



DenverDA

Mitchell R. Morrissey, District Attorney - Second Judicial District

201 W. Colfax Avenue, Dept. 801, Denver, CO 80202

Bus. Phone: 720-913-9000
Fax: 720-913-9035

April 30, 2007

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

RE: Investigation of the wounding of Gustavo Cruz, 01/20/86, DPD #633640, by Officer Damon Bowser, #00075, on March 29, 2007, in the 4600 block of Lincoln, Denver, Colorado.

Dear Chief Whitman:

On March 29, 2007, at approximately 9:20 p.m., Officers Damon Bowser, 00075, and Chuck Porter, 95094, were on patrol in the area of 47th Avenue and Lincoln Street when their attention was drawn to a speeding 1996 red four door Saturn.¹ The vehicle was being driven by a person later identified as Gustavo Cruz. Rather than stopping when the officers turned on their overhead lights, Cruz attempted to elude the officers by speeding up. While attempting to turn onto Lincoln Street from 47th Avenue, Cruz lost control of the vehicle and drove over the curb through a chain-link fence and crashed into the front porch of the corner home at 4695 Lincoln Street.

Cruz immediately jumped out of the vehicle and fled on foot. He was the only occupant of the vehicle. Officer Bowser was driving the police vehicle. He exited the vehicle from the driver's door and pursued Cruz between the houses, then southbound down the alley. Officer Porter exited the passenger door and took a parallel route in an attempt to cut off Cruz. Cruz cut into an alley driveway behind 4661 Lincoln Street and quickly climbed over the fence into the backyard of 4653 Lincoln Street. Officer Bowser was in close pursuit and as he approached he saw Cruz in the backyard approximately 15 feet away. Cruz had stopped and turned to face Officer Bowser. He was pointing a semi-automatic pistol with a black grip and body and a silver slide directly at Officer Bowser. Officer Bowser drew his service pistol as he was still running and fired a shot as he moved to his right toward cover. As Officer Bowser sought cover Cruz tracked him holding the firearm in both hands with outstretched arms. Officer Bowser then fired a second shot at Cruz within a second. Cruz fell to the snow-covered ground. Officer Porter arrived immediately after the second shot was fired. Cruz got up and fled between houses toward Lincoln Street. Officer Porter was not in a position to see Cruz's

¹ The exact time the traffic stop was initiated is unknown because of delays by the officers in making notification to the police dispatcher during this incident.

actions at the time the shots were fired by Officer Bowser. Officer Bowser and Cruz are the only witnesses to the final frames of the shooting.

Officers Bowser and Porter first independently searched for Cruz and then searched together without success. At approximately midnight, Cruz walked into the Fitzsimmons Medical Center. He was brought to the hospital by his parents. He had a single gunshot wound that entered above the buttocks on his back left side and traveled laterally exiting near the mid-line of his left hip area. Cruz gave a false name (Juan Campos) and said he had been shot near Colfax Avenue and Peoria Street. Cruz was later transferred to University Hospital. He was interviewed by Detective Aaron Lopez. During this interview, Cruz admitted to his true identity and that he was shot by the police. Cruz denied that he ever had a gun. However, he stated that there was a BB-gun in the trunk of the crashed vehicle he was driving. Cruz described the gun as being “small, black, and looking like an automatic.” On March 30, 2007, at 1:15 p.m. homicide Detectives Tyrone Campbell and Troy Bisgard executed a search warrant on the vehicle. A thorough search of the vehicle resulted in no BB-gun being found. The search did, however, result in the recovery of a box of ten CO² cartridges in the glove box that are used with BB-gun weapons.

On March 31, 2007, Detectives Aaron Lopez and Maria T. Garcia conducted a video-recorded interview with Cruz at Denver Police Headquarters. Cruz admitted that he was using cocaine on the night he was shot. He said he snorted two lines of cocaine at about 9:00 p.m. (21:00 hours) that night at work. This was approximately 20 minutes before the police contacted him. He was on break from work when the police tried to stop him. Cruz said the reason he fled was because he was afraid and was not supposed to be driving. He thought he could out run the police. He continued to deny that he pointed a handgun at the officers. After being shot he said he ran and hid in the same alley about three houses away. He hid for about 20 minutes and was aware police were looking for him. Cruz said when he uses cocaine he gets scared and his girlfriend says he becomes paranoid and angry. He stated he gave a false name at the hospital because he doesn't have insurance and the police were looking for him. He continued to claim that the BB-gun was in the trunk of the vehicle. He said it was hidden behind some carpeting. On April 2, 2007, at 11:15 a.m. homicide Detective Tyrone Campbell conducted a second search of the vehicle and once again no BB-gun was found in the trunk or in any other part of the vehicle.

In accordance with protocol, on March 30, 2007, at 1:00 a.m. Officer Bowser's weapon was collected in the Denver Police Crime Lab. His service weapon is a .45 caliber Glock model 21 semi-automatic pistol. At the time of the shooting, Officer Bowser was carrying the pistol with 13 rounds in the magazine and 1 round chambered. When checked by Crime Lab personnel there were 12 live rounds in the weapon. This is consistent with 2 shots being fired during this encounter.

Investigators recovered two Speer .45 caliber shell casings at the location Officer Bowser fired the two shots at Cruz. Subsequent testing confirmed these two shell casings were fired from Officer Bowser's service pistol. A spent bullet was recovered on the south side of 4653 Lincoln Street by the wood fence. A second spent bullet with suspected blood on it was recovered on the sidewalk in front of 4651 Lincoln Street. The bullets were determined to be consistent in class and manufacturing characteristics with the ammunition used by Officer Bowser, but could not be positively identified as being fired from his service pistol. The test results combined with circumstantial evidence suggests both bullets were fired from Officer Bowser's service pistol. Investigators believe the second bullet is the bullet that caused the wound to Cruz and that it fell from his clothing as he was fleeing.

In accordance with protocol, Officer Damon Bowser was sequestered at Denver Police Department headquarters after the shooting until he gave his voluntary sworn videotaped statement to investigators. The following is a summary of his statement.

Officer Bowser stated he is assigned to the Gang Bureau and was working in uniform. He and his partner, Officer Chuck Porter, saw a vehicle speeding and driving far too fast for the snow and ice conditions on 47th Avenue. He attempted to catch up to the vehicle and when he got within about 2 blocks of the vehicle he turned on his overhead lights. Rather than pulling over, the vehicle sped up. The vehicle was going too fast to make the turn onto Lincoln Street and crashed into the corner house at 4695 Lincoln Street. The driver (hereafter "Cruz") ran between the corner house and second house into the alley. Cruz then ran southbound in the alley with Officer Bowser closing distance on him. He was approximately 30 feet behind Cruz and Officer Porter was 40 to 50 feet behind Officer Bowser. He could not tell if Cruz had anything in his hands during the foot pursuit. He stated officers are trained that hands are the primary focus in these circumstances when they have not had an opportunity to do a pat-down for weapons. Cruz had a white hooded sweatshirt pulled tight around his head and he could not see his face. He repeatedly identified himself as "Police" and commanded Cruz to "Stop" and "Get on the ground." Cruz cut into an area by a garage into a backyard. He said he did not call in the vehicle or foot pursuit to the police dispatcher and did not know if Officer Porter did so (Officer Porter did not.). He said he was yelling verbal commands at Cruz during the foot pursuit. He said he was concerned with keeping Cruz in constant sight and was trying to anticipate where he was going to go. As Cruz turned into the backyard he lost sight of him momentarily. He quickly pried the area to keep from exposing himself to danger in the event Cruz was armed. He heard something clatter on the ground and thought Cruz may have dropped a weapon. He looked down quickly but did not see anything. He was still running but was trying to slow himself a little.

Officer Bowser said he saw Cruz climbing over the fence between the houses. He could see Cruz's hands on top of the fence as he was climbing over it. He saw Cruz drop to the ground on both feet "like a broad jumper." He thought Cruz was exhausted because Cruz was crouched down with his hands on his waistband. He was still moving toward Cruz on the opposite side of fence. Officer Bowser was in an awkward and vulnerable position. He saw Cruz spin to the right and square directly at him. Cruz was pointing a semi-automatic pistol with a black grip and body and silver slide at him. Cruz was holding the gun in both hands with his arms outstretched. He yelled at Cruz, "Don't do it!" He said he was terrified and his first reaction was to try to move to cover. As he began to do so, he saw Cruz was tracking him with the gun. He said he was "waiting for the bang." This all happened within about a second. He drew his service pistol while moving southeast toward cover. He said he was 100% positive Cruz was intent on killing him because of his tracking conduct. Officer Bowser fired one round. He was in a position higher than Cruz and was firing at a downward angle while trying to get to cover. After the first shot was fired, Cruz moved from his stance by turning to his left as he held the gun in his right hand with

his arm outstretched aiming the gun back at Officer Bowser.² Officer Bowser fired a second shot. Cruz stumbled forward and hit the fence. He saw the gun fall to the snow-covered ground. He believed Cruz was now trying to flee and was no longer a direct threat. Officer Bowser holstered his weapon. Cruz got up and ran directly eastbound between the houses toward Lincoln Street.

Officer Bowser concluded he should not go through the “fatal funnel” created by the houses because he would have no where to go if Cruz turned on him. He said he had reached the point where he wanted to slow things down. He reached for his police radio and it was gone. He realized it was his radio that made the “clatter” noise in the alley during the foot pursuit. He said his first concern was that other officers would be coming in and they needed to be warned that an armed suspect was at large in the area. He said he assumed Officer Porter had aired the incident. He said Officer Porter was looking at him and had his (Officer Porter’s) radio in his hand. He said Officer Porter appeared to be calm and composed and was talking on the radio. He said he did not get on the radio in order to keep the “air open.”

He saw a very large man in the front yard across Lincoln Street who gave him a very curious look. He approached the man, who stated, “Hispanic male—white hood—he ran down to the green and white house and jumped the fence—fell on his ass—went into the alley.” Officer Bowser yelled at Officer Porter who was on the police radio “just doing stuff.” Officer Bowser said at the time of the encounter he did not know if Cruz fired at him. After the shooting he checked himself for any injury before re-engaging Cruz. He does not now (at the time he was giving the statement) believe Cruz fired at him.

Officer Bowser said that after a few minutes Officer Porter and he had cleared the north half of the block. In the process he found a .45 caliber spent bullet in the center of the sidewalk in front of 4651 Lincoln Street. He had also gone to the location the witness told him Cruz had gone and he found two footprints on the retaining wall by the green and white house. There was also blood on the fence at that location.

Officer Bowser said he did not make any calls to the police dispatcher concerning the incident. He said it is his practice to get on the radio after he has stabilized the situation he is in. He said he would immediately call the dispatcher if there were a shooting. He said that would be the appropriate thing to do. He said he saw Officer Porter on the police radio and saw him go back to their police car. He believed Officer Porter was keying his shoulder mic and talking. He did not hear what Officer Porter was saying on the police radio. He said he assumed Officer Porter was making the appropriate calls and notifications.

² Cruz’s body position, as described by Officer Bowser, is consistent with the wound sustained by him. This supports a conclusion that the second shot fired by Officer Bowser caused the wound to Cruz.

In accordance with protocol, Officer Chuck Porter was sequestered after the shooting until he gave his voluntary sworn videotaped statement to investigators. The following is a summary of his statement.

Officer Porter stated he saw a vehicle traveling westbound on 47th Avenue at a high rate of speed with no lights on. The vehicle was not stopping at stop signs. His partner, Officer Bowser, was driving and initiated an attempt traffic stop by turning on the overhead lights. The suspect (hereafter "Cruz") did not pull over. Officer Porter said Cruz was a couple of blocks ahead of the officers and was not going to stop. At 47th Avenue and Lincoln Street, Cruz was going too fast when he attempted to turn southbound onto Lincoln Street. He skidded out of control, jumped over the curb, went through the front-yard fence, and crashed into the corner house. He said the crash occurred within approximately 30 seconds of the overhead lights being activated.

Cruz was the driver and only person in the vehicle. Cruz quickly ran from the vehicle to the south through the front yard, then ran west down the side of the house to the back alley. Officer Porter immediately exited his police vehicle which had stopped just short of the curb. Officer Porter ran on the other side of the corner house to the alley in the event Cruz were to turn north in the alley. He was attempting to parallel Cruz's path of escape. When he reached the alley, he could see Cruz running southbound in the alley with Officer Bowser in pursuit. He yelled to tell Officer Bowser that he was right behind him. A few houses down the alley he saw both of them turn into an opening by a driveway. He estimated Bowser was 30 or 35 feet behind Cruz. He said he heard Officer Bowser yell something and then heard two gunshots less than a second apart. As he drew his service pistol and turned into the area he saw Officer Bowser standing by the corner of a garage with his gun pointed at Cruz who was lying on the snow-covered ground by the fence in the backyard of 4653 Lincoln Street. He said there was a small cement pad in back of the house with a utility type trailer parked on it. Officer Bowser was standing near the trailer. He could clearly see Cruz on the ground wearing a "white hoodie." He could not see his hands at this time. Officer Porter said he never saw a gun during the incident but there were few opportunities where he could have seen one. Cruz was lying face down with his head up. He thought Cruz had probably been hit because he was lying on the ground. Cruz quickly pushed himself back up to his feet and ran eastbound between the houses toward Lincoln Street. He asked Officer Bowser if he was alright and received a "yes" response. Officer Porter then paralleled Cruz's flight path by running on the opposite side of the house toward Lincoln Street. When he looked to the south he did not see Cruz. Although he had not been told so at the time, he assumed Cruz was armed with a gun. He went to the south looking for any clues of where Cruz may have gone. He then went back and met up with Officer Bowser. In a brief exchange Officer Bowser told him that Cruz had a gun and pointed it at him. Officer Bowser said he shot at Cruz. The officers again began looking for Cruz. They slowed things down. As they searched they listened for sounds or looked for other evidence of his whereabouts. He does not know how long they searched for Cruz. Until they finished

this two-officer search for Cruz, he made no radio or telephone calls concerning the vehicle or foot pursuits and notified no one the shots had been fired.

Officer Porter said that after the second search he called the police dispatcher and reported a “one car” accident. He then made a “direct connect” Nextel call to his supervisor, Sergeant Carroll, requesting that he respond to their location. He did not inform the police dispatcher or Sergeant Kevin Carroll that shots had been fired. He said he does not know why he failed to do so.

Officer Porter said he found two shell casings in the area where Officer Bowser fired the shots. While searching for Cruz, he found a mushroomed bullet lying on the front sidewalk by 4651 Lincoln Street. At the time it did not make sense to him how it got there because it would have had to travel through the house to end up in that position.³

In a second interview with Officer Porter he indicated in pertinent part that prior to his initial search for Cruz he did not have a planning discussion with Officer Bowser. His search lasted minutes, but he did not know exactly how long. He estimated it was 5 or 6 minutes. He said he was concerned Cruz had a gun and wanted to act quickly to find him. He said he was not thinking at all about getting more officers in there because Officer Bowser and he feel comfortable in each other “that we can get the bad guy.” When he and Officer Bowser, who had also been searching for Cruz, got back together in front of the house next to the shooting scene, they searched together by retracing the shoe prints in the snow where Cruz was last seen. It was after this additional searching that he first radioed the police dispatcher. He reported that “we’re out at 4600 block of Lincoln Street on a one car.” He did not say that shots had been fired. He attributes this communication failure to “stress overload.” He stated, “I don’t have an excuse or good explanation why we did what we did—I may have some stress overload—it should have been handled in a different manner.”⁴ He also stated that the only thing he could think of is that they had searched enough to know Cruz was no longer there and was not waiting in ambush.⁵ He believed Cruz had fled the area and was gone. He said he made no call to set up a perimeter because “I thought we could find him.” He indicated that immediately after the call to the police dispatcher, he used his Nextel to make a direct connect call to Sergeant Carroll. He said he told Sergeant Carroll that “we need you down here” and “we have shots fired.”⁶

³ Investigators believe the bullet dropped out of Cruz’s clothing when he was fleeing.

⁴ This is a positive indicator that there will be no recurrence of this conduct by Officer Porter. At the time of his second statement, Officer Porter clearly acknowledged the error that was made in the aftermath of the shooting. This, of course, does not excuse the conduct, but it certainly represents professional response by him.

⁵ In his statement to investigators, Cruz stated he was hiding a few houses from the shooting scene. Therefore, if he was armed he could have ambushed someone.

⁶ Based on Sergeant Carroll’s statement and the sequence of the DPD call records it appears that a first call from Officer Porter asked Sergeant Carroll to respond and a second call informed Sergeant Carroll that shots had been fired. It should be noted that the nature of a “direct connect” Nextel communication is somewhat different than a traditional telephone call. It is a “walkie-talkie” type communication where each transmission is keyed by the speaker. The discussion is more fragmented than with a traditional telephone call where there is a seamless back-and-forth conversation.

The following is a summary of the two statements made to investigators by Sergeant Kevin Carroll on March 30 and April 5, 2007.

Sergeant Carroll stated that he heard a radio transmission to the police dispatcher by Officer Chuck Porter (TAC 44) indicating there had been a “single car accident.” This is the first notice Sergeant Carroll had of the incident. Shortly after that call, Officer Porter called him on his Nextel phone and stated, “We need you up here.” Officer Porter did not say anything regarding shots being fired. Sergeant Carroll started to respond to his location. He said that Officer Porter called back while he was on the way and said shots had been fired by Officer Damon Bowser and that no one was hurt. He estimated this call came one to two minutes after the first call. Sergeant Carroll then got on “Dispatch 2” and indicated that an officer had fired shots during the incident.

In response to questions, Sergeant Carroll indicated that it was unusual that an officer would call in an accident to police dispatch and not say anything about shots being fired—if the shots had already been fired. He said it was not a normal practice for the Denver Police Department to delay such a notification. He also stated it was not a standard practice for Gang Bureau officers. He said his Gang officers were on Channel 2, so they would have known he was on that channel. As to the Nextel call, he said it was not unusual to be called on his Nextel phone.

When he arrived at the scene he thought they had a suspect in custody. When he determined that was not the case, he got a description of the suspect and aired it. Officer Bowser was looking for the gun in the area of the snow where the party had fallen after the shots were fired. He had asked Officer Bowser where he had last seen the gun. The officers updated him on what had happened. He called in additional District 2 officers to protect the scene. They then started walking down the front sidewalk and Officer Bowser showed him the bullet on the sidewalk and then showed him some blood on a fence. At this point he called to let the Dispatcher know the suspect was probably shot.

In the second interview on April 5, 2007, Sergeant Carroll stated when there is a foot chase and shots are fired you want to get the description of the suspect to other officers quickly for officer safety reasons. He said there have been several conversations about this since the incident—to individual officers and at roll calls reinforcing the need to make immediate notifications under these circumstances. He said officers are trained to make such notifications and “you have to call that out.” He said there are a lot of questions to be answered about not calling it out. He said he is not surprised that questions are being asked about the timing of the call to dispatch.

The pertinent entries from the police dispatch tapes and CAD records for March 29, 2007 indicate the following activity. Note that other call activity occurred during these time frames.

RADIO TAPE		CAD (Computer Aided Dispatch)	
24-Hour Time (Hour:Minute:Second) Officer	Comment	24-Hour Time (Hour:Minute:Second) Officer	Comment
21:25 Porter (TAC 44)	One vehicle crash	21:25:44 Porter	1 car accident
21:30 Carroll (TAC 8)	Officer's fired shots – make the call outs	21:30:24 Carroll	TAC 8 backing up TAC 44
		21:32:32	Officers fired shots per TAC 8 ... Need call outs

Additional CAD dispatches of interest	
21:33:31 Dispatch	Per TAC 8 everybody is ok and nobody hit
21:44:36	Suspect is still at large
21:46:14	Suspect believed to be on foot EB (eastbound) from the location ... H/M 5'7" blk pants white hoodie
21:47:51	210A asked if the suspect was armed ... per TAC 8 it is most likely
21:48:50	No perimeter due to amount of time that has past per TAC 8
21:50:46	Per TAC 8 ...Officers involved in foot chase ... suspect turned and pointed a gun at officers ...officers fired at suspect
21:55:12	Spent shell casing found away from the scene ... blood on fence
21:57:42	Per TAC 8 ...it is most likely that the suspect has been hit
22:23:22	TAC 1 transporting Officer Bowser to HQ (headquarters)
22:23:39	TAC 8 transporting Officer Porter to HQ (headquarters)
22:40:34	Hospitals shared services advised to notify all hospitals any walk shootings

The "direct connect" calls on the Nextel phones do not produce a time stamped record. Therefore, a call time line cannot be established concerning those calls.

CONCLUSION

All Denver police officers receive extensive training related to every aspect of officer-involved shootings. The officers involved in this incident received the training. The training includes, among other things, the procedures and protocols to follow when an officer discharges his or her firearm. For a variety of reasons, *there should be immediate notification to the police dispatcher* so that appropriate notification can be aired to fellow officers to protect those officers and the community; to permit additional cover officers to respond to assist; to allow a perimeter to be established quickly to contain involved suspects; to provide for timely notification to other pertinent personnel, and to insure the integrity of the investigation that follows.⁷ Also, to the extent it is practicable, the involved officers should minimize their intrusion into the crime scene. When an officer fires shots at a suspect who is armed with a handgun and the suspect flees still armed with the handgun after the shooting, as is the case here according to the statement made by Officer Bowser, it is self apparent why immediate police radio notification to the police dispatcher is so critical.⁸ In fact, this notification reaction should be so instinctive to a police officer that it would seem to require a conscious decision to not do so. Even with no training—common sense and sound judgment would dictate this action. At a minimum, failure to do so places other officers and the community at risk.

⁷ There are a number of sections of the Denver Police Department Operations Manual that refer to the reporting requirement. Here are some of the references: **Sections 3.11:** “Any officer observing a police emergency or having it reported to them *shall immediately report the incident to the police dispatcher.*”

Sections 105.01 Use of Force Procedures: (1) DUTY TO REPORT: “Officers *shall immediately report* the circumstances of all resistances or incidents involving use of force to a supervisor or command officer. The supervisor or command officer shall ensure that all sections of the Denver Police Department Operations Manual and the Colorado Revised Statutes have been followed. (a) The Use of Force Report, DPD 12, related supervisory investigation and reports are required in any of the following circumstances: (1) An officer discharges a firearm other than in training or for bona fide recreational purposes.”

Section 105.03 Shooting By and/or of Police Officers: “(1) When a police officer fires a weapon as a result of contact with a person, whether or not that person is killed or wounded, the *dispatcher shall be immediately notified.* I-Call communication may be requested if officers wish to reduce the number of persons who may receive the broadcast information.”

Section 105.04 Discharge of Firearms: “(5) When an officer discharges a weapon for any reason and no one is injured or killed, or if it is unknown if a person is injured or killed, the *dispatcher will be notified immediately.* NOTE: if injury or death is involved, the procedure in OMS 105.03 is in effect.”

⁸ In this case, Officer Bowser’s police radio fell to the ground during the foot pursuit. He retrieved it a short time later and stated he believed Officer Porter had made the appropriate notifications. Officer Porter had his police radio at all times. He was the non-shooting officer and in the best position to call in the shooting. He made no notification to the police dispatcher or anyone else until several minutes after the shooting. When the call was finally made, he only reported the “one vehicle crash” and said nothing about the shots being fired. And, in his subsequent direct connect Nextel call to Sergeant Carroll he did not tell him that shots had been fired. He finally informed him of that critical fact in a second call. Sergeant Carroll then immediately advised the police dispatcher.

We are focusing on the delayed reporting issue because immediate reporting of these police actions is a critical core component to the integrity of the Officer-Involved Shooting protocol and non-compliance impacts the credibility of the officer(s) and by extension the department. Even in a totally justified police action, an unjustified delay in reporting can lead to allegations of an attempt to conceal the police action. And, even if there was no ill motive or intent, this is unacceptable conduct. It cuts at the very heart of the trust we place in our police officers.

In this case, Officer Bowser and Gustavo Cruz were the only witnesses to the final frames of the shooting. No other officer or citizen was eyewitness to the two shots fired by Officer Bowser. Officer Bowser stated Cruz was armed with a semi-automatic pistol and aimed it at him. Cruz denies being armed. The relative credibility of the accounts given by Cruz and Officer Bowser therefore become critical in assessing justification. Cruz's actions during this encounter bring his credibility into serious question. This would include Cruz's criminal conduct of fleeing in the vehicle, fleeing from the crashed vehicle on foot, and fleeing after the shots were fired; his giving false information to hospital personnel and law enforcement officers; and his statement that he had a BB-gun (handgun appearance), but stating it was in the trunk of the crashed vehicle and not in his possession at the time of the shooting. However, no such weapon was found in two thorough searches of the vehicle. This, of course, could logically lead to the conclusion he was armed with the gun during this encounter, as indicated by Officer Bowser. It is also significant to note that the description given by Officer Bowser of Cruz's body position at the time the second shot was fired is consistent with the wound sustained by Cruz. Cruz escaped and Officer Bowser was sequestered until he gave his video-taped statement at 2:45 a.m. on March 30, 2007. Officer Bowser would not have known the nature of Cruz's injury when he gave his statement. This also lends credibility to Officer Bowser's statement that Cruz was armed with a gun. Cruz described the BB-gun as being small, black, and looking like an automatic. The BB-gun has not been recovered. Again, Officer Bowser would have no knowledge about this description at the time he made his statement after being sequestered. Officer Bowser's description is very similar to Cruz's. Cruz, by his own admission, had snorted two lines of cocaine at work just prior to getting in the vehicle and driving under the influence of narcotics down 47th Avenue. And, he was not supposed to be operating a motor vehicle on our streets. This collection of facts would cause a reasonable person to question the veracity of any statement made by Cruz.

Based on the facts developed in this investigation, the after-shooting conduct of the officer(s) is called into question by their failure to follow Denver Police Department notification protocol. This conduct opens them up to questioning whether the delay in notifying the dispatcher was the result of an innocent lapse of judgment, a calculated delay because of concerns about the justification of their conduct related to the vehicle pursuit of Cruz and/or the shooting incident, or some other reason. At a minimum, the conduct casts a shadow over what the substantial weight of the evidence suggests was a justified police action.

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.

Based on the totality of the facts developed in this investigation we could not prove beyond a reasonable doubt that it was unreasonable for Officer Bowser to perceive that Cruz's conduct posed an imminent threat to Officer Bowser when he fired the two shots. Under the specific facts of this case, we would have to prove beyond a reasonable doubt, at a minimum, that Cruz did not, in fact, have a firearm and Officer Bowser knew so in order to make Officer Bowser's conduct unreasonable. Based on the totality of the facts developed in this investigation, we clearly could not do so. Therefore, no criminal charges are fileable and provable against the officer in the wounding of Cruz.

The attached document entitled *Officer-Involved Shooting Protocol 2007* is incorporated by this reference. The following pertinent statement is in that document: ***“In most officer-involved shootings the filing decision and release of the brief decision letter will occur within two-to-three weeks of the incident, unless circumstances of a case require more time. This more compressed time frame will allow the Denver Police Department administrative investigation to move forward more quickly.”*** In accordance with the protocol, the administrative and tactical aspects of the event will be addressed by the Manager of Safety and Chief of Police in their review and administrative decision letter.

In 2005, the City implemented a new Officer-Involved Shooting protocol. The Denver District Attorney's Office made a change in its protocol specifically to accommodate the City's new protocol with the **intent of cooperating with and assisting the City in speeding up the**

administrative investigation and review process.⁹ We have released our decision letters in compliance with the new protocol. The Officer-Involved Shooting decision letters of the Denver District Attorney are posted on our website at www.denverda.org.

The Denver District Attorney's Office has always believed that timely public access to the investigative file was one of the most important components of our Officer-Involved Shooting protocol. The City has a growing backlog of Officer-Involved Shooting cases in which administrative decision letters have not been released within the time frames contemplated by the City's new Officer-Involved Shooting protocol. Based on requests made by citizens in the fall of 2006, we opened two of those backlogged case files after we first sought to get the City to complete and release their administrative decision letters.¹⁰ We are still hopeful the City will be able to eliminate the backlog of cases before additional shootings add to the backlog.¹¹ **However, because we are approaching two years since the City's new protocol was put in place, we are at this time opening all the 2005 and 2006 Officer-Involved Shooting cases for in-person review at our office, even though the City has not released their administrative decision letters. Additionally, we have written a more extensive decision letter in this current case because of the anticipated delay from the City due to the backlog. And, in this current case we will open our Officer-Involved Shooting file for in-person review at our office on the earlier date of sixty (60) days from the date of this letter or when the City releases its administrative decision letter. We will continue to monitor the City's progress.¹² If sufficient progress has not been made by the time of the next officer-involved shooting, we will move away from the City's new protocol, which has significantly slowed the process of opening our case file, and return to our time-tested protocol that was endorsed by the Erickson Commission. Under that protocol the case file is open to in-person review at our office immediately after the release of the District Attorney's decision letter.¹³ We believe until the City's new protocol is functioning as intended it is in the best interest of the community for our office to make appropriate adjustments for the timely opening of the files.**

⁹ See attached memorandum dated October 28, 2005 and the Officer-Involved Shooting Protocol – 2005 with pertinent sections highlighted.

¹⁰ See attached letter. It should be noted that the individuals who made the request have never called or come to our office to review the files. The letter indicated the files would be available beginning November 1, 2006. Not surprisingly, they apparently were more interested in obtaining publicity than actually taking the time to review the investigations.

¹¹ See attached chart of letter release dates. Additional staff was hired by the Office of the Manager of Safety in September 2006 to address the backlog problem and bring the City in compliance with its protocol. (See attached letter – footnote 10) The first administrative letter was just released 7 months later on April 13, 2007. The Denver District Attorney's Office is a State agency and as such has no control or authority over any aspect of City government. Our concern is that the City's backlog of unfinished cases will never be eliminated or even reduced at this pace. Therefore, while the new protocol is well intended and may look good on paper, it has significant problems in execution. At this time it appears that either even more resources are needed or the current resources need to be more focused on this task. We are hopeful that with the first letter completed the turnaround time will accelerate.

¹² The first letter released under the City's new protocol provides the administrative depth of review and analysis we have been seeking from the City for many years. As we have said in the past, we commend Manager of Safety Alvin LaCabe for taking on this difficult challenge and for producing an excellent first administrative letter. The only problem is timeliness of release—the first letter was released 14 months after the shooting. We remain hopeful the City can eliminate the backlog and become current.

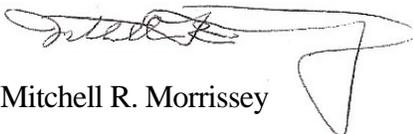
¹³ Of legal necessity the case file cannot be opened if criminal charges are pending against the shot party. If the shot party dies there is no such legal impediment.

We commend Chief Gerry Whitman, Division Chief Dave Fisher, Captain Mike Calo and other members of the Denver Police Department for their leadership in taking immediate action to address the delayed reporting issue to insure there is no recurrence. We also want to thank the officers of the Gang Bureau for their dedication to duty and their daily efforts to keep our community safe. They serve in a very difficult and dangerous assignment and we are thankful for the sacrifices they and their families make on our behalf. We also thank the Homicide Unit, the Crime Laboratory, and the other investigators for their professional work in completing a thorough investigation in a timely fashion.

Cruz has been charged with First Degree Assault to a Peace Officer. He is also being held on a Federal immigration hold.

The Denver Police Department is the custodian of records related to this case. As in every case we handle, any interested party may seek judicial review of our decision under C.R.S. 16-5-209.

Very truly yours,

A handwritten signature in black ink, appearing to read "Mitchell R. Morrissey", with a large, stylized flourish extending to the right.

Mitchell R. Morrissey

cc: Officer Damon Bowser; David Bruno, Attorney at Law; John W. Hickenlooper, Mayor; All City Council Members; Alvin J. LaCabe, Jr., Manager of Safety; Arlene Dykstra, Acting Denver City Attorney; Marco Vasquez, Deputy Chief; Michael Battista, Deputy Chief; Dan O'Hayre, Division Chief; Dave Fisher, Division Chief; David Quinones, Division Chief; Mary Beth Klee, Division Chief; Gregory LaBerge, Crime Lab Commander; John Burbach, Captain; Jon Priest, Lieutenant, Homicide; Jim Haney, Lieutenant; Detective Randy Stegman, Homicide; Detective Bruce Gibbs, Homicide; Captain Mike Calo, Gang Bureau; John Lamb, Commander, Civil Liability Bureau; Chuck Lepley, First Assistant District Attorney; Lamar Sims, Chief Deputy District Attorney; Doug Jackson, Chief Deputy District Attorney; Henry R. Reeve, General Counsel, Deputy District Attorney; Justice William Erickson, Chair, The Erickson Commission; Richard Rosenthal, Office of the Independent Monitor.

Officer-Involved Shootings - Letter Release Dates
Years 2005 and 2006

<i>Officer</i>	<i>Party Shot</i>	<i>Date of Incident</i>	<i>D.A. Letter Release</i>	<i>City Adm. Letter Release</i>
Corp. Michael Wyatt	Harrison Owens	5/25/05	(See Footnote 9)	No Letter
Off. Todd Gentry Off. Randy Parsons	Frankie Brabo	1/3/06	2/3/06	4/13/07 (14 months) (See Footnote 10)
Off. Jason Brake (et al. Seven Officers Fired Shots)	Lorenzo-Pasillas-Hernandez	3/19/06	4/11/06	No Letter
Off. Rick Nixon	Jimmy Orozco	4/20/06	5/5/06	No Letter
Off. Ricky Stern Off. James Medina Off. Andrew Richmond	Roberto Gonzales	5/6/06	5/12/06	No Letter
Off. Ryan Grothe Off. James Sewald Off. Derick Dominguez	Michael J. Ford	6/25/06	6/29/06	No Letter
Off. Larry Valentia	Daniel Ayon	12/2/06	1/10/07	No Letter

MITCHELL R. MORRISSEY
District Attorney

SECOND JUDICIAL DISTRICT



201 West Colfax Avenue
Dept. 801
Denver, CO 80202
720-913-9000
Fax 720-913-9035

State of Colorado

OFFICE OF THE DISTRICT ATTORNEY
DENVER

To: Whom it Concerns
From: Mitchell R. Morrissey
Re: Officer-Involved Shootings
Date: October 28, 2005

I am releasing the decision letter in the first officer-involved shooting to occur during my service as Denver District Attorney. In doing so, I want to add a few comments.

- Prior to being elected Denver District Attorney in November 2004, I served as a deputy district attorney and chief deputy district attorney for 22 years. I was one of 3 chief deputies selected by the District Attorney to handle officer-involved shootings with the District Attorney and First Assistant District Attorney. Prior to and since taking office, I have reviewed numerous cases. Because of this involvement I was very familiar with the protocol and issues related to officer-involved shootings prior to taking office.
- I had the good fortune to know in August of 2004 that I would become District Attorney in January 2005. During that time I observed the handling of the Officer Ranjan Ford—Frank Lobato (“Ford-Lobato”) officer-involved shooting case. This provided the opportunity to evaluate the use of the Denver Statutory Grand Jury in an officer-involved shooting case.
- I have also followed the administrative handling of the Ford-Lobato case by the Manager of Safety, Denver Police Department, and City government. Additionally, I have reviewed the very thorough letter released by the Manager of Safety at the conclusion of the administrative investigation and review.
- The delay in releasing this letter is the result of my ongoing evaluation of the process and a desire to release it in concert with the attachment to the decision letter. After evaluating the protocol that was in place when I took office, I am making the following changes which are discussed in more detail in the “*Officer-Involved Shooting Protocol 2005*” attachment:
 - In an effort to permit the Manager of Safety and Denver Police Department administrative investigation and review to begin sooner, in most cases I will make the **criminal filing decision within two-to-three weeks** of the shooting and will release a **brief decision letter** at that time, rather than a very detailed and time intensive letter.
 - In an effort to ensure the Manager of Safety and Denver Police Department administrative investigation and review is not impacted by the premature release of detailed facts, I will do the following:
 - Release a **brief decision letter** containing a **general description of the shooting**.
 - We will **not open the criminal-case file at the time our brief decision letter is released**. After the Manager of Safety has released his comprehensive letter, we will make our criminal-case 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 City is the Official Custodian of Records of the original criminal-case file and administrative-case file, not the Denver District Attorney.

MITCHELL R. MORRISSEY
District Attorney

SECOND JUDICIAL DISTRICT



201 West Colfax Avenue
Dept. 801
Denver, CO 80202
720-913-9000
Fax 720-913-9035

State of Colorado

OFFICE OF THE DISTRICT ATTORNEY
DENVER

September 7, 2006

Stephen Nash
Denver CopWatch
1276 S. Vallejo St.
Denver, CO 80223

Dear Mr. Nash:

We have received and reviewed your request, dated August 29, 2006, to inspect the police investigation files in the matters concerning Frankie Brabo and Harrison Owens. As you may already know, Mitch Morrissey issued shooting decision letters in the Brabo case on February 3, 2006, and in the Owens case on October 28, 2005. [These decision letters are available on the Denver DA website at http://www.denverda.org/News_Release/Officer-involved_shooting_investigations.htm]

Both the Brabo and Owens decision letters were written and released in accordance with the Denver District Attorney's Office - *Officer-Involved Shooting Protocol - 2005*. That protocol provides officer-involved shooting investigation files in the custody of the Denver DA's Office will be open for in person public inspection at our office after release of the *administrative* review letter by the Denver Manager of Public Safety (copy attached). The protocol was put in place as a result of the clear legislative intent and desire of the Denver Mayor and City Council in enacting new ordinances in 2005 that establish new procedures by the City in the *administrative* handling of all Denver officer-involved shootings. The new city ordinance structure was enacted after months of discussion and consideration by committees made up of representatives from throughout the community and Denver government officials. Although the Denver District Attorney's Office is a State agency independent of Denver city government, we participated in this process and have fully cooperated in the implementation of the desired changes. We have fulfilled all of our commitments under the protocol in each officer-involved shooting. The Denver District Attorney has no *administrative* authority or control over the Mayor, the City Council, the City Attorney, the Denver Police Department, the Office of Independent Monitor, the Citizen Oversight Board or any personnel of the city government.

In light of your request, we contacted Alvin LaCabe, Denver Manager of Safety, last week about the status of the *administrative* review in the Brabo and Owens cases. Mr. LaCabe said implementing the procedures to comply with the new ordinance has been a work in progress. He indicated this includes obtaining appropriate staffing levels. Mr. LaCabe has interviewed candidates and yesterday, September 6, 2006, hired a person who will have responsibility to assist him in completing the review of the Brabo and Owens matters, as well as other officer-involved shooting cases. This individual will

assume that position on September 18, 2006. Mr. LaCabe indicated that with the appropriate staffing in place he will work to eliminate the current backlog and bring the *administrative* review and letter release turnaround time in compliance with the intent of the ordinance. To that end, Mr. LaCabe also said, in view of your request to this office, he will prioritize the pending officer-involved shootings such that the two cases you have requested will be the first two *administrative* reviews he completes under the new city ordinance structure. He also indicated he expects to have these two reviews completed and letters released by November 1, 2006.

Our records in the Brabo and Owens matters will be available for your inspection on the earlier date of either November 1, 2006, or upon release of the administrative review letters by the Manager of Safety. Our records will be available to you for in person review at our office for each case, individually, as the corresponding *administrative* review letters are issued.

In pertinent part, the *Officer-Involved Shooting Protocol - 2005* states (The complete document is attached.):

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. 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.

Please feel free to contact me in the meanwhile if you have any questions.

Sincerely,

s/

Henry R. Reeve
General Counsel/Deputy District Attorney

cc: Alvin LaCabe, Esq., Denver Manager of Public Safety



OFFICER-INVOLVED SHOOTING PROTOCOL 2005



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.¹ As a result of the positive changes the Manager of Safety has now instituted and his personal involvement in the process, we will not open the criminal investigative file at the time our brief decision letter is released. Again, we are doing this to avoid in any way impacting the integrity and validity of the Manager of Safety and Denver Police Department ongoing administrative investigation and review. After the Manager of Safety has released his letter, we will make our file open for in-person review at our office by any person, if the City fails to open its criminal-case file for in-person review. The District Attorney copy of the criminal-case file will not, of course, contain any of the information developed during the administrative process. The City is the Official Custodian of Records of the original criminal-case file and administrative-case file, not the Denver District Attorney.

THE DECISION

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

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

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

¹ See the "Conclusion" statement in the "Decision Letter" in the December 31, 1997, shooting of Antonio Reyes-Rojas, where we first pointed out issues related to the importance of the Administrative review of officer-involved shootings. Subsequent letters continued to address this issue.

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.

Mitchell R. Morrissey

Denver District Attorney

CONTACT FOR INFORMATION

Chuck Lepley, First Assistant District Attorney, Denver District Attorney's Office, 201 West Colfax Avenue, Dept. 801, Denver, CO 80202 720-913-9018