



Denver DA

BETH McCANN, DENVER DISTRICT ATTORNEY

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DENVER DA

Beth McCann District Attorney

BRIEFING TOPICS

Discuss how the District Attorney's office handles use of force complaints or other violations by police officers:

- ▶ What law enforcement agencies are under your jurisdiction?
- ▶ How do you decide who to prosecute and who to not prosecute?
- ▶ How many cases of excessive use of force have you considered?
- ▶ How many cases have you prosecuted?

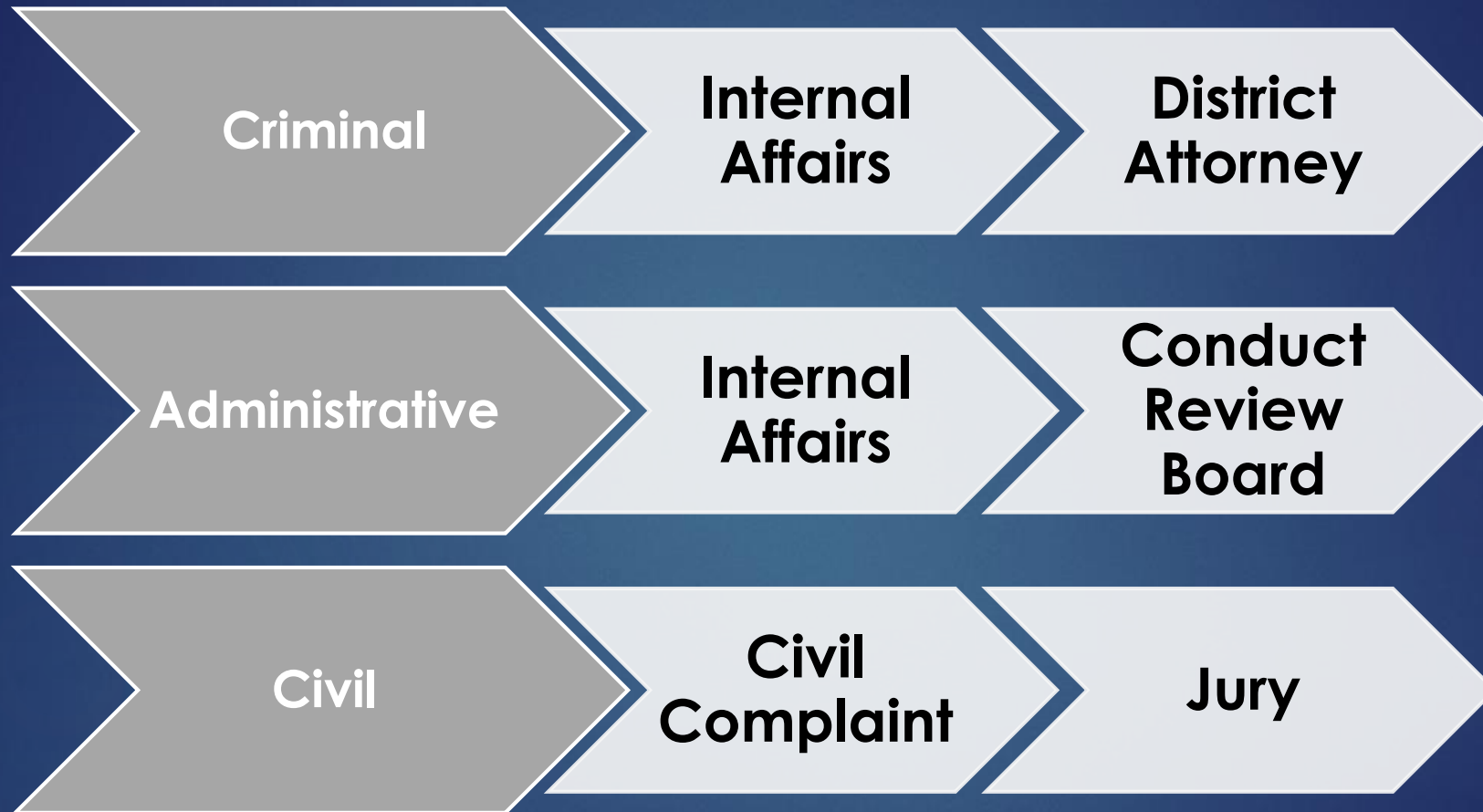


WHAT LAW ENFORCEMENT AGENCIES ARE UNDER YOUR JURISDICTION?

- ▶ The Denver DA's Office prosecutes *all crimes that occur in Denver*.
- ▶ The primary agencies are:
 - ▶ **Denver Police Department**
 - ▶ **Denver Sheriff's Department**
 - ▶ Auraria Campus Police Department
 - ▶ RTD Transit Police Division
 - ▶ **Any law enforcement officer who commits a crime in Denver** is within the jurisdiction of the Denver DA's Office.



INVESTIGATIONS INTO “USE OF FORCE”



USE OF FORCE

DPD Operations Manual 105.00(2)

- ▶ Use of Force / Force:
 - ▶ Use of force is the application of physical techniques or tactics, chemical weapons, or weapons to another person.
 - ▶ The Denver Police Department's standard requires that officers must use only the amount of force reasonable and necessary under the totality of the circumstances to safely accomplish a lawful purpose. Reasonable and necessary force is an objective standard, viewed from the perspective of a reasonable officer on the scene, without the benefit of hindsight.



INVESTIGATING USE OF FORCE COMPLAINTS

PROCESS

- ▶ After an incident involving a use of force the **officer must immediately report** the incident to a supervisor or command officer.
- ▶ Complaints are sent to Internal Affairs Bureau (IAB) of Denver Police Department
 - ▶ Independent Monitor's Office can also refer complaints to IAB
- ▶ Detectives within IAB conduct an investigation
- ▶ Assistant District Attorney (ADA) meets with the IAB Sergeant once a week to review cases that have the potential of a criminal charge
- ▶ If a case appears serious enough that it could have a criminal charge, the ADA brings the case to the District Attorney (DA).
- ▶ The DA and ADA review all of the investigative material including any body worn camera footage or videos.
 - ▶ In the more serious cases, the DA and ADA consult with Chief deputies in office, particularly those who have tried cases against law enforcement officers.
- ▶ After a thorough review of evidence and discussion amongst members of the DA's office, the DA makes a final decision regarding if charges will be filed and what charges to file

CRIMINAL CASE CONSIDERATIONS

We evaluate these cases in the same way we evaluate all cases for potential criminal charges.

- ▶ Review evidence and the strength of the evidence.
- ▶ Apply the law that governs to the facts of the case.
- ▶ Determine whether or not the evidence will support a **conviction beyond a reasonable doubt by a jury.**
 - ▶ If the answer is “yes”, the charges are brought and the case is filed.
 - ▶ If the answer is “no”, criminal charges are not brought but the case will be reviewed for any administrative violations, such as violation of the DPD use of force policy.



PROCESS WHEN A CASE IS FILED

The case follows the exact same procedure as any other criminal case.



- ▶ Defendant is booked through the Sheriff's department and bond is set.
- ▶ There is an arraignment and a setting of trial.
- ▶ Discussion of whether or not there will be a plea agreement offered.
 - ▶ If there is a plea agreement offered and accepted, that plea will be entered by the defendant and the judge will impose sentence.
 - ▶ If there is no plea agreement, the case will proceed to trial.



OFFICER INVOLVED SHOOTING PROTOCOL

C.R.S. §16-2.5-301.

- ▶ Each law enforcement agency shall develop protocols for a multi-agency team investigation involving the discharge of a firearm by a peace officer that resulted in injury or death.
- ▶ Each law enforcement agency shall post the protocol on its website.



**OFFICER-INVOLVED SHOOTING
PROTOCOL
2017**

The District Attorney is the chief law enforcement official of the Second Judicial District, the boundaries of which are the same as the City and County of Denver. By Colorado statutory mandate, the District Attorney is responsible for the prosecution of violations of Colorado criminal laws. Hence, the District Attorney has the authority and responsibility to make criminal charging decisions in officer-involved shootings.

The Denver Police Department was created by the Charter of the City and County of Denver. Under the Charter, the police department is overseen by the Office of the Denver Manager of Safety, headed by the Executive Director of the

The protocol is designed to ensure that a professional, thorough, impartial, and verifiable investigation is conducted in these situations and that it can be independently confirmed by later review.

When an officer-involved shooting occurs, it is immediately reported to the Denver police dispatcher, who then notifies all persons on the call-out list. This includes the Deputy Chief of Police Operations, Major Crimes Commander, Assistant District Attorney, Homicide Unit personnel, Director of the Crime Lab, Crime Lab Technicians, and others. These individuals respond first to the scene and then to DPD headquarters to take statements

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OFFICER INVOLVED SHOOTING PROCESS

- ▶ When there is an officer involved shooting, the DA and ADA and Chief Deputy on call receive a telephone call informing them there has been an officer involved shooting and location.
- ▶ All three attorneys respond to scene immediately in order to familiarize themselves with the scene.
- ▶ At the scene, the shooting officer(s) are separated from all other officers and taken to police headquarters.
 - ▶ Officers are not allowed to speak to each other or other officers.
 - ▶ The officers' firearms are taken for testing and body worn camera taken to be downloaded.
- ▶ Denver Homicide Detectives and Aurora Homicide Detectives respond to scene and conduct the investigation.
- ▶ The Denver Police Department Crime Scene Investigation Unit responds and controls the scene to take pictures and collect evidence.



OFFICER INVOLVED SHOOTING PROCESS CONTINUED

- ▶ At police headquarters, officers make individual recorded statements.
- ▶ The ADA sits in interviews and may ask questions.
 - ▶ The DA and Chief Deputy may also suggest questions.
- ▶ Any other witnesses, including witness officers and civilians, are also interviewed as soon as possible.
- ▶ The body worn camera is immediately downloaded and observed by detectives as well as members of DA's office.
- ▶ Detectives conduct further investigation including
 - ▶ Obtain any HALO videos and/or any videos from surrounding businesses
 - ▶ Locate any potential witnesses
 - ▶ Submit any physical evidence to crime lab for testing
- ▶ If the person passed away, office of the medical examiner conducts an autopsy.
- ▶ If the person survives, detectives attempt to obtain a statement from that person.
 - ▶ That person may be facing criminal charges and could decline to give a statement.



OFFICER INVOLVED SHOOTING PROCESS CONTINUED

- ▶ After the investigation is completed, detectives present case to the DA's office for consideration as to whether or not to file criminal charges.
- ▶ The DA, ADA, and assigned on call Chief Deputy all review the evidence and review the applicable law.
- ▶ The DA decides if criminal charges will be filed against the officers.



OFFICER INVOLVED SHOOTING PROCESS CONTINUED

If criminal charges are filed, the case follows the exact same procedure as any other criminal case.

- ▶ Defendant is booked through the Sheriff's department and bond is set.
- ▶ There is an arraignment and a setting of trial.
- ▶ Discussion of whether or not there will be a plea agreement offered.
 - ▶ If there is a plea agreement offered and accepted, that plea will be entered by the defendant and the judge will impose sentence.
 - ▶ If there is no plea agreement, the case will proceed to trial.



OFFICER INVOLVED SHOOTING PROCESS CONTINUED

If charges are not filed, the DA prepares a decision letter summarizing the facts and legal review of the shooting.

- ▶ If the person who was shot is deceased, the DA meets with the individual's family prior to the release of the decision letter, provides a copy of the letter, and answers any questions they may have.
 - ▶ The body worn camera can be shown to the family members if they request.
- ▶ The decision letter is made public and the DA holds an open community meeting to discuss her findings and discuss any questions from the public or the press.
- ▶ Once the decision letter is public, the DA's office makes the file available to interested persons for in person review by appointment.

CONSIDERATIONS IN DETERMINING PROSECUTION

ETHICAL CONSIDERATIONS

Colorado Rules of Professional Conduct Rule 3.8. Special Responsibilities of a Prosecutor

- ▶ The prosecutor in a criminal case shall:
 - ▶ (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause

ABA Standard 3-4.3 Minimum Requirements for Filing and Maintaining Criminal Charges

- ▶ (a) A prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice.

CASE LAW

Within constitutional constraints, the government can charge and take to trial any offense for which it has probable cause and thinks it can prove beyond a reasonable doubt. U.S. v. Bradshaw, 580 F.3d 1129 (10th Cir. 2009).



COLORADO APPELLATE LAW

Factors to consider in determining whether to order a district attorney to prosecute a case [pursuant to C.R.S. § 16-5-209] or appoint a special prosecutor to do so include:

- ▶ (1) the likelihood of conviction;
- ▶ (2) sufficiency of the evidence;
- ▶ (3) availability of witnesses in corroboration of the offense;
- ▶ (4) credibility of the victim;
- ▶ (5) evidence relating to motive or intent of the offender;
- ▶ (6) seriousness of the injuries inflicted; and
- ▶ (7) the competing demands of other cases on the time and resources of the prosecution.

Kailey v. Chambers 261 P.3d 792 (Colo App 2011)

COLORADO APPELLATE LAW

A prosecutor's discretionary decision not to charge may be based on weighing factors that bear on whether the likelihood of a conviction warrants charging. J.S. v. Chambers 226 P.3d 1193 (Colo App 2009).



BASIC CHARGING CRITERIA

- ▶ The evidence must show the guilt of the accused.
- ▶ There must be sufficient legal and admissible evidence of the crime.
- ▶ There must be sufficient legal and admissible evidence of the identify of the perpetrator.
- ▶ There must be a reasonable expectation of conviction by objective fact-finding based upon a hearing of all of the admissible evidence and consideration of all reasonable defenses.
- ▶ A reasonable likelihood that the crime charged can be proved beyond a reasonable doubt, unanimously, to twelve jurors, at trial, after considering reasonable defenses.

IMPROPER BASES FOR CHARGING

- ▶ The race, religion, nationality, sex, sexual orientation, occupation, economic class, or political association or position of the victim, witness, or the accused.
- ▶ The mere fact of a request to charge by a police agency, private citizen, or public official.
- ▶ Public or journalistic pressure to charge.



HOW MANY CASES OF EXCESSIVE USE OF
FORCE HAVE YOU CONSIDERED?

HOW MANY CASE OF EXCESSIVE FORCE HAVE YOU CONSIDERED?

- ▶ The Assistant District Attorney reviews all Use of Force incidents presented by the IAB in a weekly meeting.
- ▶ The numbers vary from week to week.
- ▶ The District Attorney reviews any that could conceivably result in a criminal charge, approximately 10-15 annually.

The following represent the amount of officer involved shootings.

- ▶ 2018: 6
- ▶ 2019: 10
- ▶ 2020: 3 YTD

HOW MANY CASES HAVE YOU
PROSECUTED?

PROSECUTIONS BY DA McCANN

Denver Sheriff Sergeant Romero

- Charge of Third-Degree Assault
- Trial by jury
- Found not guilty

Denver Police Corporal Oestman

- Charge of Third-Degree Assault
- Plead guilty & resigned

Denver Police Sergeant Rodarte

- Charge of Second-Degree Assault
- Trial by jury
- Found not guilty

Lakewood Police Officer Butler

- Charge of Two Counts of Sexual Assault
- Placed on administrative leave, then resigned
- Trial set August 31st, 2020



PROSECUTIONS

NEWS > COLORADO NEWS

Denver police officer charged with beating handcuffed suspect in bar basement

Suspect was belligerent, allegedly spat in Cpl. Michael Oestmann's face after a barroom fight at Jackson's in LoDo

NEWS > CRIME & COURTS

Denver police sergeant accused of beating teen with baton has long history of excessive-force complaints

Sgt. Joseph Rodarte arrested this week, faces second-degree assault charge tied to August incident

NEWS > CRIME & COURTS

Denver DA charges sheriff's sergeant after inmate suffers injuries in elevator

Sgt. Randolph Romero is accused of taking a handcuffed, hooded inmate to the floor with no apparent reason



Sergeant Randy Romero talks with an inmate at the Van Cise-Simonet Detention Center in this March 2015 file photo. Joe Ktori, The Denver Post



Denver Post Images



DENVER DA
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QUESTIONS?



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Appendix

Colorado Statutes

C.R.S. § 18-8-803. Use of excessive force

- ▶ (1) Subject to the provisions of section 18-1-707 [Use of physical force in making an arrest or in preventing an escape], a peace officer who uses excessive force in pursuance of such officer's law enforcement duties shall be subject to the criminal laws of this state to the same degree as any other citizen, including the provisions of part 1 of article 3 of this title concerning homicide and related offenses and the provisions of part 2 of said article 3 concerning assaults.
- ▶ (2) As used in this section, “excessive force” means physical force which exceeds the degree of physical force permitted pursuant to section 18-1-707 [Use of physical force in making an arrest or in preventing an escape]. The use of excessive force shall be presumed when a peace officer continues to apply physical force in excess of the force permitted by section 18-1-707 to a person who has been rendered incapable of resisting arrest.



C.R.S. § 16-3-101. Arrest-when and how made

- ▶ (2) All necessary and reasonable force may be used in making an arrest.
- ▶ (3) All necessary and reasonable force may be used to effect an entry upon any building or property or part thereof to make an authorized arrest.



C.R.S. § 18-1-704. Use of physical force in defense of a person (general applicability)

(1) Except as provided in subsections (2) and (3) of this section, 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.



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

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

- ▶ (a) The actor has reasonable ground to believe, and does believe, that he or another person is in imminent danger of being killed or of receiving great bodily injury; or
- ▶ (b) The other person is using or reasonably appears about to use physical force against an occupant of a dwelling or business establishment while committing or attempting to commit burglary; or
- ▶ (c) The other person is committing or reasonably appears about to commit kidnapping, robbery, sexual assault, or assault [in the first or second degree].



C.R.S. § 18-1-707. Use of physical force in making an arrest or in preventing an escape (prior to Sept. 1, 2020)

(1) Except as provided in subsection (2) of this section, a peace officer is justified in using reasonable and appropriate physical force upon another person when and to the extent that he reasonably believes it necessary:

- ▶ (a) To effect an arrest or to prevent the escape from custody of an arrested person unless he knows that the arrest is unauthorized; or
- ▶ (b) To defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force while effecting or attempting to effect such an arrest or while preventing or attempting to prevent such an escape.



C.R.S. § 18-1-707. Use of physical force in making an arrest or in preventing an escape (prior to Sept. 1, 2020)

(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 an 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, except through a motor vehicle violation, that he is likely to endanger human life or to inflict serious bodily injury to another unless apprehended without delay.

C.R.S. § 18-1-707. Use of physical force in making an arrest or in preventing an escape (effective Sept. 1 2020 pursuant to SB 20-217)

(1) Peace officers, in carrying out their duties, shall apply nonviolent means, when possible, before resorting to the use of physical force. A peace officer may use physical force only if nonviolent means would be ineffective in effecting an arrest, preventing an escape, or preventing an imminent threat of serious bodily injury or death to the peace officer or another person.



C.R.S. § 18-1-707. Use of physical force in making an arrest or in preventing an escape (effective Sept. 1, 2020 pursuant to SB 20-217)

(2) When physical force is used, a peace officer shall:

- ▶ (a) Not use deadly physical force to apprehend a person who is suspected of only a minor or nonviolent offense;
- ▶ (b) Use only a degree of force consistent with the minimization of injury to others;
- ▶ (c) Ensure that assistance and medical aid are rendered to any injured or affected persons as soon as practicable; and
- ▶ (d) Ensure that any identified relatives or next of kin of persons who have sustained serious bodily injury or death are notified as soon as practicable.



C.R.S. § 18-1-707. Use of physical force in making an arrest or in preventing an escape (effective June 19, 2020 pursuant to SB 20-217)

(2.5)

- ▶ (a) A peace officer is prohibited from using a chokehold upon another person.
- ▶ (b)
 - ▶ (I) For the purposes of this subsection (2.5), “chokehold” means a method by which a person applies sufficient pressure to a person to make breathing difficult or impossible and includes but is not limited to any pressure to the neck, throat, or windpipe that may prevent or hinder breathing or reduce intake of air.
 - ▶ (II) “Chokehold” also means applying pressure to a person's neck on either side of the windpipe, but not to the windpipe itself, to stop the flow of blood to the brain via the carotid arteries.



C.R.S. § 18-1-707. Use of physical force in making an arrest or in preventing an escape (effective June 19, 2020 pursuant to SB 20-217)

(3) A peace officer is justified in using deadly physical force to make an arrest only when all other means of apprehension are unreasonable given the circumstances and:

- ▶ (a) The arrest is for a felony involving conduct including the use or threatened use of deadly physical force;
- ▶ (b) The suspect poses an immediate threat to the peace officer or another person;
- ▶ (c) The force employed does not create a substantial risk of injury to other persons.



C.R.S. § 18-1-707. Use of physical force in making an arrest or in preventing an escape (effective Sept. 1st , 2020 pursuant to SB 20-217)

(4.5) Notwithstanding any other provision in this section, a peace officer is justified in using deadly force if the peace officer has an objectively reasonable belief that a lesser degree of force is inadequate and the peace officer has objectively reasonable grounds to believe, and does believe, that he or another person is in imminent danger of being killed or of receiving serious bodily injury.



C.R.S. § 18-1-703. Use of physical force-- special relationships (prior to Sept. 1, 2020 pursuant to SB 20-217)

(1) The use of physical force upon another person which would otherwise constitute an offense is justifiable and not criminal under any of the following circumstances:

...

- ▶ (b) A superintendent or other authorized official of a jail, prison, or correctional institution may, in order to maintain order and discipline, use reasonable and appropriate physical force when and to the extent that he reasonably believes it necessary to maintain order and discipline, but he may use deadly physical force only when he reasonably believes it necessary to prevent death or serious bodily injury.
- ▶ (c) A person responsible for the maintenance of order in a common carrier of passengers, or a person acting under his direction, may use reasonable and appropriate physical force when and to the extent that it is necessary to maintain order and discipline, but he may use deadly physical force only when it is reasonably necessary to prevent death or serious bodily injury.

C.R.S. § 18-1-703. Use of physical force-- special relationships (Cont.)

The use of physical force upon another person which would otherwise constitute an offense is justifiable and not criminal under any of the following circumstances:

...

- ▶ (d) A person acting under a reasonable belief that another person is about to commit suicide or to inflict serious bodily injury upon himself may use reasonable and appropriate physical force upon that person to the extent that it is reasonably necessary to thwart the result.



Excessive Force

- ▶ Colorado Law:
 - ▶ “[E]xcessive force’ means physical force which exceeds the degree of physical force permitted pursuant to section 18-1-707 [Use of physical force in making an arrest or in preventing an escape]. The use of excessive force shall be presumed when a peace officer continues to apply physical force in excess of the force permitted by section 18-1-707 to a person who has been rendered incapable of resisting arrest. C.R. S. § 18-8-803
- ▶ DPD Discipline Handbook:
 - ▶ Excessive force was replaced by the term “inappropriate force.”

