



# DenverDA

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May 29, 2008

Aristedes Zavaras  
Executive Director  
Colorado Department of Corrections  
2862 South Circle Drive  
Colorado Springs, CO 80906-4195

RE: Investigation of the shooting death of James Stewart, dob 08/27/71, by Colorado State Parole Officer Steve Crigler, badge #125, on May 13, 2008 at 1746 Emerson Street, Apartment 206, Denver, Colorado.

Dear Executive Director Zavaras:

The investigation and legal analysis of the shooting death of James Stewart (“Stewart”) have been completed, and I conclude that under applicable Colorado law no criminal charges are fileable against Colorado State Parole Officer Steve Crigler (“P.O. Crigler”). My decision, based on criminal-law standards, does not limit administrative action 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.

This shooting involved a law enforcement officer from your agency which is an agency outside the 2<sup>nd</sup> Judicial District. Therefore, the administrative aspect of the shooting will be addressed by your agency—the Colorado Department of Corrections. When we have been advised by you that your agency has concluded the administrative investigation and review, we will open our Officer-Involved Shooting file in this case for in-person review at our office. As is always the case, the physical evidence will be in the possession of the Denver Police Department. The Denver Police Department is the official custodian of records related to this case.

## **STATEMENT OF FACTS**

On May 13, 2008, shortly after 9:00 p.m., Colorado State Parole Officer Steve Crigler arrived at an apartment house at 1746 Emerson Street, Denver, Colorado. P.O. Crigler has been a parole officer for 13 years. He was at the location at the request of his

supervisor to assess the facility because there were parolees residing there. While at the location, he also intended to check on a parolee, Charles “Scrappy” Cousino (“Cousino”). After inquiring at another room, he knocked on the door to room 206. P.O. Crigler did not know the room was occupied by four individuals: James “Bam Bam” Stewart, 36, Charles “Scrappy” Cousino, 26, Eric Johnson (“Johnson”), 34, and Kathleen Mollison (“Mollison”), 55. He asked if “Charles” was there. A party inside, later determined to be Eric Johnson, responded that there was no one named “Charles” in the room.<sup>1</sup> P.O. Crigler identified himself as a parole officer and asked if he could check for himself. Eric Johnson looked through the peep hole in the door and saw P.O. Crigler, who had his badge on a chain around his neck. Mollison then immediately responded to the request by opening the door to her room.<sup>2</sup>



The instant the door opened, P.O. Crigler recognized and focused on Stewart who was seated on the end of the bed which was to the front and slightly to the left of him.<sup>3</sup> Stewart was one of his parolees for whom there were three active arrest warrants—one for absconding from parole and two from Denver police for robbery. P.O. Crigler knew Stewart was the suspect in multiple Denver robberies and that the F.L.A.G. Unit and the Denver Police Fugitive Unit were actively looking for him.<sup>4</sup> P.O. Crigler immediately drew his service pistol and began commanding Stewart to “get on the ground” and “let me see your hands,” which Stewart had concealed in his jacket.

Cousino, Johnson, and Mollison moved on the floor to the right of P.O. Crigler. Without being ordered to do so, the three raised their hands over their heads to show complete cooperation. They remained in this position throughout the armed confrontation with Stewart.

P.O. Crigler continued to loudly repeat the commands for Stewart to show his hands and get on the ground. While not complying with these lawful commands, Stewart was stating “just let me go ... just let me walk out of here.” Throughout the confrontation,

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1 At this time, Eric Johnson only knew Charles Cousino as “Scrappy.” Cousino had just moved to the location in room 207 two weeks prior. Eric Johnson did not know James “Bam Bam” Stewart at all. So Eric Johnson did not know there was a “Charles” in the room. His response was intended to be truthful.

2 See attached photograph room 206.

3 At the time of his death James Stewart was 6’3” tall and weighed 214 pounds.

4 The Fugitive Location and Apprehension Group (F.L.A.G.) is a task force composed of members of State and Federal law enforcement agencies. F.L.A.G. was actively pursuing Stewart because he was the primary suspect in a number of Denver area robberies. The Denver Police Fugitive Unit was also actively pursuing Stewart. There were probable cause arrest warrants for two of the robberies.

P.O. Crigler continued to shout the commands to no avail. P.O. Crigler became increasingly concerned with Stewart's non-compliant actions and words. At the inception of the confrontation, Stewart stood up from the bed and had his left side bladed toward P.O. Crigler with his hands concealed by his jacket. He had first stepped toward P.O. Crigler and then began to move back toward the window in the same bladed position. P.O. Crigler believed he was seeking to escape through this second-story window. The room is very small and the distance to the window is only the length of the bed—approximately six feet. As he continued to shout commands, P.O. Crigler moved toward Stewart in an effort to grab him. He was within five feet when Stewart pulled his gun from beneath the jacket. Stewart's right arm was bent at the elbow with his forearm across his stomach as he held the gun in his right hand with the barrel pointed at P.O. Crigler. P.O. Crigler instantaneously fired two shots at Stewart from an estimated barrel-to-body distance of three-to-four feet. Stewart's firearm dropped on a chair near the window as he fell to the floor.

As he controlled the room, P.O. Crigler immediately told the other occupants of the room to call 9-1-1. Cousino handed his cell phone to Mollison who made the call. It was 9:15 p.m. The phone was handed to P.O. Crigler who provided all necessary information to the dispatcher. Denver police officers and paramedics responded quickly to the scene. Stewart was transported by ambulance to Denver Health Medical Center where he was pronounced by Dr. Grossman at 9:50 p.m.

In his sworn videotaped statement, P.O. Crigler said he fired when Stewart pulled the gun from his coat and pointed it at him because he thought he was going to be shot. He said he stopped firing because Stewart went down immediately and was no longer a threat. The voluntary sworn videotaped statement given by P.O. Crigler concerning this shooting is consistent with the statements of Cousino, Johnson, and Mollison and with all the associated physical evidence.

In pertinent part, Cousino stated, "The parole officer gave Bam-Bam (Stewart) a lot of chances—maybe too many. He was forced into it (to shoot him)." He told investigators that the officer had to shoot Bam-Bam—he didn't have a choice. Cousino said the parole officer identified himself and commanded Bam-Bam to "get down" and "put your hands up ... put your hands where I can see them." He said Eric (Johnson) and Kat (Mollison) were trying to get Bam-Bam to cooperate. He thought the parole officer couldn't see Bam-Bam's hands and every time he gave Bam-Bam a command he got louder—more forceful. Cousino said it was escalating and the parole officer started yelling, "Let me see your hands—don't make me shoot you!" He said he didn't see a gun, but that Bam-Bam must have had one.<sup>5</sup> Bam-Bam wasn't listening ... he wasn't cooperating ... the parole officer must have said "show me your hands" twenty-five times ... Bam-Bam did not comply at any time ... he was just trying to figure out how to escape. As Bam-Bam was moving backward toward the window, he said the parole officer shot twice really quickly and Bam-Bam dropped right down to the floor. He said Bam-Bam and the officer were very close when the shots were fired.

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<sup>5</sup> Cousino, Johnson and Mollison were positioned so that their view was of Stewart's back and left side. They were in a position where they would not see the weapon when Stewart pulled it from its position of concealment in his coat.

In pertinent part, Mollison told investigators “Stewart had his hand in his pocket as if he had a gun. I actually covered my head with my arms for several seconds—scared to death one of us would be shot.” She said the officer gave the suspect hundreds of chances and the officer had to do it. She said, “It seemed a long time passed when the officer was trying to get him (Stewart) on the floor—probably wasn’t too long—but the guy (Stewart) just kept not complying.”

In pertinent part, Johnson told investigators that before the parole officer entered the room, the guy (Stewart) put something under the mattress, then quickly changed his mind and pulled it back out. When the officer entered, the guy had put his right hand in his coat and went toward the officer stating “I’m going to walk out of here.” He said the officer told the guy over and over to get his hands up. “If the officer asked him one time, he asked him thirty times to let him see his hands.” Johnson said he never saw a gun, but had no doubt he had one—the way he had his right hand in the left side of his coat. He told investigators the “cop had no choice—he had to do what he did.”

On May 14, 2008 at 1:00 p.m. an autopsy was performed on the body of James Stewart by Dr. John Carver with a finding that his death was caused by the two gunshot wounds. Both bullets entered his body on his left side at chest/arm-pit level—one in front of his left arm and the other behind his left arm. Both bullets traveled from left-to-right through his chest cavity at a slight downward angle and were recovered in the right side of his body. The two gunshot wounds are consistent with P.O. Crigler’s description of the shooting, including Stewart’s left side being bladed to him.

Among other items at the scene, the Denver Police Department Crime Laboratory recovered the two .40 caliber shell casings ejected from P.O. Crigler’s pistol, the .22 caliber revolver wielded by Stewart, and the jacket worn by Stewart with holes consistent with the location of the two gunshot wounds. Forty-two live rounds of .22 caliber ammunition were recovered from Stewart’s right front blue jean pocket. Stewart’s firearm was an E.I.G.-E15 Nickel .22 caliber revolver. When recovered at the scene the weapon was fully loaded with six (6) live rounds of .22 caliber hollow point ammunition and the hammer was cocked. The firearm is a single-action revolver, which means the hammer must be manually cocked before it can be fired. Stewart had the firearm cocked and ready to fire when he was shot by P.O. Crigler.

Pursuant to protocol, P.O. Crigler’s firearm was collected by Crime Laboratory personnel at Denver Police Department headquarters for testing. P.O. Crigler fired two rounds from his Glock, model 23, .40 caliber semi-automatic pistol.

## **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 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 James Stewart was shot by P.O. Crigler, the determination of whether his 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 P.O. Crigler fired the shots that caused the death of Stewart, he reasonably believed, and in fact believed, that he or another was in imminent danger of serious bodily injury or death from the actions of Stewart. 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

At the time of this incident, in addition to three active warrants for his arrest, Stewart was in possession of a firearm, which is both a parole violation and a criminal offense. This behavior is consistent with his extensive criminal record and prior conduct.<sup>6</sup> He has served five separate incarcerations in the Colorado Department of Corrections. Since his adult criminal record began in 1990, Stewart has a steady pattern of arrests, incarcerations, parole violations, and escapes. The three arrest warrants active at the time of this incident were for two separate robberies and for absconding from parole. At no time during this incident did Stewart, by word or conduct, indicate an intention to surrender peacefully. He was clearly aware that he would be returning to prison in the Colorado Department of Corrections.

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<sup>6</sup> Stewart's arrest record indicates arrests for assault, assault, false reporting, resisting officers, fugitive, larceny, burglary, vehicle theft, failure to appear, fraud-impersonation, flight-escape, parole violation, wrongs to minor-domestic violation, property damage-domestic violation, disturbing the peace-domestic violation, assault-domestic violation, disturbing the peace, assault-domestic violation, assault-threats-domestic violation, menacing-possession of firearm, possession of weapon by felon, felony trespass, dangerous drugs, dangerous drugs, dangerous drugs, assault, failure to appear, trespass, disturbing the peace, parole violation, assault-domestic violation, threat of injury, disturbing the peace-domestic violation, dangerous drugs, theft by receiving, burglary, destruction of property, drug paraphernalia, disturbing the peace, forgery, check fraud, flourishing a weapon, public fighting, obstructing police, false information, flight-escape, failure to appear, theft, drug paraphernalia, and flight-escape. The record indicates Department of Corrections incarcerations in 1997, 1999, 2001, 2003, 2005 and 2008.

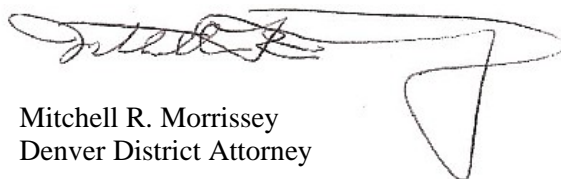
P.O. Crigler was engaged in precisely what we expect our parole officers to do by actively supervising parolees and controlling those who violate the conditions of their parole or commit new crimes in our communities. P.O. Crigler's actions in this deadly confrontation were courageous and commendable.

When P.O. Crigler entered the room, Stewart concealed his hands from view in his jacket. This conduct by Stewart placed P.O. Crigler in a state of great concern and intense focus. P.O. Crigler had good cause to believe Stewart possessed a firearm. Unbeknownst to him, it appears from the evidence that Stewart was going to conceal the firearm between the mattresses of the bed, but changed his mind and instead held the revolver in his right hand concealed by his coat. In complete contravention to the repeated commands of "get on the floor" and "show me your hands," Stewart instead continued to keep his hands concealed. While moving back toward the window, without warning, Stewart suddenly pulled the firearm from beneath his coat with the barrel pointing at P.O. Crigler. The evidence supports the conclusion that between the time he armed himself and this time, Stewart made the decision to manually cock the revolver, placing it in a condition to be fired by pulling the trigger. The quick action by Stewart of producing the firearm reduced P.O. Crigler's reaction time to zero. He was forced to instantaneously shoot to survive. His defensive action had to be executed immediately before Stewart could fire. This fact is confirmed by the recovery of Stewart's gun in the fully-cocked position. It is the non-compliant actions of Stewart in arming himself with the firearm in the first instance, failing to drop the firearm and show his hands when given repeated opportunities to do so, and then making the decision to cock, pull and aim the firearm at P.O. Crigler that forced the officer to react by shooting him. The officer's use of force was limited to the degree necessary to neutralize and control Stewart. By firing only two shots in this close quarter deadly encounter, P.O. Crigler displayed excellent weapon control under extreme pressure.

Under the specific facts of this case and as is required by law, we could not prove beyond a reasonable doubt that it was unreasonable for P.O. Steve Crigler to fire the shots that caused Stewart's death. Therefore, no criminal charges are fileable. The investigation supports the conclusion that P.O. Crigler made every effort to avoid having to use deadly force and, when he fired, he had no other option available to protect himself and the others present in the room. There is a high probability that his quick and decisive action saved his life and the others from harm. We thank and commend him for his professional and courageous response to this life-threatening encounter and for his service to our community.

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: Colorado State Parole Officer Steve Crigler; Mike Lowe, Attorney at Law; Jeaneene Miller, Director, Colorado Parole & Community; Mike Rulo, Inspector General; John W. Hickenlooper, Mayor; All City Council Members; Alvin J. LaCabe, Jr., Manager of Safety; David Fine, Denver City Attorney; John Lamb, Deputy Chief; Michael Battista, Deputy Chief; Division Chief; Dave Fisher, Division Chief; David Quinones, Division Chief; Mary Beth Klee, Division Chief; Tracie Keesee, Division Chief; Gregory LaBerge, Crime Lab Commander; Joe Montoya, Captain; Jon Priest, Lieutenant, Homicide; Kathleen Bancroft, Lieutenant; Phillip Hernandez, Lieutenant; Sergeant Matthew Murray, Homicide; Detective Jaime Castro, Homicide; John Burbach, 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.

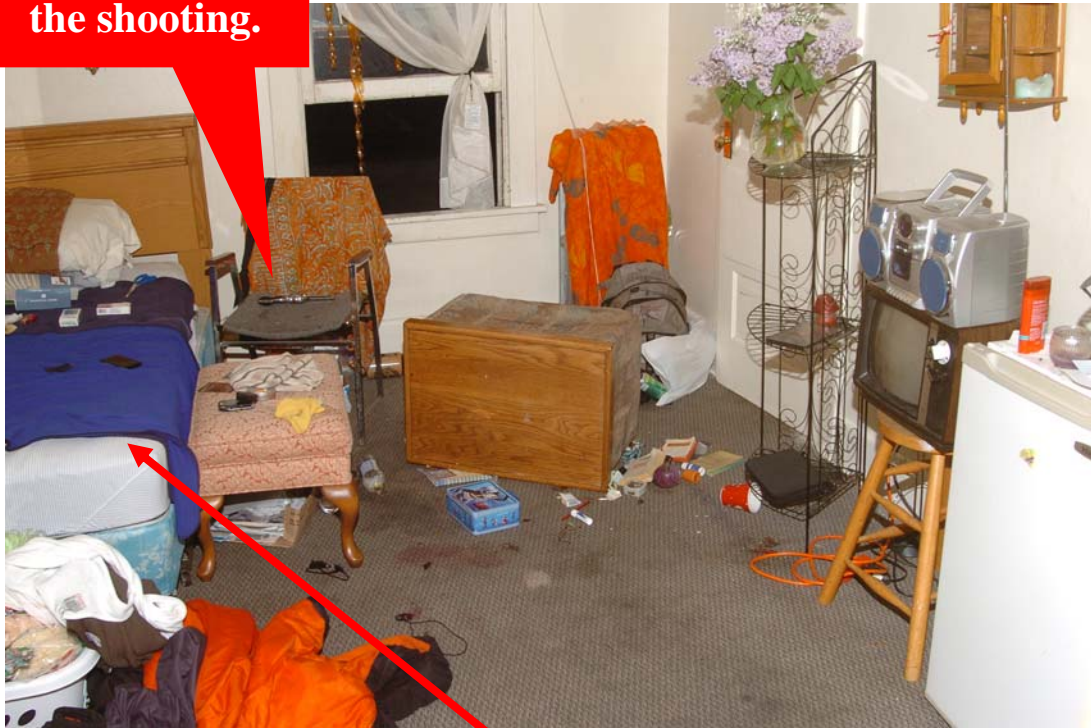


**1746 Emerson Street  
Location of room 206 on 2<sup>nd</sup> floor**

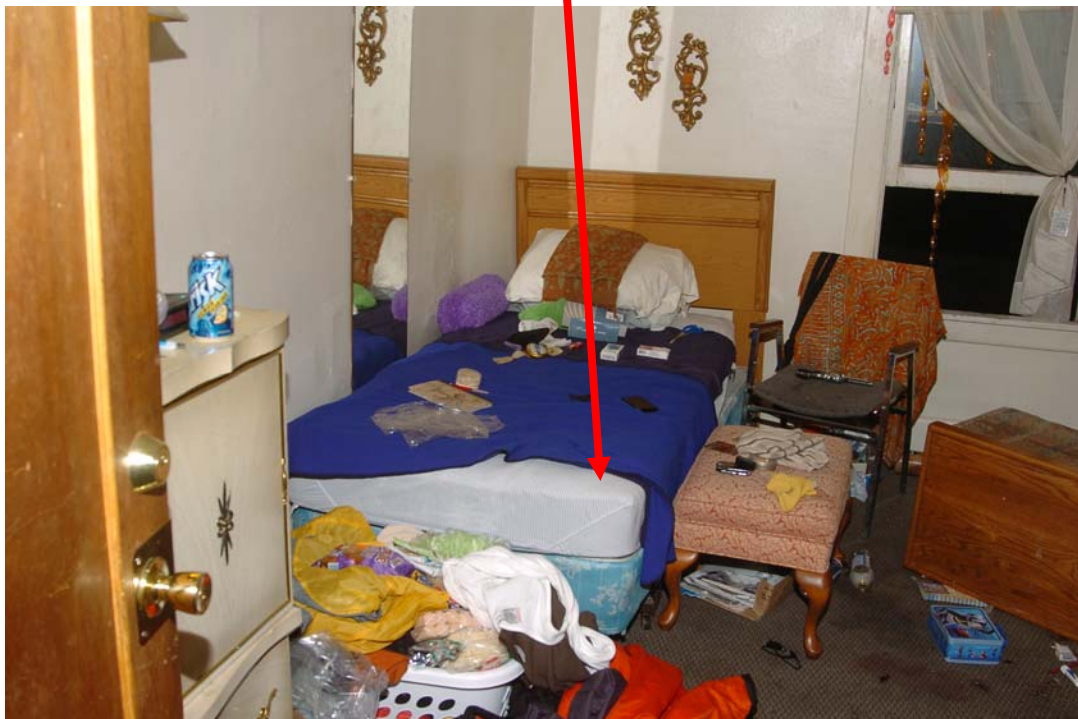




**Stewart's  
revolver after  
the shooting.**

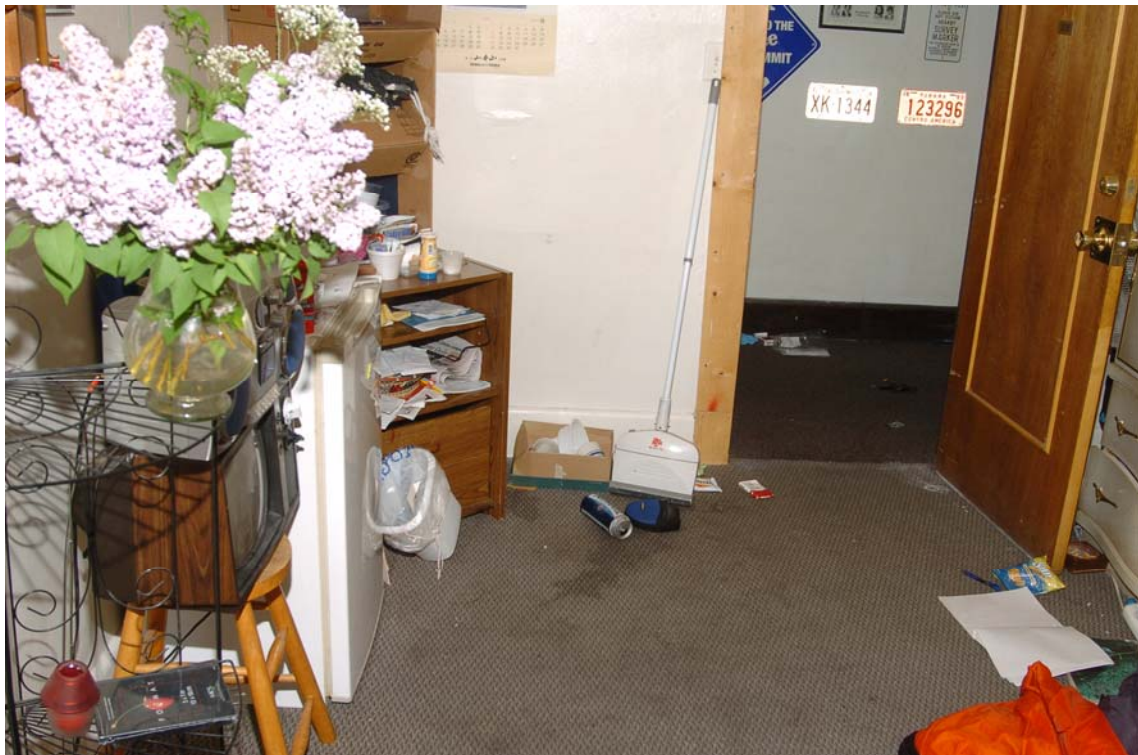


**P.O. Crigler's view from the doorway of room 206.  
When P.O. Crigler entered, James Stewart was seated on  
the near end of the bed.**





**View back to room 206 doorway.**





**Shell casings from the two rounds fired at James Stewart by P.O. Crigler**





**James Stewart's fully loaded six shot  
.22 caliber revolver**





**James Stewart's E.I.G.-E15 Nickel .22 caliber revolver. When recovered at the scene the weapon was fully loaded with six (6) live rounds of .22 caliber hollow point ammunition and the hammer was cocked. The firearm is a single-action revolver, which means the hammer must be manually cocked before it can be fired.**



# 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.<sup>7</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

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<sup>7</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.

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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