



DenverDA

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May 17, 2007

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

RE: Investigation of the wounding of Ifioma Chinyere Abiakam, dob 2/22/86, by Officer Shawn Miller, #05134, on May 12, 2007, in the 1100 block of 29th Street, Denver, Colorado.

Dear Chief Whitman:

On May 12, 2007, at 8:37 p.m. officers were dispatched to 1170 29th Street on a report of a domestic violence and felony menacing. The victim, K.M. (9/23/80), called 911 after the suspect, Ifioma Chinyere Abiakam ("Abiakam") (2/22/86), entered her home without permission and attempted to stab her and her boyfriend M.J. with a "large" knife. M.J. (9/25/84), who has been residing with her at the 29th Street address, was able to intervene and get Abiakam out the front door and slam it shut. M.J. refers to Abiakam as "my baby's mama." Abiakam is his ex-girlfriend and the mother of their baby. M.J. and Abiakam had been arguing all day because of his relationship with K.M. Abiakam had also been calling K.M. making threatening remarks during the past two weeks. After being pushed out the door, Abiakam was yelling and pounding on the door for what M.J. estimated to be a minute, then left the scene in a white Chevy with someone else driving.

Officers Shawn Miller and Ryan Nunnally were just leaving Denver Police Headquarters after processing an individual they had arrested when they radioed that they were back in service and would respond on the call for assistance. Officer Dominic Arcuri, #85002, who was near to the 29th Street location when the call was aired, was already present when Officers Miller and Nunnally arrived. Officer Arcuri advised the two officers what he had learned from speaking with K.M. and M.J. in front of the residence. Officer Arcuri then left the scene.

Officers Miller and Nunnally were interviewing K.M. and M.J. to get additional information concerning the knife attack when K.M. spotted the same white Chevy at the intersection of Arapahoe and 29th Streets. The officers immediately moved quickly out to the

street to their patrol car to pursue the suspects. The white Chevy stopped, backed up, and turned to come down 29th Street. As the vehicle approached at a slow speed, the officers exited the patrol car and waved their flashlights to motion the driver to pull over to the curb. Both officers had drawn their service pistols because the call involved a deadly weapon attack. It was dusk, but the officers could see clearly into the vehicle. An African American female (Aviance Madison - 01/01/86) was driving, an African American male (Adebayo Turner – 4-15-83) was in the front passenger seat holding a baby, and an African American female (Ifioma Chinyere Abiakam) was in the back seat on the passenger side. M.J. was standing up toward the residence about 15 or 20 feet from the vehicle. Abiakam opened the back-seat door, started to get out, and then reached back in as if she were retrieving something. She then suddenly sprinted toward M.J. The officers saw a large knife with a silver blade in her right hand. It was initially held down to her side but was quickly raised in an over head stabbing position as she sprinted after the now fleeing M.J.

Both officers immediately began chasing Abiakam while continuously commanding her to “Stop” and “Drop the knife.” They could see that Abiakam was closing distance on M.J. This all happened in just a few seconds. Abiakam refused to stop or drop the knife. To the contrary, it appeared she was focused on catching and stabbing M.J. in the back. Officer Miller was paralleling Officer Nunnelly who was chasing directly behind Abiakam. Officer Miller was off to Officer Nunnelly’s left side. When Abiakam had closed dangerously close to M.J., Officer Miller fired a single shot at Abiakam. Officer Nunnelly said he was going to fire at exactly the same moment but held his fire because M.J. was in the line of fire on the other side of Abiakam.

Officer Miller’s single shot struck Abiakam near the waistline on her back left side. The officers could see the blood on her clothing. She continued to run but her pace slowed quickly from the effects of the gun-shot wound. She then went down in the street into a squatting position, like a baseball catcher. The officers could now see that she had two knives in her hands. She transferred the one in her left hand to her right hand, but still refused to drop them. From the beginning of the chase the officers continued to yell at her to “drop the knives.” Even after being shot she refused to do so. Officer Nunnelly approached Abiakam and used an inside kick with this right foot to Abiakam’s right hand dislodging the two knives which slid across the pavement.¹ Officer Miller then kicked them further away from Abiakam. The officers then handcuffed her and placed her on her side. It was now 8:48 p.m. Officer Miller radioed that a party had been shot by the officer. An ambulance was dispatched—CODE 10.

The following is a paraphrasing of the pertinent portions of Officer Shawn Miller’s videotaped statement.²

Officer Miller stated that he was working a two-person car with his partner Officer Ryan Nunnelly. They were just leaving headquarters when the call came out concerning a party with a knife at 1170 29th Street. This address is in there precinct, 621, so they radioed that they would cover the call.

¹ See attached photos of the two knives. The straight-blade 13 inch knife was held in Abiakam’s right hand during the attack. The 11 inch “Fillet” knife was in her left hand.

² 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 Miller.

We like to handle our calls in our area ... while on the way to the call we received additional information ... the woman with the knife had been harassing the female complainant all day by phone ... Officer Nick Arcuri called that he was on scene ... as we arrived I wasn't sure if it was the victim or the suspect outside the residence when we arrived ... it was a Code 9 response because it did not sound like a life was in danger at that time.

Our car was stopped facing northbound on 29th Street ... we contacted Officer Arcuri who was already there with the victim (identified as K.M.) ... he informed us that victim had said the woman came and entered the house ... had a large knife and had it up in a stabbing position ... it was her boyfriend's (M.J.) old girlfriend (Abiakam) ... when she came at the victim with the knife the boyfriend stepped in.

We asked the boyfriend to come down from up on the 2nd floor balcony ... he said his old girlfriend had arrived on scene early ... she was "wiggling out and being crazy" ... he was talking to her outside the house ... she suddenly ran into the house with the knife ... he got in between her and his current girlfriend ... we are out on the front porch area by the walkway talking to the victim and boyfriend when we see the white Chevy suspect car at the intersection of Arapahoe and 29th ... we started to run to our patrol car ... we were going to go after the suspect vehicle ... we are looking south down the 29th street ... they are saying "That's her—That's her" ... it looked like the car was going to take off ... we started to get in the patrol car ... I was driving ... before I put the car in drive I saw the car was coming down 29th Street toward us ... we are thinking she is going to come down and tell us her side of the story.

The car comes down toward us and pulls over on the east side of the street ... Officer Nunnely had not gotten into the patrol car because he saw the car coming down the street toward us ... they were driving nice and slow... three black adults and one child were in the car ... it was dusk ... light enough to see inside the car ... a Black female was driving ... a Black male was in the front seat ... I'm trying to figure out which one is the suspect ... I yelled back to the victim to have her tell us ... the occupants are starting to get out of the car ... the passenger is holding a baby ... Officer Nunnely went to make contact with him ... the woman in backseat stepped out of the vehicle ... before I could say anything she turned back into the car to reach for something ... her back was to me ... I couldn't really see what she was reaching for ... I was thinking she is just going to want to tell me her side of the story ... up to this point she was slow ... now she had a knife with a 10-inch blade in her hand ... before I could do anything she took off running ... I started to draw my gun ... she went right past me ... it happened so fast ... I knew when she passed me that she was going somewhere ...

Her actions surprised me because when they had pulled up everyone seemed calm and relaxed ... I just wanted to hear her side of the story ... her back was to me when she reached back into the car when she started to turn I saw a big knife probably 10-inches long ... I could have reached out and touched her when she ran by ... she was running toward the boyfriend ... it startled me ... I was yelling at her to “Drop the knife—Drop the knife” ... I remember Officer Nunnelly coming ... so I chased her ... she was closing the gap on the boyfriend ... she had the knife up over her head in a stabbing position (he demonstrates) ... she was running right at him ... she was so close to him and closing on him ... I’m thinking she is going to stab him ...he takes off running down the sidewalk ... she is chasing him ... she is closing the gap ... I’m behind her ... Officer Nunnelly is behind me somewhere ... I’m thinking she is going to stab the boyfriend ... I have my gun out ... if I don’t shoot her she is going to stab him ... I fired one shot to try to stop her ... I don’t want to kill her, but I want to stop her.

When I took the shot she was on the sidewalk ... I had an angle that I could shoot her and not hit the boyfriend ... she keeps going after being shot ... she was holding her back with her left hand (demonstrates it being around the waistline) ... I heard Officer Nunnelly yelling at her to “Drop the knife” ... she still had the knife ... we are still yelling for her to “Drop the knife” ... she finally kneels down in the street ... Officer Nunnelly goes over and kicks the knife out of her hand ... I got on the radio and said we have a party shot ... I’m trying to maintain the crime scene ... she never said one word to me and I don’t remember her saying anything the entire time ... If I had not shot her it looked like she could have just come right down on him ...it all happened so fast ...

In answer to specific questions by investigators, Officer Miller estimated it was only about 10 to 12 seconds from the time she exited the car with knife in hand until the single shot was fired. He said he fired the shot because he “didn’t have a choice—if I had not shot her she would have stabbed him.” He said he didn’t want to kill her ... he just wanted to stop her ... he shot her once ... he thought she was going to kill him ... then we held her at gunpoint until we could handcuff her and get her out of there.

He said he kicked the knives a little further away after Officer Nunnelly had kicked them out of her hand. He indicated he kept his gun out after the shooting to maintain control of the scene because they were still not certain of what threat others might be. Once they had enough officers cover in to the area he holstered his gun. The radio dispatcher confirmed that it was an officer-involved shooting. He remained by the suspect while waiting for cover and the ambulance to arrive.

The following is a paraphrasing of the pertinent portions of Officer Ryan Nunnelly videotaped statement. Officers Nunnelly and Miller were together until Abiakam returned to the scene and sprinted from the car in an effort to stab M.J.

Officer Nunnelly stated Officer Miller contacted the female victim (K.M.) who said a party attempted to stab her ... the female said her boyfriends ex-girlfriend came over with a knife ... came inside ... came with a big kitchen knife held over her head in a stabbing position ... her boyfriend (M.J.) intervened ... he got her outside ... she banged on the door and then left in a white Chevy.

We spoke with a Black male (M.J.) who was the victim's boyfriend ... he said his mamma (Abiakam) came over ... he met her outside ... then she came inside ... she raised knife up at his girlfriend.

While speaking with the female victim and her boyfriend, the female said "That's the car!" ... we saw the car back up on Arapahoe Street and turn to come down 29th Street ... the car had turned right onto 29th Street traveling westbound ... the car was coming slowly ... I drew my weapon because of the information concerning the knife ... I had my flashlight out ... I flashed it to motion the car to pull over ... the car pulled up slowly ... it stopped adjacent to my patrol car ... there were 3 parties in car ... a Black female driver ... Black male passenger ... another Black female in the back seat ... I was approximately 15 feet away ... I could see the hands were clear on the two in the front seat ...

The car windows were down on the driver's side ... I'm not sure if she is armed at this time ... I make eye contact with all three occupants ... the Black female driving ... Black male with white shirt was in the front passenger seat ... Black female in back seat ... it was dark out but I could see with flashlight and regular light ... the occupants were looking at us ... Officer Miller was off to my right ... I could see him in my peripheral vision ... he was probably 10 to 12 feet away ... I was paying attention to the front passengers ... Officer Miller said "Where is the knife—Where is the knife?" ... we were half way across the street approaching the car ... the back passenger (Abiakam) had her head down ... when Officer Miller inquired "Where is the knife," the female in the backseat opens the door very quickly and I see her foot hit the ground ... she is in a sprint immediately ... I see an extremely long knife with a silver blade ... she did not look at us ... she made a bee-line straight across the street ... I said at the top of my lungs "Drop the knife—Drop the knife!" all the time until the shooting ... I lost view of her when she went in front of Officer Miller ... she was about 15 feet away from me She was very close to my partner ... she had the knife in her right hand down at her side at that time ... she said nothing ... she just sprinted straight across the street ... she didn't turn her head at all ... she was sprinting toward the male and female that we had been speaking to ... I thought she was going to kill them or stab them ... the knife was up in the air ... I thought she was going to stab or kill them because she had tried to do it before and she ran right by two police officer toward the other two individuals ... the victims were down by the curb at this time ... I raise my weapon at her ... the orange shirt Black male (M.J.) takes off as fast as he can ... she is right behind him running in a sprint ... I chase her and fall in behind them ... my attention was on the female chasing the male ... he took off running ... she was gaining ground on him ... I'm still yelling

to “Stop” and “Drop the knife” ... I was probably 20 feet behind her ... I’m trying to get behind her ... I see her closing in on him ... as she gets closer with knife up over her head ... I thought if she got a couple feet closer she was going to stab him in the back and kill him ... Officer Miller was in the street off to my left ... I was in fear for the male’s life ... the male kept coming into my view if I were to shoot ... so I could not fire at that time ... she is right on his back with the knife raised ... I’m thinking I want to take a shot ... I then hear a shot ... she starts to stumble and I see blood on the back of her shirt ... Officer Miller was off to my left and a little in front of me ... I’m yelling non-stop to “Drop the knife” ... Officer Miller also is yelling the same thing ... the male being chased (M.J.) had a fearful look on his face and was looking over his shoulder ...

When I hear the shot fired ... she slows ... she veers northeast ... the male cuts right ... she begins to stumble and the knife lowers down ... I knew she was hit ... she was faced away from me as she was going northeast ... she went out in the street and continued to walk away from us ... we followed her down the street ... she never turned around or acknowledged us ... she was about in the middle of the street ... I’m on the sidewalk when the shot is fired by Officer Miller ... he is at roughly the same level as me only out in the street ... she was still in a trot ... then slowed to a walk ... she kept going eastbound ... I continued to follow her ... Officer Miller continued to stay out at her side ... she still had her back to me ... I do not think she is a threat at that time ... she is by herself ... she still has the knife in her hand ... still the same right hand ... she came to a stop ... still standing facing away ... she turned around to face us ... she had her head down ... Officer Miller was in on my left ... we still have our weapons out ... she still had the knife in her right hand ... She squatted down ... baseball catcher stance ... knife still in hand ... I then see another knife ... she puts them both in her right hand ... I then kick both knives out of her hand with my right leg on an inside kick across to her right hand ... the straight edge knife is the one she had in her right hand during the chase ... when I kicked I saw the knives fly out of her hand and go across the street ... I remember a black handle object ... I holstered my weapon ... Officer Miller covered me ... I was telling her to get on her stomach ... she struggled ... I finally got her on her stomach ... I handcuff her and put her on her side ... I asked Officer Miller if he was okay ... I hear Miller get on the radio and say “Shots fired.”

I hear loud yelling back at where the white car is parked ... I went back to the location of the car ... I told the male and female from the car to sit on the curb ... everyone was out of the car when I got back there ... I separated the two males who were arguing (M.J. and the Black male passenger) ... ambulance and cover cars came ... I hung out at the back of my car until a Sergeant brought me down to headquarters.

Officer Nunnally estimated it was approximately 5 seconds from the time Abiakam exited the car until the shot was fired ... he said she hit the ground and sprinted ... he gave her non-stop commands to “Stop” and “Drop the knife” ... at

the time of the shot she was just a foot or two from the male she was chasing ... at the time he fired the shot he was 20 feet from the woman.

The three officers who responded to the 1170 29th Street call were dressed in full blue Denver Police Department uniforms with badge. They arrived in marked Denver Police patrol cars. Officer Shawn Miller was armed with his Colt .45 caliber Commander semi-automatic service pistol. This weapon has a magazine capacity of eight (8) rounds and had an additional round in the chamber. Officer Miller fired one (1) round during the confrontation. The single .45 caliber shell casing was recovered on the sidewalk in the vicinity of where he fired the shot. Officer Ryan Nunnely was armed with his Colt .45 caliber semi-automatic pistol, but did not fire his weapon. Following the incident and in compliance with the protocols established for officer-involved shootings, the officer's weapon was given to Denver Police Crime Laboratory personnel for appropriate testing.

Pursuant to the Officer-Involved Shooting Protocol, the officers were sequestered after the incident until they gave their voluntary sworn videotaped statements to investigators at Denver Police Headquarters. K.M., M.J., Aviance Madison, Adebayo Turner, and two citizen eyewitnesses were also sequestered and gave written and videotaped statements to investigators. Their statements combine consistently to produce the above recitation of facts. Their statements are consistent in pertinent part with the officers' statements.

On Monday, May 14, 2007, Detective Troy Bisgard interviewed Abiakam. Her statement is consistent in most part to the above recitation of facts including entering the residence uninvited and threatening K.M. and M.J. with the knife. Her statement varies in that she claims that M.J. pulled a gun on her when she came in threatening them and he forced her out of the residence.³ M.J. made no indication in his statement of using a firearm. Her account of the events surrounding the return to the scene are similar to the other witnesses including her saying she was chasing M.J. intending to kill him with the knives. She stated she did not know why the police shot her. Her statement varies regarding a couple of insignificant issues. She said at first she did not realize she had been shot, but was immediately losing her breath. She said she thought when she went down that she had already dropped the knives.

Ifeoma Chinyere Abiakam suffered a single gun-shot wound. She is being treated at Denver Health Medical Center.

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

³ If this, in fact, occurred, she is fortunate he did not shoot her. Had he done so his conduct may have been justified under the "Make My Day" law. C.R.S. 18-1-704.5

evidence establishes that Abiakam was shot by Officer Shawn Miller 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.

Section 18-1-707 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**.

Section 18-1-901(3)(d) and (e) of the Colorado Revised Statutes define the terms “Deadly Physical Force” and “Deadly weapon” respectively, as follows:

(3)(d) “Deadly Physical Force” means force, the intended, natural, and probable consequence of which is to produce death, and which does, in fact, produces death.⁴

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

Therefore, the question presented in this case is whether, at the instant Officer Miller fired the shot that wounded Abiakam, he reasonably believed that Abiakam was directing or was about to direct deadly physical force against M.J. In order to establish criminal responsibility for an officer knowingly or intentionally causing the injury to 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. It should also be noted that Abiakam had committed a felony involving the use or threatened use of a deadly weapon and was likely to endanger human life or to inflict serious bodily injury to another unless apprehended without delay. Although the facts indicate Officer Miller’s specific purpose for firing was to protect the life of M.J., these other sections of the statute could also justify his actions.

⁴ What this means is in cases, such as this, where the party shot survives, by definition the officer has only used “physical force, not “deadly physical force.” Nevertheless, we assess these cases against the higher “deadly physical force” standard. Over the years we have not encountered an officer-involved shooting where the officer would have been justified under the lesser standard of “physical force,” but not under the higher standard of “deadly physical force.” So, as it relates to officer-involved shootings, this definition has been a legal distinction without a practical difference.

CONCLUSION

The officers were dressed in full Denver Police uniforms. This combined with other circumstances make it clear she knew they were police officers. Abiakam exited the vehicle quickly and with a focused intent to stab M.J. She immediately ran at him while raising the knife and as he fled the attack she pursued him. The officers had no time to intervene between Abiakam and M.J. There was no opportunity to deescalate the confrontation. The conduct of Abiakam quickly reduced the officers' control options. She totally ignored the officers' repeated verbal commands to "Stop" and "Drop the knife." When she closed the distance between herself and M.J. to within knife-stabbing range, with the knife raised over her head prepared for a downward stabbing attack, Officer Miller was forced to fire to protect M.J. Other force options used by officers for arrest and control of assailants were not available and would not have stopped this attack.

Officer Miller's clear intent was to stop Abiakam's attack. He was successful at doing so. We have no doubt that Officers Miller and Nunnely would prefer to have assailants comply with their commands, but when that does not occur they have a responsibility to protect our citizens. Office Miller is commended for firing only a single shot under the specific circumstances of this case. One shot was clearly needed to stop the direct threat to the life of M.J. Officer Miller controlled his fire to precisely the degree of force that was reasonable and necessary to protect M.J. This reflects having both skilled weapon control and a proper mind-set about the significance of shooting at another human being.

In the four officer-involved shootings this year the officers have fired a total of only five shots. In each case they achieved their lawful objective of protecting themselves, their fellow officers, and third persons. In each case, the party shot survived. While a single gun-shot wound can be fatal, the potential for survival is obviously enhanced the fewer the gun-shot wounds. While a historical perspective will certainly show that there are situations where multiple shots are required and justified to neutralize and control an armed assailant, these recent cases demonstrate that proper weapon control can reduce total shots fired and very likely increase the likelihood of survival for the party shot.

Where use of force is concerned each application of force should be justified by the suspect's conduct. Whether it is a striking by hands or a baton, by a discharge of mace, by a TASER shot and subsequent triggering, by a bean-bag shot, or by a firearm discharge, each application of that force must be reasonable and necessary. Because a firearm is a deadly weapon, as opposed to the less lethal force options, it is imperative that officers fire no more shots than the circumstances require. The decision to stop applying force is equally as important as the decision to apply it in the first place. An officer's discharge of his or her firearm is a rare act and the overwhelming majority of officers never fire their weapon in the line of duty during their career. The importance of the decision to fire and stop firing cannot be overstated. Again, we commend these officers for minimizing their use of force while still accomplishing their lawful protective goal.

Under the facts of this case, we could not prove beyond a reasonable doubt that it was unreasonable for Officer Miller to perceive that Abiakam was an imminent deadly threat to M.J. at the instant Officer Miller fired the single shot. The fact is that Officer Miller's actions likely saved M.J.'s life and saved Abiakam from facing "Life without the possibility of parole" had she been successful in killing M.J. Therefore, no criminal charges are fileable against Officer Miller for his conduct in wounding Abiakam.

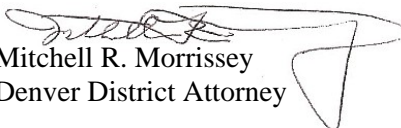
The attached document entitled *Officer-Involved Shooting Protocol 2007* is incorporated by this reference. The following pertinent statement is in that document: *"In most officer-involved shootings the filing decision and release of the brief decision letter will occur within two-to-three weeks of 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

We will open our Officer-Involved Shooting file in this case 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. However, if criminal charges are still pending against Abiakam, we cannot open the Officer-Involved Shooting file until the conclusion of the criminal prosecution.

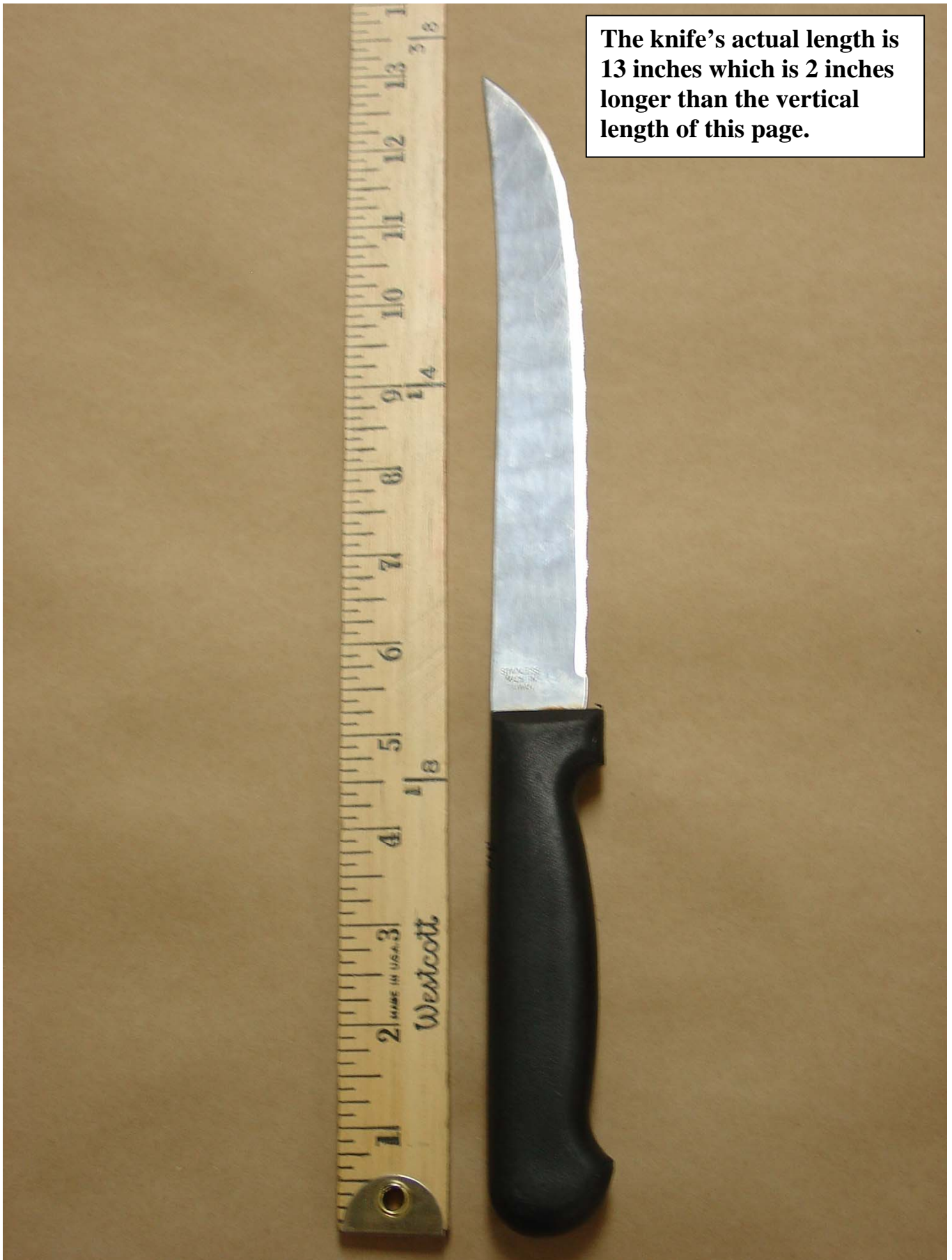
Abiakam is in custody at Denver Health Medical Center at this writing. She has been charged with Attempt First Degree Murder, First Degree Burglary, and Felony Menacing.

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,


Mitchell R. Morrissey
Denver District Attorney

cc: Officer Shawn Miller; 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 Troy Bisgard, Homicide; Detective Tyrone Campbell, 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.

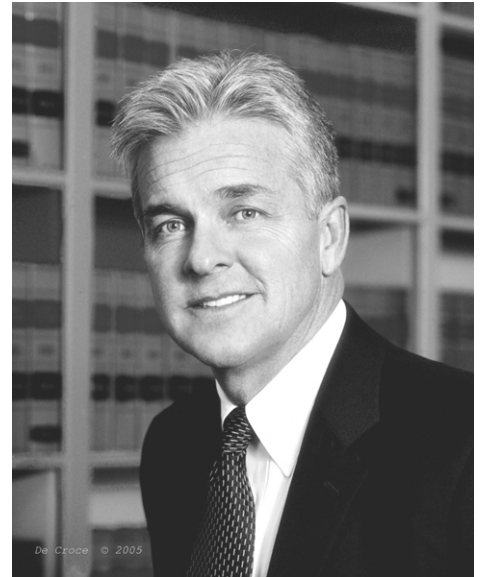


The knife's actual length is 11 inches which is the vertical length of this page.





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.⁵ 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

⁵ See the "Conclusion" statement in the "Decision Letter" in the December 31, 1997, shooting of Antonio Reyes-Rojas, where we first pointed out issues related to the importance of the Administrative review of officer-involved shootings. Subsequent letters continued to address this issue.

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

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

THE COLORADO LAW

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

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

what he reasonably believes to be the use or imminent use of deadly physical force. Therefore, the question presented in most officer-involved shooting cases is whether, at the instant the officer fired the shot that wounded or killed the person, the officer reasonably believed, and in fact believed, that he or another person, was in imminent danger of great bodily injury or death from the actions of the person who is shot. In order to establish criminal responsibility for knowingly or intentionally shooting another, the state must prove beyond a reasonable doubt that the person doing the shooting either did not really believe he or another was in imminent danger, or, if he did hold such belief, that belief was, in light of the circumstances, unreasonable.

The statute also provides that a peace officer is justified in using deadly physical force upon another person . . . when he reasonably believes that it is necessary to effect an arrest . . . of a person whom he reasonably believes has committed or attempted to commit a felony involving the use or threatened use of a deadly weapon; or is attempting to escape by the use of a deadly weapon; or otherwise indicates, except through motor-vehicle violation, that he is likely to endanger human life or to inflict serious bodily injury to another unless apprehended without delay.

In Colorado, deadly physical force means force the intended, natural, or probable consequence of which is to produce death and which does in fact produce death. Therefore, if the person shot does not die, by definition, only physical force has been used under Colorado law.

GENERAL COMMENTS

The following statement concerns issues that are pertinent to all officer-involved shootings.

The great majority of officer-involved shootings in Denver, and throughout the country, ultimately result from what is commonly called the split-second decision to shoot. It is often the culmination of a string of decisions by the officer and the citizen that ultimately creates the need for a split-second decision to shoot. The split-second decision is generally made to stop a real or perceived threat or aggressive behavior by the citizen. It is this split-second time frame which typically defines the focus of the criminal-review decision, not the string of decisions along the way that placed the participants in the life-or-death final frame.

When a police-citizen encounter reaches this split-second window, and the citizen is armed with a deadly weapon, the circumstances generally make the shooting justified, or at the least, difficult to prove criminal responsibility under the criminal laws and required legal levels of proof that apply. The fact that no criminal charges are fileable in a given case is not necessarily synonymous with an affirmative finding of justification, or a belief that the matter was in all respects handled appropriately from an administrative viewpoint. It is simply a determination that there is not a reasonable

likelihood of proving criminal charges beyond a reasonable doubt, unanimously, to a jury. This is the limit of the District Attorney's statutory authority in these matters. For these reasons, the fact that a shooting may be "controversial" does not mean it has a criminal remedy. The fact that the District Attorney may feel the shooting was avoidable or "does not like" aspects of the shooting, does not make it criminal. In these circumstances, remedies, if any are appropriate, may be in the administrative or civil arenas. The District Attorney has no administrative or civil authority in these matters. Those remedies are primarily the purview of the City government, the Denver Police Department, and private civil attorneys.

Research related to officer-involved shootings indicates that criminal charges are filed in approximately one in five hundred (1-in-500) shootings. And, jury convictions are rare in the filed cases. In the context of officer-involved shootings in Denver (approximately 8 per year), this ratio (1-in-500) would result in one criminal filing in 60 years. With District Attorneys now limited to two 4-year terms, this statistic would mean there would be one criminal filing during the combined terms of 8 or more District Attorneys.

In Denver, there have been three criminal filings in officer-involved shootings in the past 40 years, spanning seven District Attorneys. Two of the Denver officer-involved shootings were the result of on-duty, work related shootings. One case was in the 1970s and the other in the 1990s. Both of these shootings were fatal. The cases resulted in grand jury indictments. The officers were tried and found not guilty by Denver juries. The third criminal filing involved an off-duty, not in uniform shooting in the early 1980s in which one person was wounded. The officer was intoxicated at the time of the shooting. The officer pled guilty to felony assault. This case is mentioned here, but it was not in the line of duty and had no relationship to police work. In 2004, an officer-involved shooting was presented by the District Attorney to the Denver Statutory Grand Jury. The Grand Jury did not indict. A brief report was issued by the Grand Jury.

Based on the officer-involved shooting national statistics, there is a very high likelihood that individual District Attorneys across the country will not file criminal charges in an officer-involved shooting during their entire tenure. It is not unusual for this to occur. In Denver, only two of the past seven District Attorneys have done so. This, in fact, is statistically more filings than would be expected. There are many factors that combine to cause criminal prosecutions to be rare in officer-involved shootings and convictions to be even rarer. Ultimately, each shooting must be judged based on its unique facts, the applicable law, and the case filing standard.

The American Bar Association's *Prosecution Standards* state in pertinent part: "A prosecutor should not institute,

cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction. In making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved or to a desire to enhance his or her record of convictions. Among the factors the prosecutor may properly consider in exercising his or her discretion is the prosecutor's reasonable doubt that the accused is in fact guilty." The National District Attorneys Association's *National Prosecution Standards* states in pertinent part: "The prosecutor should file only those charges which he reasonably believes can be substantiated by admissible evidence at trial. The prosecutor should not attempt to utilize the charging decision only as a leverage device in obtaining guilty pleas to lesser charges." The standards also indicate that "factors which should **not** be considered in the charging decision include the prosecutor's rate of conviction; personal advantages which prosecution may bring to the prosecutor; political advantages which prosecution may bring to the prosecutor; factors of the accused legally recognized to be deemed invidious discrimination insofar as those factors are not pertinent to the elements of the crime."

Because of the difference between the criminal, administrative, and civil standards, the same facts can fairly and appropriately lead to a different analysis and different results in these three uniquely different arenas. While criminal charges may not be fileable in a case, administrative action may be very appropriate. The legal levels of proof and rules of evidence that apply in the criminal-law arena are imprecise tools for examining and responding to the broader range of issues presented by officer-involved shootings. Issues related to the tactical and strategic decisions made by the officer leading up to the split-second decision to shoot are most effectively addressed by the Denver Police Department through the Use of Force Review Board and the Tactics Review Board process and administrative review of the shooting.

The administrative-review process, which is controlled by less stringent legal levels of proof and rules than the criminal-review process, provides both positive remedial options and punitive sanctions. This process also provides significantly broader latitude in accessing and using information concerning the background, history, and job performance of the involved officer. This type of information may have limited or no applicability to the criminal review, but may be very important in making administrative decisions. This could include information concerning prior officer-involved shootings, firearm discharges, use of non-lethal force, and other conduct, both positive and negative.

The Denver Police Department's administrative review of officer-involved shootings improves police training and

performance, helps protect citizens and officers, and builds public confidence in the department. Where better approaches are identified, administrative action may be the only way to effect remedial change. The administrative review process provides the greatest opportunity to bring officer conduct in compliance with the expectations of the department and the community it serves. Clearly, the department and the community expect more of their officers than that they simply conduct themselves in a manner that avoids criminal prosecution.

There are a variety of actions that can be taken administratively in response to the department's review of the shooting. The review may reveal that no action is required. Frankly, this is the case in most officer-involved shootings. However, the department may determine that additional training is appropriate for all officers on the force, or only for the involved officer(s). The review may reveal the need for changes in departmental policies, procedures or rules. In some instances, the review may indicate the need for changing the assignment of the involved officer, temporarily or permanently. Depending on the circumstances, this could be done for the benefit of the officer, the community or both. And, where departmental rules are violated, formal discipline may be appropriate. The department's police training and standards expertise makes it best suited to make these decisions.

The Denver Police Department's Use of Force Review Board and the Tactics Review Board's after-incident, objective analysis of the tactical and strategic string of decisions made by the officer that lead to the necessity to make the split-second decision to shoot is an important review process. It is clearly not always possible to do so because of the conduct of the suspect, but to the extent through appropriate tactical and strategic decisions officers can de-escalate, rather than intensify these encounters, the need for split-second decisions will be reduced. Once the split-second decision time frame is reached, the risk of a shooting is high.

It is clear not every officer will handle similar situations in similar ways. This is to be expected. Some officers will be better than others at defusing potentially-violent encounters. This is also to be expected. To the degree officers possess skills that enhance their ability to protect themselves and our citizens, while averting unnecessary shootings, Denver will continue to have a minimal number of officer-involved shootings. Denver officers face life-threatening confrontations hundreds of times every year. Nevertheless, over the last 20 years officer-involved shootings have averaged less than eight annually in Denver. These numbers are sharply down from the 1970s and early 1980s when there were 12-to-14 shootings each year.

Skill in the use of tactics short of deadly force is an important ingredient in keeping officer-involved shootings to a minimum. Training Denver officers receive in guiding

them in making judgments about the best tactics to use in various situations, beyond just possessing good firearms proficiency, is one of the key ingredients in minimizing unnecessary and preventable shootings. Denver police officers handle well over a million calls for service each year and unfortunately in responding to these calls they face hundreds of life-threatening encounters in the process. In the overwhelming majority of these situations, they successfully resolve the matter without injury to anyone. Clearly, not all potentially-violent confrontations with citizens can be de-escalated, but officers do have the ability to impact the direction and outcome of many of the situations they handle, based on the critical decisions they make leading up to the deadly-force decision. It should be a part of the review of every officer-involved shooting, not just to look for what may have been done differently, but also to see what occurred that was appropriate, with the ultimate goal of improving police response.

RELEASE OF INFORMATION

Officer-involved shootings are matters of significant and legitimate public concern. Every effort must be made to complete the investigation and make the decision as quickly as practicable. The Denver Protocol has been designed to be as open as legal and ethical standards will permit and to avoid negatively impacting the criminal, administrative, or civil procedures. “Fair Trial—Free Press” standards and “The Colorado Rules of Professional Conduct” limit the information that can be released prior to the conclusion of the investigation.

Officer-involved shooting cases always present the difficult issue of balancing the rights of the involved parties and the integrity of the investigation with the public’s right to know and the media’s need to report the news. The criminal investigation and administrative investigation that follows can never keep pace with the speed of media reporting. This creates an inherent and unavoidable dilemma. Because we are severely restricted in releasing facts before the investigation is concluded, there is the risk that information will come from sources who may provide inaccurate accounts, speculative theories, misinformation or disinformation that is disseminated to the public while the investigation is progressing. This is an unfortunate byproduct of these conflicted responsibilities. This can cause irreparable damage to individual and agency reputations.

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

CONCLUSION

The protocol that is used in Denver to investigate and review officer-involved shootings was reviewed and

strengthened by the Erickson Commission in 1997, under the leadership of William Erickson, former Chief Justice of the Colorado Supreme Court. The report released after the 15-month-long Erickson Commission review found it to be one of the best systems in the country for handling officer-involved shootings. We recognize there is no “perfect” method for handling officer-involved shooting cases. We continue to evaluate the protocol and seek ways to strengthen it.

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