



DenverDA

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May 10, 2007

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

RE: Investigation of the wounding of John Henry Balestrieri, dob 7/23/59, DPD#603892, by Officer John Akins, #01042, on May 8, 2007, at 25 East 16th Avenue (YMCA-Room 346), Denver, Colorado.

Dear Chief Whitman:

On May 8, 2007, at 5:05 p.m., Officer John Akins, car 663C, was dispatched to the Denver YMCA building at 25 East 16th Avenue to assist with a resident, later identified as John Henry Balestrieri, who was believed to be off his medications. He arrived at 5:07 p.m. The CAD (Computer Aided Dispatch) report indicates, "COMP NEEDS TO DO EVAL ON – JOHN BALESTRIERI – IN ROOM 348¹ – NOT TAKING MEDS FOR SCHIZO-AFFECTIVE DISORDER." Officer Ken Morrill (#04094), car 665C, responded as the secondary officer on the call and arrived at 5:10 p.m. Upon arrival, they met in the lobby with Frank Mann, a MHCD (Mental Health Center Denver) case manager, and Roz Simon, a clinical psychologist concerning John Henry Balestrieri. They are the individuals who requested assistance from the Denver Police Department. The officers' purpose for being there is to "keep the peace" and assist Mann and Simon with their needs. The officers asked the standard questions related to this type of call for assistance. They had both been on calls of this nature before, were familiar with the building, and Officer Akins was a trained C.I.T. officer.² Mann and Simon informed the officers that Balestrieri did not have a history of violence and they were unaware of him possessing any weapons. Mann and Simon were there because Balestrieri was off his medications and was exhibiting bizarre behavior. In response to the officers' question, they indicated that Balestrieri would be placed on mental health hold.

¹ This was the wrong room number. Balestrieri resided in room 346 which shares a common entry way with room 348.

² C.I.T. (Critical Incident Training) officers are trained to respond and assist on calls of this nature. Information about the C.I.T. program can be accessed through the Denver Police Department website.

Officers Akins and Morrill accompanied Mann and Simon to the 3rd floor of the YMCA building to Balestrieri's room 346. Mann knocked on the door and said "John—it's Frank (Mann)." There was no answer. Mann then tried the key he thought would open the door; it did not work. Mann then went to find another key, returned a short time later with the second key, and knocked on the door to room 346 again. "John—it's Frank—we need to talk to you." Officer Akins tried the key. Once again it did not open the lock. During this time there were a number of efforts to get Balestrieri to communicate and answer the door. Mann then went to retrieve a third key. This key also failed to open the lock. However, at this time they heard noises in the room as if things were falling down or dropping and they heard movement. They again attempted to engage Balestrieri in a conversation without success. They could see his shadow through the crack at the bottom of the door. He was moving back and forth and coming over to the door. They thought he might respond if they backed away into the outer hallway. They did so and Officer Akins again indicated to Balestrieri that he was with the Denver Police Department and was there to help him. Balestrieri whispered or mumbled something that at first they could not understand. Balestrieri then mumbled words to the effect that he didn't want to open the door because he didn't want to hurt them. They thought he said the voices in his head were telling him to kill us. Officer Akins told Balestrieri that they did not want to hurt him. They also told him that they were not going to go away until they could check his medical condition.

Officer Akins informed Mann, Simon, and the two Denver Health Medical Center paramedics who had arrived at the scene, Shannon Simpson and Steve Foster, that Balestrieri had not committed any law violations and the officers were not going to force the door unless there was a medical emergency reason to do so. After the others consulted, the officers were told that it was a medical emergency because if Balestrieri had come down off the medications it was a medically dangerous situation that could be fatal. The officers contacted their supervisor, Sergeant Benita Packard, car 660C, with this information, discussed the situation, and obtained permission to assist with a forced entry to check on Balestrieri's medical condition. The officers called for assistance from the Denver Fire Department to breach the door. They also requested an officer to respond with a less lethal force TASER to assist with the entry. It was 5:37 p.m. when Officer Bill Challans (#78009), car 661C, was dispatched to assist. While waiting for their arrival they continued to calmly attempt to get Balestrieri to open the door—without success.

When the firefighters and Officer Challans arrived a plan was discussed for making the entry. They again made calm verbal attempts to get Balestrieri to open the door. The individuals who knew the most about Balestrieri and his physical and mental health issues were becoming increasingly concerned about his welfare based on his behavior and the passage of time. It was now 5:48 p.m., approximately 40 minutes had passed from the officers arrival until the forced entry was made.

The firefighters had spoken with their Assistant Fire Chief at the scene and were prepared to assist the officers in gaining entry. Officer Akins had his service pistol drawn and Officer Challans had his TASER drawn to ensure the firefighters were protected in the event

Balestrieri became combative during the entry efforts. The firefighters initially experienced difficulty in “popping” the door open. It appeared that Balestrieri was applying resistance from inside the room. When the door was forced open a few inches, Officer Akins, who was positioned to the left side of the door, put his arm in the crack.³ The door was quickly pushed against his arm by Balestrieri. Officer Challans, armed with the TASER, was positioned to the right side of the door (the hinged side). The two officers were shoulder-to-shoulder in the doorway. Officer Morrill was behind them. Officer Challans had the TASER in his right hand pointed upward with his forearm against the door assisting Officer Akins in push the door open. When the door was forced open approximately two feet, Officer Akins could see the entire room, except behind the door. The door opened inward to the right up against the wall. Officer Akins knew Balestrieri was behind the door. In these brief moments, Officers Challans and Morrill continued to push against the door in an effort to keep Balestrieri pressed against the wall to control him. Officer Akins moved quickly past the end of the door and turned to face Balestrieri. The room is very constricted and Officer Akins could only separate himself about arms length from Balestrieri.

Officer Akins immediately realized Balestrieri had a knife in his right hand and a cigarette in the left. He quickly warned his partners that Balestrieri had a knife and repeatedly yelled at him to “drop the knife.” Balestrieri’s right arm was bent at the elbow and outstretched with the knife in hand. Officer Challans came past the end of the door in an instant after Officer Akins. He, too, saw the silver blade of the knife and the combative Balestrieri. Officer Morrill continued to try to keep pressure on the door to pin Balestrieri in place. Officer Challans was shoulder-to-shoulder with Officer Akins, an arms length from Balestrieri, in the tight cluttered area of a very small room.⁴ Officer Challans instantaneously moved slightly backward as he deployed a TASER shot.⁵ At almost the same time, Officer Akins, who believed the TASER shot was ineffective, because of the cycling sound he heard and Balestrieri was still coming up from arms length away with the knife, quickly tried to move backward as he fired a single gunshot. Balestrieri fell to the floor by the door. He initially curled up in a fetal position but

3 The plan was for the firefighters to immediately retreat after they had “popped” the door. This would permit the officers to make immediate entry and would also reduce the risk of injury to the firefighters.

4 See attached crime scene photos of the room.

5 The “TASER” is a less-lethal force, pistol-shaped weapon which fires two charged wires or leads a short distance (up to 21 feet). When an individual is struck by the probes an electrical charge temporarily immobilizes the individual. The devices are made by TASER International. We will refer to the weapon as a TASER, using the company name. The TASER is a less-lethal force option designed and deployed for use in *non-deadly force encounters*. When a party is armed with a firearm or edged weapon, the confrontation is immediately a potential deadly-force threat. This is one reason why it is tactically correct to have lethal force present to back up the less-lethal force TASER. There have been confrontations where the TASER has been successfully used against assailants with edged weapons, but the TASER is not specifically designed and intended for that type of encounter. While it is fortunate that on occasion under the right set of circumstances a TASER can be deployed to end an encounter without serious injury or death to anyone, there should be no expectation that a TASER will be used in confrontations with assailants armed with firearms and edged weapons. This is clearly stated in the Denver Police Department Operations Manual at “105.02 Less Lethal Force and Control Options.” This case is an example of the fact that in these quickly evolving, tense confrontations, the presence of a TASER guarantees neither a certainty that it will be able to be deployed nor that it will be successful if deployed. When this occurs it can create an increased vulnerability and risk to the officers’ safety.

then rapidly became combative. Officer Challans cycled the TASER and nothing was happening. At 5:49 p.m., while the confrontation was still in progress, Officer Morrill radioed the dispatcher that shots had been fired. Throughout these seconds the officers were telling Balestrieri to drop the knife, show them his hands, and get on his stomach. He complied with none of the commands. Balestrieri was yelling and assumed a “turtle-like position” on his back with his legs flailing at the officers. They could not see the knife. Balestrieri began kicking out with his feet at Officer Morrill. The officers could then see both his hands and he was no longer holding the knife. Officer Akins holstered his service pistol. Officer Morrill did not have his service pistol drawn during the confrontation due to his position and efforts to control Balestrieri with the pressure of the door.

Officer Challans ejected the TASER cartridge he had fired and loaded another into his TASER. The officers attempted to gain control of Balestrieri’s arms in order to handcuff him. Balestrieri continued to violently resist and struggle. The officers had lost sight of the knife. Officer Challans told his fellow officers to step back as he deployed a second TASER shot. Officers Akins and Challans were finally able to get him controlled and handcuffed. The officers estimated that from the time of making entry until Balestrieri was under control was 30 to 45 seconds. The officers then saw some blood on Balestrieri’s sweatshirt on the right side of the lower chest area. Officer Akins immediately went to the outer hallway and summoned the paramedics and firefighters. He told them Balestrieri had been shot. They responded and immediately extracted him to an ambulance and transported him to Denver Health Medical Center for treatment.

When Balestrieri was being taken out of the room, Officer Akins informed responding officers in the hallway that he had not been searched, they had not yet found the knife, and it could be in his clothing or on his person. When Officer Akins returned to the room an officer had located the knife in an area where there was a clutter of items on the floor.⁶

The following is a paraphrasing of the pertinent portions of Officer Akins’ videotaped statement concerning the final frames of the confrontation.⁷

Bill (Officer Challans) tased him ... I hear the shot and hear the cycling and see the probes ... the suspect steps forward with the knife up and out toward me ... I step back and fire a shot at him⁸ ... we are within 3 feet of the suspect ... small room ... no where to move ... knife was a foot and a half to two feet from me at the time I fire ... Bill is shoulder-to-shoulder with me ... he is mere inches from suspect ... suspect had moved toward me ... my attention was focused on the knife, not on his face ... I probably could not identify him if I saw him.

⁶ See attached crime-scene photographs and “to scale” photo of the knife.

⁷ Transcripts of the multiple videotaped statements are not available this quickly. This paraphrasing is from typed notes taken at the time the statement was being made by Officer Akins.

⁸ Officer Akins said he remembered his leg touching the end of the bed as he stepped back while firing the shot. See attached crime scene photo.

Officer Akins demonstrates ... (suspect with knife in his right hand held out in front stepping forward with knife moving upward from waist high to chest high) ... Bill tased him ... suspect starts down and then comes up toward me and I fire a round ... I saw it strike him ... he went back and slid down the wall to the floor ... when he hit the ground the TASER stopped cycling ... suspect was on his back like a turtle with his legs and feet flailing at us ... he still had the knife ... we were giving commands all the time to drop the knife ... Bill cycles the TASER again ... then I see his hands come up and he has no knife at this time ... we're telling him to come out from the wall ... get on your stomach ... put your hands behind your back ... he does not comply ... Bill keeps cycling the TASER ... Bill says look out ... we get back ... Bill tases him again ... hear the cycling again ... as soon as cycling stops ... we grab his arms and finally get his hands out ... I then handcuff him ... I go and get the EMTs ... they come in ...

The reason I fired is I thought he was going to stab me ... cut me ... or kill me ... also Bill didn't have his gun out ... if I got stabbed, Bill would not have any protection ... all he had was the TASER and it wasn't working ... I stopped firing because once he went down he was not as much of a threat ... even though he still had a knife in his hand ... his threat level was not as great as when he was standing ... once he was on his back we did not close the distance ... we slid back a little ... he would have to have a longer motion in order to stab me ...

The following is a paraphrasing of the pertinent portions of Officer Challans' videotaped statement concerning the final frames of the confrontation. Officer Challans, who is also C.I.T. trained, had heard the original call that dispatched Officers Akins and Morrill to cover the call for assistance.

Shortly after 5 p.m. officers were dispatched to assist mental health workers on a mentally disturbed individual ... about 30 minutes later ... 663C (Officer Akins) and 665 (Officer Morrill) called for a TASER ... I know the building from numerous calls there ... I responded ... Akins and Morrill had contacted Sergeant Benita Packard for approval to force entry ... they had tried 3 keys none of which worked ... the Fire Department was on the way ... we asked the case manager if he had any weapons ... no ... does he have a knife or gun ... he said "not to my knowledge" ... got everybody out of the entry area ... the plan was for firefighters to open the door ... then get them out of the way ... then we would go in and control the suspect.

The firefighters had trouble at first getting the door open ... the door did not want to give ... John (Officer Akins) could feel the guy holding the door when trying to make entry ... could see his shadow under the door ... they popped the door ... John was on the left and I'm on the right ... shoulder-to-shoulder ... I used my forearm against the door ... we were able to shove it open ... had the TASER in

my right hand up in the air with my forearm against the door ... suspect is pinned against the wall ... I'm worried he might have a gun ... Akins yelling drop the something ... first thing I see is the silver knife blade ... see knife waving around ... we are in arms length of each other ... Akins and I are shoulder-to-shoulder and we could reach out and touch the guy ... I thought he was going to attack Akins with the knife ... I didn't know if he was going to slash at us or stab at us ... when he brought the knife up⁹ ... I stepped back to tase him at that time ... I fired for his upper body ... as I stepped back for a better angle, I discharged the TASER ... I thought God that was loud ... he drops down to the floor and gets in a fetal position behind the door ... can't see his hands ... Akins is saying "drop the knife - drop the knife - let us see your hands" ... he still has the knife in his hand ... I tried to cycle the TASER¹⁰ ... three cycles ... I have had prior situations where the TASER has failed on me ... it cycled a couple times ... I was trying to make him a little weaker ... a little more compliant ... I think we must have fired simultaneously ... he starts to fight with us ... I'm holding down on the TASER trigger ... I see right to the left side of my face Akins' gun ... I asked Akins if he fired and he said he fired one shot ... we tried to pull him out and he started kicking and screaming ... we can't see his hands ... we ordered him to show his hands and get on his stomach ... I'm about to throw my TASER down and draw my gun ... TASER was not working ... we can't see the knife on the floor ... he is still fighting us ... so I ejected the TASER cartridge and put in another one ... he was still struggling and not complying ... so I fired another TASER deployment ... finally after the second TASER he rolled over on his stomach ... I grabbed one arm and Akins grabbed the other ... we cuffed him ... the EMT's (Denver Health Medical Center paramedics) came in and took him out ...

Suspect never complied ... very combative ... he never communicated with us other than trying to menace us with the knife ... after being shot ... I was surprised he was fighting with us ... he was making sounds like he was hurt but was still in a fighting mode ... we still could not find the knife immediately after cuffing him and we told the officers coming down the hallway to check him for the knife ... we went back in the room and found the knife on the floor.

The three officers who entered the room were dressed in full blue Denver Police Department uniforms with badge. Officer Akins was armed with his Colt .45 caliber semi-automatic service pistol. This weapon has a magazine capacity of eight (8) rounds and had an additional round in the chamber. It was fully loaded with Denver Police Department issue Speer

9 Officer Challans demonstrates the close proximity of the suspect and his movements during the final frames of the shooting. This is at 12:17 a.m. on the wall clock shown in the videotaped statement.

10 Officer Challans said once you deploy the TASER it will cycle for about 5 seconds. If the wires are still attached to the suspect and the suspect is still combative you can pull the trigger again and apply voltage again. Because of the suspect's continued struggling with the officers he didn't know if the wires were still working. He reloaded and fired again. It worked and they subdued the suspect. He said "no one took the prongs out of suspect—we don't do that. (DPD protocol requires medical personnel to remove the prongs that penetrate the skin.)"

.45 caliber ammunition. Officer Akins fired one (1) round during the confrontation. The single .45 caliber shell casing was recovered in the room by the Denver Crime Laboratory. Officer Challans was armed with his less lethal force TASER. Following the incident and in compliance with the protocols established for officer-involved shootings, the officers' weapons were given to Denver Police Crime Laboratory personnel for appropriate testing. Officer Morrill did not draw or discharge his service pistol.

Among other items, the Crime Laboratory personnel recovered the two TASER cartridges, the 4 probes, and the associated wires (leads). They also recovered the Balestrieri's knife.¹¹ Numerous prescription bottles were inventoried.

Frank Mann, Roz Simon, DHMC paramedics Shannon Simpson and Steve Foster, and Denver Firefighters Dwaine Davis, John Himmler, Joseph Walker, and Marc Wiederrich had all left the immediate area of the door after the two firefighters breached the door. The three Denver officers were the only eyewitnesses to the confrontation and shooting. Pursuant to the Officer-Involved Shooting Protocol, they were sequestered after the incident until they gave their voluntary sworn videotaped statements to investigators at Denver Police Headquarters. The eight individuals named above also provided videotaped statements. Their statements are consistent with the above recitation of facts.

John Henry Balestrieri suffered a single gunshot wound to the lower-right chest area. He is being treated at Denver Health Medical Center. A hold has been placed on him for investigation of First Degree Assault.

LEGAL ANALYSIS

Criminal liability is established in Colorado only if it is proved beyond a reasonable doubt that someone has committed all of the elements of an offense defined by Colorado statute, and it is proved beyond a reasonable doubt that the offense was committed without any statutorily-recognized justification or excuse. While knowingly or intentionally shooting another human being and causing injury or death is generally prohibited as assault or homicide in Colorado, the Criminal Code specifies certain circumstances in which the use of deadly physical force by a peace officer is justified. As the evidence establishes that Balestrieri was shot by Officer John Akins the determination of whether his conduct was criminal is primarily a question of legal justification.

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

- (2) A peace officer is justified in using deadly physical force upon another person ... only when **he reasonably believes that it is necessary:**
 - (a) **To defend himself or a third person** from what he reasonably believes to be the use or imminent use of deadly physical force;

¹¹ See attached crime scene photos.

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

(2)(e) “Deadly Weapon” means any of the following which in the manner it is used or intended to be used is capable of producing death or serious bodily injury: (I) A firearm, whether loaded or unloaded; (II) **A knife**; (III) A bludgeon; or (IV) Any other weapon, device, instrument, material, or substance, whether animate or inanimate.

Also pertinent to the facts and circumstances of this case is Section 18-3-202 (1)(e), Assault in the first degree, of the Colorado Revised Statutes, which reads as follows:

- (1) A person commits the crime of assault in the first degree if:
 - (e) **With intent to cause serious bodily injury** upon the person of a peace officer or firefighter, **he or she threatens with a deadly weapon a peace officer or firefighter engaged in the performance of his or her duties**, and the offender knows or reasonably should know that the victim is a peace officer or firefighter acting in the performance of his or her duties.

In reference to the pertinent section of the “Assault in the first degree” statute in which the victim is a peace officer, in *People v. Prante*, 177 Colo. 243, 493 P.2d 1083 (1972), the Colorado Supreme Court stated:

“The General Assembly recognizes that peace officers are placed in a position of great risk and responsibility, so to invoke a special punishment for an assault upon a peace officer acting in the scope of his official duties is neither arbitrary, capricious, nor unreasonable.”

Therefore, the question presented in this case is whether, at the instant Officer Akins fired the shot that wounded Balestrieri, he reasonably believed that Balestrieri was directing or was about to direct deadly physical force against him or another person. In order to establish criminal responsibility for an officer knowingly or intentionally causing the injury or death of another, the state must prove beyond a reasonable doubt that the officer doing the shooting either did not really believe in the existence of these requisite circumstances, or, if he did hold such belief, that belief was, in light of all available facts, unreasonable.

CONCLUSION

The officers were attempting to assist Frank Mann, Roz Simon, and paramedics in making a lawful entry to Balestrieri’s room to conduct a health and welfare check. Repeated efforts had been made spanning approximately 40 minutes to get Balestrieri to open his room door and permit a check of his health condition. Three separate efforts were made to locate a key to make entry without success. The officers had informed Mann, Roz, and the paramedics that Balestrieri had not violated any laws at that point and they would not make forced entry unless it was determined that there was a medical emergency that required immediate entry.

After those individuals consulted, the officers were informed that a medical emergency existed that required the immediate entry. The officers informed their supervising Sergeant who then authorized them to do so. The officers contacted the Denver Fire Department to assist in gaining entry. The firefighters obtained permission to assist from their Assistant Chief. The officers also requested an officer respond with a less lethal force TASER. They then discussed a plan to gain entry. Their clear intent was to gain entry and control Balestrieri so that he could be tended to by Mann, Roz, and the paramedics as needed. Those involved were professional throughout this incident and had the best interest of Balestrieri in mind.

There is no question Balestrieri knew they were police officers. They were dressed in full Denver Police uniforms and repeatedly indicated they were police officers. Once entry was made, he refused to comply with the repeated commands to drop the knife. The area where the shooting took place is, in a word, constricted. The armed threat developed so quickly that the officers had no opportunity to deescalate the confrontation or safely retreat.¹² The inherent risk of being in this close proximity to a non-compliant suspect armed with an edged weapon is self apparent.

The actions of the officers, even in the split second decision process required under these circumstances, reflect a clear intent on their part to attempt to avoid having to use deadly force. The officers and others present prior to entry used not only verbal CIT techniques in an effort to calm the suspect and gain compliance, but also attempted to use a less lethal force option. In spite of the inherent potential danger it presented to them in this deadly-force encounter, the officers attempted to use a TASER. With Balestrieri continuing to refuse to drop the knife, Officer Challans attempted to use less lethal force by deploying his TASER. As Officer Challans attempted to gain compliance with his TASER, instead of dropping the knife, Balestrieri quickly and aggressively thrust the knife toward the officers. Officer Akins fired a single shot at Balestrieri in response to this sudden, threatening action from close range by Balestrieri.

Officer Akins is commended for controlling his force response to a single shot under these life-threatening circumstances. He made the split-second decision to fire to protect himself and his fellow officers and made a second split-second decision to stop when the threat was at least temporarily diminished by Balestrieri falling to the ground. Officer Akins' weapon control more than likely increased Balestrieri's potential for survival.¹³


12 Colorado law does not require an officer to retreat from an attack rather than resorting to physical force. A peace officer is expected to take appropriate action to handle a situation and is authorized to use the reasonable and appropriate force necessary to overcome resistance. The degree of force required may be different in different situations. (*Boykin v. People*, 22 Colo. 496, 45 P. 419). This, of course, does not mean that an officer cannot retreat, if he or she chooses to do so. And, there are circumstances where that would be the best course of action.

13 This case is a good example of officers limiting the degree of force used to the minimum required to protect themselves and control the suspect. Once again the paramedics, doctors, nurses, and other personnel at the Denver Health Medical Center provided outstanding professional medical intervention in treating Balestrieri's single gunshot wound. He remains under their care at this writing.

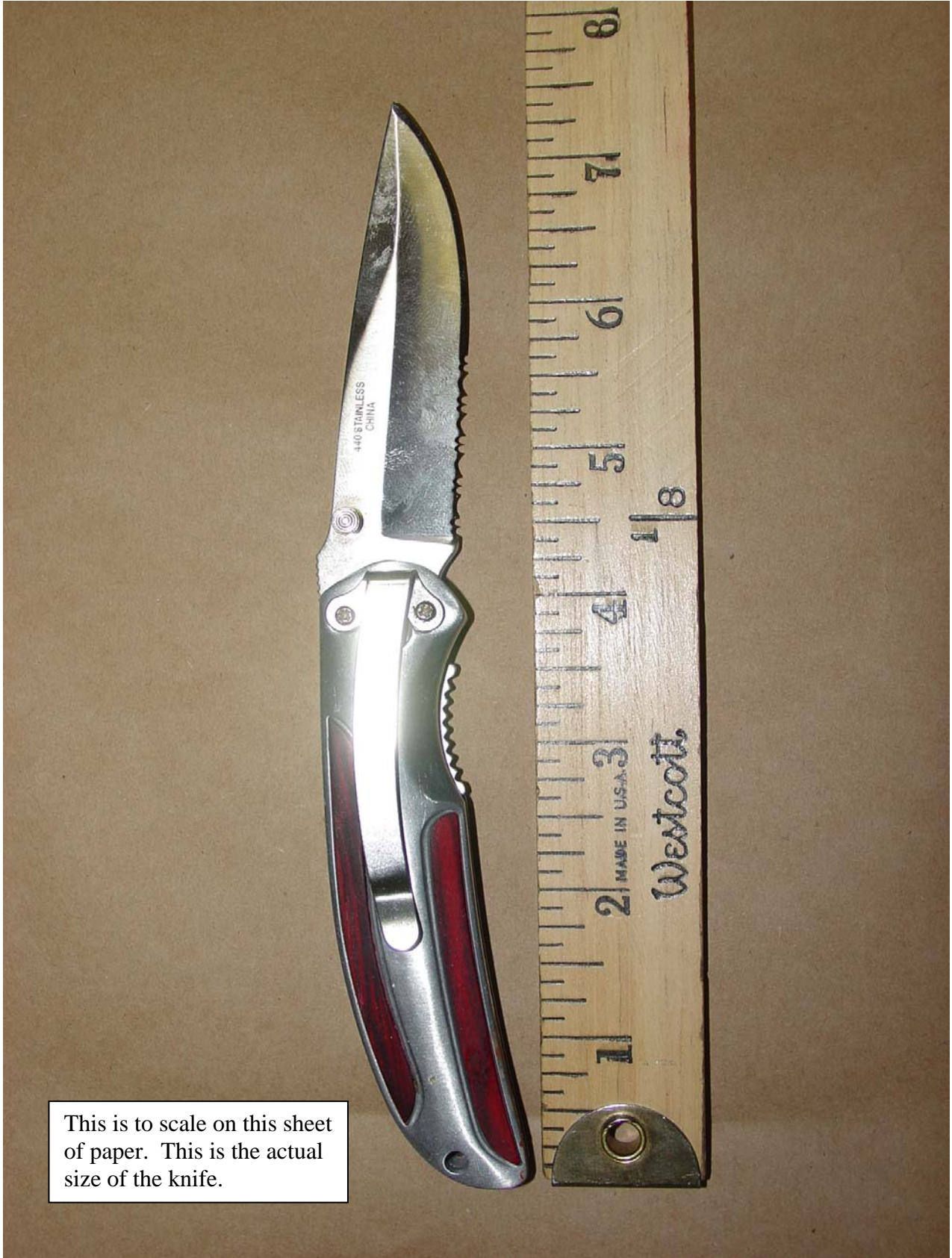
Under the facts of this case, we could not prove beyond a reasonable doubt that it was unreasonable for the officers to perceive that Balestrieri was an imminent deadly threat to them or the other officers present at the instant Officer Akins fired. To the contrary, the actions of Balestrieri reduced the officers' response options to the ones they employed. Therefore, no criminal charges are fileable against Officer Akins for his conduct in the wounding of Balestrieri.

As in every case we handle, any interested party may seek judicial review of our decision under C.R.S. 16-5-209.

Very truly yours,


Mitchell R. Morrissey
Denver District Attorney

cc: Officer John Akins; David Bruno, Attorney at Law; Sarah McCutcheon, 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; Deborah K. Dilley, Commander District 6; John Burbach, Captain; Jon Priest, Lieutenant, Homicide; Jim Haney, Lieutenant; Detective Randy Stegman, Homicide; Detective Bruce Gibbs, Homicide; 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.



This is to scale on this sheet of paper. This is the actual size of the knife.



Knife used by Balestrieri



Knife used by Balestrieri





Looking 4 directions using the TASER cartridge on the floor for reference. The room is approximately 10 feet by 13 feet. The floor tiles are one foot square.



The 2nd TASER cartridge.





Photo shows view from the outer main hallway into the entry way to:

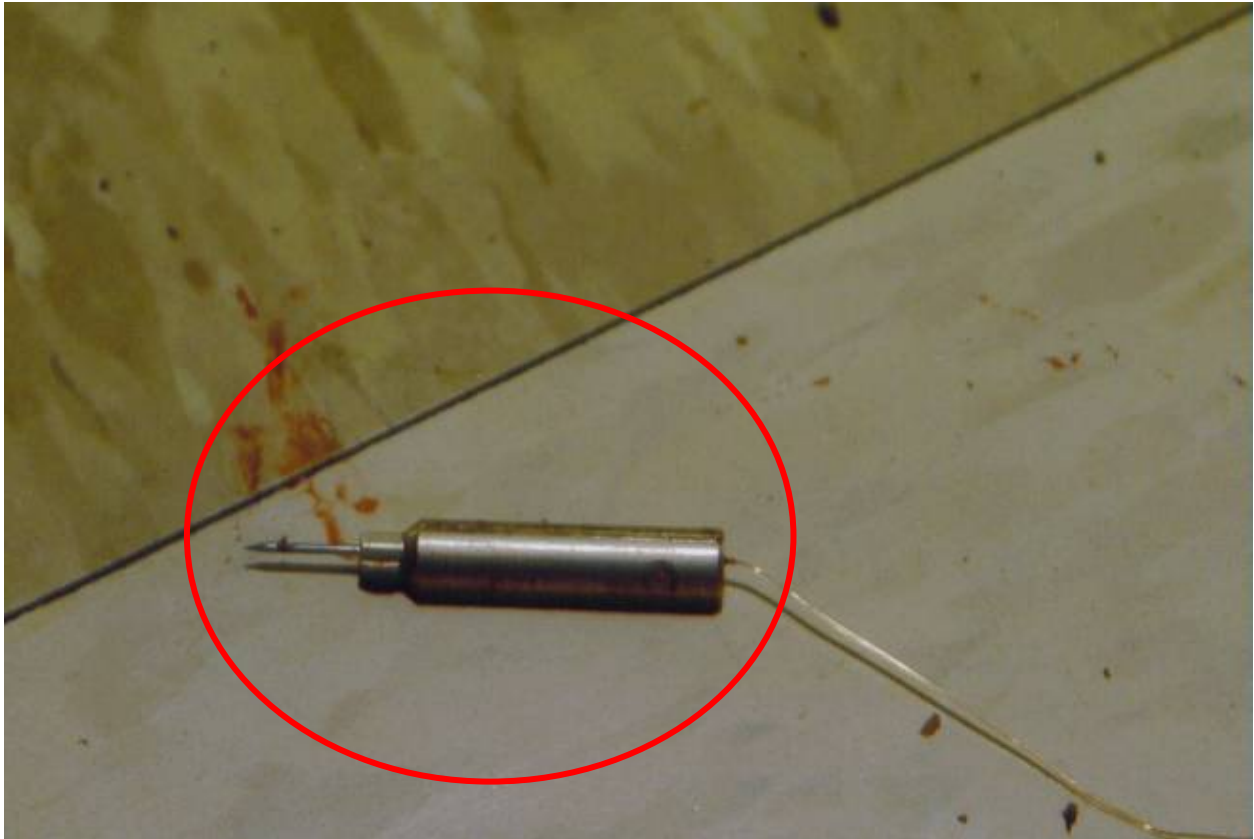
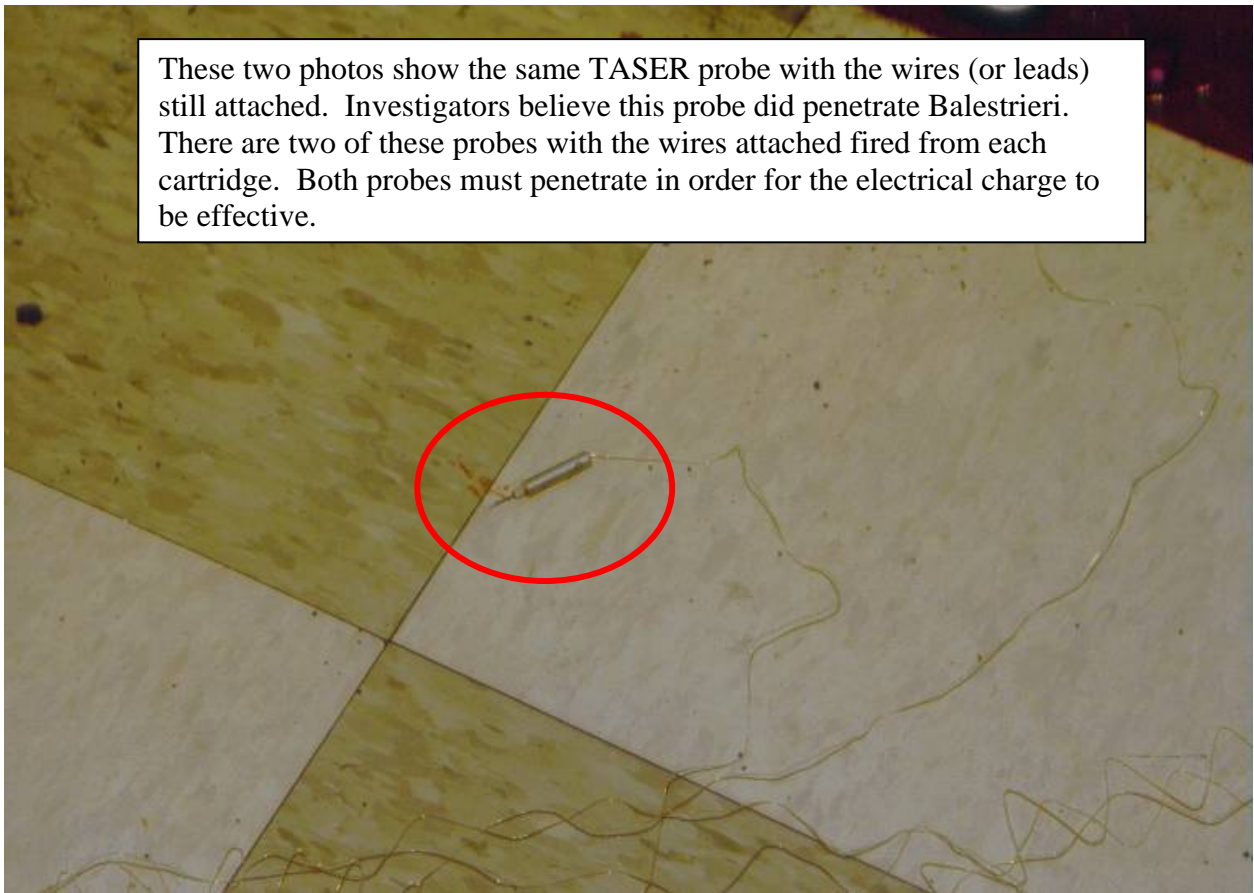
Room 348 on the right.

Balestrieri's room 346 with the door open. This is the door breached to gain entry.



Photo shows view from in the room looking out toward the outer main hallway. Room 348 is to the left.

These two photos show the same TASER probe with the wires (or leads) still attached. Investigators believe this probe did penetrate Balestrieri. There are two of these probes with the wires attached fired from each cartridge. Both probes must penetrate in order for the electrical charge to be effective.



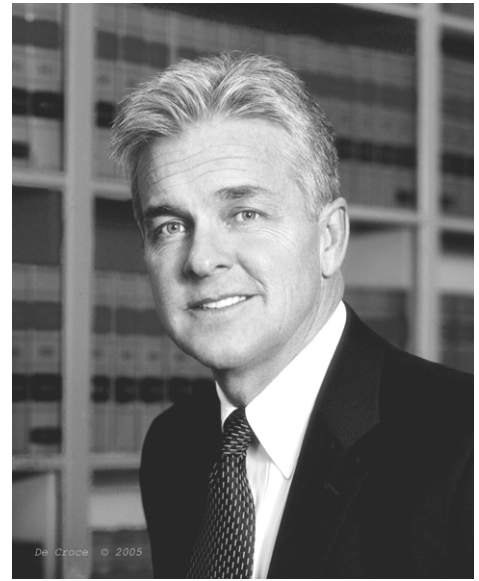
May 8, 2007



This TASER probe has material from Balestrieri's red sweatshirt in the area of the point. This probe may not have penetrated Balestrieri's body.



OFFICER-INVOLVED SHOOTING PROTOCOL 2007



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.¹⁴ 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 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

¹⁴ 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.

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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