



**OFFICE OF THE DISTRICT ATTORNEY**

Jefferson and Gilpin Counties

Peter A. Weir, District Attorney

December 8, 2017

Sheriff Jeff Shrader

Jefferson County Sheriff's Office

200 Jefferson County Parkway

Golden CO 80401

Re: CIRT 2017-02 involving Deputy Andrew James

Dear Sheriff Shrader,

My office has reviewed the Jefferson County Critical Incident Response Team's (CIRT's) submitted reports regarding the September 21, 2017 fatal shooting of Austin Clayton, DOB 11-24-91 in the parking lot of the O'Reilly Auto Parts Store at 8134 South Kipling Pkwy, Littleton, Colorado which involved JCSO Deputy Sheriff Andrew James. Senior Chief Deputy District Attorney Eva Wilson responded to the scene on the date of the shooting and also observed a number of the interviews in this case including the interview of Deputy James which took place on Monday, September 25th. An investigator from my office was also present for the witness walk-throughs which occurred on October 2<sup>nd</sup>. Members of my staff and I attended a briefing presented by CIRT Commander Michelle Moriarty from Arvada PD and other members of the Jefferson County CIRT on Monday, October 16th at my office. Senior Chief Deputy District Attorney Eva Wilson reviewed the investigatory file presented by the CIRT including the taped interviews of the lay witnesses during their individual walk-throughs on October 2<sup>nd</sup>. My office has now completed the review of Deputy James' use of deadly physical force in this incident for possible criminal charges.

**APPLICABLE LAW**

The legal framework for our analysis in this case is found in the following sections of the Colorado Revised Statutes.

**§ 18-1-407, C.R.S. Affirmative defense**

(1) “Affirmative defense” means that unless the state’s evidence raises the issue involving the alleged defense, the defendant, to raise the issue, shall present some credible evidence on that issue.

(2) If the issue involved in an affirmative defense is raised, then the guilt of the defendant must be established beyond a reasonable doubt as to that issue as well as all other elements of the offense.

**§ 18-1-710, C.R.S. Affirmative defense**

The issues of justification or exemption from criminal liability under sections 18-1-701 to 18-1-709 are affirmative defenses.

**§ 18-1-704, C.R.S. Use of physical force in defense of a person**

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

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

**§18-1-707, C.R.S. Use of physical force in making an arrest or in preventing an escape**

(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 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 escape.

(2) A peace officer is justified in using deadly physical force upon another person for a purpose specified in subsection (1) of this section only when he reasonably believes that it is necessary:

- (a) To defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force; or
- (b) To effect the arrest or to prevent the escape from custody of a person whom he reasonably believes:
  - (I) Has committed or attempted to commit a felony involving the use or threatened use of a deadly weapon; or
  - (II) Is attempting to escape by the use of a deadly weapon; or
  - (III) Otherwise indicates that he is likely to endanger human life or to inflict serious bodily injury to another unless apprehended without delay.

### **SUMMARY OF OPINION**

Applying these legal standards to the facts presented through this investigation, I find that Deputy James is not subject to criminal liability for his actions on September 21, 2017. The District Attorney's Office could not prove beyond a reasonable doubt that it was unreasonable for Deputy James to perceive that the conduct of Austin Clayton Dunsmore posed an imminent threat to him of serious bodily injury or death. Based upon the totality of the circumstances which included Dunsmore's refusal to follow orders to show his hands, his refusal to follow orders to not get in the vehicle, his continuous efforts to reach under the seat in an apparent attempt to search for something and his grabbing and pulling of Deputy James' arm into the car as he put the car in gear to drive away, it was reasonable for Deputy James to perceive that Dunsmore was at first attempting to locate a weapon from under the seat and to then believe as he was grabbed that he was going to be dragged to death. The conduct of Austin Dunsmore posed an imminent threat to Deputy James of serious bodily injury or death. The facts of this incident would not support the filing or prosecution of any criminal charges against Deputy James.

### **BRIEF SUMMARY OF RELEVANT FACTS**

On September 21, 2017 at 1542 hours, Jefferson County Dispatch received a 911 call from a citizen named Laurie Salazar. Ms. Salazar indicated that a black Audi with no rear windshield or license plates was driving EB C-470 at Ken Caryl Avenue. She indicated that the vehicle was passing other cars on the right shoulder and traveling at an estimated speed of 100 mph. At 1546 hours, Ms. Salazar called again and provided an update on the location of the vehicle. She stated that she had just seen the vehicle traveling WB on Remington Place from Garrison Street to Kipling Parkway.

A short time later, Deputy Andrew James advised dispatch that he had located an unoccupied vehicle matching the description of the Audi in the O'Reilly's Auto Parts parking lot and that he was watching it. This business is close to the general area of where the Audi had last been seen by Ms. Salazar.

At 1555 hours, Deputy James advised that an individual was entering the vehicle and he was going to make contact. Deputy Brad Abney advises he would go and cover Deputy James. At 1557 hours, Deputy James airs "SHOTS FIRED" and he requested medical assistance.

In the next several moments, Deputy Abney arrives and contacts Deputy James across Kipling street from the O'Reilly's Auto Parts store where the Audi has come to rest after the shooting. Other responding officers arrive to coordinate protecting the scene, shutting down traffic on Kipling, and getting West Metro Fire to the scene to attend to Austin. The 1<sup>st</sup> Judicial CIRT is called to respond to the scene. During the next several hours, lay witnesses to the incident are identified and interviews begin with them and officer witnesses at the JCSO south substation. The processing of the scene begins and the suspect vehicle is towed for later processing and search. Additionally, the scene is canvassed by members of the CIRT to locate any potential videotapes of the incident and to identify any other witnesses. No videotapes were located that showed any part of the shooting or the vehicle travel across Kipling Street.

While there were a number of lay witnesses who saw the Audi cross the street and strike the tree, most of those individuals did not see what occurred prior to those events. Four witnesses were identified who observed the shooting. Michael Cook and Robert Ballmer were both in the parking lot of the O'Reilly's store and witness Seth Roller was in his vehicle in the Arby's drive-through lane directly south of the parking lot. Denise Hughes, the manager of Arby's, also saw the incident from within her store, viewing it through the drive-through window.

Michael Ryan Cook was on an errand to purchase parts and he drove into the O'Reilly Auto Parts parking lot to park. As he was driving west-bound in the south portion of the lot, he observed a deputy sheriff (Deputy James) physically struggling with a man to keep the man from entering a black Audi sedan through the open driver's door. Cook then observed the man getting into the Audi's driver seat and he then saw Deputy James partially enter the front seat area, grabbing at the man in an apparent attempt to get the man out of the car. Cook could hear the officer yelling "Don't drive away, don't drive away." He described that as he was watching the two people, he was still driving his car west-bound and then north-bound as he turned the corner to find parking. He stated that throughout his time in the parking lot, he had to look away from the incident at times due to other traffic and the various cars parked in the area. He said that as he turned north, the Audi was to his right and was facing towards his vehicle. He then saw the Audi begin to drive towards his car. At that point in time, his view of the Audi was through his passenger's side window at an angle towards the southeast. He saw into the Audi through its front windshield where he could view the driver's silhouette. He saw the driver's left hand near the steering wheel area and saw the driver leaning towards the passenger side of the car. The driver was between him and Deputy James but he could see the deputy was extremely close to the driver's side door with his arms extended toward the driver. He could not clearly see the deputy's arms well enough to tell if they were bent or straight or their exact location. Cook then describes seeing a flash and hearing a gunshot. He noted that the Audi was continuing to drive west-bound during the time the shot was fired but then appeared to accelerate, jump the west parking lot curb, cross over a grassy area and then completely crossed Kipling street in front of oncoming traffic. He saw 5 to 6 vehicles having to brake and stop in the middle of the street to avoid hitting the Audi. The Audi went over the center median of Kipling where it continued westbound and struck a large tree with the front end of the car. Cook saw the rear tires spinning and some smoke coming off the car. He observed Deputy James hurriedly cross the street and cautiously approach the car with his weapon still drawn. Cook then went into the O'Reilly Auto Parts store to make his purchases. He was interviewed later that evening by CIRT investigators. When he was asked by investigators what he thought as he was viewing the struggle, Cook indicated that he was hoping the officer was alright and that he was concerned for the deputy's safety as he was struggling with the suspect. He also stated that it only took him a few seconds to drive from the initial parking area to where he was when the shot was fired.

Robert Balmer was an individual who had been in the O'Reilly's store making a purchase. He was parked directly in front of the store facing east. As he was getting into his truck in the parking lot, he saw another customer in front of him walking south towards a black vehicle parked in the lot, facing

west. He saw the person go around the side of the car to get into it and he then observed a police vehicle with emergency lights activated pull in right behind the black car at an angle, facing northwest. He saw a deputy sheriff (Deputy James) get out of the car and begin to speak but Balmer could not hear what the deputy was saying.

Balmer then got in his truck, backed out and began driving south through the lot. He could see Deputy James in full view and he had his hand on his gun. He saw the man by his driver's side door and he had his hands up around the height of his chest. He could hear Deputy James yelling, "Get your hands on top of the car" three times as he drove. He then turned west in a parallel position to the man's car and he heard Deputy James continuing to yell that same command. He then saw that Deputy James had his gun out in front of him pointed at the man. He said the man was not listening to the deputy's instructions and was "resisting" the deputy. Balmer continued to drive west and then turned left (facing south) which put him in front of the man's vehicle. He saw the man dropping his hands and lowering his upper body into the car as if he were reaching for something. Deputy James then yelled at the man to not get in the car. Balmer stated that he then turned east which put him on the south side of the man's car and a parking median was between him and that vehicle. As he continued to drive east, he lost sight of where the deputy was as he was paying more attention to the man who was not following the deputy's directions. He could hear the deputy still hollering at the man but he could not see him. As he drove, he tried to continue to watch the incident through his driver's side mirror. He said he had to look away temporarily because a vehicle was driving into the lot from the east towards his truck. Through CIRT investigation, it was ascertained that this vehicle was the one driven by Michael Ryan Cook. When he looked back at his rear side mirror, he saw that the driver's door on the black car was shut and he could no longer see the man. He then heard a "pop" sound which he recognized as a gunshot. He couldn't see the deputy at that time but he saw that the vehicle was moving forward slowly. He then made a u-turn to position his vehicle back facing westbound. He saw the vehicle crossing Kipling and he then saw the deputy running after it. When the car collided with the tree, the deputy approached on the driver's side at gunpoint. He also saw that the deputy appeared to be talking on his radio. He said the deputy never went up to the car until another deputy arrived. Mr. Balmer indicated that he had to occasionally look away during this incident to focus on driving so he may have missed details of what occurred.

Seth Rollert was going to Arby's to pick up some food that afternoon. The Arby's store Rollert was visiting was across the parking lot to the south of the O'Reilly's auto parts store. As he entered the Arby's lot, he saw a sheriff's vehicle driving through the area. As he was waiting in the Arby's drive through lane, he saw a man walk out of the O'Reilly's store to a dark blue Audi. He described this car as having missing plates and a missing back window. He saw the officer's vehicle pull up with emergency lights activated, blocking the Audi in and an officer got out of the car and walked toward the Audi. Rollert had his windows up but he could tell there was a conversation occurring which he could not hear. He then rolled down his window and he heard the officer say "Don't move your car" a number of times. He saw the officer pull his gun out as the officer was standing at the driver's side, behind the rear door. The officer continued to give the driver orders to not move the car. He said the officer then went to the front door of the car with the gun pointed at the driver. He said the car started to move and he heard the gun go off. The car went straight, over sidewalks and landscape berms and crossed Kipling where he lost sight of it. He heard cars screeching and he called 911. He got out of his car and went to see if the officer was okay. He then saw the officer was across the street where the Audi was, with his gun pointed at the vehicle. Rollert described the driver's conduct as being uncooperative. On October 2<sup>nd</sup>, during the walk-through of the scene with Rollert, it was noted that there were trees and bushes in the parking median between him and the area of the incident which partially obstructed the view from the drive-through. Rollert did not describe any other vehicles moving in the area between him and the Audi but both Cook and Balmer were driving in different directions in the area between the drive-through and the shooting incident.

Denice Hughes was employed at the Arby's store as a manager and she was working at the drive-through window that afternoon when she saw a Jefferson County Sheriff's Office vehicle in the O'Reilly's parking lot. She saw it pull in behind a dark-colored vehicle. She did not pay much attention to this as it was not an uncommon occurrence. She went back to serving customers who were in the drive-through line. A few minutes later, as she was helping a customer, she heard someone yell "Don't". She then turned towards the north and saw a deputy was standing behind the dark vehicle and in front of the sheriff's vehicle. She described that very shortly after the deputy's command, the deputy fired a shot through the rear window of the vehicle. The vehicle then drove straight out of the parking lot and she described in detail how it crossed Kipling and came to rest. She indicated that she left the drive-through window and went to a window towards the front of the store to watch the car's movement. She also stated that the car going through the drive-through at the time of the shooting was driven by a female and that she spoke with the female driver after the shooting as well. That female driver was unidentified so she was not interviewed. Other employees of Arby's describe Ms. Hughes as being very shaken up and flustered. They stated that she was having a panic attack and others had to take over her duties and Ms. Hughes confirmed this in her interview.

Deputy Abney was the first law enforcement officer who arrived on scene. He heard Deputy James call out that he was going to contact the driver of the suspect vehicle from the earlier reckless driving dispatch. Deputy Abney responded that he was in route to cover Deputy James. In a short time, he heard Deputy James call out that shots were fired and he needed medical. Deputy Abney activated his lights and siren and responded to the scene. Upon his arrival, he saw the suspect vehicle up on the side of Kipling against a tree. He saw Deputy James covering the vehicle with his gun drawn, pointed towards the back of the vehicle. As he walked up, Deputy James told him the driver was dead. Deputy Abney looked in the vehicle but did not enter it. Deputy Abney saw that the driver had a major injury to his head, that his gaze was fixed, he was not breathing and he clearly appeared to be deceased. Deputy Abney went over to Deputy James and had him move over to the side further away from the vehicle. They both holstered their weapons and Deputy Abney asked him what had happened. In summary, Deputy James told him that he had gone up to contact the suspect inside the O'Reilly's parking lot and that the suspect was not compliant. He continued to try to go for his waistband and for the pockets of his pants. Deputy James told him that he ordered the suspect to not reach inside his pockets and that Deputy James drew his weapon at that time. He stated that the suspect had gotten into his right pocket, pulled a key and jumped inside the vehicle. Deputy James tried to get him out of the vehicle but the suspect jammed the key into the ignition, started the car and grabbed ahold of Deputy James as he started to accelerate out of the parking lot and that is when Deputy James fired into the vehicle.

Deputy Andrew James was interviewed by CIRT investigators on Monday, September 25, 2017. Deputy James was brought to the JCSO south substation after the shooting where his weapon was retrieved from him and photographs were taken of him and his weapon was also processed. His legal counsel advised the CIRT commanders that he was requesting that Deputy James' interview be delayed until he had the opportunity to sleep. The attorney and Deputy James were informed that Deputy James should avoid discussing this incident with anyone, that he should avoid any media reports and that the CIRT investigators would be available to conduct the interview as soon as the attorney indicated that they were ready. It was also requested that this be as soon as possible.

On Monday, September 25, Deputy James provided the following statement regarding this incident: Deputy James had previously been employed by the Colorado Department of Corrections and he is a Level II Police Officer in Colorado. He began working for JCSO in January of 2015. Deputy James is currently assigned to patrol in the south precinct of Jefferson County which is where he was working on the date of the shooting.

He had recently come on duty when he heard dispatch air that a reckless vehicle was heading eastbound at Ken Caryl and C-470 going 100 mph on the right shoulder passing other traffic. It was aired that the vehicle had no plates or rear window. A few minutes later, he heard dispatch air that the vehicle was north-bound on Kipling. Deputy James was in that general area so he began watching for the car. As he was driving, he noticed an Audi parked in the O'Reilly's parking lot. He drove into the lot, saw that the car was unoccupied and noted that it matched the description of the reckless vehicle. He notified dispatch he had located the vehicle and he parked on the south side of the O'Reilly's parking lot. A short time later, he saw a man walking towards the vehicle. Deputy James notified dispatch he was going to contact the subject and he heard Deputy Abney call out on the radio that he was on his way to provide cover for him.

Deputy James pulled his vehicle up to the Audi and parked approximately eight to ten feet behind it with his emergency lights activated. By the time Deputy James got out of his vehicle, the suspect was getting back out of his car. He asked the suspect if this was his car and the suspect quickly began putting his hands in his pockets and digging around in them. Deputy James ordered him to take his hands out of his pockets but the suspect only stared at him. Deputy James noticed that the suspect was wearing a red hat and had what he believed to be a tattoo of a cross on his forehead and some other script tattoos on his head. Deputy James stated that these things and, in particular, the tattoos heightened his awareness because he had seen similar tattoos on gang members in prison.

Deputy James stated that he ordered the suspect several times to get his hands out of his pockets and he eventually did. He then asked him if he had any weapons in his pockets but the suspect did not answer and continued to stare at him. Deputy James said the suspect then put his hands back into his pockets and he told him to get his hands out of his pockets and to let him see his hands. At some point in time, the suspect did put his hands up approximately chest level. The suspect continued to stare at him and appeared to be "sizing him up". Deputy James then ordered him to put his hands on top of the car. The suspect continued to not comply and Deputy James drew his weapon and pointed it at him. Deputy James kept giving orders to the suspect to put his hands on the car which he finally did. Then, the suspect made a quick movement and jumped into the driver's seat.

Deputy James immediately moved to his left to get a better position on the driver. He saw that the suspect had his right hand under the driver's seat as if he was trying to reach something. Deputy James pointed the gun at him inside the vehicle and ordered him to stop. Deputy James then tried to grab the suspect's left wrist with his left hand. He could not use his right hand as it was holding the gun and was pointed at the suspect's head. He did not feel he dared try to holster the gun as that movement would give the suspect time to grab whatever he was trying to reach under the seat. Deputy James was worried that he was reaching for a weapon. He stated that he tried to shove the suspect towards the center console but the suspect was still trying to reach under the seat. He then tried to initiate a wrist lock with his left hand on the suspect's left wrist but he was not able to accomplish that. The suspect then reached up with his right hand and freed the deputy's grip from his left wrist. As a result, the suspect was able to grab the car keys out of his left pocket, transfer them to his right hand and put them in the ignition. Deputy James tried to grab the suspect again but he heard the car turn on and the suspect was reaching under the seat again. Deputy James described that the suspect grabbed his left arm somewhere near the steering wheel, shoved his arm forward and that the suspect then "floored it". Deputy James did not recall the car being put into gear but suddenly, his head was "whipping forward" and the suspect still had hold of Deputy James' left arm. Deputy James recalled taking a few steps forward, realizing that the car was moving and he fired his weapon at that point. Deputy James described that as the car started to move forward that he thought "he's gonna drag me to death... he's not gonna let go of me." During his CIRT interview, he stated that his intent when he fired his weapon was to stop the suspect. He said "...Stop him from dragging me forward. At that time, he was dragging me forward. I re- I mean, I realize, as quick as it was, like, we didn't get super far, but I wasn't gonna

let him drag me to death.” He also described that when the car started moving, both his arms and his head were in the suspect vehicle.

After the shot, Deputy James regained his footing as he was moving forward with the vehicle. He saw the vehicle continue to move forward and saw the door slam shut from the momentum. He described the car was moving forward fast and that it went across Kipling at a steady pace. He saw cars being able to brake to avoid the Audi and he went across the street after it. As he approached, he called for medical when he saw the driver leaning over inside the car. He also called Deputy Abney with his location. When Deputy Abney got there, he looked in on the driver and he gave Deputy Abney a brief description of what had occurred. Other deputies quickly arrived and Deputy Joel Mayns drove him to the south substation.

Deputy James was asked if he considered using a less-lethal type of weapon instead of drawing his firearm. He indicated that he was nervous that he was dealing with a gang member and that when the suspect shoved his hands back in his pockets, he had a heightened sense of awareness and he decided to draw his firearm. He stated that it was more difficult to go from less lethal to lethal if things escalate. This suspect did not comply with his commands, did not speak to him but only stared at him and all of these things made him feel that he was looking for an opportunity to attack him physically.

Deputy James was armed with his service revolver, a Glock 9MM. It was loaded with 17 rounds and 1 in chamber. Upon inspection by CIRT, it contained 17 rounds with 1 round missing from the weapon.

The CIRT investigation revealed that a large hammer was located on the console of the suspect’s vehicle. There were no other weapons located under the front seat of the vehicle. One bullet which had been fired was recovered from the vehicle behind the driver’s seat. There was an empty beer bottle on the front passenger floorboard and two plastic containers of marijuana and a marijuana pipe in that same area. In the trunk of the car was bag which held a pill bottle containing one pill described as VyVanse, an amphetamine type medication, two empty plastic marijuana containers and a drug scale.

Medical personnel that responded to the scene found that the suspect was deceased due to the very significant head injury he sustained from the gunshot. At autopsy, it was noted that there was a bullet entrance wound on the left side of the suspect’s head, just above his ear. There was an exit wound located just under and behind the right ear. The entrance wound had stippling and powder burns surrounding it which is consistent with a close contact gunshot wound.

## **LEGAL ANALYSIS**

We find in our review of this shooting that the conduct of Deputy James was not criminal.

It is the conclusion of my office, based upon the applicable law and the facts and circumstances of this case, that the shooting by Deputy James of Austin Clayton Dunsmore during this incident meet the legal requirements of the affirmative defense of self-defense as contained in §18-1-704 (1)(2)(a).

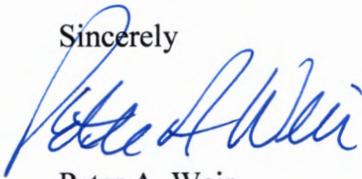
The underlying facts supporting this conclusion involve the information obtained from the various lay witnesses to this event both from their initial interviews and the later walk-throughs, the statement given to Deputy Brad Abney by Deputy James within minutes of the incident, the crime scene investigation and the statements of Deputy James himself. While no lay witness saw the incident clearly from beginning to end, their statements are reasonably consistent with one another.

The only exception to that is the account of the shooting provided by Denice Hughes where she claims that she saw, from the drive-through window, Deputy James shoot at the vehicle from behind it and directly through the rear window. Ms. Hughes account is inconsistent with all other accounts and the physical evidence from the vehicle and the scene demonstrate that her account is inaccurate.

Pursuant to C.R.S. 18-1-704 and C.R.S. 18-1-707, this analysis considers whether Deputy James was justified in using reasonable and appropriate physical force to defend himself from the imminent use of deadly physical force by the suspect. Based on the evidence, Deputy James knew from dispatch reports that this man was most likely the suspect who had just been driving in a very reckless manner, endangering the lives of other innocent motorists. Upon his encounter with the suspect, the suspect refused to comply with legitimate commands and never said a word in response to Deputy James. Instead, he stared at him and continued to dig in his pockets. He was ordered to put his hands on the car and instead, he dove into the vehicle in an apparent attempt to either get a weapon or flee the scene. Inside the vehicle, he repeatedly kept reaching under the driver's seat in an apparent effort to get some object. At that point in time, Deputy James' options to contain the suspect became very limited. He made efforts to physically subdue the suspect which failed. Instead, the suspect pulled free, retrieved his car keys from his pocket and started the vehicle. He then grabbed and hung onto Deputy James' arm as he accelerated his vehicle. Deputy James could not free himself and was in legitimate fear and in grave danger of being dragged to death. Using deadly physical force was reasonable under these specific facts and circumstances and it is likely that the use of that force saved Deputy James' life. The People would be unable to disprove the affirmative defense of self-defense beyond a reasonable doubt.

Based upon the investigation of this incident and the information provided to this office by the 1<sup>st</sup> Judicial District Critical Incident Response Team, it is the final conclusion of my office that the legal requirements of the affirmative defense of self defense were satisfied by law enforcement actions on September 21, 2017, that law enforcement was justified in the use of deadly physical force and that the conduct of Deputy James did not violate any criminal statutes.

Sincerely



Peter A. Weir  
District Attorney  
1<sup>st</sup> Judicial District Attorney's Office