



DenverDA

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May 5, 2006

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

RE: Investigation of the shooting death of Jimmy G. Orozco, DOB 09/27/82, DPD # 635206 by Officer Rick Nixon, 04098, on April 20, 2006, in the parking garage at 699 West 29th Avenue, Denver, Colorado.

Dear Chief Whitman:

On April 20, 2006, at approximately 4:40 a.m. a citizen called 9-1-1 to report a theft from motor vehicle in progress. The citizen was watching a suspect break into a black Cadillac Escalade on the third floor of the parking garage at his apartment complex at 699 West 29th Avenue, Denver, Colorado. Denver police officers Rick Nixon and Robert Anderson, working car 621A, were dispatched to cover the call.

The reporting citizen was watching the suspect in the parking garage from his adjacent apartment balcony and was providing a real-time description to the Denver Police Dispatcher of what was occurring. This information was aired to the responding officers. As Officers Nixon and Anderson circled up the parking garage ramp and entered the third level, Officer Anderson saw the black Cadillac Escalade the witness had described. As they passed by Officer Anderson noticed that the driver's side back door window was broken out. Officer Nixon continued on by and turned his marked police car around. His car was stopped in the traffic lane with the lights on facing back down the ramp toward the Escalade.

Officers Nixon and Anderson walked the 30 or 40 feet back down the ramp to the Escalade. As they were inspecting the damage, the Dispatcher advised the officers that the reporting citizen could see the officers and that the suspect was sitting in a white vehicle parked across from the Escalade. The suspect's vehicle was approximately two car spaces up the ramp from the Escalade. The officers immediately turned their attention from inspecting the damage to the Escalade to attempting to identify the white vehicle. They instantly spotted the white vehicle which was backed into the parking spot. Although there was some lighting in the parking garage, the vehicle had tinted windows, so the officers used their flashlights to illuminate the area of the driver's seat as they were approaching the vehicle. They were attempting to get into a position to flank the vehicle from the front sides. When their flashlights illuminated the suspect (later identified as Jimmy Orozco), he immediately started the engine and sped out of the parking spot—squealing his tires. This all occurred instantaneously.

When this action occurred, Officer Anderson was partially across the traffic lane in front of the suspect's vehicle on the lower side of the ramp. Officer Nixon was partially across the traffic lane directly in front of the vehicle in a position above Officer Anderson. Both officers were walking toward the vehicle and were within approximately ten to fifteen feet of the front of the suspect's vehicle. Immediately behind the officers was a full row of vehicles parked side-by-side up the ramp, including the Escalade. Officer Anderson had his flashlight in hand and his firearm was still holstered. Officer Nixon had his flashlight in his hand and he had just drawn his firearm when the suspect floored the vehicle and sped forward.

Officers Nixon and Anderson both gave sworn videotape statements to investigators. In accordance with protocol, the officers were separated immediately after the shooting and were sequestered at police headquarters until their statements were taken.

In his sworn videotaped statement to investigators, Officer Anderson stated in pertinent part that he could not see the suspect until the flashlight hit the suspect's eyes. When he yelled for the suspect to get out of the vehicle the suspect instantly started the car, "floored it and whipped out of the parking spot." There was a "high engine noise." He knew Officer Nixon was right in front of the vehicle at this time, not off to its side. Officer Anderson said he (Officer Anderson) jumped and ran out of the way of the vehicle and heard Officer Nixon fire a shot. He could not see Officer Nixon at that instant because he (Officer Anderson) was attempting to avoid being struck by the car. He said that he would have been struck by the vehicle had he not taken the immediate evasive action. He stated the vehicle came within one or two feet of him—"I could have touched the car at that time." He said his main concern was to get out of the way—"I thought the car was going to hit me." He stated that "it scared the crap out of me." He then saw his partner chasing the car on foot. Officer Anderson ran up the ramp to the police car with the intent to catch up to Officer Nixon who was pursuing the suspect on foot. About the time he started his pursuit in his police car, he heard a crash below him. He saw a party jump out of the suspect's crashed vehicle and run.

In his sworn videotaped statement to investigators, Officer Rick Nixon stated in pertinent part that when Officer Anderson saw there was someone in the car, he (Officer Nixon) drew his firearm. He yelled at the suspect to, "Get out of the car." He said the suspect was looking right at him. He said he was looking right into the eyes of the suspect when the suspect started the car and came right at him (Officer Nixon). Officer Nixon stated, "I thought he was going to come right at me and kill me—like he didn't care if I was in the way—I was stuck—I was focused on the driver—Hispanic male, mid 20s, black hair—the way he looked at me it was like I was in his way and he didn't care what he did to me—my legs were like I couldn't move—like I had lead boots on—he's going to run me over—there goes my legs—I was inches away when he turned in front of me—came very close to me—I could reach out and touch the vehicle—I felt like I couldn't move and get out of the way—I took one shot at center mass—he drove down and around—I chased the car."

Officer Nixon said he could hear the tires squeal when the suspect accelerated forward. He stated that the vehicle was coming right at him. "I don't know if I side stepped or back stepped—I was just stuck there—he was going to go right through me—I don't know how many feet exactly I was in front of him—I thought I was going to get run over—either go underneath the car or on top of the car."

Investigators also obtained written and/or video-taped statements from other witness officers. A video-taped statement was given by the reporting citizen. After his statement was taken at police headquarters, investigators returned with him to the scene and obtained follow up information and video from his position on his apartment balcony. Statements were also taken from all identified ear-witnesses from the apartment complex.

In his video-taped statement to investigators, the reporting citizen described his observations from the time he came home from work and saw the suspicious person in the parking garage. He described his 9-1-1 call to the Denver Police Department and the information he provided directing the officers' attention to the suspect's white car. The following are pertinent comments to the 9-1-1 Operator:

. . . your officers are right next to them right now, they just drove by and I mean, he just got back in his car and he's hiding. It's a, it's a white sedan, that's all I can see, I can see his head. I've been watching him. They got to turn around and it's the white sedan right behind them.

In pertinent part, he stated that when the officers turned around from the Escalade and started to walk towards the suspect's car, he saw the car's back-up lights come on. The car sped out of the parking space with its tires squealing.¹ It appeared to him that the officers were about in the middle of the ramp and in danger of being hit. He said he heard the officers shouting but could not tell what they were saying. He then heard a gunshot and ducked down in case a bullet came towards him. When he looked up he saw the white car traveling down the ramp and then strike several cars before coming to a stop. He saw the male he had described earlier get out of the white car and run down the ramp. The police car followed. The male stopped running and surrendered to the officers on the second floor of the parking garage. He heard an officer shout and ask the male why he tried to run them over. One of the officers bent over as if he was injured and the other officer patted him on the back.² He said he did not learn until later that there was a second male in the white car. The following are pertinent comments to the 9-1-1 Operator:

. . . now he's trying, he's trying to drive away right now. There he goes, they got him. (The record should reflect the sound of gunshots in the background) Now there's gunshots.³ Oh, shit. Oh my God. They just hit, he just ran into like four different cars. They got him, he's on foot. He's running down to the second floor. He's on the second floor parking garage heading . . . (The record should reflect the sound of yelling and horns honking in the background) They got him. He's got his hand up now. He's down on the ground.

¹ In his statement he said it appeared to him that the suspect's vehicle backed out and then reversed directions toward the officers. It is clear from all other statements and from the physical evidence that the car sped out front first. This is also supported by his statement regarding seeing the back-up lights come on. The vantage point from his balcony was directly behind the suspect's vehicle.

² Officer Nixon had chased the suspect on foot from the third floor to the second floor of the parking garage. Officer Anderson had pursued the suspect in the police car.

³ Based on the totality of the evidence developed in the investigation, there was only one shot fired. The environment in which the shot was fired can explain why it may have sounded like more than a single shot.

The reporting citizen and the officers believed there was only one person in the vehicle at the time of the shooting. Unbeknownst to them a second offender, Devon Lee Kelly, was concealing himself in the passenger seat which was reclined almost to the back seat. When the suspect's vehicle crashed into the parked cars, it was Kelly who jumped from the vehicle and ran. However, the officers believed it was the driver exiting through the passenger door. Consequently, when they caught and handcuffed Kelly on the second floor of the parking garage they believed the event was over. The officers advised the Dispatcher that the suspect was in custody. Officer Nixon assumed his single shot had missed the suspect.

As other officers were arriving at the scene, a tenant from the apartment complex approached the suspect's crashed vehicle. When she looked into the vehicle she immediately screamed for assistance. Officers rushed to her location and discovered Orozco laying wounded in the driver's seat. His condition was clearly grave. Because the responding ambulance would not be able to enter the parking garage, Orozco was removed from the vehicle by paramedics and carried to the street level. He was transported to Denver Health Medical Center. Orozco was pronounced dead by Dr. Colwell at 5:23 a.m.

Officer Nixon fired the single shot from his Sig Sauer, model P226, 9mm semi-automatic pistol. The weapon has a magazine capacity of 15 rounds. The weapon was being carried with the magazine fully loaded and an additional round chambered—a total of 16 rounds in the weapon. After the shooting and pursuant to the protocol, his weapon was taken by Denver Police Department Crime Lab personnel. Fifteen live rounds were recovered from the weapon. A single spent 9mm shell casing was recovered at the scene. Technician Frank Kerber of the Denver Police Department Crime Lab identified the shell casing as having been fired from Officer Nixon's firearm.

The single shot fired by Officer Nixon entered the very bottom of the driver's-side window just above the car body. The window was shut at the time of the shooting. This is consistent with Orozco's wound which entered his body on the left side of his chest under his left arm and traveled from left to right through his chest cavity. This is also consistent with his left arm being raised to steer the vehicle as he sped out of the parking spot.

On April 20, 2006, Dr. James Wahe performed an autopsy on the body of Orozco. The cause of death was determined to be the result of a single gunshot wound to the left chest. The bullet was recovered by Dr. Wahe from Orozco's body and was later identified by Technician Frank Kerber as having been fired from Officer Nixon's firearm.

The crime scene investigation revealed that the suspect's vehicle could have traveled directly forward as much as three feet six inches before arcing to the right as he sped out of the parking spot and down the ramp. There were visible tire-tread marks on the ramp surface which are consistent with the officer and witness statements regarding hearing squealing tires. These tracks also provided the basis for a photo and videotaped simulation of the probable path of the suspect's vehicle during the critical time frame. This simulation is consistent with the officers' statements and is indicative of life-threatening conduct by Orozco. Whether Orozco's intent was to run down the officers or to escape at any cost, in a split second his conduct clearly placed the officers' lives in harm's way. Their perceptions of this threat are consistent with the physical evidence.

Devon Lee Kelly, DOB 04/15/82, DPD#578396, has been charged with First Degree Criminal Trespass—a class 5 felony. Electronic and other items taken from the Escalade were recovered in the suspect's vehicle. Both Orozco and Kelly have a number of prior arrests and prior felony convictions. A number of other thefts from motor vehicles occurred in the area at the time of this offense. The investigation of those crimes continues at this time.

Based on the totality of the facts developed in this investigation, the single shot fired by Officer Nixon was not criminal conduct under C.R.S. 18-1-707 (2) and 18-1-704 (1). We could not prove beyond a reasonable doubt that it was unreasonable for Officer Nixon to perceive that Orozco's conduct posed an imminent threat to him or his partner when he fired the single shot. The vehicle driven by Orozco was a deadly weapon under Colorado law because in the manner in which it was being used by Orozco it was capable of producing serious bodily injury or death to either or both of the officers. The District Attorney's authority and responsibility in these cases is not to determine whether an officer should or should not shoot in a given situation, but rather to determine if the act is criminal if an officer does elect to shoot and wounds or kills a person. Under the specific facts of this case, no criminal charges are fileable against Officer Nixon in the shooting death of Orozco.

The attached document entitled *Officer-Involved Shooting Protocol 2006* 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 this case, the facts and decision are sufficiently clear that this letter can be released at this time.

The Denver Police Department is the custodian of records related to this case. The case investigation documents in our possession will be open for in-person review at our office at the conclusion of the following two events: (1) the prosecution of Devon Lee Kelly for his criminal conduct in this incident, and (2) the Manager of Safety and Denver Police Department's administrative investigation and review of this shooting, if the City fails to open its criminal case investigative file for review at that time. 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,

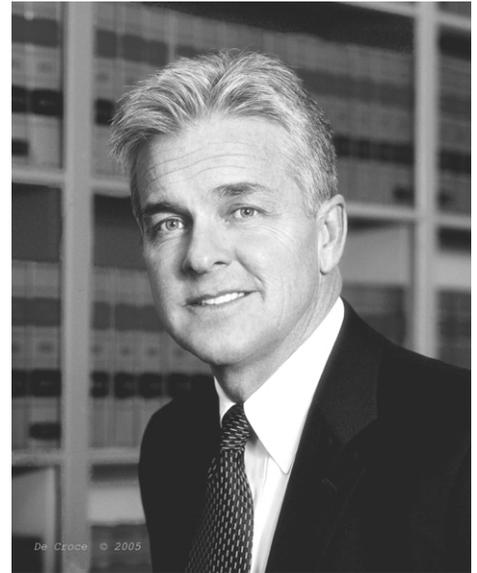


Mitchell R. Morrissey
Denver District Attorney

cc: Officer Rick Nixon; Doug Jewell, Attorney at Law; John W. Hickenlooper, Mayor; All City Council Members; Alvin J. LaCabe, Jr., Manager of Safety; Cole Finegan, Denver City Attorney; 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; John Burbach, Captain; Jim Haney, Lieutenant; Jon Priest, Lieutenant, Homicide; Michael Martinez, Detective, Homicide; Randy Denison, Detective, Homicide; John Lamb, Commander, Civil Liability; Chuck Lepley, First Assistant District Attorney; Lamar Sims, Chief Deputy District Attorney; Doug Jackson, Chief Deputy District Attorney; Henry R. Reeve, General Counsel, Deputy District Attorney; Justice William Erickson, Chair, The Erickson Commission; Richard Rosenthal, Office of the Independent Monitor.



OFFICER-INVOLVED SHOOTING PROTOCOL 2006



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.⁴ As a result of the positive changes the Manager of Safety has now instituted and his personal involvement in the process, we will not open the criminal investigative file at the time our brief decision letter is released. Again, we are doing this to avoid in any way impacting the integrity and validity of the Manager of Safety and Denver Police Department ongoing administrative investigation and review. After the Manager of Safety has released his letter, we will make our file open for in-person review at our office by any person, if the City fails to open its criminal-case file for in-person review. The District Attorney copy of the criminal-case file will not, of course, contain any of the information developed during the administrative process. The City is the Official Custodian of Records of the original criminal-case file and administrative-case file, not the Denver District Attorney.

THE DECISION

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

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

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

⁴ 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.

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 that may provide inaccurate accounts, speculative theories, misinformation or disinformation that is disseminated to the public while the investigation is progressing. This is an unfortunate byproduct of these conflicted responsibilities. This can cause irreparable damage to individual and agency reputations.

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

CONCLUSION

The protocol that is used in Denver to investigate and review officer-involved shootings was reviewed and strengthened by the Erickson Commission in 1997, under the leadership of William Erickson, former Chief Justice of the Colorado Supreme Court. The report released after the 15-

month-long Erickson Commission review found it to be one of the best systems in the country for handling officer-involved shootings. We recognize there is no “perfect” method for handling officer-involved shooting cases. We continue to evaluate the protocol and seek ways to strengthen it.

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