COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	DATE FILED: April 8, 2022 5:16 PM FILING ID: 9F21445DC736D CASE NUMBER: 2020CA1121
Appeal from La Plata County District Court Case No. 2019CR91 Honorable William Laurence Herringer, Judge	
Plaintiff-Appellee: People of the State of Colorado v. **Defendant-Appellant:** William Benjamin Cline, VI	**▲ COURT USE ONLY ▲**
Adam Mueller, #42176 HADDON, MORGAN & FOREMAN, P.C. 950 17th Street, Suite 1000 Denver, CO 80202 Tel 303.831.7364 Fax 303.932.2628 amueller@hmflaw.com *Attorney for Defendant-Appellant William Benjamin Cline, VI*	Case Number: 2020CA1121

Mr. Cline's Reply Brief

Certificate of Compliance

I 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. The undersigned certifies that:

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

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

s/ Adam Mueller
Attorney for William Benjamin Cline, VI

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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 defendant is constitutionally entitled to have the jury instructed on the affirmative defense of make-my-day when there is a scintilla of evidence of "(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).

The Attorney General does not dispute that there was sufficient evidence of elements (2) and (3) of the defense. Ans. Br., pp 11-15. Nor does the Attorney General dispute that Mr. Cline preserved this issue for appeal. *Id.* at .9.

Instead, the Attorney General offers two defenses of the district court's refusal to instruct the jury on make-my-day. Relying exclusively on the district court's pretrial order granting Mr. Cline's motion to suppress, the Attorney General first contends that there was no evidence of an "unlawful entry" by Deputy Draughon into Mr. Cline's house. *Id.* at 11-15. Second, despite the Supreme Court's ruling that the failure to instruct on an affirmative defense can never be

harmless, the Attorney General offers a three-sentence argument that, in fact, any error by the district court here was harmless beyond a reasonable doubt. *Id.* at 15-16. Neither of these arguments passes muster.

A. The district court erred in concluding there was insufficient evidence to instruct the jury on the make-my-day defense.

1. The district court's suppression order necessarily proves there was more than a scintilla of evidence that Deputy Draughon's entry into Mr. Cline's house was unlawful.

The Attorney General's first argument is that, in granting Mr. Cline's motion to suppress, the district court *did not* conclude that Deputy Draughon's entry into Mr. Cline's home was unlawful. *Id.* at 11-13. Instead, says the Attorney General, the district court determined *only* that Deputy Draughon unlawfully seized Mr. Cline but that, after the unlawful seizure, Mr. Cline voluntarily consented to Deputy Draughon's entry. *Id.* This consent, concludes the Attorney General, rendered Deputy Draughon's entry lawful. *Id.* at 14-15.

There are two problems with this argument. First, the Attorney General misreads the district court's order, ignoring the district court's express finding that Mr. Cline's consent was not attenuated from the unlawful seizure and that, as a result, the entry was unlawful. *Compare id.* at 11-15, *with* CF, pp 347-48. Second, irrespective of the pretrial order itself, the *trial evidence* was more than sufficient to support a finding by the jury that Deputy Draughon's entry was unlawful. Op. Br.,

pp 19-22. Thus, even if the Attorney General's reading of the district court's order were correct—which it isn't—that wouldn't be a defense of the court's refusal to instruct the jury on the make-my-day affirmative defense based on the evidence offered at trial.

The district court's order first. The order proceeds in three parts, only two of which the Attorney General acknowledges. *Compare id.* at 11-15, *with* CF, pp 341-48. In the first part of the order, the district court found that Deputy Draughon unlawfully seized Mr. Cline by compelling him to come to and open the front door to the home. CF, pp 341-44. In the second part, the district court determined that Mr. Cline consented to Deputy Draughon's entry into the house. *Id.* at 345-47. This is where the answer brief stops its analysis. Ans. Br., pp 11-15.

But the district court's order went on, and in the third part the district court found that Mr. Cline's "consent" was not attenuated from the unlawful seizure. *Id.* at 347-48. Putting the three parts of the order together, the district court found that Deputy Draughon's entry into the home was "unlawful." *Id.* at 349, 352. Said the court:

- "[T]he opening of the door and entry into the home was *unlawful*."
- "[T]he deputies *unlawfully entered* the home."

- Suppression and severance were needed to "prevent the deputies from benefiting from their *unlawful entry*."

Id. at 349, 352 (emphases added). Only by ignoring the third part of the order can the Attorney General claim that the district court did not conclude that Deputy Draughon's entry into Mr. Cline's home was "unlawful."

Thus, as the district court itself recognized when granting the motion to suppress, there was more than a "scintilla" of evidence that Deputy Draughon "unlawfully entered" Mr. Cline's home. *See People v. Newell*, 2017 COA 27, ¶ 29 ("Here, the district court itself found some evidence for the affirmative defense of self-defense as codified in section 18-1-704 and mirrored in the model jury instructions. . . . And because the court found some evidence, it should have given the jury an instruction on self-defense."). The court, therefore, erred in refusing to instruct the jury on the make-my-day defense.

2. The trial evidence was more than sufficient to justify the affirmative defense instruction.

Irrespective of the district court's order, however, and no matter how one tries to parse the order in retrospect, the evidence presented *at trial* was more than sufficient to permit a finding by the jury that Deputy Draughon's entry was unlawful. Deputy Draughon testified that he did not have a search warrant, an arrest warrant, or exigent circumstances:

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.

The answer brief neither acknowledges this testimony (quoted in full in the opening brief) nor attempts to explain why these admissions from Deputy

Draughon were insufficient for a jury to find that his entry into Mr. Cline's home was unlawful.

Instead, the answer brief points to other testimony Deputy Draughon offered both at the motions hearing and at trial. Ans. Br., pp 13 (citing TR 10/23/2019, p 35:13-20, p 90:13-20, p 77:17-22; TR 1/14/2022. pp 368-69). This reliance is misplaced, however. The motions hearing testimony is irrelevant, both because the district court discredited Deputy Draughon's version of events when in *granted* the motion to suppress and because the jury did not hear the motions hearing testimony at trial.

As for the trial testimony, Deputy Draughon's story is just one of the two versions of events. But the defense had a different version of events, which it elicited through cross-examination of Deputy Draughon and Deputy Christensen and through the body camera footage. *See Newell*, 2017 COA 27, ¶ 21 ("The small quantum of evidence that must appear in the record in order to warrant an instruction on an affirmative defense may come from any source, even from the prosecution."); *People v. Whatley*, 10 P.3d 668, 670 (Colo. App. 2000) ("The quantum of evidence that must appear in the record in order to warrant an instruction on an affirmative defense is some credible evidence. That evidence may come from any source, even from the prosecution." (citation omitted)). So there

was a dispute of fact as to whether Deputy Draughon's entry into Mr. Cline's home was unlawful. And that dispute of fact should have been resolved by the jury, not by the judge through the refusal to instruct on the make-my-day defense. *See Newell*, 2017 COA 27, ¶ 28 (reversing convictions because judge failed to instruct on affirmative defense of self-defense and because "[i]t is for the jury, not the judge, to decide which witnesses and even which version of the witnesses' testimony is to be believed"). Just because Deputy Draughon testified that he believed his entry was lawful does not make it so.

To be entitled to the affirmative defense instruction, Mr. Cline needed only to present a scintilla of evidence to support the instruction. The record here contains more than a scintilla of evidence and, as a result, the district court erred in refusing to permit Mr. Cline to present his defense to the jury and to permit the jury to consider whether the prosecution could disprove make-my-day.

B. The district court's error could not have been, and in fact was not, harmless beyond a reasonable doubt.

"A trial court's error in refusing to give an affirmative defense instruction improperly lowers the prosecution's burden of proof." *People v. DeWitt*, 275 P.3d 728, 733 (Colo. App. 2011), *cert. denied*, 2012 WL 920043 (Colo. No. 11SC827, Mar. 19, 2012), overruling on other grounds recognized by *People v. Hasadinratana*, 2021 COA 66, ¶ 2, *cert. denied*, 2022 WL 369510 (Colo. No. 21SC454, Feb. 7, 2022). And

"[b]ecause a defendant's constitutional right to due process is violated by an improper lessening of the prosecution's burden of proof, such error cannot be deemed harmless." *People v. Garcia*, 113 P.3d 775, 784 (Colo. 2005).

The Attorney General agrees this is the rule. Ans. Br., p 15. Even so, the answer brief argues the rule should not apply here because, "in the unique circumstances of this case, any error was harmless beyond a reasonable doubt." *Id.* According to the answer brief:

> Even if the *deputies* knew their entry was technically unlawful, defendant apparently did not know, because he not only consented to the entry, but actually extended an unsolicited invitation. This fact was necessarily found by the jury based on the evidence proved at trial, i.e., defendant did not dispute it. In so doing, the jury necessarily found the prosecution disproved the make-my-day defense, which is intended to apply to "intruders" only.

Id. at 15-16 (emphasis in original).

This argument fails for two reasons. First, it contravenes the rule in Colorado that the failure to instruct on an affirmative defense can never "be deemed harmless." *Garcia*, 113 P.3d at 784; *DeWitt*, 275 P.3d at 733. Second, there is no requirement in the make-my-day statute that a defendant *know* the intruder entered unlawfully. § 18-1-074.5(2), C.R.S. Instead, the government must disprove each of these elements beyond a reasonable doubt:

> (1) the defendant was an occupant of a dwelling; (2) another person made a knowingly unlawful entry into that dwelling; (3) the defendant

> had a reasonable belief that, in addition to the uninvited entry, the other person had committed, was committing, or intended to commit a crime against a person or property in the dwelling; and (4) the defendant reasonably believed that the other person might use any physical force (no matter how slight) against any occupant of the dwelling.

People v. Rau, 2022 CO 3, ¶ 21.

Here, of course, the government was never put to that burden, because the district court refused to instruct the jury on the make-my-day defense. The state of the evidence, however, is not such that this Court could say, beyond a reasonable doubt, that the government would have disproved the defense had the jury properly been instructed.

After all, that is what the Attorney General's underdeveloped harmlessness argument asks this Court to do: speculate about what a jury *would have* found. But the Sixth Amendment and its Colorado counterpart guarantee an actual jury finding on every element essential to prove a defendant's guilt, including the elements of an affirmative defense. *People v. Pickering*, 276 P.3d 553, 555 (Colo. 2011) ("In Colorado, if presented evidence raises the issue of an affirmative defense, the affirmative defense effectively becomes an additional element, and the trial court must instruct the jury that the prosecution bears the burden of proving beyond a reasonable doubt that the affirmative defense is inapplicable."). If this Court were to conclude that the district court's error was harmless, that conclusion would

violate Mr. Cline's constitutional right to trial by jury. *See* U.S. Const. amends. VI, XIV; Colo. Const. art. II, §§ 22, 23, 25. "The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty." *Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993).

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.

The answer brief is unclear about what facts, in its view, supported the initial aggressor instruction. Ans. Br., pp 17-20.

The brief first appears to embrace the district court's reasoning that an initial aggressor instruction was proper because the "jury could reasonably find . . . that the deputy did not use excessive force while arresting and handcuffing defendant, and thus defendant was the initial aggressor." *Id.* at 17.

This argument misses the mark, however, because the one thing (whether Deputy Draughon used excessive force) has nothing to do with the other (whether Mr. Cline was the initial aggressor). The former question concerns the alleged victim's conduct, while the latter concerns the defendant's conduct. Irrespective of the degree of force used by a peace officer, a defendant is the initial aggressor *only if* he "initiate[s] the physical conflict by using or threatening the imminent use of

unlawful physical force." *People v. Castillo*, 2018 CO 62, ¶ 43. If Deputy Draughon did not use excessive force, then Mr. Cline was not justified in acting in self-defense, but not because he was the initial aggressor.

The answer brief also appears to contend that Mr. Cline was the initial aggressor because, after Deputy Draughon took the cell phone away, Mr. Cline came "toward him, so Deputy D push[ed] him away with one hand to maintain his 'safety bubble.'" Ans. Br., p 19. There are at least two problems with this argument. First, Deputy Draughon himself testified that he did not feel threatened when Mr. Cline "came toward" him, TR 1/13/2020, p 217:19-24; Op. Br., p 28. Because Deputy Draughon did not feel threatened by this conduct, there was no basis for the jury to infer that the conduct rendered Mr. Cline the "initial aggressor."

Second, a defendant is the initial aggressor only if he "initiate[s] the physical conflict by using or threatening the imminent use of unlawful physical force." *Castillo*, ¶ 43. Standing up and "coming toward" the officer in a manner that (by the officer's own admission) is not even threatening cannot amount to "threatening the imminent use of unlawful physical force." Recall as well that Mr. Cline was handcuffed and that his conduct was so non-threatening that Deputy Draughon was able to "repel" it simply by sticking out his arm. At most, therefore, Mr. Cline's act

was "an aggressive step." *Id.* ¶ 53. But it was not a "threat[] [of] the imminent use of unlawful physical force." *Id.*

Finally, the answer brief relies on testimony that Mr. Cline was "being dead weight" and started to struggle and kick. Ans. Br., p 19. But again, the evidence was undisputed that Mr. Cline kicked Deputy Draughon *only 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 Mr. Cline initiated the aggression by kicking Deputy Draughon.

Either Mr. Cline acted in self-defense, or he didn't. If Mr. 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 Mr. Cline to the ground after he stood up. TR 1/13/2020, pp 217–18, 222.[1] If Mr. 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

[1] Like Deputy Draughon, who wrote in his report that he arrested Mr. Cline "due to him not confirming he understood the *Miranda* advisement," TR 1/14/2020, p 331:15–19, the answer brief appears to defend the Deputy's conduct based on Mr. Cline's refusal to acknowledge that he understood his *Miranda* rights. Ans. Br., p 19. Of course, a defendant has no such obligation, and even if he did, a failure to acknowledge that he understood his *Miranda* rights could never justify the use of physical force by a peace officer, let alone unreasonable and excessive force.

on Mr. Cline and punching him in the face, two forms of "lethal force." TR 1/14/2020, pp 484, 535, 543. There was simply no basis in the record to conclude that Mr. Cline was the initial aggressor.

Finally, the Attorney General does not dispute that if the trial court erred, the error was prejudicial. The Attorney General has waived any contention that the trial court's error was harmless beyond a reasonable doubt—which, of course, it wasn't, since failing to properly set forth the applicable law of self-defense lowers the prosecution's burden of proof, deprives a defendant of his right to an acquittal on grounds of self-defense, and cannot be deemed harmless. *See People v. Garcia*, 113 P.3d 775, 784 (Colo. 2005); *Idrogo v. People*, 818 P.2d 752, 756 (Colo. 1991).

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.

The answer brief offers two defenses of the trial court's order. It first argues that the excluded expert opinions were irrelevant. Ans. Br., pp 24-26. Second, it argues that their exclusion was harmless. *Id.* at 27-28. Neither argument is persuasive.

The Attorney General's first argument is that the excluded expert opinions were irrelevant because they concerned Deputy Draughon's conduct after any alleged assault by Mr. Cline. In the words of the answer brief,

> After defendant was tased, he did not respond to Deputy D physically, nor was he charged with assaulting any deputy after he was tased. Thus, under CRE 702, there was no reason for the expert to opine on the police procedures used in tasing defendant and standing him up and taking him to the vehicle, i.e., the expert's opinion regarding tasing procedures was irrelevant on this point.

Id. at 26 (citing *People v. Bruno*, 2014 COA 158, ¶¶ 23-24; CRE 401). (The answer brief does not argue that the evidence was unfairly prejudicial under CRE 403, Ans. Br., pp 24-26.)

Contrary to the Attorney General's argument, the excluded evidence was relevant for at least two reasons. First, entire encounter—which lasted about 30 minutes—was relevant to Mr. Cline's theory of self-defense, because it was his contention that Deputy Draughon came into the incident full of adrenaline and that he overreacted at every step, rather than deescalate. He was, to use Chief Montgomery's words, a victim of "emotional capture." And the deputy's excessive and unreasonable force in tasing Mr. Cline and aggressively transporting him to the car corroborates Mr. Cline's contention that, just minutes earlier, Deputy Draughon had used unreasonable and excessive force when taking Mr. Cline to the ground while already in handcuffs and in putting Mr. Cline in a potentially lethal chokehold.

There's another reason the deputies' conduct was relevant. The government argued that Mr. Cline was guilty of harassment and criminal mischief for calling

Deputy Draughon Kunta Kinte and the "N" word during transport to the police station and by allegedly kicking the door of the police car, causing $436 dollars in damage. In evaluating whether this alleged conduct was unlawful, the jury should have been permitted to consider what likely motivated it—being placed in a chokehold *and* being tased for no legitimate reason while being aggressively transported to the police car. The deputies' violent conduct, and expert opinion that it was unreasonable and excessive, was relevant to place in context and explain what Mr. Cline allegedly did after the police put him in the squad car.

As for prejudice, the answer brief says three things: (1) the constitutional harmless error test does not apply; (2) the court properly rejected the make-my-day defense; and (3) the effect of exclusion was "minimal given that [the jury] was not asked to decide any issue regarding defendant's transport to the vehicle."

The first statement is not correct, for the reasons given in the opening brief: As the Supreme Court held in *People v. Hampton*, "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." 696 P.2d 765, 778 (Colo. 1985). "[A]bridgment of [these] right[s] is subject to a constitutional harmless error analysis." *Golob v. People*, 180 P.3d 1006, 1013 (Colo. 2008).

The second statement misses the mark because, as explained in the opening brief and elaborated above, the district court reversibly erred in refusing to instruct the jury on the make-my-day defense. *Cf. Bruno*, 2014 COA 158, ¶ 25 ("Because the court properly rejected Bruno's adverse possession defense, Atwater's proposed [expert opinion] testimony [about adverse possession] was not relevant and would likely have confused the jury.").[2]

Moreover, in arguing that the trial court's exclusion of the expert evidence was harmless because the court correctly rejected the make-my-day defense, the answer brief implicitly concedes the former's relevance to the latter. If it's true that evidence of the deputies' tasing Mr. Cline into submission and aggressively transporting him to the police car is relevant to a make-my-day defense (assuming the court should have instructed the jury on that defense), then the evidence is just as relevant to Mr. Cline's affirmative defense of self-defense, which everyone agrees was an issue for the jury to decide. The answer brief's second "harmlessness" argument thus impliedly confesses that the district court reversibly erred.

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[2] If this Court reverses the judgment of conviction because the trial court erred in refusing the make-my-day instruction, it need not decide whether exclusion of Chief Montgomery's testimony was prejudicial. But it should instruct the court to admit the testimony on retrial because it's relevant to the make-my-day defense (in addition to being relevant to self-defense).

The answer brief's final basis for arguing harmlessness fails because it misconceives the nature of the encounter between Mr. Cline and the deputies. In the answer brief's version of events, the encounter took place in distinct three parts—the assault, the transport to the car, and the ride to the police station—bookended by illegality by Mr. Cline: He assaulted Deputy Draughon in part one, and he committed harassment in part three.

The court should not have permitted the prosecution to artificially break the encounter into these "separate" parts while depriving the jury of relevant expert opinion about the deputies' conduct during part two of the encounter. The *entire* encounter was put before the jury. Moreover, even when viewed as three "separate" parts, the deputies' conduct during part two is relevant to Mr. Cline's actions during part one because it corroborates his claim that Deputy Draughon used unreasonable and excessive force against him. And the deputies' conduct during part two is relevant to Mr. Cline's conduct during part three, because any alleged harassment was informed by how the deputies had just treated him—tasing him and aggressively transporting him to the car. Thus, contrary to the answer brief's contention, the effect of Chief Montgomery's expert testimony would not have been "minimal."

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.

In response to the answer brief, Mr. Cline relies on the arguments and authorities presented in the opening brief.

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

If this Court reverses the judgment of conviction on other grounds, it need not decide whether the district court erred in refusing to conduct an in camera review of Deputy Draughon's personnel file. If the case is reversed for a new trial, Mr. Cline can issue a new subpoena, and the district court can, at that point, consider any motion to quash. *See People v. McCants*, 2021 COA 138, ¶¶ 47-48 (reversing on other grounds, saying, "we don't need to (and, therefore, don't) reach the questions of whether defense counsel had authority to issue the subpoena [for the officer's disciplinary and internal files] or whether the trial court had authority to do anything other than quash the subpoena," and concluding "we offer no opinion as to whether an in camera review or production of the subpoenaed documents will be required in the event that the defense issues a similar subpoena in connection with the proceedings on remand. Instead, the trial court will need to

make that determination based on the facts and circumstances before it at the time").[3]

As to remedy, it's irrelevant that Deputy Draughon's personnel file is not part of the appellate record. It's not part of the record because the district court quashed the subpoena, refused even to conduct an in camera review, and "direct[ed] to Clerk of the Court to return the records received in open court to the La Plata County Attorney." CF, p 169.

It's not as if the district court conducted an in camera review and then refused to turn some or all of the material over to the defense. In that case, the personnel file would be part of the record and this Court could conduct its own in camera review and determine whether the district court abused its discretion. *E.g.*, *People ex rel. A.D.T.*, 232 P.3d 313, 319 (Colo. App. 2010) ("[A]fter the trial court conducts its in camera review of the confidential material at issue, the defendant should move to have the material sealed and filed or otherwise preserved for

[3] Moreover, if this Court reverses the judgment of conviction and Mr. Cline issues a new subpoena on remand, there is every reason to think that an in camera review will lead to production of material and exculpatory evidence from Deputy Draughon's personnel file. *See* EXHIBIT 1 (subpoena *duces tecum* for investigative and/or disciplinary file of Deputy Draughon in *People v. Huffman-Ditto*, Case No. 2020CR216 (La Plata County Dist. Ct.), for information "related to allegations of excessive force [and] untruthfulness"); EXHIBIT 2 (order directing disclosure following in camera review of Deputy Draughon's records because "all of the documents are material in this matter and must be provided to Defendant").

appellate review. Thereafter, the appellate court may properly exercise its discretion to review the preserved evidence in camera, pursuant to the defendant's showing of cause.").

But when, as here, the district court fails even to accept the records as part of the record, let alone conduct an in camera review, this Court will not conduct the in camera review for itself in the first instance. *See McCants*, ¶¶ 47-48. A remand for an in camera review is therefore the appropriate remedy if this Court holds the district court erred. *See id.*

On the merits, for all the reasons given in the opening brief, Mr. Cline contends that the *Spykstra* test does not apply here. Op. Br., pp 41-43. *But see People v. Battigalli-Ansell*, 2021 COA 52M, ¶¶ 74-76.[4] On the assumption *Spykstra* does apply, however, the district court erred.

The district court found in Mr. Cline's favor on the first prong of *Spykstra*—the records exist, and the county produced them. CF, p 169. *People v. Spykstra*, 234 P.3d 662, 669 (Colo. 2010).

Spykstra's second prong requires a preliminary showing that the subpoenaed "materials are evidentiary and relevant." *Id.* at 669. Mr. Cline made such a showing

[4] This Division is not bound by the decision of any other Division. *People v. Smoots*, 2013 COA 152, ¶ 21, *aff'd sub nom. Reyna-Abarca v. People*, 2017 CO 15.

here. TR 9/6/2019, pp 2-4; CF, pp 102, 177-78. And at the September 6 hearing counsel agreed that the defense was not entitled to the entire file necessarily, only those materials "related to things like credibility, aggression, use of Taser, use of force, that type of stuff." TR 9/6/2019, pp 3-4. *But see supra* Note 3 (subpoena and district court order directing disclosure of Deputy Draughon's entire file in *People v. Huffman-Ditto*, Case No. 2020CR216 (La Plata County Dist. Ct.)).

This Court should decline the Attorney General's argument to affirm the district court's decision by invoking prongs three, four, or five of the *Spykstra* test. The district court made *no* findings on these prongs. CF, pp 169, 185. And because the district court's decision is subject to abuse of discretion review, *id.* at 666, this Court cannot affirm when the district court has yet to exercise its discretion, *see, e.g.*, *McCallum Fam. L.L.C. v. Winger*, 221 P.3d 69, 79 (Colo. App. 2009) (district court made findings on prongs one and two of a test but not prong three, and "whether to exercise that discretion must be determined in the first instance by the trial court, and thus we remand for the trial court to consider this issue").

For all these reasons, this Court should, if it reaches the issue, remand the case for an in camera review of Deputy Draughon's personnel file.

Conclusion

For these reasons, as well as those given in the opening brief, this Court should reverse the second-degree and third-degree assault convictions based on Issues I, II, and III. Based on Issue IV, this Court should reverse the trespass conviction. And based on Issue V, this Court should remand the case for the district court to conduct an in camera review of Deputy Draughon's personnel file.

Dated: April 8, 2022.

Respectfully submitted,

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Certificate of Service

I certify that on April 8, 2022, a copy of this *Mr. Cline's Reply Brief* was served *via* Colorado Courts E-Filing upon the Office of the Attorney General.

s/ Stephanie Poole