



# DenverDA

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January 10, 2007

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

RE: Investigation of the wounding of Daniel H. Ayon, DOB 1-24-63, DPD#489642, by Sergeant Larry Valencia, 82089, on December 2, 2006, at 2223 Irving Street, Denver, Colorado.

Dear Chief Whitman:

On December 2, 2006, Daniel Ayon entered the MAS Food Mart-Sinclair at 2105 Federal Boulevard to commit a robbery. The store employee recognized Ayon when he entered the store as the same individual who had robbed him the day before.<sup>1</sup> The employee immediately ran to the back room, locked the door and called 911 to report the crime in progress. Ayon had simulated a weapon and went behind the counter in an attempt to break into the cash register, which he threw on the floor. When he could not get to the employee, nor get into the cash register, he fled the scene. He had also simulated a weapon the prior night by lifting his shirt to show something in his waistband area. Officers responded to the location at approximately 5:33 p.m. While searching the area officers located and followed distinctive shoe prints in the snow, believed to be those of the perpetrator, to the rear of 2223 Irving Street.

After further investigation and discussion, officers knocked on the front door of 2223 Irving Street. Ms. Shauntae Pacheco answered the door and allowed the officers to enter the home. There were three adults and two children on the first floor. Ms. Pacheco first advised the officers that they were the only individuals in the house, but she would later tell Corporal Duane Parton that her father, Daniel Ayon, was upstairs. Prior to admitting this, the owner of the house, Joyce Mares, Ayon's mother and Shauntae's grandmother, took Sergeant Larry Valencia upstairs to check the area. The third adult present was Rocky Valdez, Shauntae's husband, who also knew that Ayon was upstairs, but did not tell the officers.

In his voluntary sworn videotaped statement to investigators, Sergeant Larry Valencia stated that he was taken upstairs by Ayon's mother, Joyce Mares, to check the area. He had looked in one closet and was moving toward another closet when Corporal Duane Parton approached him and said that Ayon was upstairs. Mrs. Mares started stating, "Daniel—are you here?" Sergeant Valencia,

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<sup>1</sup> Ayon was also suspected of robbing this same store and another store close in time on November 15, 2006.

using his flashlight, could see Ayon crouching in the closet through the partially open door. Clothing was hanging in the closet, including a robe in the area where Ayon was crouched. The officers immediately identified themselves and loudly commanded Ayon to show his hands and come out. Mrs. Mares was immediately moved away from the confrontation to a safe location. Rather than complying with the repeated orders, Ayon began making movements reaching down toward the floor and digging back in an area the officers could not see. Based on the information the officers had concerning the robberies in which a gun was simulated and the refusal of Ayon to comply with their repeated commands, Sergeant Valencia believed he was attempted to get to a gun. The officers were both pointing their service pistol at him and yelling at him to show his hands and come out. Ayon's action became a great concern to their safety. Sergeant Valencia said he started backing up as Ayon suddenly reached with both hands down to his right to an area into which he had been repeatedly reaching. Sergeant Valencia said he thought Ayon was going to come up with a gun. At that moment he heard a shot coming from his left. Sergeant Valencia stated, "I hear a shot coming from my left ... officer Parton is shooting ... I think this guy is going to shoot officer Parton ... I'm not even thinking about myself ... I fired two shots and all of a sudden the guy is gone ... I see officer Parton pulling the trigger on his TASER and nothing is happening ... I pull the robe down (The robe hanging in the closet where Ayon was crouched.) and see this hole in the wall ... not a very big hole ... but know he is in there (referring to the attic on the other side of the small opening)." Sergeant Valencia said that because of all of Ayon's actions, "I fired because I thought he was coming out with a gun ... I couldn't understand why he was doing what he was doing ... when he made the quick movement, I thought he was coming up with the gun. I was so scared ... I didn't even have a sight picture ... I thought the guy was coming up with a gun ... I just wanted to stop him."

In pertinent part of his voluntary sworn videotaped statement to investigators, Corporal Duane Parton stated that when Ayon made a quick move, he shot him with his TASER. He didn't know if the shot hit Ayon and a second later he heard one or two shots from Sergeant Valencia who was standing to his front-right side. Corporal Parton said that just before the shot, Ayon reached into the area by the floor with both hands and during the shots Ayon went into the area where the hole was located. He said the wires from the TASER deployment were dangling in the robe that was hanging in the closet. Corporal Parton said he initially had his service pistol trained on Ayon. Sergeant Valencia had his service pistol covering Ayon, so he drew his TASER. He let Sergeant Valencia know this. After deploying the TASER, he again armed himself with his service pistol, but fired no shots. During the entire confrontation, Ayon never did show the officers his hands. Corporal Parton stated, "This makes the hair stand up on the back of your neck when you can't see the hands and the guy is not following commands ... the guy seemed to be getting more aggravated." After the TASER was deployed and the two shots were fired, the officers did not know if Ayon had been hit.

After being shot, Ayon barricaded himself in the crawl space in the attic. He had escaped into the attic through the small opening in the bottom corner of the closet. He refused all commands to come out and surrender to the officers. Sergeant Valencia immediately called for the K-9 dogs and for a ballistic shield. The Metro-SWAT Unit responded to the scene. After lengthy and professional efforts to end this confrontation without further injury to anyone, Ayon was successfully arrested by Metro-SWAT officers. He was immediately transported by the waiting ambulance to DHMC for treatment. He suffered a single gunshot wound to the pelvis. The injury was not life threatening and the bullet was not removed during initial treatment.

In her statement to investigators, Joyce Mares, Ayon's mother, stated that three days before the shooting her son had told her that "he wanted to die rather than go to jail." She said he has been depressed since he broke up with his wife and lost his job. He told her several times that he wanted to get a gun and shoot himself. He told her he wasn't going to court or jail and that he would rather die. Mares also stated she heard the officers give commands "come out or we'll shoot; let us see your hands; and come out with your hands up or we'll shoot." She said she heard two gunshots.

Ayon's daughter, Shauntae Pacheco, told investigators that just prior to hearing two shots she heard the officers say, "put your hands up." Pacheco stated that about three weeks ago Ayon asked her if she could get him a gun or if she knew anyone who could get one because he wanted to kill himself. He told her that if the police came he could act like he had a gun so they would shoot him. Officer Daniel Giles told investigators that when he responded to 2223 Irving Street to assist other officers with the family members after the shots were fired, Shauntae Pacheco told him that her father had told her that if the police ever tried to get him "they would have to kill him."

Rocky Valdez, who is Shauntae's husband and Ayon's son-in-law, told investigators that when officers knocked on the front door he was in the kitchen getting a beer. Ayon, who was upstairs, asked who was at the door. Ayon asked him to help him hide in the "cubby hole." Valdez said he did not want to help him, so he walked back into the living room. When the officers entered the house they handcuffed him. He said he later heard officers shouting commands and then heard two gunshots. Valdez also told investigators that Ayon, in recent conversations, had told him if "bounty hunters" came to the house they should not be allowed in and that he would hide in the hole. Ayon told him if the police came they could come in and he would hide in the hole. Valdez said Ayon told him three or four times that he did not want to go to prison and wouldn't be taken alive. Ayon said he would act like he had a gun so the police would shoot him, because he wanted to die.

After Ayon's condition stabilized, Detective Randal Denison attempted to interview him at the hospital. When asked if he wished to talk about what had happened, Ayon stated, "I better not." As he was advising him of his rights, Detective Denison told him he did not have to talk to him and asked Ayon if that was his wish. Ayon responded "yes." Detective Denison did not ask any further questions, but Ayon stated, "I should have just gone willingly." Detective Denison left his business card and cell phone number in the event Ayon wanted to make a statement. To this point, Ayon has elected to make no statement.

In accordance with protocol, on December 3, 2006, at 12:11 a.m., Sergeant Valencia's weapon was collected in the Denver Police Crime Lab. His service weapon is a Sig Sauer P220 .45 caliber semi-automatic pistol with a 7-round magazine. At the time of the shooting, Sergeant Valencia was carrying the pistol with 7 rounds in the magazine and 1 round chambered. When checked by Crime Lab personnel there were 6 live rounds in the weapon.

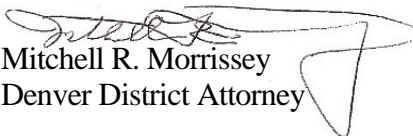
Based on the totality of the facts developed in this investigation, the shots fired by Sergeant Valencia were not criminal conduct under C.R.S. 18-1-707. We could not prove beyond a reasonable doubt that it was unreasonable for Sergeant Valencia to perceive that Ayon's conduct posed an imminent threat to Corporal Parton and him when he fired the two shots. In fact, the evidence developed in the investigation supports a finding that Ayon's conduct was an intentional effort to get

the officers to shoot him. Therefore, no criminal charges are fileable and provable against the officer in the wounding of Ayon.

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.”*** Other events that have occurred during the past month, that have nothing to do with this officer-involved shooting, have slightly delayed the release of this letter. The facts and decision are sufficiently clear in this case that this letter can be released at this time. 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.

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 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.

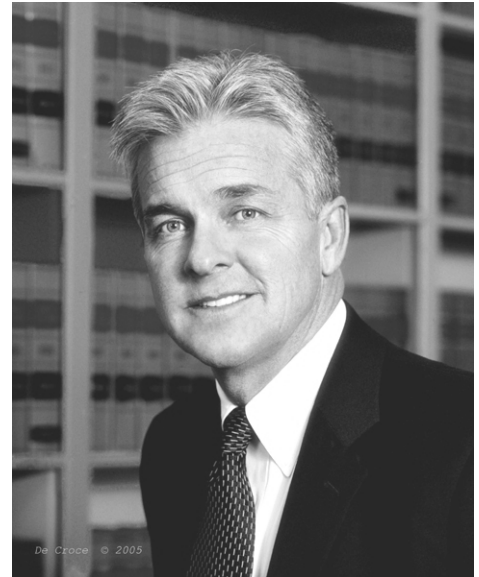
Very truly yours,

  
Mitchell R. Morrissey  
Denver District Attorney

cc: Sergeant Larry Valencia; Marc Colin, Attorney at Law; John W. Hickenlooper, Mayor; All City Council Members; Alvin J. LaCabe, Jr., Manager of Safety; Lawrence Manzanares, 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; Gregory LaBerge, Crime Lab Commander; David Quinones, Commander, District 1; Ron Thomas, Lieutenant; Pat Carver, Captain, Metro-SWAT; Pat Phelan, Lieutenant, Metro-SWAT; Frank Conner, Lieutenant, Metro-SWAT; John Burbach, Captain; Jon Priest, Lieutenant, Homicide; Jim Haney, Lieutenant; Detective Bruce Gibbs, Homicide; Detective Randal Denison, 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*

**T**he 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.<sup>2</sup> 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

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<sup>2</sup> 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.

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

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

#### THE COLORADO LAW

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

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

what he reasonably believes to be the use or imminent use of deadly physical force. Therefore, the question presented in most officer-involved shooting cases is whether, at the 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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