# A. WILLAM RITTER, JR. District Attorney

SECOND JUDICIAL DISTRICT



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November 18, 2003

Daniel Montgomery Chief of Police Westminster Police Department 9110 Yates Street Westminster, CO 80031

RE: Investigation of the shooting death of Sergio Alejandro Medrano, DOB 5/26/56, DPD #251986, by Westminster Police Officer Karl Scherck, 0201, on September 22, 2003, in the 1400 block of South Lincoln Street, Denver, Colorado.

# Dear Chief Montgomery:

The investigation and legal analysis of the shooting death of Sergio Alejandro Medrano have been completed, and I conclude that under applicable Colorado law no criminal charges are fileable against Westminster Police Officer Karl Scherck. My decision, based on criminal-law standards, does not limit administrative action by the Westminster Police Department where non-criminal issues can be reviewed and redressed, 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. The complete file of the investigation will be open to the public at our office and any interested party is welcome to review the investigation and my decision in greater detail.

#### **SYNOPSIS**

Shortly before 1:00 p.m. on Monday, September 22, 2003, Westminster Police Officer Karl Scherck, went to his mother's home at 1402 South Lincoln Street in Denver to mow her lawn. Officer Scherck, who was off-duty and lived in the neighborhood, had walked the short distance to his mother's home. As he approached the house, he saw a man standing on his mother's property and acting in a suspicious manner. The man made eye contact with Officer Scherck then walked away. Officer Scherck was aware that in recent years his mother's home had been burglarized twice and that other homes in the neighborhood had also been burglarized. Because of his concerns, he returned to his home to retrieve his cell phone and call 9-1-1. As he was returning to his home, he saw the same individual peering into the front door and window of a home at 1434 South Lincoln Street. Upon arriving at his house, Officer Scherck picked up his cell phone. He also armed himself with his off-

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duty pistol and started walking in the direction of 1434 South Lincoln Street. He called the 9-1-1 emergency line.

When Officer Scherck reached a point across the street from 1434 South Lincoln Street, he saw the individual he had seen before, later identified as Sergio Medrano, in the backyard of that residence. Officer Scherck knew that Medrano was not the resident of that address and he went into the backyard to see if Medrano had fled. During this time, he was on the telephone with the 9-1-1 operator. Once in the backyard, Officer Scherck approached the detached garage. He heard a noise coming from inside. He opened the door and saw Medrano standing less than ten feet from him. According to Officer Scherck, Medrano turned toward him holding a one-by-four board in his right hand. As Officer Scherck stood in the doorway, Medrano took one or two steps towards him. Medrano held the board in one hand and, according to Officer Scherck, Medrano was reaching into his jacket pocket with his left hand. As Medrano moved toward him, Officer Scherck fired three shots at him. Medrano fell wounded to the garage floor. Officer Scherck, who was still on the telephone with the 9-1-1 operator, advised the operator that the shooting had occurred. Denver police and paramedics were dispatched immediately. Medrano was taken to Denver Health Medical Center, where he was pronounced dead shortly after arrival.

#### STATEMENT OF INVESTIGATION

This investigation involves the shooting death of Sergio Alejandro Medrano by Westminster Police Officer Karl Scherck. Officer Scherck is a Denver resident and this incident occurred near his home. Officer Scherck was off-duty and in plainclothes at the time of the incident. Officer Scherck was going to his mother's house to mow her lawn. He saw a suspicious individual, later identified as Medrano, standing in the area of his mother's front yard. Concerned that Medrano was "casing" houses in the neighborhood, Officer Scherck returned to his home, retrieved his cellular telephone and his off-duty pistol and went back out in the neighborhood with the intent to locate Medrano so he could direct Denver officers to his location. Officer Scherck had seen Medrano peering into the front door and window at a neighbor's home at 1434 South Lincoln Street. When he returned from his home, he saw Medrano in the backyard at that address. Officer Scherck then lost sight of Medrano and, in a stated effort to determine whether Medrano had jumped the back fence and fled, Officer Scherck entered the backyard. Ultimately, Officer Scherck found Medrano in the unattached garage to 1434 South Lincoln Street. When confronted, Medrano had a one-by-four board in his right hand. According to Officer Scherck, Medrano turned and took one or two steps toward him, wielding the board in a threatening manner and reaching in his pocket with his left hand. Officer Scherck said he thought Medrano was going to pull a "knife or gun" on him. Officer Scherck estimated that Medrano was no more than ten feet away from him in the darkened garage. He believed he fired his pistol at Medrano two times. Medrano fell and Officer Scherck immediately advised the Denver police 9-1-1 operator that a shooting had occurred and that an ambulance was needed. Officer Scherck made the initial 9-1-1 call at 12:49:26 p.m. One minute later the CAD (Computer Aided Dispatch) report notes that the dispatcher is being advised that the suspect is an Hispanic Male "5'10/THIN/BLACK SHIRT AND BLK SHIRT IN BACK." The next notation is that the caller "SHOT BURG SUSPECT." This entry is made at 12:50.59 p.m. Medrano was rushed to Denver Health Medical Center where, despite medical intervention, he was pronounced dead at 1:15 p.m.

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Monday, September 22, 2003, was a warm, sunny day. Officer Scherck, who was preparing to mow his mother's lawn, was wearing tennis shoes, shorts and a blue t-shirt. The t-shirt was a "gag" law enforcement shirt. At the time of the incident, Officer Scherck was armed with a Colt .380 semi-automatic pistol. This weapon is approved for off-duty use by the Westminster Police Department. It is a weapon that has a seven round magazine capacity and may be carried with an additional round in the chamber. On September 22, 2003, Officer Scherck had the weapon fully loaded with Westminster Police issued ammunition. The weapon was initially secured at the scene by Officer Richard Tartar, #71092, who was first to arrive at the scene. In compliance with the officer-involved shooting protocol, Officer Scherck's weapon was secured from Officer Tartar by Denver Police Department Crime Laboratory personnel. Examination of the weapon, the medical reports, and the audiotape of the 9-1-1 call established that Officer Scherck fired three shots.

On September 23, 2003, Dr. Amy Martin, forensic pathologist for the Denver Coroner's Office, conducted an autopsy on Medrano's body. Dr. Martin found evidence of eight entry and exit wounds; however, some of the wounds were caused by bullets which entered, exited, and re-entered the body. One bullet entered the front of the left shoulder, passing through the skin and subcutaneous tissues, then exited the inside of the left arm and re-entered the left chest. This bullet entered the chest wall and the wound track was "traced through the left lung, entering the left upper lung lobe, and exiting the left lung in the left lower lung lobe." This bullet was not recovered.

Another bullet entered the left biceps area, passed through the skin and subcutaneous tissue in the arm, exited the "left axilla" [armpit area] and then re-entered the left axilla. Dr. Martin noted the "bullet wound track . . . sequentially perforates the skin and subcutaneous tissue of the left upper arm, and can be traced to the two wounds in the axilla. These wounds appear to be an entrance and an immediate re-entry wound. The wound track then can be traced along the outside of the chest wall and comes to rest where the bullet is palpable in the left posterior flank. This bullet was recovered at autopsy.

Dr. Martin determined that Medrano had also suffered a gun-shot wound in his left knee wherein the bullet entered the body and passed through the "distal left femur," but it did not penetrate any "vital structures." This bullet was recovered at autopsy. Dr. Martin noted a final gun-shot wound to the back of the left hand which "involved the left ring finger." A bullet fragment was recovered from this wound at autopsy.

Toxicological analysis of blood and urine removed from Medrano at autopsy disclosed that his blood-ethanol level was positive but "less than 0.010%." His blood was positive for cocaine at a level

<sup>&</sup>lt;sup>1</sup> The shirt was blue. On the chest was a seal-type emblem in the center of which, in large print, were the words "Police Officer." Above the seal was emblazoned "Fraternal Order of Rapid Fire," and below was inscribed "Local 69." A caption underneath this emblem read, "Our bravery and courage are held in regard cause our guns don't shoot blanks and our nightsticks are hard."

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of 102 nanograms per milliliter. His blood was positive for benzolecgonine, a cocaine metabolite, at level of 3514 nanograms per milliliter.

Examination of the magazine of Officer Scherck's Colt .380 determined that it contained four live rounds. Another live round was removed from the chamber of the weapon by Denver Police Officer Richard Tartar, who secured the weapon at the scene. Denver Police firearms examiners compared the two spent slugs removed from Medrano's body with bullets test-fired from Officer Scheck's weapon. The two spent slugs were "identified to each other has having been fired from his weapon. Morgue envelope #2 contains a fragment weighing 9.96 grams that has no further comparative value." Powder-pattern testing done in an effort to determine the distance from the muzzle to Medrano's clothing at the time of the shooting resulted in a determination that "the most probable muzzle to garment distance was beyond 3 feet."

Investigators obtained a search warrant to process and document the scene of the shooting.<sup>3</sup> Inside the garage was a pool of blood and, in or near the pool, was a "wood picket style board" painted white. The item was a wooden sign attached to a board. The sign was 12 inches by 12 inches. It was attached to a one-inch by four-inch board that was 31 inches long, 19 inches of which extended below the sign. The total weight of the object was 27.7 ounces. Just outside the entry or pedestrian doorway to the garage was a nylon jacket "primarily black and white in color." There were apparent blood stains on the jacket. Investigators looked both in the garage and in the bushes, plants and foliage outside the garage but located no shell casings.

Medrano and Officer Scherck were the only eyewitnesses to the shooting. Area residents who heard gunshots were identified and written statements were obtained from them. Two neighbors, Ms. Betty Dozier, 6/25/46, and her daughter Dawna "Melissa" Dozier, 11/26/70, both of whom reside at 1442 South Lincoln Street, heard some of the events leading up to the shooting and heard the shots being fired. Each of these witnesses provided written and video-taped statements to investigators. Officer Scherck's wife, Kimberly Scherck, was at home when Officer Scherck left to mow his mother's lawn and when he returned to retrieve his cell phone. She also heard some yelling and heard the sounds of gunfire. She provided written and video-taped statements to investigators describing what she saw and heard. In addition, Officer Scherck was speaking to a 9-1-1 operator during much of the incident, including when the three shots were fired. The tape of this telephone call was preserved and made part of the case investigation. Following the incident, Officer Scherck was brought to Denver Police Headquarters by an uninvolved Denver police supervisor. At headquarters, after meeting with his attorney, Officer Scherck gave a voluntary, video-taped statement to investigators. Finally, investigators located an acquaintance of Medrano's who was able to shed some

<sup>&</sup>lt;sup>2</sup> As noted in the autopsy report, one projectile was not recovered at autopsy. Of the two that were recovered, one weighed 77.31 grains and one weighed 90.37 grains. The fragment recovered from Medrano's finger might have been part of that bullet recovered from his body. In short, the evidence is not inconsistent with Officer Scherck firing three times and one of the rounds striking Medrano's left hand and then hitting his arm or body.

<sup>&</sup>lt;sup>3</sup> A diagram of the backyard and garage is attached as Appendix 1.

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light on Medrano's activities earlier in the day and his state of mind. This individual, Mr. Vincent Herrera, provided a written statement to investigators.

While Officer Scherck is the only surviving eyewitness to the shooting, the ear-witnesses and the physical evidence are corroborative of some aspects of his statement. Ms. Betty Dozier told investigators that she was on her front porch when she heard "loud voices – arguing – crying. I looked next door and could see my neighbor Karl Scherck, a police officer for Thornton (actually a Westminster Officer). I lost sight of Karl because of the bushes. I heard 3 shots." Although Ms. Betty Dozier was unable to distinguish what was being said, Ms. Melissa Dozier was able to provide more information. The following information is in her written statement:

I Melissa Dozier was walking from the trash dumpster when I heard two people arguing & running. I was right behind our garage & the neighbor's garage. I heard someone like hit the neighbor's garage thinking it was our neighbors inside or going to open the garage. I heard someone say show me your hands and I heard 3 gun shots. I ran through the yard & heard someone like crying & someone asking to show him his hands.

The statements of the witnesses are generally consistent with the audiotape of Officer Scherck's call to the 9-1-1 operator. The audiotape begins with Officer Scherck indicating to the operator that he believes that a man is trying to break into a house at 1434 South Lincoln Street. The operator asks where the party is attempting to break in and Officer Scherck stated "he tried to get in the front, I think he's at the back . . ." The operator has Officer Scherck give a description of Medrano and the clothing he is wearing and then asks where the party is at the time. Officer Scherck replied: "I don't know if he got in or not. He might be in the back of the house." The operator asks "and what is your name?" There is no response to the question but over the telephone one can hear Officer Scherck say: "Yo! Police Officer!" The sound of gunshots is heard almost immediately after that warning and the sound of a man screaming. Officer Scherck then says into the telephone, "Shit! I just . . . oh, shit! He tried to come after me! I shot him. Shots fired! 1434 South Lincoln." In the background the sound of a party crying or moaning can be heard and then Officer Scherck can be heard saying, "Sir, show me your hands. Show me your hands!" Officer Scherck confirms with the operator that an ambulance is on the way and the call is terminated.

The first Denver police radio call regarding the incident was a "simulcast" that an officer was calling for help at 1434 South Lincoln Street. Several Denver officers began to respond and the dispatcher repeated the address, adding, "It's a Westminster officer. Believe there's been a shooting at

<sup>&</sup>lt;sup>4</sup> The audiotape of the conversation reveals that Officer Scherck fired the three shots first and after that made the comment, "Show me your hands."

<sup>&</sup>lt;sup>5</sup> Because of the quality of the recording and the noise of the incident, it is difficult to discern all that is going on. However, on the tape it appears one can hear three rapid shots being fired.

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that location from the information I'm getting." The dispatcher aired the time as 12:53 p.m. and, as additional officers began to respond "Code 10," added "Cars covering, my call . . .says 'Hispanic male 5'10" thin build, black shirt, at the rear of that location, Westminster officer shot a burglary suspect." Officer Richard Tartar, was the first officer to arrive. He advised the dispatcher that he had contacted a person claiming to be a Westminster police officer, he had control of the weapon, there was a party down, and he requested an ambulance, "Code 10." The dispatcher confirmed that an ambulance was responding and noted that the time was 12:53 p.m. This means the emergency call, response, and arrival of Denver police occurred within one minute.

In his video-tape interview, Officer Scherck told investigators that he was home from work and relaxing with his family. After eating lunch with them he decided to go to his mother's home to mow her lawn as she is an elderly woman living alone. As he approached his mother's address at 1402 South Lincoln Street, he saw a "guy walk from near her bushes." Officer Scherck stated that he was aware that there had been "a lotta burglaries" in the neighborhood and, further, that his "parents' house had been burglarized twice . . . both times while they were at home." Based on the area from which the man came and Officer Scherck's knowledge of the fact that the neighborhood had been subject to several burglaries, he suspected that the man, later identified as Medrano, might be "casing" the neighborhood in general and his mother's house in particular. Medrano walked passed Officer Scherck, who immediately decided to check on his mother's house. He verified that the door to that home was closed and then he decided to see where the stranger was going. He turned and walked in the direction he had last seen Medrano but he did not see him. He further noted that he saw no cars in the area nor did he see or hear a car leaving. Officer Scherck was concerned that Medrano might have broken into a neighbor's home. He "crossed the street with the intent to goin' back to my house to get a cell phone to call the police." As Officer Scherck proceeded south on Lincoln Street, he saw Medrano standing at the home of the residents at 1434 South Lincoln Street. Officer Scherck told investigators that he knew the residents and knew they were not likely to be home at that hour. Officer Scherck told investigators that Medrano was "up on the door like -p . . . like pullin' the door or tryin' to pull the security door an' lookin' in the window." In short, Medrano was giving every indication that he was a burglar.

Officer Scherck said he returned home, told his wife he thought someone was attempting to break into a neighbor's home, grabbed his cellular telephone and his handgun and returned to an area across the street from where he had last seen Medrano. From the yard of the house at this location, Officer Scherck called 9-1-1. He told investigators that he identified himself as an off-duty Westminster police officer and told the call taker that the house at 1434 South Lincoln Street was being burglarized. He stated that he was "sittin' there [in the back yard] givin' [the operator] the information [and] I see a person in the backyard." Officer Scherck stated that he then crossed the street and went into the backyard of 1434 South Lincoln Street in order to "get a direction o' where the guy's goin' so I can give it to you guys [Denver police]." When he reached the backyard, he did not see Medrano, but he noted that the door to the unattached garage was slightly open. He then heard

<sup>6</sup> The term used by Denver police and paramedics for responding or traveling with emergency equipment activated (lights and siren).

Officer Scherck's father, now deceased, was alive during at least one of these incidents.

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a noise coming from within the garage. Officer Scherck was aware that the residents kept dogs and thought the noise might have been caused by one of the dogs as he believed that it was likely that Medrano had jumped the backyard fence. However, he decided to check the garage. He told investigators that he

peeked in there real quick. I just pushed the door open a little bit. It was probably open more than eighteen inches. And, uh, as I open the door, I step in . . .it's real dark in there, had my sunglasses on. And, uh, real dark in the garage. Uh, I don't [think?] there's any windows in there an' I look in an' I see the same guy that I saw in front o' my mom's house. Same guy that was standin' at the front door. He's facin' the south wall. And, uh, he's about probably eight f- . .. eight, eight feet away from me maybe, maybe ten feet away from me. [I] Pushed the door open. He looks at me, looks at me an' he's got a, he's got a yellow, er, a white piece o' board. An' its . .

**INVESTIGATOR**: M-huh.

**SCHERCK**: it's like a . . . I think it's a one by four, about six feet. He's got that in his han- . . . hand. An' I think it's in his right hand. An' he immediately looks at me, he puts his right hand, his left hand in his pocket, his coat pocket. He's wearin' like a, like a dark jacket. I don't know if it's nylon or terry cloth or a, um, fleece material.

**INVESTIGATOR**: M-huh.

**SCHERCK**: An' he looks an' he comes at me. He takes like two steps. An' to protect myself I'm thinkin' the guy's got a knife, he's got a gun. And, uh, I'd fire what I believe is two shots to protect myself.

**INVESTIGATOR**: M-kay.

**SCHERCK:** I don't, I don't, I, I think I may have said police. I may have said stop. I, I don't remember exactly. I, I think I said somethin' to 'im.

Officer Scherck told investigators that after the shots were fired, Medrano dropped the board and "kinda sat down." Officer Scherck saw that he was bleeding and then saw him fall to or lie down on the ground. Officer Scherck remained in his position with his handgun trained on Medrano until he heard the sound of sirens. He then went back to the street where he saw a police officer arriving. He identified himself as a police officer, dropped his handgun and placed his hands in the air. The officer, Officer Richard Tartar, took custody of Officer Scherck's weapon and had Officer Scherck show him where Medrano had fallen. As previously noted, an ambulance responded, CODE 10, and Medrano was transported to Denver Health Medical Center.

During the course of the investigation, investigators were contacted by a Mr. Vincent Herrera. Mr. Herrera was not an eyewitness, but his statement provides information concerning Medrano's mindset prior to the shooting. It was written for him by Denver Police Detective Ken Gurule, 82027,

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at Mr. Herrera's request, and was then read and affirmed by him. The statement, in its entirety, is as follows:

A girlfriend of Sergio Medrano dropped Sergio off @ 1190 South Broadway – [Medrano] said he was hungry – I gave him \$10 and he walked to Texaco across the street. [Medrano] was asking for work. [He] came back with food and ate in the office. [Medrano] told everyone he used to be in prison for breaking into rich people's homes. This was about 9 – 9:30 a.m. [Medrano] said he was leaving and left the shop – as he was eating, [he] said I think I'm going to start breaking into houses. We told him that's a felony but [he] said he didn't care if he went back to prison. At least [he] would have a bed. [Medrano] told everyone he was in a hospital in Aurora about 2 wks ago for drug abuse. [He] left the hospital and came to the shop with IV in his arm. [He] said he wasn't afraid to die and didn't care if anyone shot him. [Medrano] left the shop at about 10 a.m. and that was the last we saw of him – I was watching the news and thought [the individual shot] fit the same time frame and decided to contact police at the scene.

**[QUESTION**]: Is this statement true and correct to the best of your knowledge? **[ANSWER]**: Yes [signed by Herrera].

#### 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 their death is generally prohibited as homicide in Colorado, the Criminal Code specifies certain circumstances in which the use of deadly physical force is justified. As the evidence establishes that Medrano was shot by Officer Scherck, the determination whether his conduct was criminal is primarily a question of legal justification.

Section 18-1-707(2) of the Colorado Revised Statutes defines the circumstances under which a peace officer can use deadly physical force in Colorado. In pertinent part, the statute reads as follows:

- (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.

Section 18-1-704 of the Colorado Revised Statutes defines the circumstances under which a person can use deadly physical force in Colorado. In pertinent part, the statute reads as follows:

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

(a) The actor has reasonable ground to believe, and does believe, that he or another person is in imminent danger of being killed or of receiving great bodily injury.

Section 18-1-901(2)(e) of the Colorado Revised Statutes defines the term "Deadly weapon" as follows:

- (2)(e) "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.

Therefore, the question presented in this case is whether, at the instant Officer Scherck fired the shots that resulted in the death of Medrano, he reasonably believed that Medrano was directing or was about to direct deadly physical force against him or another person. In order to establish criminal responsibility for an officer or a person knowingly or intentionally causing the death of another, the state must prove beyond a reasonable doubt that the officer or person 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**

Although none of the information provided to investigators by Vincent Herrera about Medrano was known to Officer Scherck at the time he saw, contacted, and shot Medrano, it does establish that Officer Scherck's concerns about Medrano being a possible burglar were well founded. The facts overwhelmingly support the conclusion that Medrano was intending to burglarize a home in this neighborhood. The facts, also, suggest that Medrano's mindset was not that of a person who intended to cooperate if caught. He was clearly a potential risk to any person who would encounter him while he was engaged in his criminal pursuits. Medrano has an extensive criminal history, including felony convictions.

While burglary is a serious felony crime, under Colorado law it is not a crime that would permit or justify a citizen or a police officer to use deadly physical force to prevent the escape or effect the arrest of the perpetrator. Additionally, the conduct involved here is not a "make my day" encounter that would permit a deadly force response. Under the facts of this case, the use of deadly physical force is permissible only to defend against the use or imminent use of deadly physical force by the offender. Additionally, a citizen can only use deadly physical force if *a lesser degree of force is inadequate*. A citizen is certainly risking prosecution by shooting and killing someone armed with only a one-by-four board and sign under facts similar to this case. Therefore, it is Officer Scherck's claim that Medrano was also reaching into his jacket pocket and that he believed Medrano was going for a "knife or gun" that must be evaluated to determine whether the shooting is justified.

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This case points out the problem with citizens (here an off-duty police officer in shorts and a tee shirt) taking action related to criminal suspects, rather than contacting the police, providing information, and then letting the police make the contact. In this instance, Officer Scherck (citizen) says that was his intent when he went to his house and retrieved his cell phone and a gun. However, that is not how it played out. While it may be well-intended and even courageous on the part of a citizen, taking such action is fraught with potential problems. Here, the citizen was, in fact, a trained police officer and the problems still occurred.

Calling 9-1-1 and providing information was the correct thing to do. Placing himself in the doorway of the garage was neither good judgment nor a good police tactic. If there was no chance Medrano would be in the garage, there would be no reason to check the garage. The fact is there was a chance he would be there and he was. As would be the case with a citizen taking similar action, Officer Scherck was not in uniform (off-duty). He had nothing official to identify himself to the suspect. He was not wearing his body armor. He did not have a police radio for direct contact with other officers. He did not have any intermediate weapons, such as mace, a baton, or a taser and, therefore, was severely restricted in his response options. In the event of non-compliance and an attack by the suspect, his options were to attempt to retreat, engage in direct physical contact with the suspect, or shoot him. This action placed the officer (citizen) and the suspect at an unnecessary and unacceptable risk level. Officer Scherck had no handcuffs or other restraining device with him in the event an arrest needed to be made. He had no one covering him. Even though he knew uniform Denver police officers were responding, he entered the doorway of the darkened garage, placing himself in a dangerous, back-lit, and disadvantaged position. He was also wearing sunglasses at the time. The suspect was, in fact, present in the garage. During the brief confrontation which followed, Officer Scherck shot and killed him.

The incident is further complicated by the fact that Officer Scherck is the only surviving eyewitness to the conduct of Medrano in the seconds before the shots were fired. Consequently, his statement is the only direct evidence we have concerning his and the suspect's conduct during the critical final frames of this confrontation. According to Officer Scherck, when he opened the garage door, the suspect quickly turned on him with a one-by-four board in his right hand while reaching into his jacket pocket with his left hand. He said that at the same time, the suspect moved toward him in a threatening manner. Officer Scherck said he thought the suspect was reaching for "a knife or a gun." He provided no other specific facts that caused him to reach that conclusion. He said he fired to protect himself. The investigation determined that the suspect did have the board, but did not have a knife or a gun in his jacket pocket or anywhere else. Shootings such as this are sometimes labeled, "I thought he had a gun" cases.<sup>8</sup>

By their very nature, "I thought he had a gun" cases can be controversial and raise questions about the veracity of the claim. They are an unusual occurrence. This does not, however, mean that the shooting is, per se, unjustified. It also is not an indication that the officer is being untruthful. It does mean there can be uncertainties and reasonable doubts about what happened in the critical moments before the shots were fired.

<sup>&</sup>lt;sup>8</sup> In this type of shooting incident, the officer states that, based on the actions of the suspect, the officer believed the suspect had a gun and was going to shoot him. The officer shoots to protect himself from what he perceived to be an imminent threat of serious bodily injury or death. It is later determined the suspect, in fact, did not have a gun.

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When attempting to assess the accuracy and credibility of such a claim, it is necessary to look for other facts that are consistent or inconsistent with the account. When there are other witnesses present, it is often possible to independently confirm the accuracy of the officer's statement. When there are no other witnesses, it may not be possible to independently do so. The 9-1-1 tape provides a mixed assessment. On the audiotape, after he has shot the suspect, he later states, "Sir, show me your hands." He does not make any statement to that effect prior to shooting the suspect. He makes no statement to the 9-1-1 operator regarding thinking the suspect was reaching for a "knife or gun." Rather, the sequence is: "Yo! Police Officer!" The sound of gunshots is heard almost immediately after that warning and the sound of a man screaming. Officer Scherck then says into the telephone, "Shit! I just . . . oh, shit! He tried to come after me! I shot him." He says nothing about thinking he was going to pull a knife or gun on him. In the background the sound of a party crying or moaning can be heard and then Officer Scherck can be heard saying, "Sir, show me your hands. Show me your hands!" Additionally, there is no indication in Officer Scherck's statement or in the statements of other officers made to the investigators that Officer Scherck indicated to them at the scene that they should approach Medrano with caution because there might be a gun in Medrano's jacket pocket."

In most situations, the existence of a prior shooting or shootings by the officer would not be directly relevant to the criminal law analysis of the current shooting. However, if there is a similarity between the prior and current shooting, it should be evaluated along with all of the other pertinent facts of the case. Officer Scherck shot and killed another person on April 25, 2003—just 150 days prior to this shooting. In that case, Officer Scherck indicated he fired because he thought the party was reaching between the car seats for a gun. No gun was found. This was another "I thought he had a gun" case. To put this in context, in the ten years that I have been the Denver District Attorney, there have been 79 officer-involved shootings in Denver. Of those, there have been only three "I thought he had a gun" cases. I am unaware of any Denver Police Officer in the last 30 years who has been involved in two "I thought he had a gun" cases during his or her entire career. In the last 30 years who has been involved in two "I thought he had a gun" cases during his or her entire career.

Under Colorado law, officers have a right to act on reasonable appearances to protect themselves and other citizens from what they reasonably believe to be the use or imminent use of deadly force against them. Along with that right goes a heavy responsibility to use proper tactics, sound judgment, and to be as accurate as possible in assessing the degree of threat and the level of force that is reasonable and appropriate under the circumstances.

As I have said before, the high legal level of proof required under the law for a criminal prosecution can only control police conduct at the very fringes of acceptability. While there are concerns raised by this case, based on the totality of the facts developed in this investigation, I conclude that we do not have a reasonable likelihood of proving criminal charges beyond a reasonable doubt against Officer Scherck. He is the only surviving eyewitness to the shooting and we could not

<sup>&</sup>lt;sup>9</sup> There is no indication that Officer Scherck checked for a weapon in Medrano's jacket pocket or anywhere else. In fact, because he was alone, it would have been tactically unwise to do so. However, there is also no indication that the responding officers immediately checked for a weapon, as you would expect them to do if Medrano had told them he believed that one was present. Regardless of Medrano's condition, it would be prudent to do so for general safety concerns.

<sup>&</sup>lt;sup>10</sup> First Assistant District Attorney Chuck Lepley of the Denver District Attorney's Office was appointed special prosecutor on the case. The decision letter is available at <a href="https://www.denverda.org">www.denverda.org</a>.

prosecutor on the case. The decision letter is available at <a href="https://www.denverda.org">www.denverda.org</a>.

This sample is not sufficient for a formal statistical analysis or conclusion, but it does indicate that in Denver, "I thought he had a gun" cases are an infrequent and unusual occurrence.

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disprove his account of the facts beyond a reasonable doubt.<sup>12</sup> Therefore, no criminal charges will be filed based on the specific facts of the case. We could neither prove beyond a reasonable doubt that Officer Scherck's conduct was justified nor that it was unjustified.

This case provides a good example of why citizens should call the police and provide information, but not take actions that potentially place themselves in direct contact with the suspect. As in every case we handle, any interested party may seek judicial review of my decision not to file charges under 16-5-209.

Very truly yours,

Bill Ritter, Jr.

cc: Officer Karl Scherck, Westminster Police Department

David Bruno, Attorney at Law

Tina Hobis, Attorney at Law

John W. Hickenlooper, Mayor

All City Council Members

Alvin J. LaCabe, Jr., Manager of Safety

Gerald Whitman, Chief of Police

Marco Vasquez, Deputy Chief

Michael Battista, Deputy Chief

Dan O'Hayre, Division Chief

Dave Fisher, Division Chief

Steve Cooper, Division Chief

Mary Beth Klee, Division Chief

Dave Abrams, Captain, Crimes Against Persons Bureau

Jim Haney, Lieutenant

Jon Priest, Lieutenant, Homicide

Dave Neil, Detective, Homicide

Ken Gurule, Detective, Homicide

John Lamb, Commander, Civil Liability

Chuck Lepley, First Assistant District Attorney

Lamar Sims, Chief Deputy District Attorney

Tim Twining, Chief Deputy District Attorney

Henry R. Reeve, General Counsel, Deputy District Attorney

Justice William Erickson, Chair, The Erickson Commission

Bob Grant, District Attorney, Seventeenth Judicial District

Steve Bernard, First Assistant District Attorney, Seventeenth Judicial District

<sup>&</sup>lt;sup>12</sup> Officer Scherck's statement may, in fact, be totally truthful and accurate. Unfortunately, the "I thought he had a gun" nature of the shooting and the situation he placed himself in does not lend itself to conclusive independent corroboration.



# CRIME SCENE MAP

## NOT DRAWN TO SCALE

DRAWN BY: Detective David E. Neil, 74-010 DATE: 09/23/2003 Shed 1434 S. Lincoln St. t Garden with Water display Keys — 🗩 B P r a i t c i Sign Drop Cłath Bullet Strike -Blood 6-11