



DenverDA

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April 21, 2008

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

RE: Investigation of the shooting death of Nathan Paul Aguillard, Jr., dob 2/22/1982, by Technician Thomas McKibben, #86-42, and Technician Ronald Fox, #87-26, on April 4, 2008 at 4754 Peoria Street, Building#1-Apartment #107, Denver, Colorado.

Dear Chief Whitman:

The investigation and legal analysis of the shooting death of Nathan Paul Aguillard, Jr. ("Aguillard") have been completed, and I conclude that under applicable Colorado law no criminal charges are fileable against Technician Thomas McKibben or Technician Ronald Fox. 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

On April 4, 2008, at approximately 10:40 a.m. members of the Denver Police Department—Metro SWAT Unit executed an immediate entry search warrant at building #1, apartment #107, at 4754 Peoria Street, Denver, Colorado. The search warrant was signed by Judge Alfred Harrell authorizing officers to make immediate entry, without knocking and announcing their presence, based on a finding by the judge that the legal requirements for such an entry had been established in the affidavit for search warrant. An undercover buy by a Denver narcotics detective of crack cocaine had been made from Aguillard on April 2, 2008 at this location. As a result of that criminal act an arrest warrant for Aguillard was issued by Judge Robert Crew. Aguillard was also known to carry a .25 caliber semi-automatic pistol and had recently been contacted by Denver police officers while in possession of this weapon.

The members of the SWAT Unit followed their standard protocols and procedures in preparing to gain entry and secure the residence so that narcotics detectives could

execute the search warrant. During entry SWAT officers are in two-person teams. The front door to the apartment was breached with a ram, a “flash bang” device was introduced by Technician Delmonico of team #1, and then team #1 entered followed by team #2—Technicians Thomas McKibben and Ronald Fox. They were followed by the other members of the entry teams. Team #1 went to the right upon entry which according to procedure meant team #2 would go left. Technicians McKibben and Fox did so and entered a short hallway that led to a bedroom door to the right and a bathroom straight ahead with an open door. The other teams secured other areas of the apartment. The bathroom door was open and no one was present in that room. The bedroom door to the right was closed. At the time Technicians McKibben and Fox did not know the door led to a bedroom and did not know whether anyone would be in the room.¹

Prior to breaching the front door and entering the apartment and throughout the clearing of the residence the officers repeatedly shouted that they were the “Police-Police.” These statements continued to be shouted when Technician Fox opened the door to the bedroom. Technician McKibben entered first and quickly moved to the left to a corner of the room. Technician Fox entered immediately after Technician McKibben and moved forward and slightly to the right. He was approximately one foot from the end of the bed. Technician McKibben was to his left. The officers immediately saw Aguillard standing between the left side of his bed and a dresser in a constricted area about three-feet wide. Aguillard was standing at an angle that concealed his right side, right arm, and right hand from the view of the officers. In addition to shouting “Police-Police,” Technician McKibben shouted for Aguillard to “Show me your hands-Show me your hands.” As he did so, Aguillard turned to face Technician McKibben. At that time, both officers saw that he had a firearm in his right hand. Aguillard immediately raised the firearm to waist level pointed at Technician McKibben. Technician McKibben fired a single shot striking Aguillard in the right chest. Technician Fox almost simultaneously fired a single shot striking Aguillard between the eyes. This occurred within approximately 5 seconds of opening the bedroom door. Aguillard immediately slumped to a seated position on the floor with his legs apart. The firearm was in his right hand between his spread legs. The weapon then dropped from his right hand to the floor.²

In his sworn videotaped statement, Technician McKibben said he shot because he thought he was going to be shot by Aguillard. He told investigators that over the years he has been in many situations similar to this where people have guns, but they drop them when told to do so. He said “this guy did not do so—he pointed the gun at me.” In his sworn videotaped statement, Technician Ronald Fox said he shot because he “was worried about Tom’s welfare and thought the guy was going to shoot him.” He said he stopped firing because the guy went down immediately and was no longer a threat. The voluntary sworn videotaped statements given by Technicians McKibben and Fox concerning this

1 See attached photographs of the apartment.

2 Sergeant Johnson had Technicians McKibben and Fox move to the living room immediately after the shooting. Sergeant Jimmy Gose covered Aguillard until the paramedics entered the bedroom. Sergeant Gose then removed Guillard’s firearm from between his legs and placed it on top of the large television that was adjacent to the bed. This was done for safety purposes to permit the paramedics to provide medical attention to Guillard and extract him from the room. The firearm was later photographed and collected from that location by Crime Laboratory personnel. See attached photographs.

shooting are consistent with one another, with the other witnesses, and with all the associated physical evidence.

Because of the increased risk to officers and occupants associated with executing immediate entry search warrants, paramedics accompany the officers to the vicinity of the target location. The paramedics were immediately called to respond to provide medical care for Aguillard. They arrived quickly and removed Aguillard from the scene and transported him by ambulance to Denver Health Medical Center. The Denver Police Department dispatch was immediately notified of the officer-involved shooting. Dr. Biffel pronounced Aguillard deceased at 11:15 a.m. at Denver Health Medical Center.

On April 5, 2008 an autopsy was performed on the body of Nathan Paul Aguillard, Jr. with a finding that his death was caused by the gunshot wounds—one to the right chest and one to his head between his eyes.

Among other items, the pertinent items recovered by the Denver Police Department Crime Laboratory at the scene were three loaded handguns, boxes of ammunition for the handguns, a baggie of cocaine, and two shell casings—one .45 caliber and one .223 caliber.

Guillard's three loaded handguns were a Lorcin .25 caliber semi-automatic pistol with one live round in the chamber and four live rounds in the magazine, a five shot U.S. Postal Company .32 caliber revolver with five live rounds in the cylinder, and a Colt 1911 U.S. Army .45 caliber semi-automatic pistol with ten live rounds in the magazine.³ The .25 caliber semi-automatic pistol is the weapon that was in Guillard's right hand and pointed at Technician McKibben when the officers fired. The Colt 1911 U.S. Army .45 caliber semi-automatic pistol was under the edge of the dresser where Guillard slumped to the floor after being shot. The fully loaded .32 caliber revolver was on the kitchen counter which is near the front door of the apartment.

Pursuant to protocol, the officers' weapons were collected by Crime Laboratory personnel at Denver Police Department headquarters for testing. Technician McKibben fired a single shot from his Colt .45 caliber semi-automatic pistol. He was carrying the weapon with ten (10) rounds in the magazine and one (1) round in the chamber. Technician Fox fired a single shot from his AR-15 "shoulder weapon" which fires .223 caliber rounds. Technician Fox was carrying the weapon with twenty-nine (29) rounds in the magazine and one (1) round in the chamber. The weapon-unload finding by Crime Laboratory personnel was consistent with a single shot being fired from each weapon. This is also consistent with the recovery of one .45 caliber and one .223 shell casing at the scene. Subsequent testing identified the shell casings to the officers' respective weapons.

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

³ See attached photographs.

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 causing their death is generally prohibited as homicide in Colorado, the Criminal Code specifies certain circumstances in which the use of deadly physical force by a peace officer is justified. As the evidence establishes that Nathan Aguillard was shot by Technicians McKibben and Fox 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:

- (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.

Therefore, the question presented is whether, at the instant Technicians McKibben and Fox fired the shots that caused the death of Aguillard, they each reasonably believed, and in fact believed, that Technician McKibben was in imminent danger of serious bodily injury or death from the actions of Aguillard. 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.

CONCLUSION

The SWAT officers were executing an immediate entry search warrant involving the residence of Nathan Aguillard—a known crack-cocaine dealer who was also known to carry a handgun. The officers’ loudly identified themselves as “Police-Police.” In spite of these commands, Aguillard chose to arm himself with his .25 caliber semi-automatic pistol. This is not consistent with intent to surrender peacefully. When the officers entered the bedroom Aguillard positioned himself so as to conceal the pistol from their view. When commanded to “show me your hands,” instead of dropping the weapon, he kept it in his right hand and raised it at Technician McKibben. When Aguillard produced the pistol into the confrontation, the officer’s reaction time was reduced to almost zero. The officers were forced to instantaneously determine if a deadly attack was occurring—determine the proper defensive response—and take the defensive action before Aguillard could fire. The officers had to react before there was no time to react and they could not stop the potential deadly attack. They fired to protect their lives. It is the non-compliant actions of Aguillard in arming himself with the pistol in the first instance, failing to drop the pistol when confronted by the officers and then making the decision to raise the firearm at Technician McKibben that forced the officers to react by shooting him. The officers displayed excellent weapon control by limiting the shots fired to one each. In the context

of this case, this represents the minimal force necessary to neutralize and control the assailant. It is fortunate that no officer was shot in this life-threatening encounter.

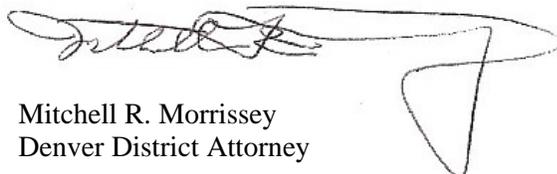
Under the specific facts of this case, we could not prove beyond a reasonable doubt that it was unreasonable for Technician Thomas McKibben or Ronald Fox to fire the shots that caused Aguillard's death. In fact, they had no other option available to protect their lives. Therefore, no criminal charges are fileable against either officer for his conduct in this incident.

The attached document entitled *Officer-Involved Shooting Protocol 2008* 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.

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,



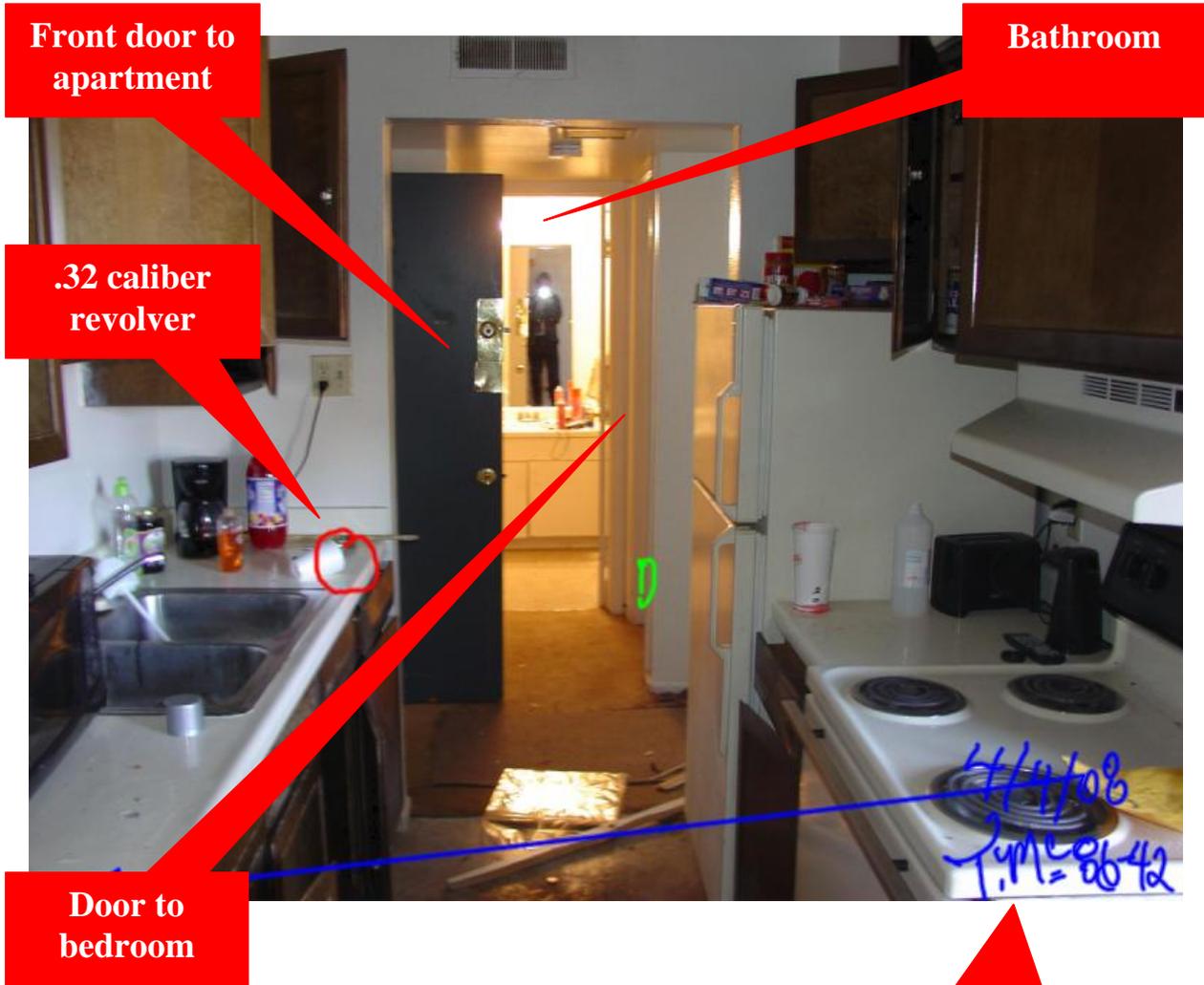
Mitchell R. Morrissey
Denver District Attorney

cc: Technician Thomas McKibben; Technician Ronald Fox; Marc Colin, 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; 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; Sergeant Matthew Murray, Homicide; Detective Teresa Garcia, Homicide; Detective Mark Crider, 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.



Front door to Aguillard's apartment #1-107. Metro SWAT officers staged and "stacked" in two-person teams on the steps prior to breaching the door and making entry.

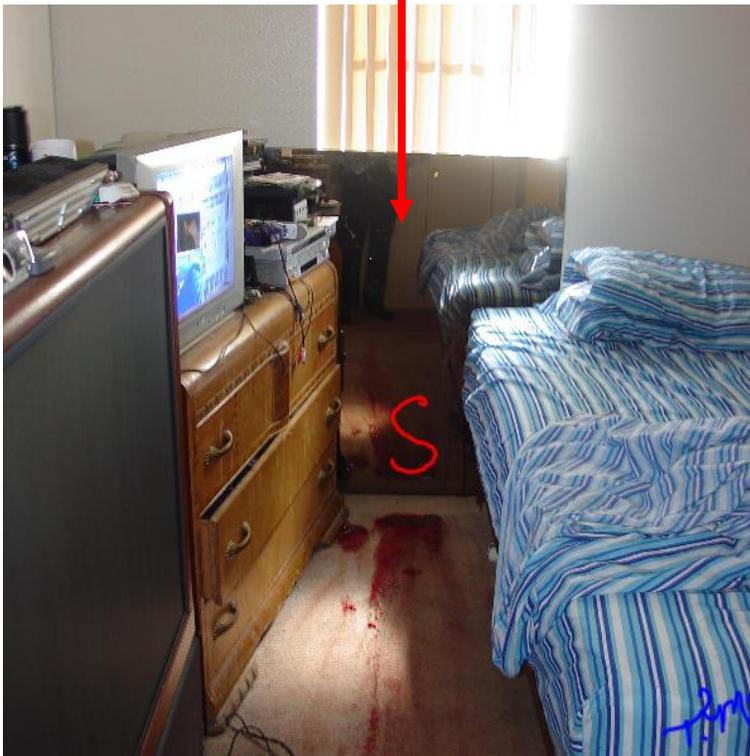




This photograph was marked on by Technician McKibben, #86-42, during his videotaped statement to investigators.

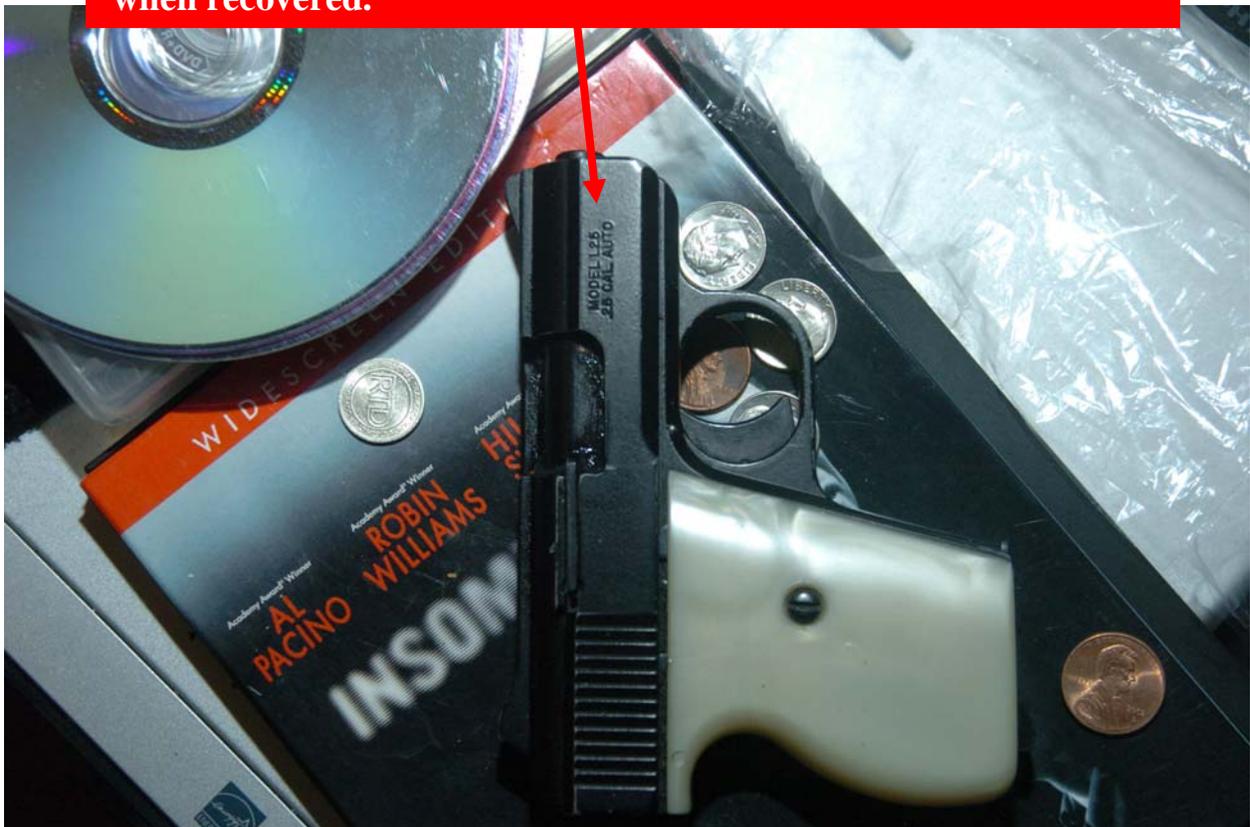


Guillard's position between the bed and the dresser. These photographs were marked on by Technician McKibben, #86-42, during his videotaped statement to investigators.





The .25 caliber semi-automatic pistol Guillard pointed at Technician McKibben before being shot. The weapon had one live round in the chamber and 4 live rounds in the magazine when recovered.





The .25 caliber semi-automatic pistol Guillard pointed at Technician McKibben before being shot. The weapon had one live round in the chamber and 4 live rounds in the magazine when recovered.





Five shot .32 caliber U.S. Pistol Co. revolver with five live rounds in the weapon when recovered on the kitchen counter.





Colt 1191 U.S. Army .45 caliber semi-automatic pistol. Located under the edge of the dresser in the bedroom. Ten live rounds in the magazine when recovered. Boxes of ammunition for the recovered firearms.





OFFICER-INVOLVED SHOOTING PROTOCOL 2008



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.⁴ 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

⁴ 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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