on his duty weapon. The impact of the vehicle striking him caused the weapon to discharge, thus causing an unintentional discharge of his weapon. The projectile struck the roof of the vehicle just above the driver's side window. The projectile traveled along the roof and struck the rear driver's side back window.

When Mr. Keil was driving dangerously through Fort Collins at a high rate of speed, failing to stop at stop signs and ignoring Officer Cutter's attempts to pull him over, and then driving straight toward Officer Nichols jumping a curb accelerating in his direction, it was reasonable for Officer Nichols to believe, and in fact he did believe, that there was an imminent threat to the life and safety to the students and residents in that area and the life and safety of himself and his fellow officers.

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Based upon the totality of the circumstances, I find that the degree of physical force that Officer William Nichols was attempting to employ was justified under the applicable Colorado law while acting in his official capacity as a peace officer. However, no actual physical force was used due to the fact that Officer Nichols was struck by the truck driven by Mr. Keil causing an unintentional discharge of his weapon.

Sincerely,

A handwritten signature in black ink, appearing to read "Larry R. Abrahamson". The signature is fluid and cursive, with a long horizontal stroke at the end.

Larry R. Abrahamson
District Attorney