



# DenverDA

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January 17, 2008

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

RE: Investigation of the wounding of Phuong Van Dang, DOB 8-31-81, DPD#523298, DOC#97955, by Sergeant John Pinder, 75-73, and Detective Jesse Avendano, 94-32, on November 14, 2007, at 1036 South Federal Boulevard, Denver, Colorado.

Dear Chief Whitman:

The investigation and legal analysis of the shooting of Phuong Van Dang have been completed, and I conclude that under applicable Colorado law no criminal charges are fileable against Sergeant John Pinder or Detective Jesse Avendano. My decision, based on criminal-law standards, does not limit administrative action by the Denver Police Department where non-criminal issues can be reviewed or civil actions where less-stringent laws, rules and legal levels of proof apply. A description of the procedure used in the investigation of this officer-involved shooting and the applicable Colorado law is attached to this letter.

## **STATEMENT OF FACTS**

Shortly after noon on November 14, 2007 Denver Police dispatch was notified of an officer-involved shooting at the Ha Noi Restaurant at 1036-1038 South Federal Boulevard. Sergeant John Pinder and Detective Jesse Avendano, assigned to the Denver Police Narcotics Bureau, were working in plain clothes and eating lunch at the restaurant. An armed robber, later identified as Phuong Van Dang, entered the kitchen through the open back door. He was dressed in dark clothing with a hooded jacket and black bandana covering his head and face. He was carrying a black pistol grip shotgun in his right hand and a black duffle bag in his left hand. With Dang in pursuit, the employees immediately ran from the kitchen in an effort to escape through the front door.

There were a number of patrons seated at tables. As Dang quickly moved to a table at the northwest corner of the restaurant—the table next to the one occupied by Sergeant

Pinder and Detective Avendano—he was waving and pointing the shotgun at patrons.<sup>1</sup> Dang was holding the shotgun in his right hand with his finger on the trigger in a threatening posture—leveled at the patrons. He opened the black bag and motioned for the two men at the table to empty their pockets and produce money. When the officers first saw Dang appear from the kitchen they inconspicuously drew their firearms and calmly placed them on their laps. As Dang was seeking to rob the individuals at the adjacent table—just arms-length away—the officers knew if he turned to their table next he would soon discover they were police officers. They were also aware that a uniformed Denver Police Officer was to join them for lunch and could walk into this robbery in progress at any moment.

For an unknown reason, Dang was distracted and suddenly turned away from the two men at the table and began to move toward the south end of the restaurant. Sergeant Pinder was seated facing south with his back to the north-mirrored wall.<sup>2</sup> Detective Avendano was seated across the table facing Sergeant Pinder. As Dang moved a few feet south of the officers' table, the officers were presented with what could be their only opportunity to neutralize the deadly threat he posed. Sergeant Pinder raised his firearm from below the table and fired almost simultaneously with Dang. Dang had swung around and fired a shotgun blast at them—shattering objects on the table and blowing a hole in the front window of the restaurant next to Detective Avendano. As Sergeant Pinder fired at Dang, Detective Avendano also stood and fired. Dang fell wounded to the restaurant floor near the south-front door.

The officers quickly moved to control Dang and insure he had no accomplices. They immediately determined three patrons seated against the south-mirrored wall were also wounded. The female patron had suffered the most serious wound. Dang lay wounded on the floor with his shotgun laying nearby. The officers kicked the gun away from his reach. Denver Police dispatch was immediately notified. Cover cars and medical personnel were dispatched to the scene immediately. The three wounded patrons and Dang were taken to Denver Health Medical Center for treatment. All survived their wounds.

One of the patrons who suffered a graze wound to his lower-left leg told investigators that if it were not for the actions of the officers they could have been killed. This patron's father, who was shot in the lower-right leg, told investigators—“Those two guys saved everyone's life. If it would not have been for them everyone would have died.” He was very grateful to the two undercover police officers for saving their lives. The patron's mother suffered a gunshot wound to the abdomen. She underwent surgery at Denver Health Medical Center and is recovering from the wound.

Following the shooting and in compliance with the protocols established for officer-involved shootings, the firearms of Sergeant Pinder and Detective Avendano were collected by Denver Police Crime Laboratory personnel for appropriate testing. Sergeant

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1 See attached photos of the restaurant.

2 The north and south walls of the restaurant are mirrored. In addition to making the restaurant seem to be larger, it also allows someone facing the mirror to see what is behind them. The mirrors also result in seeing individuals and objects twice. This double imaging can be distracting. See attached photos of the restaurant at page 10.

Pinder fired six (6) rounds from his Sig Sauer, P220, .45 caliber semi-automatic pistol. Detective Avendano fired six (6) rounds from his Sig Sauer, P228, 9mm semi-automatic pistol.

Dang fired one (1) round from his Mossberg, model 500A, pistol grip, 12 gauge shotgun. The weapon holds five (5) rounds. Four (4) live shotgun shells were in the weapon when recovered and one (1) spent shotgun shell did not properly eject and was jammed in the weapon. This prevented Dang from firing additional shots during his assault. The execution of a search warrant on his vehicle parked in the alley behind the restaurant resulted in the recovery, among other items, of six (6) live shotgun shells and a purchase receipt dated the morning of the shooting. Also recovered in the vehicle were papers concerning his placement in a community-corrections facility.

Phuong Van Dang was treated at Denver Health Medical Center for multiple gunshot wounds. Dang has been returned to incarceration at the Fremont Correctional Facility where he has been serving an 18-year sentence since his 1998 convictions on two cases: 1. Jefferson County case #98CR449 ... pled guilty to First Degree Assault w/ Deadly Weapon (F3), sentenced 7/30/98 to 18 years at the Department of Corrections (DOC); Menacing (F5), 3 years DOC; and Possession of a Handgun by a Juvenile, 12-months jail. All three sentences ran concurrently to one another for a total term of 18 years. 2. Arapahoe County case #97CR4085 ... pled guilty to Aggravated Robbery, Use of Deadly Weapon (F3), sentenced 12/11/98 to 10 years DOC concurrent with Jefferson County case #98CR449. In 2000, while incarcerated in the Colorado Department of Corrections, Dang was caught with a "shank" and upon conviction an additional 3 year sentence was imposed.

At the time of this shooting, Dang was in placement at the Ulster halfway house, Correctional Management Inc., and was supposed to be on "work release," due to return to the facility at 6:30 p.m. Thirty-six felony charges have been filed against Dang. At the January 15, 2008 preliminary hearing all thirty-six charges were bound-over to District Court for trial. The charges pending against Dang for his criminal conduct in this case are: four (4) counts of Attempt 1<sup>st</sup> ° Assault; one (1) count of 1<sup>st</sup> ° Assault; seventeen (17) counts of felony Menacing; twelve (12) counts of Attempt Aggravated Robbery; and two (2) counts of Possession of Weapon by Previous Offender.

## 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 physical force or deadly physical force by a peace officer is justified. As the evidence establishes that Dang was shot by Sergeant Pinder and Detective Avendano the determination of whether their conduct was criminal is primarily a question of legal justification.

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

(1) Except as provided in subsection (2) of this section, a peace officer is justified in using reasonable and appropriate **physical force** upon another person when and to the extent that he reasonably believes it necessary:

a) **To effect an arrest or to prevent the escape** from custody of an arrested person unless he knows that the arrest is unauthorized; or

b) **To defend himself** or a third person from what he reasonably believes to be the use or imminent use of physical force while effecting or attempting to effect such an arrest or while preventing or attempting to prevent such an escape.

(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; or

(b) **To effect the arrest or to prevent the escape** from custody of a person whom he reasonably believes:

1. Has committed or attempted to commit a felony involving the **use or threatened use of a deadly weapon**; or
2. Is attempting to **escape by the use of a deadly weapon**.

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.

Section 18-1-901(3)(d) of the Colorado Revised Statutes defines the term “Deadly Physical Force” 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**.

Therefore, the question presented is whether, at the instant the officers fired the shots that wounded Dang, the officers reasonably believed, and in fact believed, that they or another person, were in imminent danger of serious bodily injury or death from the

actions of Dang.<sup>3</sup> 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. The officers were legally justified in using the degree of force they used under multiple sections of the statute.

### CONCLUSION

The actions of the armed assailant, Dang, quickly reduced the officers' options to one. Their only reasonable available option under the facts of this case was to use their service pistols to control the deadly threat posed by Dang. Electing to employ a less than optimum or an ineffective response in these circumstances could heighten the risk to everyone. In addition to committing a felony involving the use of a deadly weapon, Dang posed an immediate threat of serious injury or death to the officers, all the employees and patrons in the restaurant, any person who would unknowingly walk into the restaurant, and individuals in the immediate vicinity. He, in fact, fired upon the officers—nearly striking Detective Avendano.<sup>4</sup> Of absolute necessity the officers fired until Dang went down and the threat was neutralized. Also, the officers fired on Dang when he was moving in an open area and was not yet confronting and victimizing patrons at another table. This presented the most opportune time, if not the only time, to neutralize the threat. The actions of Dang and the circumstances of this confrontation made any verbal commands by the officers, prior to firing, both unnecessary and tactically dangerous.

It is unfortunate and tragic that Dang's conduct forced the officers to fire to protect themselves and others, and that this action resulted in the wounding of three "innocent-bystander" patrons. For the reasons stated above, the officers acted reasonably and appropriately under the specific facts of this deadly confrontation with a very dangerous assailant. They controlled their fire to the minimal level required to accomplish their protective objective. The wounding of the three citizens was clearly an unfortunate and unintended result of the need to eliminate the deadly threat posed by Dang. The officers'

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3 By definition, Sergeant Pinder and Detective Avendano only used "**physical force**" in defending everyone in the area and in effecting the arrest of Dang. Nevertheless, under the facts of this case, they would also have been justified under the "**deadly physical force**" sections of the statute.

4 Among the criminal acts for which Phuong Van Dang is currently serving an 18 year sentence to the Colorado Department of Correction is shooting an individual in the back.

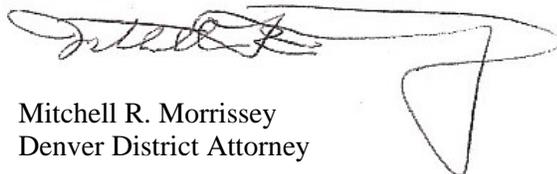
actions were neither reckless nor criminally negligent, but rather were necessary, reasonable and appropriate. We are thankful that the three patrons survived their wounds and that the officers and other patrons were not injured or killed by Dang. Dang's conduct in this case and his criminal history highlight his propensity for violence and his disregard for human life. The necessity to fire until he was incapacitated is further confirmed by the jamming of his weapon from his first shot, which prevented him from firing the other four rounds in his shotgun.

Under the facts of this case, we could not prove beyond a reasonable doubt that it was unreasonable for Sergeant Pinder and Detective Avendano to fire the shots that wounded Dang and inadvertently wounded the three patrons who were having lunch at the restaurant. Therefore, no criminal charges are fileable against either officer for their conduct in this incident.

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. The completion of this letter has been delayed because another officer-involved shooting occurred two days before this shooting and a third shooting occurred on December 19, 2007.

We will open our Officer-Involved Shooting file in this case for in-person review at our office at the conclusion of the criminal prosecution of Dang. 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,

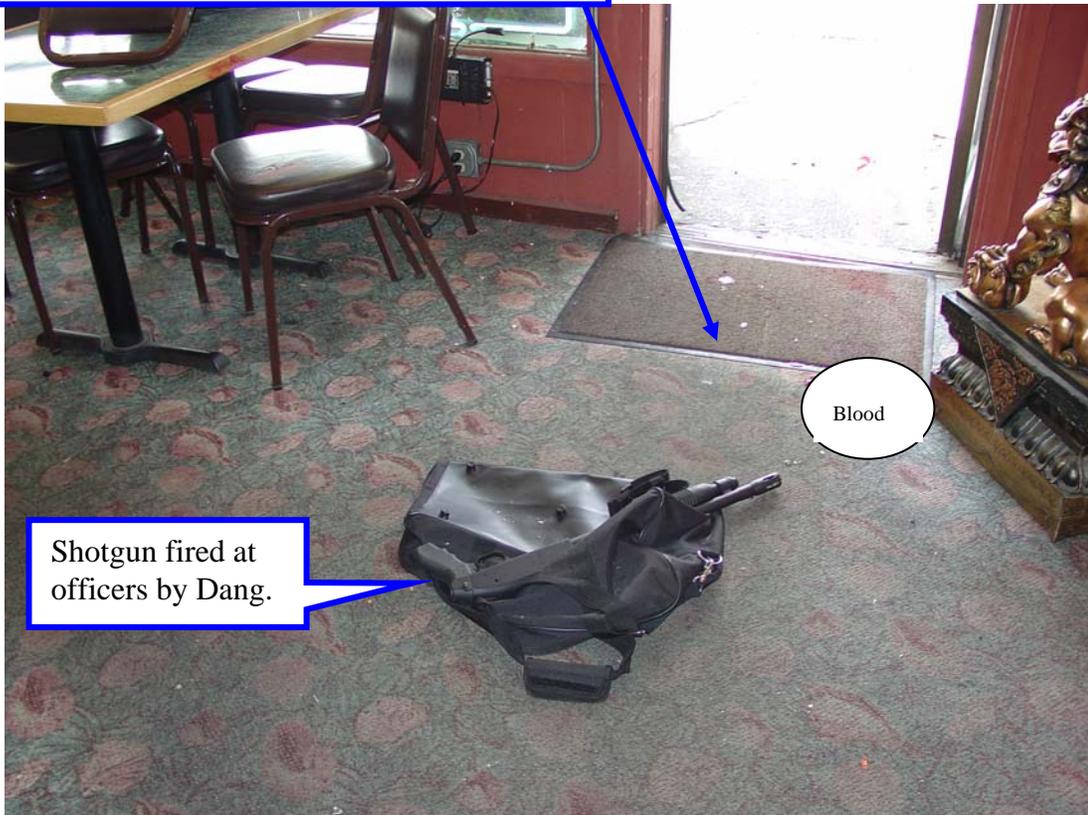


Mitchell R. Morrissey  
Denver District Attorney

cc: Sergeant John Pinder; Detective Jesse Avendano; 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; David Fine, Denver City Attorney; Marco Vasquez, Deputy Chief; Michael Battista, Deputy Chief; Dan O'Hayre, Division Chief; Dave Fisher, Division Chief; David Quinones, Division Chief; Mary Beth Klee, Division Chief; Gregory LaBerge, Crime Lab Commander; John Burbach, Captain; Jon Priest, Lieutenant, Homicide; Jim Haney, Lieutenant; Detective Randall Stegman, 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.



South front door to restaurant where Phuong Van Dang fell and was arrested after being shot by Sergeant Pinder and Detective Avendano.



Shotgun fired at officers by Dang.

South front door to restaurant where Phuong Van Dang fell and was arrested after being shot by Sergeant Pinder and Detective Avendano.



Photo taken from general area of the kitchen door looking to the west.



Shotgun fired at officers by Dang.



Gunshot hole and shattered blinds in front window from shotgun blast at officers by Dang.

Detective Avendano's position at the time shots were fired.

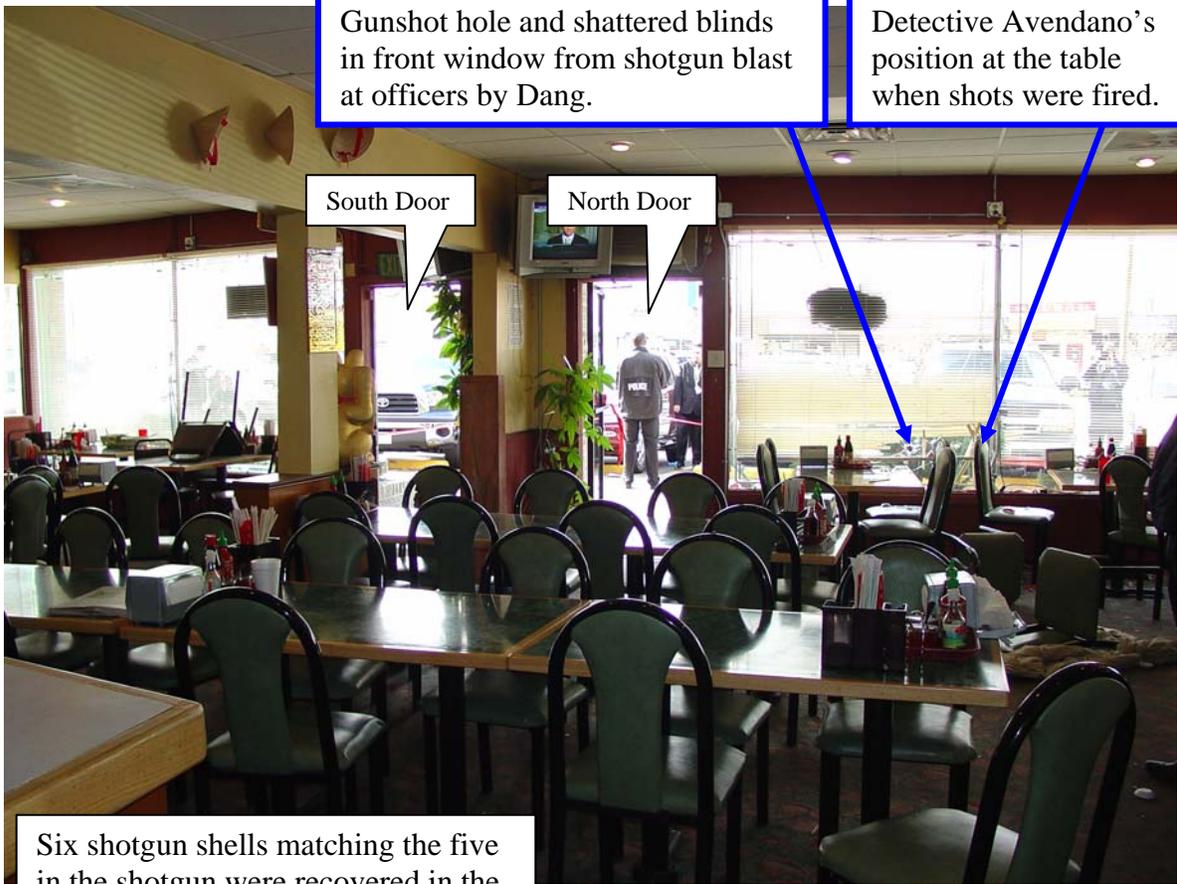
Sergeant Pinder's position at time shots were fired.

Table at which the 3 patrons were seated when they were struck by gunshots.

South front door to restaurant where Phuong Van Dang fell and was arrested after being shot by Sergeant Pinder and Detective Avendano.



Shotgun fired at officers by Dang.



Six shotgun shells matching the five in the shotgun were recovered in the vehicle along with a purchase receipt dated the morning of the shooting.

Community Corrections papers in Dang's name were recovered in the vehicle.





# 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.<sup>5</sup> As a result of the positive changes the Manager of Safety has now instituted and his personal involvement in the process, we will not open the criminal investigative file at the time our brief decision letter is released. Again, we are doing this to avoid in any way impacting the integrity and validity of the Manager of Safety and Denver Police Department ongoing administrative investigation and review. After the Manager of Safety has released his letter, we will make our file open for in-person review at our office by any person, if the City fails to open its criminal-case file for in-person review. The District Attorney copy of the criminal-case file will not, of course, contain any of the information developed during the administrative process. The City is the Official Custodian of Records of the original criminal-case file and administrative-case file, not the Denver District Attorney.

#### THE DECISION

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

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

One exception to the Denver District Attorney making the filing decision is if it is necessary to use the Denver 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

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

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 require by law, ethics, and the need to insure the integrity of the investigation to only do so at the appropriate time.

#### CONCLUSION

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

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

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