



DenverDA

Mitchell R. Morrissey, District Attorney - Second Judicial District

201 W. Colfax Avenue, Dept. 801, Denver, CO 80202

Bus. Phone: 720-913-9000
Fax: 720-913-9035

June 16, 2014

Robert White
Chief of Police
Denver Police Department
1331 Cherokee Street
Denver, CO 80204

RE: Investigation of the shooting and wounding of Isaac Vigil, DOB 4/9/82, DPD # 587159, in which John G. Sisneros, 01041, fired shots on May 14, 2014, at 2100 South Clay Street, Denver, Colorado.

Dear Chief White:

The investigation and legal analysis of the shooting and wounding of Isaac Vigil, in which shots were fired by Corporal John Sisneros, has been completed. I conclude that under applicable Colorado law no criminal charges are fileable against Corporal Sisneros. My decision, based on criminal-law standards, does not limit administrative action by the Denver Police Department, where non-criminal issues can be reviewed, or civil actions where less-stringent laws, rules and legal levels of proof apply. A description of the procedure used in the investigation of this officer-involved shooting and the applicable Colorado law is attached to this letter.

STATEMENT OF FACTS

On the afternoon of May 14, 2014, Denver police plainclothes Detectives Nick Rogers, 86037, and John Robledo, 05122, were engaged in a surveillance operation at a fast food restaurant in the area of Alameda and Eliot as they were aware drug users frequented the restaurant parking lot. Also in the area was undercover Detective Jaime Disbrow, 98044. Detective Rogers took a position from which he could watch the area using binoculars. Shortly before 4:00 p.m., Det. Rogers advised the other detectives, by police radio, that he saw someone apparently "getting high" in a vehicle. The detectives decided to contact this individual, later identified as Isaac Vigil ("Vigil"). Det. Robledo drove his unmarked car into a position behind the suspect's vehicle. Dets. Rogers and Disbrow drove up. The detectives got out of their respective vehicles and approached Vigil's car; Det. Rogers on the driver's side, the other two on the passenger's side.

The detectives contacted Vigil, identifying themselves as police officers. Det. Robledo told investigators Vigil was “very jumpy, talking, yelling at us – cussin’ us...”¹ The detectives asked Vigil to step out of the car and he refused. The three officers got him out of the car and Vigil started “moving around -- he’s not punching but he’s resisting” making it difficult for the officers to control him. As Det. Robledo described events, “even though [Vigil] was small, we were having a hard time trying to put him in custody.” The detectives ultimately gained control over Vigil, but while doing so a knife fell from the area around Vigil’s waistband. The detectives attempted to frisk Vigil at this time but had difficulty because Vigil was highly agitated and, in Detective Robledo’s words, “squirrely.” As they were so engaged, and because of the manner in which Vigil was acting, one of the detectives got on the police radio and requested a uniformed officer to respond for cover and to transport Vigil – the plainclothes detectives’ cars did not have prisoner cages.

The detectives got Vigil to the ground and frisked him at this point, recovering a bank card bearing his name and a crack pipe. Det. Robledo conducted an NCIC clearance on Vigil and learned there was an outstanding Adams County warrant for his arrest for assault. Because of the way Vigil was acting and the nature of the warrant, the detectives searched him *again*. Det. Robledo was holding Vigil down and Vigil kept saying “I’m gonna kill you, motherfucker. I’m gonna kill you!”² Det. Rogers searched Vigil’s car and found several small caliber cartridges. After he conveyed this fact to the other detectives, Vigil was searched yet again.

Corporal Greg Juarez, 00064, driving a marked patrol car and dressed in full blue DPD uniform, arrived to transport Vigil to the District Four Station at 2100 S. Clay Street. Det. Rogers left to take the recovered evidence to the property bureau at Denver police headquarters while Dets. Robledo and Disbrow drove to District Four to begin Vigil’s booking procedures. Officer Juarez followed Det. Robledo and Det. Disbrow pulled in behind Officer Juarez’s marked patrol car. Det. Robledo noted that while he was driving to the station, he noted that Officer Juarez was

right on me. And I’m wondering why he’s on me and he said [via car to car radio] that this guy is making all these threats, he thought, just to be on the safe side – someone’s right there.”

Upon arriving at District Four, Officer Juarez drove directly to the “sally port”- an open garage type entryway into which officers can drive a patrol car and off-load prisoners. Detective Robledo parked his car and walked over to Officer Juarez’s car to assist in moving Vigil. Because of his concerns regarding Vigil’s aggressive statements and movements, Officer Juarez enlisted uniformed Officer Anthony Tak, 00018, to provide additional assistance – he and Officer Tak were at the back door on the driver’s side of the patrol car; Detective Robledo was at the opposite door. Both doors were open. The officers ordered Vigil out of the car at which point Vigil said, “man! You’re gonna hear a ‘pop’! You’re gonna hear ‘pop’!” Officers Tak and Juarez reached into the patrol car to grab Vigil and Detective Robledo heard a gunshot and saw Vigil, whose hands were handcuffed behind him, holding a silver gun in his hands pointing it in

¹ All three detectives provided video-taped statements to investigators. The detectives’ various statements regarding the initial contact are corroborative of one another.

² Det. Disbrow recalls Vigil stating “I’m gonna kill you guys. You better watch out. You better get your vest on. Be careful, you don’t know who I am. That warrant is for attempted murder.” Det. Robledo told investigators Vigil threatened to kill him “at least three or four times” during the span of the contact.

Det. Robledo's direction. As they scrambled for cover, the officers immediately began warning other officers the suspect had a gun and had fired shots. Detective Robledo ducked behind Cpl. Juarez's patrol car. As he did so, he heard a second gunshot. After the second gunshot, Det. Robledo relocated to a position behind the same car Cpl. Sisneros would use for cover. He was at that position when he heard the shot fired by Cpl. Sisneros. He remained at that point until officers moved in to take Vigil into custody and he joined that team.³ Police radio traffic shows the call "shots fired" was aired at 16:40:14 hours.

In Cpl. Juarez's video-taped statement he corroborated the detectives' statements regarding his arrival to the restaurant parking lot to serve as a cover car and transport officer.⁴ He was driving a marked DPD Ford Explorer. He told investigators that when he arrived at the parking lot, the detectives already had Vigil, who was "screaming and hollering," on the ground. The officers stood Vigil up and told Cpl. Juarez Vigil had been searched twice. Cpl. Juarez asked that Vigil be searched again before he was placed in the patrol car and he and two of the detectives again searched Vigil incident to his arrest.

Vigil was handcuffed and placed in the back seat of the patrol vehicle. Cpl. Juarez told investigators

[Vigil] was extremely agitated in the back seat of my car, sweating profusely, screaming obscenities, kicking the doors, banging his head on the, on the glass. Uh, telling us we were "assholes" and he's not gonna go back to prison, he's got something for us -- and basically wanting to fight the detectives and myself.

The officers drove to the District Four Station in the caravan described above. Cpl. Juarez stated that during the ride, Vigil continued screaming obscenities and, as Cpl. Juarez recalled, stating

he's gonna kill me, he's got something for me, he's not going to go back to prison, that he's going to kill whoever opens the door [to the police car] . . .

During the drive to the police station, Cpl. Juarez noted Vigil was "squirming" around in the back seat. Vigil continued screaming and threatening the officers all the way to the police station.⁵ When Cpl. Juarez pulled into the sally port at the police station he saw Officer Anthony Tak, 00018, and, because of his concerns regarding Vigil's aberrant behavior, he motioned his fellow officer over to give him some assistance in controlling Vigil. Cpl. Juarez and Officer Tak went to the driver's side, Det. Robledo went to the passenger's side and Det. Disbrow went into the station to open a holding cell.

³ After Vigil was taken out of the car, Detective Robledo saw the small caliber pistol Vigil had fired on the back seat of the patrol car. He also noted the weapon appeared to have a "stovepipe" malfunction. He removed the pistol from the car and placed it on the ground.

⁴ Every officer who had direct contact with Vigil or was an eye-witness to the shooting gave a video-taped statement to investigators. The statements are largely corroborative – differences primarily result from the different positions and perspectives held by the witness officers. We are satisfied the investigation was complete and thorough.

⁵ The officers who came in contact with Vigil all concluded he was high on some substance. Vigil confirmed these suspicions - while he was being transported to District Four he told Cpl. Juarez he had been "smoking meth" for three days. He also stated "I'm not going back to prison. You're gonna have to kill me. I wanna die."

Cpl. Juarez told investigators,

As we opened that door, the individual scooted over to Det. Robledo's side, which is the right side of the vehicle. Uh, at the point Det. Robledo opened his, his car door, the rear door. The suspect kept sliding back and forth so we couldn't, couldn't get him out of the vehicle. Uh, he was close enough to Officer Tak and I that we both went hands on with him to try to get him out of the police vehicle. When we went inside the police vehicle, um, I heard a gunshot, saw the muzzle flash, uh, at that time we backed off, Officer Tak and Robledo, we all backed off. We got to the rear of the police unit, um, and that's when we went to the side of the District Four police building.⁶

Officers alerted to the situation, either by the sound of the shot or the shouts of the involved officers, began responding to the location. With Vigil inside the car and armed, a brief stand-off ensued while officers began to formulate plans for his extrication. One of the officers who responded was Corporal John Sisneros. Cpl. Sisneros, dressed in his full blue police uniform, was just coming on shift and was loading his patrol car in the parking lot when he heard the first gunshot. He initially thought it was a fire cracker but then heard a police radio broadcast that "we've got shots fired at the District Four Station." He saw officers running and "hunkered" down near the sally port so he quickly drove to that area, got out of his car, and took a position behind an unmarked police car.⁷ From this position, he was able to see into the back of Cpl. Juarez's patrol car. He also noted a uniformed police officer, Sergeant Joe Rodarte, 90004, moving into a possible field of fire.

What I can see from here is the suspect screaming and yelling, uh, "NO" after they're telling him to drop his guns. He actually said, "Fuck you", uh, out loud and then while these things are going on – these officers are crossing over – another shot rings out, which made me believe that he's firing at Sgt. Rodarte, or myself, or him. Uh, it was life threatening to me, this officer, Sgt. Rodarte, this officer, and these officers also [the other officers in the area]. Uh, I know the shooting was coming from the back of the car.

Cpl. Sisneros told investigators Vigil was lying on the back seat of the patrol car and he was able to see his torso "down to his feet."

Sgt. Rodart – Rodarte is moving into line of fire then there's a gunshot, and I screamed at Rodarte to get back, uh, and fired kind of – I wouldn't say it's simultaneous, but, [Rodarte's] coming – I'm saying, "Get back!" and then, uh, there's a shot fired. And, uh, so I, I fired my one shot.

Almost immediately after Cpl. Sisneros fired he heard Vigil cry "Okay, I'm done." Officers continued to command him to drop his weapon and surrender. After a short interval, officers approached Vigil and took him into custody. Computer Aided Dispatch records reflect the call "Susp is in custody no one else outstanding" was aired at 16:45:45.

⁶ After the situation was stabilized, Cpl. Juarez and other officers approached his police car. He saw Vigil on the ground next the rear door on the driver's side and a small caliber pistol on the ground near Vigil. It was Cpl. Juarez who placed the pistol on the hood of his police car. The pistol can be seen in this position in the photos on page 9. The "stovepipe" malfunction is clearly visible in the close-up photo of the handgun.

⁷ See the photos on page 9, showing the unmarked patrol vehicle behind which Cpl. Sisneros took cover.

Cpl. Sisneros was armed with a Sig Sauer model 229 9mm semi-automatic pistol loaded with DPD issued ammunition. This firearm has a ten round magazine capacity and may be carried with an additional round in the chamber, as was Cpl. Sisneros' practice. Investigators confirmed Cpl. Sisneros fired one round.

Vigil was armed with a .25 caliber Raven Arms semi-automatic pistol. When it was recovered, it contained three live rounds in the magazine and one spent casing "stove-piped" in the chamber. An additional .25 caliber casing was found on the ground next to the driver's side of the patrol car. This evidence is consistent with Vigil firing twice before his gun jammed. Crime scene investigators examined the passenger compartment of Cpl. Juarez's patrol car and located a "bullet fragment in the back seat of the patrol vehicle [and] a possible bullet ricochet mark on the interior side of the rear passenger-side door, . . ." This latter item of evidence corroborates Det. Robledo's belief Vigil was shooting at him.

Officers had requested an ambulance to stand-by almost immediately after the first shot was fired. When Vigil was taken into custody the ambulance moved in and firefighters and paramedics began attending to him. Emergency personnel noted what appeared to be a "through and through" wound to his abdomen. DHMC paramedic Katherine Lopez provided investigators with the following statement:

On arrival to 2100 S. Clay St. we found male in his 20's/30's in (L) lateral recumbent position on ground & handcuffs on & 1 entry/and 1 exit wound to abdomen from GSW. Pt's clothes were cut off by EMS. Pt kept on relaying he had meth in his rectum. Pt did not want/could not relay name /DOB. Pt. relayed he took meth today. He was transported to Denver Health without further incident.

Vigil was found to have baggies containing more than three grams of methamphetamine hidden in his rectal area. He was treated for his wounds at Denver Health Medical Center.⁸ The following day he was moved to the Correctional Care Medical Facility and placed in the custody of the Denver Sheriff. On May 20, 2014, Vigil was charged with two counts of Criminal Attempt First Degree Murder of a Peace Officer, two counts of First Degree Assault (Peace Officer), and charges related to the controlled substances and the handgun he possessed. Those charges are pending in the Denver Courts.

LEGAL ANALYSIS

Criminal liability is established in Colorado only if it is proved beyond a reasonable doubt that someone has committed all of the elements of an offense defined by Colorado statute, and it is proved beyond a reasonable doubt that the offense was committed without any statutorily-recognized justification or excuse. While knowingly or intentionally shooting another human being is generally prohibited as assault or homicide in Colorado, the Criminal Code specifies certain circumstances in which the use of physical force or deadly physical force by a peace officer is justified. As the evidence establishes that Vigil's injuries were caused by the shot fired by Cpl. Sisneros, the determination of whether his conduct was criminal is primarily a question of legal justification.

⁸ Privacy issues prevent hospital authorities from providing investigators with information regarding Vigil's condition or treatment.

C.R.S. 18-1-707 defines the circumstances under which a peace officer can justifiably use physical force and deadly physical force in Colorado. In pertinent part, the statute reads as follows:

(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 affect such an arrest or while preventing or attempting to prevent such an escape.

(2) A peace officer is justified in using **deadly physical force** upon another person ... only when he reasonably believes that it is necessary:

(a) To defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force;

or

(b) To effect the arrest or to prevent the escape from custody of a person whom he reasonably believes:

1. Has committed or attempted to commit a felony involving the use or threatened use of a deadly weapon; or

2. Is attempting to escape by the use of a deadly weapon; or

3. 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.

Section 18-1-901(2)(e) of the Colorado Revised Statutes defines the terms “Deadly weapon” and “Deadly physical force” as follows:

“**Deadly weapon**” means any of the following which in the manner it is used or intended to be used is capable of producing death or serious bodily injury: (I) **A firearm**, whether loaded or unloaded; (II) A knife; (III) A bludgeon; or (IV) Any other weapon, device, instrument, material, or substance, whether animate or inanimate.

“**Deadly physical force**” means force, the intended, natural, and probable consequences of which is to produce death, and which does, in fact, produce death.

Officers are entitled to rely on the doctrine of “apparent necessity” so long as the conditions and circumstances are such that a person would reasonably believe, erroneously or not, that action was necessary. See, *People v. La Voie*, 155 Colo. 551, 395 P.2d 1001 (1964), *People v. Silva*, 987 P.2d 909 (Colo. App. 1999). It is immaterial whether the suspect was actually trying to injure the officers or another, so long as a reasonable person, under like conditions and circumstances, would believe the appearances were sufficient to require the action taken.

It is fundamental that the law of self-defense, which is emphatically a law of necessity, involves the question of one's right to act upon appearances, even though such appearances may prove to have been deceptive; also the question of whether the danger is actual or only apparent, and as well the fact that danger is not necessary, in order to justify one in acting in self-defense. Apparent necessity, if well grounded and of such a character as to appeal to a reasonable person, under like conditions and circumstances, as being sufficient to require action, justifies the application of the doctrine of self-defense to the same extent as actual or real necessity. *Young v. People*, 107 P. 274, (Colo. 1910).

The test in determining whether an officer's use of physical force to take a suspect into custody is appropriate is whether the nature and degree of force used is objectively reasonable after considering the totality of the circumstances. As Vigil survived his wounds, the issue in this case revolves around the question whether Cpl. Sisneros' use of **physical force** was justifiable.

Therefore, the question presented in this case is whether, at the instant Cpl. Sisneros fired his rifle, he reasonably believed that level of force was necessary to take Vigil into custody or that Vigil was directing or was about to direct unlawful physical force against either him *or* another officer. In order to establish criminal responsibility for an officer knowingly or intentionally causing injury to another, the state must prove beyond a reasonable doubt that the officer doing the shooting either did not really believe in the existence of these requisite circumstances, or, if he did hold such belief, that belief was, in light of all available facts, unreasonable.

CONCLUSION

Cpl. Sisneros responded quickly and courageously to an "active shooter" situation unfolding in what most people would believe to be a relatively safe area – a secured parking lot of a police station staffed by armed and trained law enforcement officers. Unfortunately, as recent events in other jurisdictions have, again, made clear, there are people who willingly target police officers solely because of their status and role in society. Vigil chose to arm himself, threatened numerous officers repeatedly and then attempted to shoot officers at point blank range when they reached in to remove him from the back of a police car. Vigil had a position of relative cover and security from which to attack the officers in the District Four parking lot - few use of force options, other than the choice to return fire, were available to the officers seeking to take Vigil into custody. The facts strongly suggest it was only because Vigil's handgun malfunctioned that no one other than Vigil was shot.

Cpl. Sisneros' decision to fire his handgun to save the life of fellow officers and, potentially, his own is clearly justified by the facts and supported by C.R.S. 18-1-707 (1) (a) and (b), and we could not prove otherwise beyond a reasonable doubt. His decision to cease fire when Vigil indicated he had "had enough" is a hallmark of the professionalism we expect from Denver law enforcement officers when confronting armed and dangerous individuals. As should be clear from the foregoing, no criminal charges are fileable against Cpl. Sisneros for his actions in this incident.

The attached document entitled Officer-Involved Shooting Protocol 2013 is incorporated by this reference. The following pertinent statement is in that document: "In most officer-involved shootings the filing decision and release of the brief decision letter will occur within two to three weeks of the incident, unless circumstances of a case require more time. The more compressed time

June 16, 2014

frame will allow the Denver Police Department administrative investigation to move forward more quickly.” In accordance with the protocol, the administrative and tactical aspects of the event may be addressed by the Manager of Safety and Chief of Police in their review and administrative decision letters they choose to issue.

As there is a pending prosecution against Vigil, we will open our file related to this Officer-Involved Shooting for in-person review at our office following the conclusion of that criminal proceeding. The Denver Police Department is the custodian of record related this case. All matters concerning the release of records related to administrative or civil actions are controlled by the Civil Liability Division of the Denver Police Department. As in every case we handle, any interested party may seek judicial review of our decision under C.R.S. § 16-5-209.

Very truly yours,

Mitchell R. Morrissey
Denver District Attorney

cc: Cpl. John Sisneros; Sean Olson, Attorney at Law; David Bruno, Attorney at law; Michael Hancock, Mayor; All City Council Members; Scott Martinez, Denver City Attorney; Stephanie O’Malley, Executive Director, Department of Safety; David Quinones, Deputy Chief of Police; Mary Beth Klee, Deputy Chief of Police; Ron Saunier, Commander of Major Crimes Division; William Nagle, District 4 Commander; Gregory Laberge, Crime Lab Commander; Lt. Ron Thomas, Commander of Internal Affairs, Lieutenant Steve Addison, Major Crimes Division; Lieutenant James Haney, Major Crimes Division; Sgt. James Kurukis, Homicide; Sgt. Ed Leger, Homicide; Detective John Meoni, Homicide; Detective Troy Bisgard, Homicide; Lamar Sims, Senior Chief Deputy District Attorney; Doug Jackson, Senior Chief Deputy District Attorney; Nicholas E. Mitchell, Office of the Independent Monitor; Rev. William T. Golson, Jr.



Officer Juarez's patrol car, District Four sally-port.



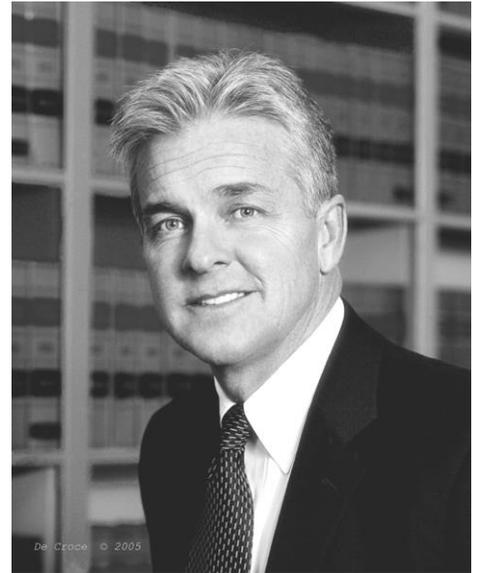
Photos of pistol wielded by Vigil



These photos show the unmarked patrol car used for cover by Cpl. Sisneros.



OFFICER-INVOLVED SHOOTING PROTOCOL 2014



Mitchell R. Morrissey
Denver District Attorney

The Denver District Attorney is a State official and the Denver District Attorney's Office is a State agency. As such, although the funding for the operations of the Denver District Attorney's Office is provided by the City and County of Denver, the Office is independent of City government. 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 peace 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 Department of Safety. The Executive Director of the Department of Safety ("Executive Director"), and the Chief of Police are appointed by and serve at the pleasure of the Mayor of Denver. The District Attorney has no administrative authority or control over the personnel of the Denver Police Department. That authority and control resides with City government.

When a peace officer shoots and wounds or kills a person in Denver, Colorado, a very specific protocol is followed to investigate and review the case. Officer-involved shootings are not just another case. Confrontations between the police and citizens where physical force or deadly physical force is used are among the most important events with which we deal. They deserve special attention and handling at all levels. They have potential criminal, administrative, and civil consequences. They can also have a significant impact

on the relationship between law enforcement officers and the community they serve. It is important that a formal protocol be in place in advance for handling these cases. The following will assist you in understanding the Denver protocol, the law, and other issues related to the investigation and review of officer-involved shootings.

For more than a quarter century, Denver has had the most open officer-involved shooting protocol in the country. The protocol is designed to insure that a professional, thorough, impartial, and verifiable investigation is conducted and that it can be independently confirmed by later review. The fact that the investigative file is open to the public for in-person review at the conclusion of the investigation and review process, permits not only formal legal reviews to occur, but also allows for any citizen to review the case. This, perhaps more than any other single factor, helps to insure that the best possible investigation is conducted by all involved parties.

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 Major Crimes Commander, Senior Chief Deputy District Attorney, Division Chief of Patrol, Captain of Crimes Against Persons Bureau, 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 and conduct other follow-up investigation. The Denver District Attorney, Executive Director, and Chief of Police are notified of the shooting and may respond.

The criminal investigation is conducted under a specific investigative protocol with direct participation of Denver

Police Department and Denver District Attorney personnel. The primary investigative personnel are assigned to the Homicide Unit where the best resources reside for this type of investigation. The scope of the investigation is broad and the focus is on all involved parties. This includes the conduct of the involved officer(s) and the conduct of the person who is shot. Standard investigative procedures are used at all stages of the investigation, and there are additional specific procedures in the Denver Police Department's Operations Manual for officer-involved shootings to further insure the integrity of the investigation. For example, the protocol requires the immediate separation and sequestration of all key witnesses and all involved officers. Involved officers are separated at the scene, transported separately by a supervisor to police headquarters, and sequestered with restricted visitation until a formal voluntary statement is taken. Generally the officers speak with their attorney prior to making their voluntary statement. A log is kept to document who has contact with the officer. This is done to insure totally independent statements and to avoid even the appearance of collusion.

In most cases, the bulk of the criminal phase of the investigation is concluded in the first twelve to twenty-four hours. Among other investigative activities, this includes a thorough processing of the crime scene; a neighborhood canvass to identify all possible witnesses; the taking of written statements from all witnesses, and video-taped statements from all key witnesses and the involved officer(s). The involved officer(s), like any citizen, have a Constitutional Fifth Amendment right not to make a statement. In spite of this fact, Denver officers have given voluntary sworn statements in every case, without exception, since 1979. Since November of 1983, when the videotape- interview room was first used, each of these statements has been recorded on videotape. *No other major city police department in the nation can make this statement.*

Officers are trained to properly secure their firearm after an officer-involved shooting. The protocol provides for the firearm to be taken from the officer by crime lab personnel for appropriate testing. The officer is provided a replacement weapon to use pending the completion of the testing. The protocol also allows for any officer to voluntarily submit to intoxicant testing if they chose. The most common circumstance under which an officer might elect to do so would be in a shooting while working at an establishment that serves alcohol beverages. Compelled intoxicant testing can be conducted if there are indications of possible intoxication and legal standards are met.

The Denver Chief of Police and Denver District Attorney commit significant resources to the investigation and review process in an effort to complete the investigation as quickly as practicable. There are certain aspects of the investigation that take more time to complete. For example, the testing of physical evidence by the crime lab—firearm examination, gunshot residue or pattern testing, blood analyses, and other

testing commonly associated with these cases. In addition, where a death occurs, the autopsy and autopsy report take more time and this can be extended substantially if it is necessary to send lab work out for very specialized toxicology or other testing. In addition to conducting the investigation, the entire investigation must be thoroughly and accurately documented.

Officer-involved shooting cases are handled by the District Attorney, and the Senior Chief Deputies District Attorney specifically trained for these cases. At least two of these district attorneys respond to each officer-involved shooting. They are notified at the same time as others on the officer-involved shooting call-out list and respond to the scene of the shooting and then to police headquarters to participate in taking statements. They are directly involved in providing legal advice to the investigators and in taking video-taped statements from citizens and officer witnesses, and from the involved officer(s). They continue to be involved throughout the follow-up investigation.

The Denver District Attorney is immediately informed when an officer-involved shooting occurs, and if he does not directly participate, his involved personnel advise him throughout the investigative process. It is not unusual for the District Attorney to personally respond and participate in the investigation. At the conclusion of the criminal investigation the District Attorney personally makes the filing decision.

If criminal charges are not filed, a brief decision letter describing the shooting is sent to the Chief of Police by the District Attorney, with copies to the involved officer(s), the Mayor, City Council members, other appropriate persons, and the media. The letter is intentionally brief to avoid in any way impacting the integrity and validity of the Denver Police Department administrative investigation and review, which follows the criminal investigation and review. This represents a 2005 change from the very thorough decision letters that have previously been written by the District Attorney in these cases.

This change has been made because the Executive Director now writes an exhaustive letter at the conclusion of the administrative review of the shooting. The Executive Director's letter can include additional facts, if any, developed during the administrative investigation. Therefore, the Executive Director's letter can provide the most comprehensive account of the shooting. In contrast to the criminal investigation phase, the administrative process addresses different issues, is controlled by less stringent rules and legal levels of proof, and can include the use of investigative techniques that are not permissible in a criminal investigation. For example, the department can, under administrative rules, order officers to make statements. This is not permissible during the criminal investigation phase and evidence generated from such a statement would not be admissible in a criminal prosecution.

The Executive Director has taken a more active role in officer-involved shooting cases and has put in place a more thorough administrative process for investigating, reviewing, and responding to these cases. The critical importance of the administrative review has been discussed in our decision letters and enclosures for many years.⁹ As a result of the positive changes the Executive Director has now instituted and that office's personal involvement in the process, we will not open the criminal investigative file at the time our brief decision letter is released. Again, we are doing this to avoid in any way impacting the integrity and validity of the Department of Safety and Denver Police Department ongoing administrative investigation and review. After the Executive Director has released her letter, we will make our file open for in-person review at our office by any person, if the City fails to open its criminal-case file for in-person review. The District Attorney copy of the criminal-case file will not, of course, contain any of the information developed during the administrative process. The City is the Official Custodian of Records of the original criminal-case file and administrative-case file, not the Denver District Attorney.

THE DECISION

By operation of law, the Denver District Attorney is responsible for making the criminal filing decision in all officer-involved shootings in Denver. In most officer-involved shootings the filing decision and release of the brief decision letter will occur within two-to-three weeks of the incident, unless circumstances of a case require more time. This more compressed time frame will allow the Denver Police Department administrative investigation to move forward more quickly.

The same standard that is used in all criminal cases in Denver is applied to the review of officer-involved shootings. The filing decision analysis involves reviewing the totality of the facts developed in the criminal investigation and applying the pertinent Colorado law to those facts. The facts and the law are then analyzed in relation to the criminal case filing standard. For criminal charges to be filed, the District Attorney must find that there is a reasonable likelihood that all of the elements of the crime charged can be proven beyond a reasonable doubt, unanimously, to twelve jurors, at trial, after considering reasonable defenses. If this standard is met, criminal charges will be filed.

One exception to the Denver District Attorney making the filing decision is if it is necessary to use the Denver Statutory Grand Jury. The District Attorney will consider it appropriate to refer the investigation to a grand jury when it

⁹ See the "Conclusion" statement in the "Decision Letter" in the December 31, 1997, shooting of Antonio Reyes-Rojas, where we first pointed out issues related to the importance of the Administrative review of officer-involved shootings. Subsequent letters continued to address this issue.

is necessary for the successful completion of the investigation. It may be necessary in order to acquire access to essential witnesses or tangible evidence through the grand jury's subpoena power, or to take testimony from witnesses who will not voluntarily cooperate with investigators or who claim a privilege against self-incrimination, but whom the district attorney is willing to immunize from prosecution on the basis of their testimony. The grand jury could also be used if the investigation produced significant conflicts in the statements and evidence that could best be resolved by grand jurors. If the grand jury is used, the grand jury could issue an indictment charging the officer(s) criminally. To do so, at least nine of the twelve grand jurors must find probable cause that the defendant committed the charged crime. In order to return a "no true bill," at least nine grand jurors must vote that the probable cause proof standard has not been met. In Colorado, the grand jury can now issue a report of their findings when they return a no true bill or do not reach a decision—do not have nine votes either way. The report of the grand jury is a public document.

A second exception to the Denver District Attorney making the filing decision is when it is necessary to have a special prosecutor appointed. The most common situation is where a conflict of interest or the appearance of impropriety is present. As an example, if an officer involved in the shooting is related to an employee of the Denver District Attorney's Office, or an employee of the Denver District Attorney's Office is involved in the shooting. Under these circumstances, there would exist at a minimum an appearance of impropriety if the Denver District Attorney's Office handled the case.

THE COLORADO LAW

Criminal liability is established in Colorado only if it is proved beyond a reasonable doubt that someone has committed all of the elements of an offense defined by Colorado statute, and it is proved beyond a reasonable doubt that the offense was committed without any statutorily-recognized justification or excuse. While knowingly or intentionally shooting and causing injury or death to another human being is generally prohibited as assault or murder in Colorado, the Criminal Code specifies certain circumstances in which the use of physical force or deadly physical force is justified. As there is generally no dispute that the officer intended to shoot at the person who is wounded or killed, the determination of whether the conduct was criminal is primarily a question of legal justification.

Section 18-1-707 of the Colorado Revised Statutes provides that while effecting or attempting to effect an arrest, a peace officer is justified in using deadly physical force upon another person . . . when he reasonably believes that it is necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of

deadly physical force. Therefore, the question presented in most officer-involved shooting cases is whether, at the instant the officer fired the shot that wounded or killed the person, the officer reasonably believed, and in fact believed, that he or another person, was in imminent danger of great bodily injury or death from the actions of the person who is shot. In order to establish criminal responsibility for knowingly or intentionally shooting another, the state must prove beyond a reasonable doubt that the person doing the shooting either did not really believe he or another was in imminent danger, or, if he did hold such belief, that belief was, in light of the circumstances, unreasonable.

The statute also provides that a peace officer is justified in using deadly physical force upon another person . . . when he reasonably believes that it is necessary to effect an arrest . . . of a person whom he reasonably believes has committed or attempted to commit a felony involving the use or threatened use of a deadly weapon; or is attempting to escape by the use of a deadly weapon; or otherwise indicates, except through motor-vehicle violation, that he is likely to endanger human life or to inflict serious bodily injury to another unless apprehended without delay.

In Colorado, deadly physical force means force the intended, natural, or probable consequence of which is to produce death and which does in fact produce death. Therefore, if the person shot does not die, by definition, only physical force has been used under Colorado law.

GENERAL COMMENTS

The following statement concerns issues that are pertinent to all officer-involved shootings.

The great majority of officer-involved shootings in Denver, and throughout the country, ultimately result from what is commonly called the split-second decision to shoot. It is often the culmination of a string of decisions by the officer and the citizen that ultimately creates the need for a split-second decision to shoot. The split-second decision is generally made to stop a real or perceived threat or aggressive behavior by the citizen. It is this split-second time frame which typically defines the focus of the criminal-review decision, not the string of decisions along the way that placed the participants in the life-or-death final frame.

When a police-citizen encounter reaches this split-second window, and the citizen is armed with a deadly weapon, the circumstances generally make the shooting justified, or at the least, difficult to prove criminal responsibility under the criminal laws and required legal levels of proof that apply. The fact that no criminal charges are fileable in a given case is not necessarily synonymous with an affirmative finding of justification, or a belief that the matter was in all respects handled appropriately from an administrative viewpoint. It is simply a determination that there is not a reasonable

likelihood of proving criminal charges beyond a reasonable doubt, unanimously, to a jury. This is the limit of the District Attorney's statutory authority in these matters. For these reasons, the fact that a shooting may be "controversial" does not mean it has a criminal remedy. The fact that the District Attorney may feel the shooting was avoidable or "does not like" aspects of the shooting, does not make it criminal. In these circumstances, remedies, if any are appropriate, may be in the administrative or civil arenas. The District Attorney has no administrative or civil authority in these matters. Those remedies are primarily the purview of the City government, the Denver Police Department, and private civil attorneys.

Research related to officer-involved shootings indicates that criminal charges are filed in approximately one in five hundred (1-in-500) shootings. And, jury convictions are rare in the filed cases. In the context of officer-involved shootings in Denver (approximately 8 per year), this ratio (1-in-500) would result in one criminal filing in 60 years. With District Attorneys now limited to three 4-year terms, this statistic would mean there would be one criminal filing during the combined terms of 5 or more District Attorneys.

In Denver, there have been three criminal filings in officer-involved shootings in the past 40 years, spanning seven District Attorneys. Two of the Denver officer-involved shootings were the result of on-duty, work related shootings. One case was in the 1970s and the other in the 1990s. Both of these shootings were fatal. The cases resulted in grand jury indictments. The officers were tried and found not guilty by Denver juries. The third criminal filing involved an off-duty, not in uniform shooting in the early 1980s in which one person was wounded. The officer was intoxicated at the time of the shooting. The officer pled guilty to felony assault. This case is mentioned here, but it was not in the line of duty and had no relationship to police work. In 2004, an officer-involved shooting was presented by the District Attorney to the Denver Statutory Grand Jury. The Grand Jury did not indict. A brief report was issued by the Grand Jury.

Based on the officer-involved shooting national statistics, there is a very high likelihood that individual District Attorneys across the country will not file criminal charges in an officer-involved shooting during their entire tenure. It is not unusual for this to occur. In Denver, only two of the past seven District Attorneys have done so. This, in fact, is statistically more filings than would be expected. There are many factors that combine to cause criminal prosecutions to be rare in officer-involved shootings and convictions to be even rarer. Ultimately, each shooting must be judged based on its unique facts, the applicable law, and the case filing standard.

The American Bar Association's *Prosecution Standards* state in pertinent part: "A prosecutor should not institute,

cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction. In making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved or to a desire to enhance his or her record of convictions. Among the factors the prosecutor may properly consider in exercising his or her discretion is the prosecutor's reasonable doubt that the accused is in fact guilty." The National District Attorneys Association's *National Prosecution Standards* states in pertinent part: "The prosecutor should file only those charges which he reasonably believes can be substantiated by admissible evidence at trial. The prosecutor should not attempt to utilize the charging decision only as a leverage device in obtaining guilty pleas to lesser charges." The standards also indicate that "factors which should **not** be considered in the charging decision include the prosecutor's rate of conviction; personal advantages which prosecution may bring to the prosecutor; political advantages which prosecution may bring to the prosecutor; factors of the accused legally recognized to be deemed invidious discrimination insofar as those factors are not pertinent to the elements of the crime."

Because of the difference between the criminal, administrative, and civil standards, the same facts can fairly and appropriately lead to a different analysis and different results in these three uniquely different arenas. While criminal charges may not be fileable in a case, administrative action may be very appropriate. The legal levels of proof and rules of evidence that apply in the criminal-law arena are imprecise tools for examining and responding to the broader range of issues presented by officer-involved shootings. Issues related to the tactical and strategic decisions made by the officer leading up to the split-second decision to shoot are most effectively addressed by the Denver Police Department through the Use of Force Review Board and the Tactics Review Board process and administrative review of the shooting.

The administrative-review process, which is controlled by less stringent legal levels of proof and rules than the criminal-review process, provides both positive remedial options and punitive sanctions. This process also provides significantly broader latitude in accessing and using information concerning the background, history, and job performance of the involved officer. This type of information may have limited or no applicability to the criminal review, but may be very important in making administrative decisions. This could include information concerning prior officer-involved shootings, firearm discharges, use of non-lethal force, and other conduct, both positive and negative.

The Denver Police Department's administrative review of officer-involved shootings improves police training and

performance, helps protect citizens and officers, and builds public confidence in the department. Where better approaches are identified, administrative action may be the only way to effect remedial change. The administrative review process provides the greatest opportunity to bring officer conduct in compliance with the expectations of the department and the community it serves. Clearly, the department and the community expect more of their officers than that they simply conduct themselves in a manner that avoids criminal prosecution.

There are a variety of actions that can be taken administratively in response to the department's review of the shooting. The review may reveal that no action is required. Frankly, this is the case in most officer-involved shootings. However, the department may determine that additional training is appropriate for all officers on the force, or only for the involved officer(s). The review may reveal the need for changes in departmental policies, procedures or rules. In some instances, the review may indicate the need for changing the assignment of the involved officer, temporarily or permanently. Depending on the circumstances, this could be done for the benefit of the officer, the community or both. And, where departmental rules are violated, formal discipline may be appropriate. The department's police training and standards expertise makes it best suited to make these decisions.

The Denver Police Department's Use of Force Review Board and the Tactics Review Board's after-incident, objective analysis of the tactical and strategic string of decisions made by the officer that lead to the necessity to make the split-second decision to shoot is an important review process. It is clearly not always possible to do so because of the conduct of the suspect, but to the extent through appropriate tactical and strategic decisions officers can de-escalate, rather than intensify these encounters, the need for split-second decisions will be reduced. Once the split-second decision time frame is reached, the risk of a shooting is high.

It is clear not every officer will handle similar situations in similar ways. This is to be expected. Some officers will be better than others at defusing potentially-violent encounters. This is also to be expected. To the degree officers possess skills that enhance their ability to protect themselves and our citizens, while averting unnecessary shootings, Denver will continue to have a minimal number of officer-involved shootings. Denver officers face life-threatening confrontations hundreds of times every year. Nevertheless, over the last 20 years officer-involved shootings have averaged less than eight annually in Denver. These numbers are sharply down from the 1970s and early 1980s when there were 12-to-14 shootings each year.

Skill in the use of tactics short of deadly force is an important ingredient in keeping officer-involved shootings to a minimum. Training Denver officers receive in guiding

them in making judgments about the best tactics to use in various situations, beyond just possessing good firearms proficiency, is one of the key ingredients in minimizing unnecessary and preventable shootings. Denver police officers handle well over a million calls for service each year and unfortunately in responding to these calls they face hundreds of life-threatening encounters in the process. In the overwhelming majority of these situations, they successfully resolve the matter without injury to anyone. Clearly, not all potentially-violent confrontations with citizens can be de-escalated, but officers do have the ability to impact the direction and outcome of many of the situations they handle, based on the critical decisions they make leading up to the deadly-force decision. It should be a part of the review of every officer-involved shooting, not just to look for what may have been done differently, but also to see what occurred that was appropriate, with the ultimate goal of improving police response.

RELEASE OF INFORMATION

Officer-involved shootings are matters of significant and legitimate public concern. Every effort must be made to complete the investigation and make the decision as quickly as practicable. The Denver Protocol has been designed to be as open as legal and ethical standards will permit and to avoid negatively impacting the criminal, administrative, or civil procedures. “Fair Trial—Free Press” standards and “The Colorado Rules of Professional Conduct” limit the information that can be released prior to the conclusion of the investigation.

Officer-involved shooting cases always present the difficult issue of balancing the rights of the involved parties and the integrity of the investigation with the public’s right to know and the media’s need to report the news. The criminal investigation and administrative investigation that follows can never keep pace with the speed of media reporting. This creates an inherent and unavoidable dilemma. Because we are severely restricted in releasing facts before the investigation is concluded, there is the risk that information will come from sources that may provide inaccurate accounts, speculative theories, misinformation or disinformation that is disseminated to the public while the investigation is progressing. This is an unfortunate byproduct of these conflicted responsibilities. This can cause irreparable damage to individual and agency reputations.

It is our desire to have the public know the full and true facts of these cases at the earliest opportunity, but we are required by law, ethics, and the need to insure the integrity of the investigation to only do so at the appropriate time.

CONCLUSION

The protocol that is used in Denver to investigate and review officer-involved shootings was reviewed and strengthened by the Erickson Commission in 1997, under the leadership of William Erickson, former Chief Justice of the Colorado Supreme Court. The report released after the 15-month-long Erickson Commission review found it to be one of the best systems in the country for handling officer-involved shootings. We recognize there is no “perfect” method for handling officer-involved shooting cases. We continue to evaluate the protocol and seek ways to strengthen it.

Mitchell R. Morrissey

Denver District Attorney

CONTACT FOR INFORMATION

S. Lamar Sims, Senior Chief Deputy District Attorney,
Denver District Attorney’s Office, 201 West Colfax
Avenue, Dept. 801, Denver, CO 80202 720-913-9019