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| **COURT OF APPEALS, STATE OF COLORADO**<br>2 East 14th Avenue<br>Denver, CO 80203 | DATE FILED: January 14, 2021 7:19 PM<br>FILING ID: 1D1039AC828F4<br>CASE NUMBER: 2020CA1121 |
| Appeal from La Plata County District Court<br>No. 2019CR91<br>Honorable William Laurence Herringer, Judge | |
| **Plaintiff-Appellee:** People of the State of Colorado<br><br>v.<br><br>**Defendant-Appellant:** William Benjamin Cline, VI | **▲ COURT USE ONLY ▲** |
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# Mr. Cline's Opening Brief

## Certificate of Compliance

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

**The brief complies with applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).**

- ☑ It contains 9,492 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

**The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).**

- ☑ **For each issue raised by the appellant**, the brief contains under a contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

**I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.**

*s/ Adam Mueller*
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## Table of Contents

## Table of Authorities

### Cases

**Statutes**



**Other Authorities**

**Rules**



**Constitutional Provisions**

## Statement of Issues

1. Whether the trial court reversibly erred, violated Cline's constitutional right to present a defense, and lowered the State's constitutional burden of proof when it concluded that "there is no evidence in the record that would support the finding that there was an illegal entry" into Cline's house and rejected his "make-my-day" instruction.

2. Whether the trial court reversibly erred, lowered the State's constitutional burden of proof, violated due process, and deprived Cline of his right to an acquittal when it instructed the jury on the "initial aggressor" exception to self-defense.

3. Whether the trial court violated Cline's constitutional right to present a defense when it precluded his expert witness from testifying about how the deputies tased Cline into submission and aggressively transported him to the police car.

4. Whether the trial court reversibly erred, lowered the State's constitutional burden of proof, violated due process, and deprived Cline of his right to an acquittal when it refused to instruct the jury on the affirmative defense of reasonable mistake of fact as to the criminal trespass charge.

5. Whether the trial court erred in refusing to conduct an *in camera* review of the personnel file of Deputy Draughon.

## Statement of the Case

The State charged Cline with second-degree burglary of a dwelling, first-degree criminal trespass of a dwelling, second-degree assault, third-degree assault, criminal mischief, and harassment. CF, pp 511–14. The district court severed the assault, criminal mischief, and harassment charges from the burglary and trespass charges, and it held two separate trials. *Id.* at 349–53.

At the first trial, the jury acquitted Cline of burglary but convicted him of trespass. *Id.* at 456–57. At the second trial, the jury convicted Cline as charged. *Id.* at 729–35.

The court sentenced Cline to concurrent sentences of 731 days' imprisonment on the second-degree assault conviction, 731 days in jail on the third-degree assault conviction, one year imprisonment on the trespass conviction, one year in jail on the harassment charge, and six months in jail on the criminal mischief charge. *Id.* at 882–85

## Statement of the Facts

Cline was living at his parents' home in Durango. TR 12/9/2019, p 268. Late one winter evening, during a white-out snowstorm, Cline left his house with his dog

and drove through the neighborhood in the family golf cart. *Id.* at 318. Cline was heavily intoxicated. He barely made it a half a mile before he crashed the golf cart into a snow drift in William Poillion's driveway. *Id.* at 354, 363–64.

Cline walked from the snow drift and, mistaking Poillion's house for his own, went inside. *Id.* at 257–58. When Cline entered the bedroom with a flashlight, Poillion awoke. *Id.* at 258:1–2. Cline mumbled nonsensically and then went downstairs to the kitchen. TR 12/10/2019, p 414:13–18.

Poillion followed Cline downstairs. *Id.* at 415:13–24. By the time Poillion made it downstairs with a shirt and his glasses, however, Cline was gone. TR 12/9/2019, p 259–60.

Poillion went through his garage and saw that Cline had left the house and was now outside. *Id.* at 260–61. Poillion asked Cline, "What are you doing here?" *Id.* at 261. Poillion testified that Cline responded, "I did not know anybody was home. I like to go in the empty houses at night." *Id.* Poillion asked, "Who are you?" *Id.* Cline offered a nonresponsive answer, telling Poillion his address: "376 Glacier Cliff." *Id.* at 261–62. Cline and his dog walked away. *Id.* at 262. Poillion testified that he believed Cline was carrying a firearm in a holster. *Id.*

Cline was completely out of sorts. *Id.* at 262, 287. He had lost both a shoe and a neck gator, and he walked half a mile back to his house in a blizzard with only one shoe. *Id.* at 287, 363; TR 12/10/2019, p 551.

On the way back to his home, Cline was confronted by the neighborhood security guard, Michael Bobo, whom Poillion had called after finding Cline in his house. TR 12/9/2019, p 450–51. According to Bobo, Cline appeared quite intoxicated. *Id.* at 453. Bobo asked, "What's going on?" *Id.* at 452. Cline responded, "I thought it was my house, so I went in." *Id.* Bobo said, "This is really serious. I don't know what's gonna happen here," to which Cline replied, "I don't give a fuck what they do. I just like checking these houses to see if anybody's home." *Id.* Bobo left to go to Poillion's house, and Cline went home. *Id.* at 453.

Poillion called police after speaking with Bobo. TR 12/9/2019, p 286. Poillion said he called 911 "[b]ecause of the seriousness of it and actually seeing the gun, also." *Id.* at 286:22–23.

Yet, just minutes later, when the 911 dispatcher asked whether a weapon was involved, Poillion replied, "I'm not sure." *Id.* at 338:9–11.

Deputy Antaeus Draughon responded to the call, along with Deputy Darin Christensen. After speaking with Poillion, the deputies went to Cline's house. TR 1/13/2020, p 205. Everything that happened next was captured on the body

cameras Deputies Draughon and Christensen were wearing. EX. 4 (Deputy Draughon body cam); EX. 8 (Deputy Christensen body cam).

They rang the doorbell and banged on the door. TR 1/13/2020, pp 210–11. Through the closed door, Deputy Draughon yelled at Cline and ordered him to come to the door, open it, and step outside. Cline submitted to the deputies' commands and opened the door. CF, pp 218, 343–44. Instead of coming outside, though, Cline let the officers in, saying "why don't you guys come in." EX 4 (1:09–1:14); *see* CF, p 218. The district court made the following findings of fact regarding the encounter at the door:

> There were two officers present at the front door of the home, both officers were dressed in uniform, and as the Defendant approaches the door, Deputy Draughon shines his flashlight into the home onto the person of the Defendant. The multiple directions from the deputies to the Defendant to "grab your dog" and "open the door" were not phrased as requests, but instead as imperatives. The commands were stated in a forceful tone at loud volume and were accompanied by the deputies identifying themselves as law enforcement. The deputies were clearly invoking the color of their authority and directing the Defendant to open the door. It is also of significance that after the Defendant walked away from the door, which indicates a desire not to engage, the deputies remained at his front door and continued to issue commands to him to open the door, yelling at him and calling him by name.

CF, p 343.

Inside, the officers handcuffed Cline and sat him on the ground. TR 1/13/2020, pp 215–16. Deputy Draughon advised Cline of his *Miranda* rights, but

Cline refused to acknowledge them, angering Draughon. TR 1/14/2020, p 331; TR 1/15/2020, p 638.

Cline attempted to reach for his cell phone, at which point Deputy Draughon moved it and set it off to the side. TR 1/13/2020, p 217. According to Deputy Draughon, Cline then tried to get up, still handcuffed, and moved towards him. *Id.* at 217–18. The deputies grabbed Cline and took him to the ground. *Id.*

While pinning Cline to the ground, Cline struggled with the deputies. *Id.* at 218–19. Deputy Draughon gave Deputy Christensen the keys to his police cruiser and asked him to bring it closer to the house. *Id.* at 222.

Deputy Draughon claimed that, after Deputy Christensen left the house, Cline began to kick him in the leg, knees, and chest. *Id.* at 223–24. Deputy Draughon tried to subdue Cline by punching him in the head and face, TR 1/14/2020, p 340, and by getting behind him and wrapping his legs around his waist in a body lock, TR 1/13/2020, p 225. Deputy Draughon then placed Cline in a chokehold. TR 1/14/2020, p 484.

Deputy Draughon alleged that, with his hands handcuffed behind his back, Cline grabbed the deputy's penis and testicles and began to squeeze and pull them. TR 1/13/2020, p 226.

Deputy Christensen returned to the house and saw Deputy Draughon with his arm around Cline's neck and throat. TR 1/14/2020, p 495. Cline was screaming, "I can't breathe, he's gonna kill me, he's gonna kill me, he's gonna kill me." TR 1/15/2020, p 644:19–20; TR 1/14/2020, p 484:4. Deputy Draughon instructed Deputy Christensen to "tase him." TR 1/14/2020, p 344–44. Deputy Christensen used his Taser to dry stun Cline. *Id.* at 344, 484.

A short time later, additional officers arrived. *Id.* at 349. Deputies Draughon and Christensen lifted Cline from a prone position on the ground by pulling his arms upwards, causing excruciating pain. CF, p 369. Because Cline was uncooperative when Deputy Draughon tried to put him in the police car, Deputy Draughon tased him again. TR 1/14/2020, p 346.

Deputy Draughon transported Cline to jail. During the drive, Cline yelled at Deputy Draughon and called him various names, including Kunta Kinte and the "N" word. Cline allegedly kicked the door of the police car, causing $436 dollars in damage. TR 1/14/2020, p 455:7.

At the trespass trial, Cline argued that he was not guilty of burglary or trespass into Poillion's home because he was too intoxicated to form the specific intent required for a burglary charge and because he mistook Poillion's home for his

own. CF, p 469. The jury acquitted Cline of burglary but convicted him of trespass. *Id.* at 456–57.

At the assault trial, Cline argued that he did not grab or pull Deputy Draughon's genitals and that he otherwise acted in self-defense in response to Deputy Draughon's unreasonable and excessive force.[1] Deputy Draughon, the defense argued, escalated the situation from the very beginning and unreasonably failed to remain calm and deescalate when appropriate. TR 1/15/2020, pp 630, 636–37, 644. For example, Deputy Draughon became frustrated and angry when, after reading Cline his *Miranda* rights, Cline refused to acknowledge them. *Id.* at 638. Indeed, in his report, Deputy Draughon wrote that he arrested Cline "due to him not confirming he understood the *Miranda* advisement." TR 1/14/2020, p 331:15–19.

The defense contended that Deputy Draughon used unreasonable force by putting Cline in a chokehold, which can be fatal, and then tried to justify his conduct after the fact by fabricating the allegation that Cline grabbed and squeezed his genitals. TR 1/13/2020, p 32; TR 1/15/2020, pp 637–38. The defense pointed to substantial evidence supporting this argument. For example, Deputy Draughon

[1] A person has a right to use self-defense to resist an officer's use of unreasonable and excessive force. *People v. Barrus*, 232 P.3d 264, 268 (Colo. App. 2009).

denied ever putting Cline in a chokehold, but the chokehold is plainly visible on Deputy Christensen's body camera footage. EX. 8 (33:40–34:20). The video also shows that, until Deputy Draughon releases the chokehold, Cline can barely speak. *Id.* Consistent with the video, Deputy Christensen testified that he saw Deputy Draughon's arm around Cline's neck and that he had Cline in a chokehold. TR 1/14/2020, pp 484, 495. Deputy Christensen testified that he was concerned about Cline's ability to breathe and that, as the body camera footage shows, he told Deputy Draughon to "watch his breathing." *Id.* at 485; *id.* at 495.

Deputy Draughon did not tell Deputy Christensen that Cline grabbed his genitals. EX. 8. When other officers arrived on the scene, including the supervisor, Deputy Draughon never claimed that Cline grabbed and squeezed his genitals. TR 1/14/2020, p 349. When Deputy Draughon drafted the affidavit in support of warrantless arrest, he did not claim that Cline grabbed him by the genitals, even though the affidavit alleged the Cline committed second-degree assault on a cop. *Id.* at 350; *see* CF, p 3. Indeed, as the body camera shows, Deputy Draughon never claimed to anybody on the night of the incident that Cline grabbed his genitals. TR 1/14/2020, p 348; EX. 4; EX 8. Nor did Deputy Draughon make a workers' compensation claim based on Cline allegedly grabbing his testicles, even though he did file a claim based on the allegation that Cline kicked him in the knee. *Id.* at 348–

49. Ultimately, the first time Deputy Draughon alleged that Cline grabbed his genitals was after he watched the body cam footage and reviewed his own conduct, including the use of a chokehold. *See* TR 1/13/2020, pp 267–68.

The defense offered expert testimony from Dan Montgomery, the former Police Chief in Westminster. 1/14/2020, p 521. A forty-seven-year veteran of policing, Chief Montgomery was the Chief of Police for twenty-five years. *Id.* at 522. Chief Montgomery testified about the concept of "emotional capture" among police officers, which is when an officer becomes overloaded by adrenaline and overreacts based on emotions, employing excessive force and making unreasonable decisions. *Id.* at 530. This commonly happens, Chief Montgomery explained, when an officer perceives "contempt of cop," that is, when a suspect is not listening or obeying an officer's commands. *Id.* at 558.

Chief Montgomery testified that a chokehold is considered "lethal force" in the matrix or pyramid of force on which police officers are trained, as is striking a suspect in the head with a closed fist, both of which Deputy Draughon did here. *Id.* at 535, 543. Chief Montgomery explained that an officer can use only the amount of force that is reasonable under the circumstances. *Id.* at 546. What's reasonable is largely a question of proportionality. *Id.* For example, in his expert opinion, if an individual is on the ground violently thrashing and resisting arrest, as Cline

allegedly was, an officer is justified in punching and striking back, so long as he does not "punch[] or strike[] the head" and if he "avoid[s] the neck and spine, as well." *Id.* at 553:18–20.

Over defense counsel's objection, the court instructed the jury on the initial aggressor exception to self-defense. CF, p 708; TR 1/15/2020, p 593. In turn, the government argued in its initial and rebuttal closing arguments that Cline was the initial aggressor. TR 1/15/2020, pp 624–25, 664. The government's PowerPoint made the argument as well, highlighting the term "initial aggressor" in bold. (EXHIBITS 01-13-2020-10-16-2020, p. 32).

The defense tried to argue that Cline had a right to use force against Deputy Draughon under Colorado's "make my day" statute, which creates an affirmative defense justifying the use of force against an intruder who unlawfully enters the defendant's home. CF, pp 619–22, 688. The district court rejected the proposed affirmative defense and refused to instruct the jury on the "make my day" statute, however, even though the court had previously granted a motion to suppress based on its finding that Cline's consent to the officers' entry into his home was tainted by Deputy Draughon's unlawful and unconstitutional order compelling Cline to come to and open the door. TR 1/13/2020, pp 273–74; TR 1/15/2020, pp 597–98; *see* CF, pp 340–53. In the order granting to the motion to suppress, the court found

that "the opening of the door and entry into the home was unlawful," that "the deputies unlawfully entered the home," and that suppression and severance were required to "prevent the deputies from benefiting from their unlawful entry." CF, pp 349, 352.

Unable to consider whether Cline had the right to use force against Deputy Draughon because he entered the home unlawfully, and instructed that Cline could not claim self-defense if he were the initial aggressor, the jury convicted Cline of second-degree and third-degree assault. *Id.* at 729–35. The jury also convicted Cline of harassment and criminal mischief. *Id.*

## Summary of the Argument

1. The trial court reversibly erred when it concluded that "there is no evidence in the record that would support the finding that there was an illegal entry" into Cline's house and rejected his "make-my-day" instruction. In granting a motion to suppress earlier in the case, the court itself recognized there was substantial evidence of an "unlawful entry." And at trial, Cline presented ample evidence from which a jury could have concluded that he did not validly consent to Deputy Draughon's entering the house.

2. The trial court reversibly erred when it instructed the jury on the "initial aggressor" exception to self-defense. There was no evidence that Cline was

the initial aggressor. Rather, the only issue was whether he assaulted Deputy Draughon or acted in self-defense. If Cline kicked Deputy Draughon, that was either an assault or it was a reasonable act of self-defense in response to the unreasonable and excessive force Deputy Draughon (and Deputy Christensen) used when taking Cline to the ground. If Cline grabbed Deputy Draughon's genitals, that was either an assault or it was a reasonable act of self-defense in response to the unreasonable and excessive force Deputy Draughon applied by using a chokehold on Cline and punching him in the face.

3. The trial court reversibly erred when it precluded Cline's expert witness from testifying about how the deputies tased Cline into submission and aggressively transported him to the police car. Chief Montgomery's testimony was relevant to Cline's defense that Deputy Draughon escalated the encounter at every turn and, acting on adrenaline, used excessive and unreasonable force.

4. The trial court reversibly erred when it refused to instruct the jury on the affirmative defense of reasonable mistake of fact as to the criminal trespass charge. Mistake of fact is an affirmative defense under Colorado statute, and the court is not free to ignore the plain commands of the General Assembly. Moreover, a mistake of fact instruction would not have been superfluous.

5. The trial court erred in refusing to conduct an *in camera* review of the personnel file of Deputy Draughon. Under *People v. Walker*, a defendant charged with assaulting a police officer has a right to have the court conduct an *in camera* review of the officer's personnel file and, thereafter, to release complaints of excessive use of force or any information within the file relating to the officer's credibility. 666 P.2d 113, 121–22 (Colo. 1983).

## Argument

### I. The trial court reversibly erred, violated Cline's constitutional right to present a defense, and lowered the State's constitutional burden of proof when it concluded that "there is no evidence in the record that would support the finding that there was an illegal entry" into Cline's house and it rejected his "make-my-day" instruction.

#### A. Preservation and Standard of Review.

Cline preserved this issue by endorsing and tendering the affirmative defense of "make my day." CF, pp 619–22, 688.

The trial court is duty-bound to correctly instruct the jury on all matters of law. *People v. Mattas*, 645 P.2d 254, 257 (Colo. 1982). The defendant's right to due process of law requires correct instructions, particularly when those instructions "bear on the prosecution's burden to prove the defendant guilty beyond a reasonable doubt." *People v. Harlan*, 8 P.3d 448, 471 (Colo. 2000), *overruled on other grounds by People v. Miller*, 113 P.3d 743, 748 (Colo. 2005); *In re Winship*, 397 U.S. 358, 364 (1970); *Mattas*, 645 P.2d at 257; *see* U.S. CONST. amends. V, VI, XIV;

COLO. CONST. art. II, §§ 16, 23, 25. Whether the instructions were legally erroneous is a question of law subject to de novo review. *People v. Wickham,* 53 P.3d 691, 694 (Colo. App. 2001).

A defendant is entitled to an affirmative defense instruction when there is some credible evidence to support it. § 18-1-407(1); *O'Shaughnessy v. People*, 269 P.3d 1233, 1236 (Colo. 2012). Whether Cline proffered sufficient evidence to support a "make my day" instruction is a question of law that this Court reviews de novo. *See O'Shaughnessy*, 269 P.3d at 1236; *Lybarger v. People*, 807 P.2d 570, 579 (Colo. 1991). "A trial court's error in refusing to give an affirmative defense instruction improperly lowers the prosecution's burden of proof, and, therefore, the error cannot be deemed harmless." *People v. DeWitt*, 275 P.3d 728, 733 (Colo. App. 2011), *cert. denied*, 2012 WL 920043 (Colo. No. 11SC827, Mar. 19, 2012).

**B. Law and Analysis.**

The United States and Colorado Constitutions protect a criminal defendant's right to present a defense. U.S. CONST. amends. V, VI, XIV; COLO. CONST. art. II, §§ 16, 23, 25. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476

U.S. 683, 690 (1986); *People v. Bueno*, 626 P.2d 1167, 1169-70 (Colo. App. 1981). Those same authorities additionally protect a defendant from conviction except upon proof beyond a reasonable doubt of the existence of every element necessary to support a conviction. U.S. CONST. amends. V, VI, XIV; COLO. CONST. art. II, §§ 16, 23, 25; *Winship*, 397 U.S. at 364; *People v. Hardin*, 607 P.2d 1291, 1294 (Colo. 1980); *People v. Duncan*, 109 P.3d 1044, 1045 (Colo. App. 2004).

A defendant is entitled "to all reasonable opportunities to present evidence which might tend to create a doubt as to his guilt." *Bueno*, 626 P.2d at 1169. Moreover, it is a trial court's duty to instruct the jury on all matters of law. *People v. Munsey*, 232 P.3d 113, 118 (Colo. App. 2009). "As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews v. United States*, 485 U.S. 58, 63 (1988). A defendant need only present a "scintilla" of evidence in order to be entitled to an instruction on an affirmative defense. *People v. Saavedra-Rodriguez*, 971 P.2d 223, 228 (Colo. 1998).

When a defendant raises an affirmative defense, such as "make my day," the burden is on the State to disprove the defense beyond a reasonable doubt. § 18-1-407(2); *see Vega v. People*, 893 P.2d 107, 111 (Colo. 1995); *Lybarger*, 807 P.2d at 579. When a trial court errs "in disallowing [an] affirmative defense, it improperly

lighten[s] the prosecution's burden of proof" and deprives the defendant of his constitutional right to present a defense. *Vega*, 893 P.2d at 111; *People v. Sandoval*, 805 P.2d 1126, 1127-28 (Colo. App. 1990).

Section 18-1-704.5, commonly known as the "make my day" statute, creates an affirmative defense for the use of force against an intruder. In relevant part, it provides:

> any occupant of a dwelling is justified in using any degree of physical force, including deadly physical force, against another person when that other person has made an unlawful entry into the dwelling, and when the occupant has a reasonable belief that such other person has committed a crime in the dwelling in addition to the uninvited entry, or is committing or intends to commit a crime against a person or property in addition to the uninvited entry, and when the occupant reasonably believes that such other person might use any physical force, no matter how slight, against any occupant.

§ 18-1-704.5(2).

"[T]he make-my-day statute has three elements: (1) an unlawful entry, (2) the occupant's reasonable belief that the person entering unlawfully has committed, is committing, or intends to commit a crime, and (3) the occupant's reasonable belief that the person entering unlawfully might use physical force against an occupant." *People v. Zukowski*, 260 P.3d 339, 343 (Colo. App. 2010), *cert. denied*, 2011 WL 3855726 (Colo. No. 11SC142, Aug. 29, 2011). Although the "unlawful entry" must be "knowing," an intruder's "mistaken belief that an entry, although

uninvited, is lawful does not make it lawful." *Id.* at 345. The intruder must "knowingly engage in criminal conduct," but he need not know that he is "violating a criminal statute" or "breaking the law." *Id.* at 344.

A defendant can invoke the "make my day" defense against police officers. *People v. Malczewski*, 744 P.2d 62, 65–66 (Colo. 1987). Whether an officer made an unlawful entry into the defendant's home is a question of fact for the jury. *Zukowski*, 260 P.3d at 345; CJI-Crim. H:15 (2019).

The district court here rejected the "make may day" defense after concluding "there is no evidence in the record that would support the finding that there was an illegal entry." TR 1/15/2020, p 597:16–7. This conclusion was incorrect, and this Court should reverse.

### 1. The district court itself, in its suppression order, found there was sufficient evidence of an unlawful entry.

The district court wrongly concluded that there was no evidence from which a jury could find an unlawful entry by Deputy Draughon into Cline's home.[2] In granting an earlier motion to suppress, the district court expressly concluded that Deputy Draughon and Deputy Christensen "unlawfully entered" Cline's home,

[2] The court actually used the term "illegal entry" rather than "unlawful entry," but does not appear to have considered an "illegal entry" to be any different from an "unlawful entry."

finding, "the opening of the door and *entry* into the home was *unlawful*," "the deputies *unlawfully entered* the home," and suppression and severance were required to "prevent the deputies from benefiting from their *unlawful entry*." CF, pp 349, 352 (emphases added). The court held that Deputy Draughon acted unlawfully by ordering Cline to come to and open the door without a warrant and that, even though Cline asked the deputies to come inside the house, Cline's "consent" was not attenuated from Deputy Draughon's unlawful conduct. The court's suppression ruling necessarily proves that there was more than a "scintilla" of evidence that Deputy Draughon "unlawfully entered" Cline's home.

**2. In any event, whether the deputies' entry into the house was unlawful is a question of fact, and there is ample evidence in the record that their entry was unlawful.**

Apart from the suppression order, Cline elicited sufficient evidence of an unlawful entry.

"Valid consent renders a warrantless search constitutionally permissible." *United States v. Mumme*, ___ F.3d ___, 2021 WL 118010, at *6 (1st Cir. No. 19-1983, Jan. 13, 2021). Whether consent is valid depends on the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). Relevant factors include the "defendant's age, demeanor, intelligence . . . and possibly vulnerable subjective state, as well as evidence of inherently coercive tactics, either in the

nature of police questioning or in the environment in which the questioning took place." *Mumme*, 2021 WL 118010, at *6 (quotations omitted).

Here, a jury could have concluded that Cline's consent was not valid. First, as the district court found, the consent was not attenuated from the deputies' unlawful conduct of ordering Cline to come to and open the door. CF, p 347–48.

Second, the totality of circumstances could support a jury finding of involuntary consent. Cline was commanded to open the door, even though that command was unlawful since the deputies did not have a warrant. *See United States v. Flowers*, 336 F.3d 1222, 1226 n.2 (10th Cir. 2003) ("[A] reasonable person confronted by police officers outside his door at night and a command by one of the officers to allow them to enter, would have believed that he had to open the door of his home and submit to the show of authority. Accordingly, [defendant's] decision to open his door was not voluntary."). The deputies were in uniform, with guns, shining flashlights into the home, clearly acting under the color of their authority. *See United States v. Reeves*, 524 F.3d 1161, 1167 (10th Cir. 2008) ("Opening the door to one's home is not voluntary if ordered to do so under color of authority."). The deputies did not tell Cline that he could refuse to open the door or refuse to consent to their entry. Cline was intoxicated and mentally vulnerable. Given these facts, a

jury could have found that Cline's consent was not voluntary and that Deputy Draughon's entry into Cline's home was unlawful.

Moreover, the defense cross-examined Deputy Draughon as follows:

> Q Okay. Now, what is your understanding when you can go into somebody's home?
>
> A My understanding? Exigent circumstances [or] emergency if someone's being assaulted, hurt, it's a burglary in progress, extreme domestic violence situations where someone's being harmed, when I have a warrant, a search warrant for that home, not just a warrant for someone's arrest.
>
> Q Right.
> Okay. And none of those existed in this situation.
>
> A No.
>
> Q Okay.
>
> A It was the suspect's home.
>
> Q Right.
>
> And you didn't have a warrant.
>
> A A search warrant?
>
> Q Right.
>
> A I did not have a search warrant.
>
> Q Or an arrest warrant.
>
> A No.

TR 1/14/2020, p 300–01.

Given Deputy Draughon's testimony, and because a jury could have found that Cline's consenting to deputies' entering was involuntary, the jury was presented with "some credible evidence"—a "scintilla" at the very least—that Deputy Draughon unlawfully entered Cline's home. The district court, therefore, erred in finding that "there [was] no evidence in the record that would support the finding that there was an [was] entry."

#### 3. Reversal is required.

"A trial court's error in refusing to give an affirmative defense instruction improperly lowers the prosecution's burden of proof, and, therefore, the error cannot be deemed harmless." *DeWitt*, 275 P.3d at 733. This Court should reverse the assault convictions.

## II. The trial court reversibly erred, lowered the State's constitutional burden of proof, violated due process, and deprived Cline of his right to an acquittal when it instructed the jury on the "initial aggressor" exception to self-defense.

### A. Preservation and Standard of Review.

The prosecution tendered a self-defense instruction that included an initial aggressor exception. CF, p 652. Cline preserved this issue by objecting to the prosecution's instruction. TR 1/15/2020, p 593. Whether the instructions were

legally erroneous is a question of law subject to de novo review. *People v. Wickham,* 53 P.3d 691, 694 (Colo. App. 2001).

Although preserved instructional errors are generally subject to constitutional harmlessness analysis, *Griego v. People*, 19 P.3d 1, 8 (Colo. 2001), when the court errs in failing to properly set forth the applicable law of self-defense, the prosecution's burden of proof is unconstitutionally lowered and the accused is deprived of his right to an acquittal on grounds of self-defense. *People v. Garcia*, 113 P.3d 775, 784 (Colo. 2005); *Idrogo v. People*, 818 P.2d 752, 756 (Colo. 1991). Therefore, such an error cannot be deemed harmless. *Garcia*, 113 P.3d at 784.

**B. Relevant Facts.**

After Deputy Draughon moved Cline's cell phone, Cline stood up and moved toward the deputy. TR 1/13/2020, p 217. Cline was handcuffed. *Id.* Deputy Draughon did not claim that Cline's move was threatening. *Id.* Instead, Deputy Draughon testified that to maintain his "safety bubble," he and Deputy Christensen each grabbed Cline by one arm and took him to the ground. *Id.*

Deputy Draughon pinned Cline to the ground with his leg while deputy Christensen went to move the police car close to the house. *Id.* at 222. Cline then allegedly kicked Deputy Draughon in the legs, knees, and chest. *Id.* at 223–24. After wrapping Cline up from behind with his own legs, Deputy Draughon placed Cline

in a chokehold, TR 1/14/2020, pp 484, 495, at which point Cline allegedly grabbed the deputy's genitals. TR 1/13/2020, p 226. Deputy Christensen then dry stunned Cline with his Taser. TR 1/14/2020, pp 344, 484.

### C. Law and Analysis.

A court is duty-bound to correctly instruct the jury on the law applicable to the case so that the instructions "fairly and adequately cover the issues presented." *Zukowski*, 260 P.3d at 343. "It is an essential feature of a fair trial that the court correctly instruct the jury on all matters of law." *Harlan*, 8 P.3d at 471. The defendant's right to due process of law requires correct instructions, particularly when those instructions "bear on the prosecution's burden to prove the defendant guilty beyond a reasonable doubt." *Id.*; *Winship*, 397 U.S. at 364; *Mattas*, 645 P.2d at 257; *see* U.S. CONST. amends. V, VI, XIV; COLO. CONST. art. II, §§ 16, 23, 25. Jury instructions that fail to properly set forth the law of self-defense, when the evidence could support a reasonable doubt on the issue, deprive the defendant of his right to an acquittal on those grounds, improperly lower the prosecution's burden of proof, and constitute error requiring reversal. *Garcia*, 113 P.3d at 784; *Idrogo*, 818 P.2d at 756.

In self-defense cases, the court must tailor the self-defense instructions to the particular circumstances of the case so that they adequately apprise the jury of

the law from the defendant's standpoint. *Garcia*, 28 P.3d at 347; *Cassels v. People*, 92 P.3d 951, 956 (Colo. 2004). A court should refrain from instructing the jury on abstract principles of law that are either unsupported by the facts or unrelated to the issues in controversy. *People v. Castillo*, 2018 CO 62, ¶ 34; *People v. Alexander*, 663 P.2d 1024, 1032 (Colo. 1983); *People v. Manzanares*, 942 P.2d 1235, 1241 (Colo. App. 1996).

Section 18-1-704(3)(b) provides that a person is not justified in using physical force against another if he is the "initial aggressor." However, a court should instruct on this principle of law only when the evidence supports it. *People v. Ujaama*, 2012 COA 36, ¶¶ 48–49; *Manzanares*, 942 P.2d at 1241. To justify an initial aggressor instruction, there must be some evidence that the defendant, *prior to* the conduct which gave rise to the self-defense claim, initiated the physical conflict. *See People v. Roadcap*, 78 P.3d 1108, 1113 (Colo. App. 2003); *Manzanares*, 942 P.2d at 1241. Where the only issue under the facts is whether the defendant, by striking the alleged victim, either committed the charged crime or acted in self-defense, an initial aggressor instruction is improper. *Manzanares*, 942 P.2d at 1241.

In *Manzanares*, the defendant attended a party where a fight broke out between his friend and another person. *Id.* at 1238. Manzanares left but then returned and fired a gun. *Id.* At trial, Manzanares claimed self-defense; he disputed

having fired the first shots and having aimed at the house. *Id.* The court gave an initial aggressor instruction because "the jury could conclude that, once the defendant returned, he acted as the initial aggressor . . . not in self-defense." *Id.* The jury convicted Manzanares of felony menacing but acquitted him of the assault charges. *Id.* On appeal, Manzanares argued that the court erred in giving an initial aggressor instruction because it was not supported by the evidence. *Id.* at 1241.

This Court held that the initial aggressor instruction should not have been given. *Id.* Noting that Manzanares did not participate in the initial altercation, the Court stated:

> [T]he only issue remaining upon defendant's return to the party was whether, by firing his pistol, he committed any of the crimes charged and, if so, whether the conduct was justified because he had acted in self-defense. A finding by the jury that he was at that point the "initial aggressor" would be no more than a rejection of the claim of self-defense.

*Id.*

In *Castillo*, the Colorado Supreme Court held that there was insufficient evidence to instruct the jury on the initial aggressor exception to self-defense. *Castillo*, ¶¶ 46–54. Castillo was driving a car and attempting to leave downtown after a night out. *Id.* ¶¶ 6–8. Many facts were disputed, but it was undisputed that Castillo opened the trunk of his car before getting out and that a series of gunshots started before Castillo got to his trunk. *Id.* ¶ 14. Castillo fired in return, using a

shotgun he retrieved from the trunk of his car. *Id.* ¶¶ 12–13. The single, continuous episode took a matter of seconds or maybe a minute. *Id.* ¶ 47.

The district court instructed the jury on the initial aggressor exception to self-defense, and the Supreme Court reversed. *Id.* ¶ 33. The Court defined an initial aggressor as the person who "initiated the physical conflict by using or threatening the imminent use of unlawful physical force." *Id.* ¶ 43. The Court concluded there was no evidence from which a jury could find that Castillo was the initial aggressor: popping the trunk and getting out of the car was not a threat of the imminent use of unlawful physical force. *Id.* ¶ 53. "[P]opping the trunk and getting out of the car is, at most, an aggressive step. But we cannot say that doing so threatens the imminent use of unlawful physical force." *Id.*

Here, as in *Manzanares* and *Castillo*, there was no evidence that Cline was the initial aggressor. Cline either acted in self-defense or he didn't. If Cline kicked Deputy Draughon, that was either an assault or it was a reasonable act of self-defense in response to the unreasonable and excessive force Deputy Draughon (and Deputy Christensen) used when taking Cline to the ground after he stood up. TR 1/13/2020, pp 217–18, 222. If Cline grabbed Deputy Draughon's genitals, that was either an assault or it was a reasonable act of self-defense in response to the unreasonable and excessive force Deputy Draughon applied by using a chokehold

on Cline and punching him in the face, two forms of "lethal force." TR 1/14/2020, pp 484, 535, 543.

The prosecution argued and the trial court found that Cline was the initial aggressor because there was evidence that Cline "first struck [kicked] the deputy, making him the initial aggressor." TR 1/15/2020, p 593:16–17. But the evidence was undisputed that Cline only kicked Deputy Draughon after the deputies took him to the ground, even though he was handcuffed, and only after Deputy Draughon pinned him to the ground with his leg. There was no evidence Cline initiated the aggression by kicking Deputy Draughon.

Cline's act of standing up and moving toward Deputy Draughon, after the deputy moved Cline's phone, does not make Cline the initial aggressor, just as popping the trunk and getting out of the car to retrieve a shotgun did not make Castillo the initial aggressor. Indeed, Deputy Draughon did not testify to being threatened by the handcuffed Cline "coming towards" him. Deputy Draughon acted merely to maintain his "safety bubble," and he was able to push Cline away with "one hand." TR 1/13/2020, p 217:19–24. At most, Cline's act was "an aggressive step." *Castillo*, ¶ 53. It was not a "threat[] [of] the imminent use of unlawful physical force." *Id.* Because there was no evidence from which a jury

could conclude that Cline was the initial aggressor, the district court erred by instructing the jury on the initial aggressor exception to self-defense.

This Court should reverse both assault convictions. Juries are prone to "fit facts into an erroneously given instruction." *Castillo*, ¶ 59. Moreover, the prosecution argued that Cline was the initial aggressor in both its initial and rebuttal closing argument, and it highlighted the argument in bold in its closing argument PowerPoint, which "exacerbated" the error, *id.* ¶ 60. On this record, the trial court's error in failing to properly set forth the applicable law of self-defense lowered the prosecution's burden of proof and deprived Cline of his right to an acquittal on grounds of self-defense. *See Garcia*, 113 P.3d at 784; *Idrogo*, 818 P.2d at 756.

## III. The trial court violated Cline's constitutional right to present a defense when it precluded his expert witness from testifying about how the deputies tased Cline into submission and aggressively transported him to the police car.

### A. Preservation and Standard of Review.

Cline preserved this issue for appeal. CF, p 367-69; TR 12/20/2019, pp 7–14.

This Court reviews for an abuse of discretion the district court's exclusion of Cline's expert testimony. *People v. Douglas*, 2015 COA 155, ¶ 58. In reviewing the court's ruling regarding expert testimony, this Court affords the proffered evidence

the maximum probative value and minimum unfair prejudice. *People v. Conyac*, 2014 COA 8M, ¶ 23. Because an accused has a constitutional right to call witnesses in his defense, "abridgment of that right is subject to a constitutional harmless error analysis." *Golob v. People*, 180 P.3d 1006, 1013 (Colo. 2008).

"The exclusion of relevant and competent evidence offered in defense of a criminal charge is a severe sanction, implicating as it does the defendant's right to present a defense and ultimately the right to a fair trial." *People v. Hampton*, 696 P.2d 765, 778 (Colo. 1985). Reversal is required if "there is a reasonable possibility that the [error] might have contributed to the conviction." *Hagos v. People*, 2012 CO 63, ¶ 11.

### B. Relevant Facts.

Chief Montgomery proposed to testify that:

> The handcuffing of Cline and forcefully placing him on the floor of the residence was not reasonable and appropriate. Cline was not acting in an "aggressive manner" and was not an "officer safety" concern. There was no need to forcefully handcuff him and place him on the floor, and there was no need apply a wrist lock as a pain compliance tool. Furthermore, the strikes to Cline's face by Deputy Draughon to a handcuffed prisoner were not reasonable and appropriate. Strikes to the face and head can cause very serious injuries externally and can cause brain damage.

CF, pp 368–69. The district court permitted this testimony.

In contrast, the court refused to allow Chief Montgomery to offer two additional opinions:

- Using a TASER in the "drive stun" mode on Mr. Cline while he was handcuffed and on his back with his hands behind him was not reasonable and appropriate. In the "drive stun" mode the TASER does not create neuro-muscular incapacitation (NMI) and only creates excruciating pain.

- Deputies Draughon and Christensen attempted to get Mr. Cline to stand up from being in a prone position on his stomach while handcuffed with his hands behind him, and in so doing they lifted both of his arms upwards. This is not the proper technique for getting a prisoner up off the ground and is not reasonable or appropriate. This technique creates excruciating pain and can cause injuries to the upper arms and/or shoulders.

*Id.* at 369. The court held that these two opinions were irrelevant and unfairly prejudicial because the tasing of Cline and the act of standing him up to transport him to the car occurred *after* any alleged assault by Cline and *after* any act of self-defense.

### C. Law and Analysis.

The right of a defendant to call witnesses in his defense is a fundamental component of due process. *Hampton*, 696 P.2d at 774. Few rights are more fundamental than the right of an accused to present evidence that might influence a jury's determination of innocence or guilt. *People v. Richards*, 795 P.2d 1343, 1345 (Colo. App. 1989).

CRE 702 provides that expert testimony is admissible if the expert's specialized knowledge will assist the jury in understanding the evidence or determining a fact in issue. *People v. Shreck*, 22 P.3d 68, 78-79 (Colo. 2001). There is no dispute Chief Montgomery was qualified to testify as an expert. TR 1/14/2020, p 526.

"[T]he rules of evidence reflect a liberal approach to the admissibility of expert testimony." *People v. Jimenez*, 217 P.3d 841, 866 (Colo.App.2008). The evidence admitted must be logically relevant under CRE 401. *People v. Ramirez*, 155 P.3d 371, 378 (Colo. 2007). Further, the testimony must be useful to the fact finder. *Id.* at 379. The court "must also apply its discretionary authority under CRE 403" to ensure that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. *Id.*

Here, the trial court erred in prohibiting Chief Montgomery from testifying about the reasonableness and appropriateness of the deputies' conduct in tasing Cline, lifting him from the ground, and transporting him to the car.

The central dispute at trial was whether Deputy Draughon used unreasonable and excessive force, such that Cline could act in self-defense. Even though Cline's acts of self-defense—kicking Deputy Draughon and grabbing Deputy Draughon's genitals (if in fact that happened)—occurred before the

deputies tased him and lifted him off the ground, the reasonableness of the deputies' conduct was still relevant. The entire theory of defense was that Deputy Draughon came into the incident full of adrenaline and that he overreacted at every step, instead of deescalating. He was, to use Chief Montgomery's words, a victim of "emotional capture." Deputy Draughon's adrenaline took over, the defense argued, when Cline refused to acknowledge his *Miranda* rights. This "contempt of cop," as Chief Montgomery put it, spurred the use of excessive force. As defense counsel summarized in closing argument:

> Deputy Draughon was amped up, he went there to make an arrest, things didn't go the way he thought they would or he wanted them to go. Cline didn't submit to his absolute authority and that caused some problems. He was acting on adrenaline.

TR 1/15/2020, p 643:17–21. Deputy Draughon's conduct, from the beginning of the encounter to the end, was relevant to the defense that he overreacted and used excessive force. Chief Montgomery's expert opinions were relevant to show that given every opportunity, Deputy Draughon escalated when he should have deescalated.

None of the preferred opinions were unfairly prejudicial because the jury heard evidence regarding the entire encounter (and saw two videos of the entire encounter, EX. 4 and EX 8), including the tasing and the transport of Cline to the

car. Therefore, the jury should have been permitted to hear Chief Montgomery's expert opinion on the appropriateness and reasonableness of that conduct.

The State cannot prove the district court's error was harmless beyond a reasonable doubt. When a trial court, as here, commits error through the exclusion of defense evidence, "the classic formulation for applying the harmless beyond a reasonable doubt test to improperly admitted evidence [is not] as easy to apply." *People v. Dunham*, 2016 COA 73, ¶ 64. "This is so because 'the erroneous exclusion of evidence in violation of the . . . Sixth Amendment . . . infringe[s] upon the jury's factfinding role and affect[s] the jury's deliberative process in ways that are, strictly speaking, not readily calculable.'" *Id.* (quoting *Neder v. United States*, 527 U.S. 1, 18 (1999)).

After the improper exclusion of his "make my day" defense, Cline's self-defense argument was all that was left. Chief Montgomery's testimony went to the heart of the self-defense claim, and the exclusion of it requires a new trial. *See Golob*, 180 P.3d at 1011-14 (trial court's improper limitation of defense expert testimony required a new trial); *People v. Brown*, 2014 COA 130M, ¶¶ 31-37 (finding an abuse of discretion for exclusion of expert testimony as irrelevant).

## IV. The trial court reversibly erred, lowered the State's constitutional burden of proof, violated due process, and deprived Cline of his right to an acquittal when it refused to instruct the jury on the affirmative defense of reasonable mistake of fact as to the criminal trespass charge.

### A. Preservation and Standard of Review.

Cline preserved this issue for appeal by tendering a mistake of fact instruction. CF, p 488. Relying on *People v. Walden*, 224 P.3d 369 (Colo. App. 2009), the court refused to instruct the jury on the affirmative defense of mistake of fact. TR 12/10/2019, p 526

This Court reviews this issue under the constitutional provisions, statutes, and caselaw articulated above. *Supra* Part I.

### B. Law and Analysis.

"A person commits the crime of first degree criminal trespass if such person knowingly and unlawfully enters or remains in a dwelling of another or if such person enters any motor vehicle with intent to commit a crime therein. First degree criminal trespass is a class 5 felony." § 18-4-502.

Colorado law provides, however, that a person is relieved of criminal liability if "he engaged in that conduct under a mistaken belief of fact [and the mistake of fact] . . . negatives the existence of a particular mental state essential to commission of the offense." § 18-1-504(1)(a). A "defense authorized by [§ 18-1-504(1)(a)] is an affirmative defense." § 18-1-504(3).

There is no dispute there was sufficient evidence to support a mistake of fact defense here. As Cline said to Bobo, "I thought it was my house, so I went in."

The court still refused to instruct the jury on the affirmative defense after reviewing *Walden* and concluding a mistake of fact instruction was superfluous because the jury was already instructed that the government had to prove the element of "knowingly" beyond a reasonable doubt. *See Walden*, 224 P.3d at 379. The trial court's decision—that mistake of fact was essentially a traverse rather than an affirmative defense—was wrong for at least three reasons.

First, § 18-1-504(3) unequivocally says that "[a]ny defense authorized by this section is an affirmative defense." And under § 18-1-407(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." The trial court is not at liberty to ignore these plain statutory commands. *See Yates v. Hartman*, 2018 COA 31, ¶ 9 ("[C]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law.").

Second, even if it were a traverse, the trial court's ruling was still wrong. When a defense is a traverse and not an affirmative defense, the court must still provide an instruction informing jurors of their obligation to consider evidence of

the traverse in determining whether the government has proved the mens rea beyond a reasonable doubt. This is precisely what happens, for example, when self-defense operates as a traverse rather than an affirmative defense. *See* § 18-1-704(4). So, even if the court properly refused to instruct on mistake of fact as an affirmative defense, it reversibly erred in failing to instruct the jury that it had to consider evidence of mistake of fact in deciding whether Cline knowingly entered Poillion's home.

Third, the trespass instruction here did not clearly inform the jury of the government's burden to prove beyond a reasonable doubt the Cline knew he was entering Poillion's home and not his own. That's because the jury instruction did not indent or offset the element of "dwelling of another" under the element of "knowingly." CF, p 465. The jury was thus inadequately informed that "knowingly" applied to the "dwelling of another" element. *See Auman v. People*, 109 P.3d 647, 664 (Colo. 2005); *People v. Bornman*, 953 P.2d 952, 954 (Colo. App. 1997). Unlike in *Walden*, the mistake of fact affirmative defense instruction was not superfluous here.[3]

[3] Cline's theory of defense instruction was not sufficient to communicate the applicable law to the jury. CF, p 469. That instruction did not connect the mistake of fact to the "knowingly" element, use the word knowingly, refer to the trespass charge, or explain the prosecution's burden of proof.

In any event, *Walden* was incorrectly decided, and this Court is not bound by it. *People v. Smoots*, 2013 COA 152, ¶ 20 ("We are not obligated to follow the precedent established by another division."), *aff'd sub nom.*, *Reyna-Abarca v. People*, 2017 CO 15, ¶ 20.

Finally, "A trial court's error in refusing to give an affirmative defense instruction improperly lowers the prosecution's burden of proof, and, therefore, the error cannot be deemed harmless." *DeWitt*, 275 P.3d at 733; *see* U.S. CONST. amends. V, VI, XIV; COLO. CONST. art. II, §§ 16, 23, 25. This Court should reverse the trespass conviction.

## V. The trial court erred in refusing to conduct an *in camera* review of the personnel file of Deputy Draughon.

### A. Preservation and Standard of Review.

Cline preserved this issue for appeal by issuing a subpoena for Deputy Draughon's personnel file. *See Zoll v. People*, 2018 CO 70, ¶ 12. The district court quashed the subpoena without conducting an *in camera* review.

A defendant who is charged with assaulting a police officer is not automatically entitled to the release of a police officer's personnel file. *People v. Walker*, 666 P.2d 113, 121–22 (Colo. 1983). Even so, he does have a right to have the court conduct an *in camera* review of the file and, thereafter, a right to the release of complaints of excessive use of force or any information within the file that relate to

the officer's credibility. *Id.* The district court's contrary conclusion—that no *in camera* review was required—is an error of law subject to de novo review. *See Valdez v. People*, 966 P.2d 587, 590 (Colo. 1998) (questions of law are reviewable de novo). Even if an abuse of discretion standard of review applies, "A district court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996).

If the district court erred, this Court must remand the case for an *in camera* review. After conducting that review, the district court must disclose to the parties responsive materials and allow the parties to brief whether a new trial is warranted. *Zoll*, ¶ 12.

**B. Relevant Facts.**

Cline subpoenaed Deputy Draughon's personnel file, looking for information regarding the deputy's performance, credibility, and misconduct, if any, including excessive use of force. CF, p 102. The subpoena also sought all internal investigations of Deputy Draughon. *Id.*

In response, La Plata County filed a motion to quash. *Id.* at 146–48. The County informed the Court that it did not possess any "internal investigations" records for Deputy Draughon. *Id.* at 147. The County asked the Court to quash the subpoena's request for the deputy's personnel file. *Id.*

The defense initially did not file a written response to the motion. The defense argued that an *in camera* review was required as a matter of law. *See People v. Walker*, 666 P.2d 113 and *Martinelli v. District Court*, 612 P.2d 1083 (Colo. 1980).

Applying *People v. Spykstra*, 234 P.3d 662 (Colo. 2010), and without citing or discussing either *Walker* or *Martinelli*, the district court granted the motion to quash. It refused to conduct an *in camera* review of Deputy Draughon's personnel file.

**Order: RE: Motion to Quash Subpoena**

The motion/proposed order attached hereto: GRANTED.

No response to the Motion to Quash has been filed by the Defendant or the Prosecution. The Court grants the motion to quash.

Based upon the representations in the motion to quash, with the exception of the personnel file, the documents sought in the subpoena either do not exist or will be produced voluntarily by the La Plata County Sheriff's Office.

With respect to the personnel file the Defendant had failed to show a specific factual basis demonstrating reasonable likelihood that documents exist within the file that would be relevant to this action. People v. Spykstra, 234 P.3d 662 (Colo. 2010). The Court directs the Clerk of the Court to return the records received in open court to the La Plata County Attorney. No in camera review will be conducted.

CF, p 169.

Cline filed a motion to reconsider, arguing that *Walker* mandates that the court conduct an *in camera* review and that *Spykstra* did not alter that requirement. *Id.* 177–78. The district court disagreed, and it denied the motion to reconsider. *Id.* at 185.

### C. Law and Analysis.

The State has a duty to turn over relevant evidence that may be material to the defense. U.S. CONST. amend. XIV; COLO. CONST. art. II, § 25; *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The failure to do so violates a defendant's constitutional right to due process. *See* U.S. CONST. amend. XIV; COLO. CONST. art. II, §25; *Kyles v. Whitley*, 514 U.S. 419, 432 (1995); *People v. Gallegos*, 644 P.2d 920, 925-26 (Colo. 1982) (due process requires court to compel discovery of evidence which may be of material importance to the defense). Even so, police officers have a limited interest in keeping their personal and professional information confidential. *Martinelli*, 612 P.2d at 1090–91.

The Colorado Supreme Court has held that a defendant who is charged with assaulting a police officer is not automatically entitled to the *release* of a police officer's personnel file. But he does have a right to an *in camera* review of the file and then to the release of complaints of excessive use of force or any information within the file that relates to the officer's credibility. *Walker*, 666 P.2d at 121–22. "[W]hen the only prosecution witnesses are the police officers involved, anything that goes to their credibility may be exculpatory." *Denver Policemen's Protective Ass'n v. Lichtenstein*, 660 F.2d 432, 436 (10th Cir. 1981).

In turn, after the required *in camera* review, the court must balance the competing interests and disclose any discoverable information. Discoverable information need not be admissible at trial. Rather, the defense is entitled to such information as long as it is "relevant to the conduct of the defense," *Gallegos*, 644 P.2d at 924, and when the officer's due process right to confidentiality does not outweigh the defendant's due process right to the information. Relevance, in a discovery context, "embodies a broad standard of disclosure." *Id.*

Here, the district court erred in refusing even to conduct the mandated *in camera* review. Under *Walker*, an *in camera* review was required because "[t]he procedure . . . of ordering the [police] files to be produced for an *in camera* inspection and applying a balancing test to determine what documents should be given to defense counsel protects the competing interests of the defendant, the government, and the public." 666 P.2d at 122.

*Spykstra* is not to the contrary. *Spykstra* did not purport to overrule *Walker* or *Martinelli*. 234 P.3d at 667–71. And although the Court in *Spykstra* said "[w]e do not, however, adopt a mandate of *in camera* review," in the very same sentence the Court also said, "such review may in some instances be necessary in the interest of

due process." *Id.* at 670. As *Walker* holds, the personnel file of a police officer in an assault-on-a-police-officer case in one such instance. 666 P.2d at 121–22.[4]

## Conclusion

For the reasons given in Arguments I, II, and III, this Court should reverse the second-degree and third-degree assault convictions. For the reasons given in Argument IV, this Court should reverse the trespass conviction. And for the reasons given in Argument V, this Court should remand the case for the district court to conduct an *in camera* review of Deputy Draughon's personnel file.

Dated: January 14, 2021.

Respectfully submitted,

*s/ Adam Mueller*

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[4] This Court should remand the case as to all of the counts of conviction, not just the assault convictions, because "when the only prosecution witnesses are the police officers involved, anything that goes to their credibility may be exculpatory." *Lichtenstein*, 660 F.2d at 436.

## Certificate of Service

I certify that on January 14, 2021, a copy of this *Mr. Cline's Opening Brief* was served *via* Colorado Courts E-Filing upon the Office of the Attorney General.

*s/ Adam Mueller*