



DenverDA

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January 2, 2010

Gerald Whitman
Chief of Police
Denver Police Department
1331 Cherokee Street
Denver, CO 80204

RE: Investigation of the shooting death of Nicholas Alvarado Morales, dob 2/18/80, by Officer Kevin Ford, #07046, on December 13, 2009, at the intersection of West Louisiana Avenue and South Patton Court, Denver, Colorado.

Dear Chief Whitman:

The investigation and legal analysis of the death of Nicholas Alvarado Morales have been completed, and I conclude that under applicable Colorado law no criminal charges are fileable against Officer Kevin Ford ("Officer Ford"). 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 December 12, 2009 at 11:57 p.m. the first of a number of citizens called 9-1-1 to report a person firing shots in the vicinity of South Knox Court and West Louisiana Avenue. After taking information from the callers, Officer Ford, working car 431-A, was dispatched at 12:02:46 a.m. to locate and apprehend the suspect. Officer Stephen Garber, working car 432-A was dispatched at 12:03:00 a.m. to cover Officer Ford. The suspect was described as an Hispanic male ... 5 feet 8 inches tall ... 145 pounds ... all black clothes ... black hoody ... walking down the middle of the street shooting a handgun in an unknown direction ... about 4 shots fired. Officer Ford and Cadet Nicole Martinez ("Cadet Martinez") were traveling eastbound on West Louisiana Avenue when they made visual contact with the described suspect who was at the intersection of West Louisiana

Avenue and South Patton Court. Officer Ford illuminated the suspect with his spotlight. Officer Ford radioed at 12:05:35 a.m., “With one.” (This indicated that Officer Ford had a visual spotting of the described suspect.) The suspect, later identified as Nicholas Alvarado Morales (“Morales”), was walking westbound on the sidewalk on the north side of West Louisiana Avenue with both hands in his black-hoody pockets. As Morales crossed Patton Court, Officer Ford turned left in the intersection of South Patton Court to pull in behind Morales, intending to exit his marked patrol car to contact him. Officer Ford made this tactical move in order to place himself and the left side of his patrol car between Morales and Cadet Martinez, because he believed Morales was armed with a firearm. Cadet Martinez was on her mandatory monthly ride along with a Denver police officer as part of the Denver Police Cadet Program.

As Officer Ford stopped his Denver Police patrol car northbound in the intersection, Morales stopped and turned facing Officer Ford and Cadet Martinez. Officer Ford put his hand on his service pistol, but did not draw it. As Officer Ford was exiting his patrol car, he saw Morales pull a pistol with his right hand from his right-hoody pocket, holding the pistol close to his body as he leveled the barrel in the direction of Officer Ford and Cadet Martinez. Officer Ford drew his service pistol and started to move quickly toward the back of his patrol car for cover. Cadet Martinez reacted to Morales’ deadly threat by immediately exiting the passenger door and seeking cover behind the back tire. Officer Ford raised his service pistol at Morales and repeatedly ordered Morales to drop the gun. Rather than dropping the firearm as commanded by Officer Ford, Morales began extending his arm and raising the firearm up toward eye level—directly at Officer Ford. Officer Ford believed Morales was going to shoot him. He responded by firing five shots at Morales. Morales turned away as he fell to the pavement. Morales still had the firearm in his right hand. Morales rolled over on his back, kicking his feet as if he was trying to get up. At some point Morales’ gun fell from his hand to the pavement. Officer Ford repeatedly ordered him to stay down. Morales did so at that time.

When Officer Garber heard Officer Ford’s radio transmission that he was “With one,” he accelerated westbound on West Louisiana Avenue to South Patton Court. As he pulled up to the intersection and was beginning to exit his patrol car, he heard multiple shots. He drew his service pistol as he exited. He could only see Officer Ford’s upper body on the other side of Officer Ford’s patrol car. He could see smoke from the gunshots. He did not know who had fired or if anyone had been shot. He saw Cadet Martinez crouched by the rear tire for cover. He immediately ran around the front of Officer Ford’s patrol car to cover Morales and assist Officer Ford in taking him into custody. He saw a gun on the pavement near Morales. When Officer Ford saw Officer Garber was present to cover, dispatch was radioed, “Shots fired—suspect down.” It was 12:07:19 a.m. The two officers approached Morales with weapons drawn. Morales’ firearm was still on the pavement near his head. Officer Garber kicked the weapon away from Morales’ reach. Officer Garber provided armed cover while Officer Ford holstered his service pistol and took out his handcuffs. When Officer Ford put a cuff on one wrist, Morales swung his other arm preventing completion of the cuffing. The officers repeatedly ordered Morales to “stop resisting” as they struggled to control him. Officer Garber still had his service pistol in his right hand. He only had his left hand available to gain control. Officer Ford

had holstered his service pistol. Morales had not been patted down and it was unknown if he had any other weapons. Morales continued aggressively resisting efforts to handcuff him. The officers struggled in an attempt to gain control of Morales arms. Officer Garber told investigators he struck Morales in the area of his upper body and head with his service pistol, which was still in his right hand, in an effort to gain control.

At this time, Officer Brian Mudloff and Jeff DiManna arrived at the scene in separate patrol cars. Officer Mudloff saw the officers wrestling to control Morales. Morales was on his stomach actively resisting the officers. He saw two handguns on the ground in the area of Morales head. Officer DiManna pushed the firearm nearest Morales away from him to the west. The officers were then able to secure Morales' arms and handcuff him. After being cuffed, Morales continued to kick his legs at the officers. Officers Mudloff and DiManna held his legs down until paramedics arrived. Twenty-one seconds after radioing, "Shots fired—suspect down," Officer Ford radioed, "Suspect in custody—officer involved." It was 12:07:40 a.m. (This indicated the suspect was in custody and it was an officer-involved shooting.) Twelve seconds later, at 12:07:52 a.m., Officer Ford radioed, "Party shot." (This indicated confirmation that the suspect had, in fact, received a gun-shot wound.) Paramedics responded and placed Morales in the ambulance with officer assistance. Officer Mudloff rode with the treating paramedics to Denver Health Medical Center. Morales was pronounced dead at 12:37 a.m. by Dr. Peter Pryor.

STATEMENT OF INVESTIGATION

Officer Ford was the only eyewitness to the final frames of the shooting. Officer Garber and Cadet Martinez were eyewitness to portions of the events leading up to the shooting, but were not in a position to see Morales' final actions before being shot by Officer Ford. Prior to the shots being fired, Cadet Martinez had appropriately exited the police car and positioned herself behind the passenger side rear tire for protection. Prior to doing so, she had seen Morales draw his firearm and level it at Officer Ford and her. Officer Garber arrived at the scene and began to exit his marked Denver Police patrol car when he heard the shots. He saw Officer Ford from the shoulders up on the other side of Officer Ford's marked police car. He did not see Morales or Officer Ford at the time the shots were fired. No citizen saw the incident until after the shots were fired. Other ear witnesses were located after the shooting during a neighborhood canvas and statements were taken from them. Statements were also taken from citizens who observed the officers' efforts to control Morales after being shot.¹ In accordance with the protocol in

¹ The following is addressed in this footnote because it is independent of the determination of Officer Ford's justification in shooting Morales, which is the focus of this decision letter concerning the "officer-involved shooting." Two individuals alleged the officers beat Morales to death. Their initial statements made to investigators the morning of the incident did not include these allegations. The two individuals contacted and spoke with local media representatives and appeared on television coverage and in newspaper articles. They alleged that Morales was beaten to death by the officers. They did not observe the shooting. They saw the officers attempting to place the resisting Morales in custody by handcuffing him after the shooting, as is standard procedure for police officers in these situations.

After the media reports, they were contacted again by investigators and gave videotaped statements. When viewed in the context of the totality of the evidence developed in the investigation, the allegation that Morales was beaten to death is simply not supported by the facts. That allegation is most significantly inconsistent with the degree of non-gunshot

officer-involved shootings, Officers Ford and Garber were sequestered until they gave their voluntary sworn statements to investigators. All officers who responded to the scene provided statements. The officers' statements are consistent with one another, the time frames established by the radio call records, all physical evidence recovered at the scene, and the injuries to Morales as documented by Dr. Michael Burson.

Pathologist, Dr. Michael Burson, performed an autopsy on the body of Morales on December 13, 2009. He determined the cause of death was a single gunshot wound to the center of his chest just above the nipple line. Dr. Burson determined the abrasions to areas of Morales' head were superficial injuries that did not contribute in any manner to his death. Morales had scrapes to his left and right cheek areas, a small v-shaped cut above his right eyebrow, and a bruise on his forehead. These injuries were not significant and did not contribute to his death.

Officer Ford fired five shots from his model 17, Glock 9mm semi-automatic pistol. His weapon has a magazine capacity of seventeen rounds. At the time of the shooting he was carrying his weapon with the magazine fully loaded with seventeen rounds and one additional round in the chamber—a total of eighteen rounds. When the weapon was unloaded by Denver Police Department Crime Laboratory personnel after the shooting there were 12-live rounds in the magazine and one live round in the chamber. Five 9mm cartridge cases were recovered at the scene in locations consistent with Officer Ford's position at the time of the shooting.²

Officer Garber did not fire his service pistol. His model 17, Glock 9mm semi-automatic pistol was recovered at the scene in the location he described in his statement to investigators. The weapon slipped from his hand during his efforts to subdue Morales.³

At the time of this incident, Morales was armed with a Ruger 9mm P89 semi-automatic pistol.⁴ When recovered at the scene (Marker #2) by Denver Crime Lab personnel, the magazine was empty and there was a live round in the chamber. A live round was also recovered from Morales' pocket. There is no evidence that Morales fired

injury to Morales as reported by Dr. Michael Burson at autopsy. Their description and demonstration of the degree of force used by the officers would clearly have produced more serious injury to Morales. And, Morales' death was clearly caused by the gunshot wound to his chest, not by any other injury. Additionally, the indication the beating went on for minutes is totally inconsistent with the recorded time frames of the officers' contact with Morales from the time he was shot until he was placed in custody. At a minimum, an objective review of the facts would question the accuracy of their account of the incident.

In his statement to investigators, Officer Garber reported that he had struck Morales in the head with his firearm in his right hand during his struggle to control him. In fact, his firearm fell from his hand while doing so. The superficial injuries noted by Dr. Burson are consistent with Officer Garber's statement of his use of force. Additionally, the duration of the contact with Morales is recorded by the radio call records as indicated in the "Statement of Facts" section of this letter. The use of force lasted seconds, not a number of minutes. And, other witness statements are consistent with the officers' over-all account of the incident. Officer Garber by his own account used physical force to control Morales, including striking him in the head with his firearm. He was clearly justified in using the degree of force he used based on the specific facts and circumstances of this case.

2 See attached diagram and photos. Officer Ford's 5 shell casings were at markers # 4, 5, 6, 8 & 9.

3 See attached diagram and photos. Officer Garber's pistol was at marker #1.

4 See attached photo of Morales' firearm. Morales' pistol was at marker #2.

his weapon at the South Patton Court location. Two spent cartridge cases were recovered in the vicinity of the earlier shots fired by Morales that gave rise to the citizen 9-1-1 calls. In addition to other items recovered from Morales, he had cash in the amount of \$973.95.

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 and causing death is generally prohibited as 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 Nicholas Alvarado Morales was shot by Officer Ford, the determination of whether his conduct was criminal is primarily a question of legal justification.

C.R.S. 18-1-707 defines the circumstances under which a peace officer can 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” as 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 for justifiable self defense or defense of others requires that, given the totality of the circumstances, a person reasonably believed that he or another person was being subjected to the use or imminent use of unlawful physical force or deadly physical force and that he used a degree of force that he reasonably believed to be necessary to protect himself or another person.

Therefore, the question presented in this case is whether, at the instant Officer Ford fired the shots that caused the death of Morales, they reasonably believed that Morales was directing or was about to direct deadly physical force against him or another person. In order to establish criminal responsibility for an officer knowingly or intentionally causing death 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

The intent of the officers who responded to the citizens' 9-1-1 calls of shots being fired in their neighborhood was to identify the suspect, protect the citizens from his dangerous conduct, and take the suspect into custody. Morales' armed, non-compliant, life threatening response to the police contact forced Officer Ford to shoot him.

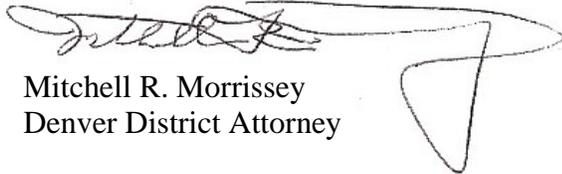
Officers have a right to defend themselves from a perceived imminent deadly threat. Morales clearly presented a deadly threat to Officer Ford. There is no justification to draw a firearm and threaten a police officer who is performing his lawful duty. The officers were attempting to protect the citizens in this neighborhood from Morales' dangerous conduct. When an assailant is ordered by a uniformed police officer to drop a firearm in these circumstances, his refusal to do so invites a deadly force response by the officer. Had Morales simply complied with Officer Ford's lawful commands, the confrontation would have ended peacefully at that time. Instead of dropping the firearm, Morales chose to point and raise the firearm at Officer Ford, who reacted to this deadly threat by shooting Morales. Morales suffered a single gunshot wound. Officer Ford stopped firing when Morales fell to the pavement and was no longer a direct threat.

Based on a review of the totality of facts developed in this investigation, we could not prove beyond a reasonable doubt that it was unreasonable for Officer Ford to fire the shot that caused Morales' death. Therefore, no criminal charges are fileable against Officer Ford for his conduct in this incident.

The attached document entitled Officer-Involved Shooting Protocol 2009 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. This more compressed time 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 will be addressed by the Manager of Safety and Chief of Police in their review and administrative decision letter.

We will open our file for in-person review at our office 60 days from the date of this letter. The Denver Police Department is the custodian of records related to this case. As in every case we handle, any interested party may seek judicial review of our decision under C.R.S. 16-5-209.

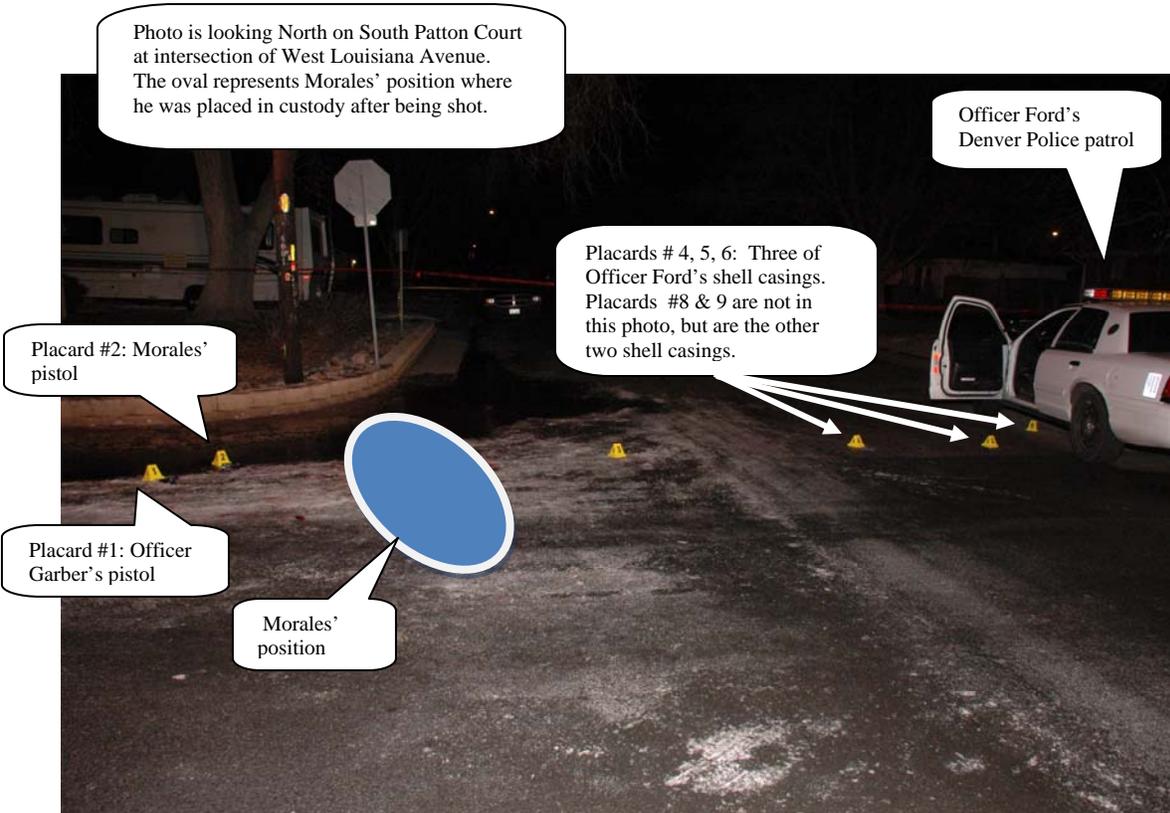
Very truly yours,



Mitchell R. Morrissey
Denver District Attorney

cc: Officer Kevin Ford; David Bruno, Attorney at Law; Brian Reynolds, Attorney at Law; John W. Hickenlooper, Mayor; All City Council Members; Alvin J. LaCabe, Jr., Manager of Safety; Mel Thompson, Deputy Manager of Safety; Mary Malatesta, Deputy Manager of Safety; David Fine, Denver City Attorney;

John Lamb, Deputy Chief; Michael Battista, Deputy Chief; Dave Fisher, Division Chief; David Quinones, Division Chief; Mary Beth Klee, Division Chief; Tracie Keese; Rudy Sandoval, Commander, District 4; Gregory LaBerge, Crime Lab Commander; Joe Montoya, Captain; Jon Priest, Lieutenant, Homicide; Kathleen Bancroft, Lieutenant; Sergeant James Kukuris, Homicide; John Coppedge, Sergeant, Homicide; Detective Bruce Gibbs, Homicide; Detective Randy Stegman, Homicide; John Burbach, Commander, Civil Liability Bureau; Chuck Lepley, First Assistant District Attorney; Lamar Sims, Chief Deputy District Attorney; Doug Jackson, Chief Deputy District Attorney; Henry R. Reeve, General Counsel, Chief Deputy District Attorney; Justice William Erickson, Chair, The Erickson Commission; Richard Rosenthal, Office of the Independent Monitor.







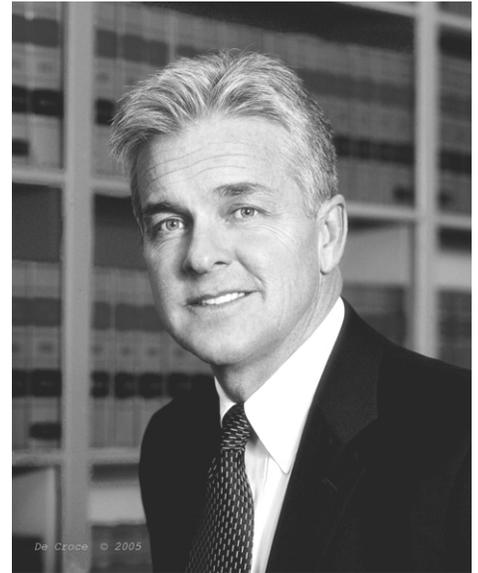
Placard #2: Morales' pistol
... to scale



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OFFICER-INVOLVED SHOOTING PROTOCOL 2009



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, First Assistant District Attorney and 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, 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, First Assistant District Attorney, and 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.⁵ 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

⁵ 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.

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 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 who 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.

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