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July 8, 2013

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

RE: Investigation of the shooting death of Christopher Dubois (dob 11/25/73), by **Officer Mike Walsh, DPD Badge #P07048**, on May 14, 2013, at 2605 S. Federal Blvd., Denver, Colorado.

Dear Chief White:

The investigation of the shooting death of Christopher Dubois has been completed. I conclude that under applicable Colorado law no criminal charges are appropriate against Officer Mike Walsh or any other individuals involved in this incident. 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 officer-involved shootings is attached to this letter. As in every case we handle, any interested party may seek judicial review of this decision under C.R.S. 16-5-209.

SUMMARY OF FACTS

On Sunday, May 14, 2013, Ms. Elissa Fleischman called the 911 emergency lines at 5:32 p.m. and at 6:08 p.m. Ms. Fleischman requested that the police check on her "ex-boyfriend" who lived at 2621 South Federal Blvd. in Denver, Colorado. Ms. Fleischman was concerned about the welfare of Christopher Dubois because he was threatening to commit suicide. Ms. Fleischman indicated that Dubois had stolen her prescription medication yesterday and he told her on the phone that he had consumed all the pills today. She said that Dubois had "mental health issues", was a heroin addict, had attempted suicide before, and that he currently suffered from bi-polar disorder and was depressed.

Denver Fire Department personnel responded to the 2621 South Federal Blvd. address concerning a "suicidal party". As the firefighters approached the residence they could see through the door into the house. They saw Christopher Dubois on the couch. He appeared to be snorting cocaine. The firefighters announced themselves as "Denver Fire" and told Dubois they

were there to help him and asked if they could come in. Dubois said he did not want help and ordered the firefighters to leave. When asked if he had a gun, Dubois answered "Yes". The firefighters decided to back away from the door and to request assistance from DPD. Firefighter Todd Gordon told Dubois: "Alright. We're going to leave you alone." Dubois said: "Don't call the cops. If the cops come, I'm going to shoot myself."

After the firefighters backed away from the house, Dubois walked outside a few feet and raised a gun above his head, thus showing the firefighters he indeed had a gun. He manipulated the slide on the gun and returned inside the house. The firefighters called for emergency DPD assistance. At 6:21 p.m., the dispatcher called for Code 10 cover by DPD to Dubois' address and informed officers firefighters indicated Dubois had walked outside with a gun. Additionally it was related that Dubois was known to use drugs.

Denver Police Department officers responded to the scene and took up positions on South Federal Blvd. and across the street from the residence, using police vehicles as cover. Sgt. Dominick Salinas used a public address loudspeaker from a police car to communicate with Dubois, who was inside the house. Sgt. Salinas urged Dubois to come out of the house and to leave any weapons inside. Dubois was told several times that the police did not want to hurt him, that they were there to help him and that he should come out but he should leave any weapons inside. After a few minutes, Dubois came to the doorway. He had a pistol in his hand, holding the gun to his head. He appeared to unlock the door and he walked outside. It was 6:39 p.m.

Sgt. Salinas told Dubois to put the gun down and to get on the ground. Instead, Dubois stood in the yard holding the gun to his head and paced about. Dubois was yelling "Shoot me. Shoot me." Sgt. Salinas continued to urge Dubois to put the gun down. Instead, Dubois did several things that escalated the situation. He "racked" the slide on the pistol, left the yard and walked onto the street. He waved the gun around and directed the muzzle of the pistol in the direction of Officer Chris Evans and Corporal Greg Juarez who were positioned across Federal Blvd to the east of the residence. Dubois walked south and east onto Federal Blvd. toward the officers. Officer Evans yelled for Dubois to drop the gun. Dubois yelled "Just shoot me".

Corporal Juarez later described Dubois' movements into the traffic lanes of Federal Blvd. as an "aggressive walk towards myself and Officer Evans' location". "He was pointing the pistol right at us ... I thought he was going to shoot us ... I told Officer Evans I was going to deploy the 40." (This refers to a less-lethal weapon that launches a large, 40 millimeter, rubber projectile). Corporal Juarez fired the 40 millimeter. The rubber projectile struck Dubois in the torso but seemed to barely affect him. Dubois picked up the rubber round and threw it back at Corporal Juarez and yelled: "Shoot me again. Shoot me again." Dubois then began to walk northbound on South Federal Blvd.

Officer Evans noticed that some on-lookers were in the park to the northeast of the residence. Officer Evans and Corporal Juarez moved north in order to parallel the movement of Dubois in case they needed to stop Dubois from going east into the park.

As Dubois walked north in the street he approached the location where Sgt. Tom

Sherwood and Officer Nathan Beiriger were positioned. They gave commands for Dubois to “drop the gun”, which Dubois was holding to his head. Dubois saw these officers and changed directions back toward the south. At this point, Corporal Juarez fired a second 40 millimeter round which also struck Dubois in the torso. Again, the impact did not disable Dubois, cause him to relinquish his pistol, or deter him from defying police commands. It seemed to hardly affect him. However, at this point Dubois began to move more quickly and he turned to his right. He began to speed up and run away from the officers, jogging to the west toward the residence at 2605 South Federal Blvd.

Several officers, including Officer Mike Walsh, knew that this residence had occupants inside. Sgt. Tom Sherwood had seen two women in the doorway of the house. As Dubois advanced toward that residence, Sgt Sherwood became concerned for the safety of the women he had seen. He left his position of cover and began to hurry west toward the house. He wanted to prevent Dubois from approaching the door of that house and possibly creating a hostage situation involving the occupants. Officer Evans had a similar concern. Sergeant Salinas had already cautioned that the officers must not let Dubois get to those houses.

As Dubois ran west, he ran along the south side of the driveway that led to the garage of 2605 South Federal Blvd. A yellow car was parked in the driveway. When Dubois ran beside the yellow car, a shot was fired by Officer Mike Walsh. Dubois fell to the ground after a few more steps. Officers ran to Dubois. His handgun was found with him where he fell on the ground. Officer Walsh removed the gun from Dubois’ presence and moved it away. It was a silver colored Astra Constable 380 Auto semi-automatic pistol with magazine. Later, the DPD crime laboratory firearms unit examined this weapon and found that it lacked a firing pin and was incapable of firing and was not loaded with ammunition.

The shooting occurred at 6:45 p.m. A radio call was made at 6:45:48 p.m. announcing “Shot fired”. Seconds later, an ambulance was requested “Code 10”. Paramedics on scene rendered aid to Dubois and transported him to the hospital. The investigation of this shooting began.

A few hours later at police headquarters, Officer Mike Walsh voluntarily gave a recorded statement. His statements were consistent with the recollections of other officers. He had heard radio calls of a suicidal party who had “felony menaced” the firemen by pointing a gun at them. When the firemen requested Code 10 cover he drove to the scene. He learned that the suicidal person had been using drugs. He saw neighbors and on-lookers outside at the scene. He ordered them to get inside. He retrieved his shotgun from his car and took up a position south of Dubois’ address. Walsh’s shotgun is a Remington 870 Express Magnum pump action 12 gauge shotgun. It was loaded with DPD issued shot shells. Some shells contained “00” buckshot, some shells contained rifled slugs.

After Corporal Juarez fired the first 40 millimeter round at Dubois, and when Dubois began to move north on South Federal Blvd., Officer Walsh moved to the east side of the street and then moved north as Dubois did. Officer Walsh was behind Officer Evans and Corporal Juarez as they paralleled Dubois’ movements north. Officer Walsh stopped, however, and took a kneeling position behind a telephone pole on the sidewalk on the east side of South Federal Blvd.

After the second 40 millimeter round was fired at Dubois, Officer Walsh saw Dubois start to run to the west toward the houses on the west side of the street. Officer Walsh described his split-second decision to shoot Dubois:

"I knew at that point 'I can't let him get to the houses'. I knew there were people in those houses. I ordered them to go back in the houses. And I felt their lives were in danger if I let him get.... I felt there was just no other choice at that point and I had to pull the trigger. I had to stop him. And I fired one time."

Physical evidence recovered during the investigation was consistent with Officer Walsh's description. One spent shotgun shell casing was recovered on the ground on the east side of South Federal Blvd. Before being fired, that shotgun shell casing contained eight pellets of "00" buckshot. Six of the pellets were recovered at the shooting scene.

During the investigation after the shooting, witnesses in the neighborhood gave their accounts of the portions of this incident they observed. These accounts were consistent with what the officers said in their statements. One neighbor said, regarding Dubois:

*"It was kind of scary 'cause, you know, I mean, with his gun you had to know he was going to start pointing it at people and just start shooting."
...."I was trying to get everybody back inside my apartment in case he was going to start shooting."*

Some witnesses used cell phone video cameras to record portions of this incident. The actions of Dubois and the position of some police officers and cars can be seen on the videos. Dubois is shown standing in the yard; leaving the yard and walking south and east onto the street; bending over after the first 40 millimeter round was fired; walking northbound on the street toward officers; turning back south, then turning to his right and running/jogging west alongside the driveway at 2605 South Federal Blvd. When he passes beside the yellow car in the driveway a gunshot is heard. After a few more steps Dubois is seen falling to the ground. Multiple officers are seen running towards him.

Some of the words spoken by Sgt. Salinas over the public address system prior to the shooting can be heard on a cell phone video:

*"Chris, put the gun down"; "Stop";
"Chris, I need you to put the gun down" ;
"Chris, I need you to stop"; "Chris, stop where you are";
"Do not let him approach another house"; "Chris, I need you to stop." ;*

Moments before Officer Walsh fired his shotgun, an officer can be heard yelling: *"Don't let him get to another house."*

An autopsy was performed on Christopher Dubois and an autopsy report was produced. The report noted the cause of death was a through-and-through shotgun wound to the back and the manner of death was homicide. It was noted that possibly six shotgun pellets struck Mr. Dubois: Four shotgun pellets struck the right back; One shotgun pellet struck the posterior right upper arm; and one shotgun pellet possibly produced a graze wound (abrasion) on the lateral right shoulder.

The house where Dubois was first contacted, at 2621 South Federal Blvd., was searched. Drug paraphernalia and numerous pieces of burnt tin foil consistent with the use of narcotics were found inside the residence.

LEGAL ANALYSIS

Criminal liability is established only if it is proved beyond a reasonable doubt that all of the elements defining a criminal offense have been committed and that the offense was committed without legal justification or excuse. While intentionally shooting and thereby causing the death of another human being is generally prohibited as homicide, Colorado law specifies certain circumstances in which the use of physical force and deadly physical force is justified by a peace officer and therefore not unlawful. Accordingly, because the evidence in this case establishes that Officer Walsh shot Mr. Dubois and caused his death, the determination of whether this conduct was criminal is primarily a question of whether the use of deadly force in this circumstance was legally justified.

C.R.S. 18-1-707 is the Colorado statute which provides legal justification for a peace officer's use of force when effecting an arrest or preventing an escape. It is applicable to this case. As pertinent, C.R.S. 18-1-707 states 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 effect such an arrest or while preventing or attempting to prevent such an escape.

- (2) A peace officer is justified in using deadly physical force upon another person for a purpose specified in subsection (1) of this section only when he reasonably believes that it is necessary:**
 - (a) To defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force; or**
 - (b) To effect 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.**

In Colorado the prosecution has the burden of proving that this legal justification, or defense, does not apply. In other words, to appropriately file criminal charges the prosecution must be able to prove beyond a reasonable doubt that a justification for the use of deadly physical force did not exist when the deadly force was used. Therefore, the question presented in this shooting is: Does the evidence prove beyond a reasonable doubt that Officer Walsh lacked a lawful justification for using deadly force?

CONCLUSION

This is a rare occasion where we have video evidence of much of what led to this officer-involved shooting. The video evidence shows that Dubois never heeded the officers' repeated commands to drop his gun. It shows that Dubois continuously acted as if the gun he carried was loaded, functional and deadly. With his upset and irrational behavior, he convincingly gave the appearance that he was a threat to himself, to the officers, and to the people in the neighborhood. It was entirely reasonable for the officers and the on-lookers to believe, as they did, that the gun Dubois held was functional, loaded and deadly. Thus, the fact that later examination revealed the gun to be non-functional does not affect this analysis regarding the officer's justification for using deadly physical force.

The video evidence shows that considerable efforts of a non-lethal nature were made by the police to try to contain and stop the threat that Dubois posed, but these efforts were unsuccessful. During the six minutes between the time Dubois came out of his house and the time Officer Walsh discharged his shotgun, Dubois could have peacefully ended his hostility on many occasions, but, unfortunately, he chose not to do so. Instead, Dubois increased the perceived risk he presented to others in the neighborhood by running toward houses that were not his own. When Dubois chose to run west along the driveway of the house at 2605 South Federal Blvd. there was an increased risk he would escape being contained by police. At that point, based on Dubois' erratic, unreasonable, and apparently suicidal behavior while brandishing a deadly weapon, it was certainly reasonable to believe that Mr. Dubois was likely to endanger human life or to inflict serious bodily injury to another person if he was not apprehended without delay.

I conclude that justifications set forth in C.R.S. 18-1-707 (2) apply to the facts and circumstances of this shooting, and that the use of deadly physical force by Officer Walsh was justified. We could not prove beyond a reasonable doubt that Officer Walsh lacked a justification for using deadly physical force. Therefore, this office will not file any charges against Officer Walsh or any other individuals involved in this incident.

Very truly yours,

Mitchell R. Morrissey
Denver District Attorney

cc: Officer Mike Walsh; Sean Olson, Attorney at Law; Michael Hancock, Mayor; All City Council Members; Doug Friednash, Denver City Attorney; Alex Martinez, Manager 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; Mona Lisa Fair, Commander Administration Management; Gregory Laberge, Crime Lab Commander; Ron Thomas, Commander of Internal Affairs; Lieutenant Steve Addison, Major Crimes Division; Lieutenant James Haney, Major Crimes Division; Sgt. James Kukuris, Homicide; Sgt. Ed Leger, Homicide; Detective Randal Denison, Homicide; Detective Aaron Lopez, Homicide; Lamar Sims, Senior Chief Deputy District Attorney; Doug Jackson, Senior Chief Deputy District Attorney; Henry R. Reeve, General Counsel, Chief Deputy District Attorney; Nicholas E. Mitchell, Office of the Independent Monitor.



OFFICER-INVOLVED SHOOTING PROTOCOL 2013



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. The Manager of Safety 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 Division Chief of Investigations, Senior Chief Deputies 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, Manager of Safety, 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 Denver Manager of Safety now writes an exhaustive letter at the conclusion of the administrative review of the shooting. The Manager of Safety's letter can include additional facts, if any, developed during the administrative investigation. Therefore, the Manager of Safety'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 Manager of Safety 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.¹ As a result of the positive changes the Manager of Safety has now instituted and his 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 Manager of Safety and Denver Police Department ongoing administrative investigation and review. After the Manager of Safety has released his 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 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

¹ 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.

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 two 4-year terms, this statistic would mean there would be one criminal filing during the combined terms of 8 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 require 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.

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