



DenverDA

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July 16, 2009

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

RE: Investigation of the shooting death of Hector Esparza, dob 7-06-83, by Officer Michael Oestmann, #05058, and Technician Christopher Wilcox, #04001, on July 2, 2009, at 4503 Fillmore Street, Denver, Colorado.

Dear Chief Whitman:

The investigation and legal analysis of the death of Hector Esparza ("Esparza") have been completed, and I conclude that under applicable Colorado law no criminal charges are fileable against Officer Michael Oestmann ("Officer Oestmann") or Technician Christopher Wilcox ("Technician Wilcox"). 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.

SYNOPSIS OF THE SHOOTING

On July 2, 2009 at approximately 1:23 a.m. a 9-1-1 call was received by Denver Police indicating that Esparza had assaulted his stepfather at their residence at 4503 Fillmore Street. Denver officers were advised the suspect was suicidal and known to be violent with police. Officer Oestmann, Technician Wilcox, Sergeant Beveridge and Sergeant West, who speaks Spanish, responded to the address and spoke with Esparza's mother and stepfather—who was bleeding from a cut on the bridge of his nose. Among other things they were told by his mother that Esparza may be armed with a gun and that she had been told by a friend of her son that it was not real, but she did not know if that

was true. They were also told he took a lot of pills and may have overdosed. After obtaining information about the suspect and the assault they formulated a plan to make contact with Esparza. They first attempted to obtain a Pepper Ball Deployment System, but none were available. Sergeant Beveridge had Technician Wilcox retrieve his TASER.¹ They made entry to the house at approximately 1:36 a.m.

The officers announced their presence and called for Esparza by name—“Hector.” They received no response so they tactically cleared the rooms on the first floor; then went up the stairs to the second floor with Technician Wilcox in the lead with the TASER. They quickly determined Esparza was in the bedroom with the door closed (parent’s bedroom)—the other two bedroom doors were open and were cleared by Technician Wilcox. When they knocked on the bedroom door and ordered Esparza to come out, he responded that he was going to shoot them. This caused Technician Wilcox to retreat to a bedroom and Officer Oestmann and Sergeant Beveridge to retreat to the stair landing. During this time, Esparza opened the door slightly and Officer Oestmann could see through the crack in the door to a mirror on the wall which reflected Esparza behind the door with his arms and hands in a position similar to holding a weapon—but he could not see the weapon. Technician Wilcox holstered his TASER, because it was no longer appropriate for an encounter with a party armed with a firearm. He drew his service pistol and was able to quickly move to join the officers on the landing. Esparza opened the door slightly, peeked out, and then closed the door. He repeated this conduct. Then Esparza opened the door slightly and put his arm out waving and pointing a gun in the direction of the officers on the landing and stairs.

Sergeant Beveridge notified the dispatcher at approximately 1:41 a.m. that the party was armed with a gun and was contained in the room. He made a radio call for Metro-SWAT and spoke with Lieutenant Paul Berdahl who indicated they would respond. Officer Oestmann and Technician Wilcox maintain constant eye contact with the door with an intent to contain Esparza in the room until Metro-SWAT took over the confrontation. Other Denver officers were securing the outside of the residence. Sergeant Beveridge went outside to have the mother and stepfather removed to the safety of a patrol car down the

¹ The “TASER” is a less-lethal force, pistol-shaped weapon which fires two charged wires or leads a short distance (up to 21 feet). When an individual is struck by the probes an electrical charge temporarily immobilizes the individual. The devices are made by TASER International. We will refer to the weapon as a TASER, using the company name. The TASER is a less-lethal force option designed and deployed for use in *non-deadly force encounters*. When a party is armed with a firearm or edged weapon, the confrontation is immediately a potential deadly-force threat. This is one reason why it is tactically correct to have lethal force present to back up the less-lethal force TASER. There have been confrontations where the TASER has been successfully used against assailants with edged weapons, but the TASER is not specifically designed and intended for that type of encounter. While it is fortunate that on occasion under the right set of circumstances a TASER can be deployed to end an encounter without serious injury or death to anyone, there should be no expectation that a TASER will be used in confrontations with assailants armed with firearms and edged weapons. This is clearly stated in the Denver Police Department Operations Manual at “105.02 Less Lethal Force and Control Options.” This case is an example of the fact that in these quickly evolving, tense confrontations, the presence of a TASER guarantees neither a certainty that it will be able to be deployed nor that it will be successful if deployed. When this occurs it can create an increased vulnerability and risk to the officers’ safety.

street. He also made a series of radio transmissions to have officers block off streets in the area. He then returned to the bottom of the stairs on the first floor.

Within seconds of Sergeant Beveridge's return, Esparza opened the bedroom door, came out at a brisk walking pace with the gun in his right hand pointed at Technician Wilcox who was on the landing.² During his advance to within six to eight feet of them, the officers were yelling at Esparza to "Drop the gun." He did not comply. Officer Oestmann fired three shots. Technician Wilcox fired four shots. The shots were fired simultaneously and in rapid succession. Esparza was struck four times and fell backward toward the bedroom door he had come through. Sergeant Beveridge immediately radioed: "Shots fired ... need ambulance code-10." It was 1:47 a.m. Esparza's gun fell under his left leg. The gun was retrieved by Officer Oestmann who placed it on an ironing board in the hallway. While waiting for paramedics to arrive, Sergeant Beveridge checked Esparza's pulse and administered chest compressions when he stopped breathing, which revived him. Esparza was transported by ambulance to Denver Health Medical Center. Medical intervention for the gunshot wounds was unsuccessful. He was pronounced at 2:54 a.m.



STATEMENT OF FACTS

Officer Oestmann and Technician Wilcox were the only eyewitnesses to the shooting. Sergeant Beveridge was in the house at the bottom of the stairs when the shooting occurred. He could see the officers, but could not see Esparza. Other ear witnesses were located during a neighborhood canvass after the shooting, but they provided no significant information. Esparza's mother, stepfather, two brothers and girlfriend were not witness to the shooting. They provided information about Esparza's background and actions that led up to the call for police assistance. The videotaped statements of Officer Oestmann and Technician Wilcox are consistent with other witness statements, 9-1-1 and dispatch call records, the wounds to Esparza's body documented at autopsy and all of the physical evidence developed in the investigation. The videotaped statements of the involved officers, Esparza's mother, stepfather, two brothers and girlfriend, in combination with the totality of evidence developed in the investigation, paint a very clear picture of what occurred in this incident.

In their individual statements to investigators, Hector Esparza's mother, stepfather, brothers and girlfriend collectively told investigators that Esparza started "huffing paint" when he was about 14 years old. He also was using marijuana, which continued to the present. He abused paint for a number of years causing damage to his brain. He has had numerous arrests and has been incarcerated both as a juvenile and as an adult. As a

² See attached photos of the area and photo comparison of Esparza's weapon and a Smith & Wesson model 659, 9mm semi-automatic pistol.

juvenile he unsuccessfully attempted to commit suicide by hanging himself. While serving time in the Colorado Department of Corrections he was prescribed a variety of medications for his mental and medical issues and this continued after his release. More recently he has again talked about wanting to die and wanting to kill himself. On June 16, 2009 he was taken by ambulance to the hospital after attempting suicide by overdosing on prescription medications. According to these relatives and friends, he has been depressed from being unemployed for a number of months and from financial issues with the mother of his two young daughters. They all indicated that in the hours leading up to his assaulting his stepfather, menacing his mother, and confronting the officers, he was acting very strange as a result of taking too many prescription pills. In a phone call with his girlfriend at 1:07 a.m. (she retrieved the exact time from her cell phone), in addition to being verbally abusive to her, which she said he had never done before, Esparza told her he wanted to die and that he was going to “get in a shootout with the cops.” He said he was “not going to jail” and that he “was ready to die.”

In their videotaped statements, with a Spanish speaking officer interpreting, Esparza’s mother and stepfather told investigators in pertinent part that Esparza entered their bedroom in the early morning hours while they were asleep and turned on the light. They awoke to him making statements that people were after him to kill him—he was near the window in the small bedroom indicating the people were out there pointing flashlights at him. He knocked the screen out of the window. His mother told him there was no one there. He left the bedroom. He returned a few minutes later. This time he had a handgun. He was moving the gun around pointing it in various directions, including at them. They were scared. His stepfather jumped out of bed in an attempt to protect them from his actions. Esparza’s right arm swung around in a back-hand motion striking him in the face with the gun, causing an injury to the bridge of his nose. The wound was bleeding.³ Esparza’s mother saw her husband drop to the floor. She got out of bed to confront Esparza. She yelled at him, “Hector—don’t do it! Don’t do it!” She grabbed Esparza around the stomach and they wrestled out into the hallway. In the process he knocked the other screen out of the bedroom window. At this time, his stepfather escaped the room to get assistance from Esparza’s brother who was sleeping in the adjacent bedroom. He quickly woke him and told him to go for help and call 9-1-1 for the police. Esparza’s brother hurriedly went out the second-floor window to seek help.⁴ He could not exit through the hallway and down the stairs because his mother was now wrestling with Esparza for the gun in the hallway. At one point the gun fell to the floor, but Esparza retrieved it before she could. Esparza’s stepfather immediately returned to the hallway to help his wife. While in the bedroom, Esparza was saying he was going to jump out the window and wanted to die. When the struggle went out into the hallway he twice put the gun to his head and said he was going to kill himself. She said, “Don’t do it son! Don’t do it!” Esparza broke free of his mother and slammed the bedroom door. She heard him say he was going to kill himself—he did not want to live anymore. She and her husband fled down the stairs and out the front door. Esparza remained in the house. Esparza’s brother

³ See attached photos.

⁴ See attached photo of the front of the residence. Esparza’s brother exited through the window on the second floor above the front door. Note the damage to the gutter when he lowered himself to the ground.

had by then gone to a neighbor's house for help and 9-1-1 was called.⁵ They waited in front of the house for the police to arrive.

Officer Oestmann, Technician Wilcox and Sergeant Beveridge are the only officers who entered the residence at 4503 Fillmore Street to contact Esparza on the second floor after responding to the residence on the 9-1-1 call. The following is a paraphrasing of Officer Oestmann's voluntary videotaped statement to investigators. In accordance with the protocol in officer-involved shootings, he was sequestered from other officers and citizen witnesses prior to giving his statement.

I was the first to arrive at the residence. I talked to the mother of the suspect—she was speaking Spanish. She understood English but had difficulty verbalizing. Sergeant West, who speaks Spanish, arrived and spoke with her in Spanish. She said her son was acting crazy, ran into the house and said someone was chasing him—but no one was chasing him. She said he takes a lot of medicines. She pointed to her head indicating for mental health issues. She said he had a gun which she had seen. She did not specify when she saw it. Her son told her it was fake, but she didn't know whether it was fake, because it looked real. She said he was in the upstairs bedroom.

I noticed her husband standing nearby in a bloody shirt. He was cut across the bridge of his nose. She said her son had caused the injury. Sergeant Beveridge arrived and asked if I had a pepper-ball weapon. No one had one. Technician Wilcox had a TASER. We talked and formulated a plan for entry. We then knocked on the front door and announced ourselves as police officers. The stairs go up and make a 180 degree turn at the landing to go back up to the 2nd floor. When we entered another officer told us someone had peeked out the window on the south side (this is the parent's bedroom). Two doors were open on the second floor, which were cleared by Technician Wilcox. We knocked on the closed third door. The door opened slightly. I could see from his reflection in a mirror on the east wall from his ribs to his chin, but could not see what was in his hands. The door opened just enough to see his arms together pointing down, but I could not see what was in his hands. He was standing close to the door. He said, "Leave me alone or I will shoot you." I was right along the wall to the right of the door. We were calling his name—"Hector". He said, "Go away or I will shoot you." Technician Wilcox immediately retreated into the bedroom next to his position to the left of the door. The suspect made the statement a number of times. Sergeant Beveridge then went down the stairs from the landing. I went down to a lower position on the stairs so I was looking through the banister and Wilcox came from the bedroom down to the stair landing near me.

Sergeant Beveridge told us to keep eyes on the door. He said we

⁵ Radio room records indicate the 9-1-1 call was received at 1:23 a.m.

have him in this room and need to keep him in there. He then called for Metro-SWAT to respond. I tried to talk to Hector, telling him he was not in trouble and that we just needed to talk. I received no response. It seemed like forever that we were standing on the landing and stairs. During this time he kept opening the door slightly ... peeking out ... then opening the door a little further—4 or 5 inches. He then opened the door and his arm came out with the gun in his hand waving it around. I ducked down behind the floor of the landing and yelled, “Gun!” Then after nothing happened, I looked again—he had closed the door again. Then he opened the door and walked straight out the door toward where Technician Wilcox was on the landing to my right. He raised the gun. I yelled, “Drop the gun!” As soon as he came out of the door he began raising the gun up. He more turned toward Technician Wilcox than where I was down lower. He was walking with a purpose straight toward Technician Wilcox ... at a pretty quick pace ... he got to within about 6 feet. (He demonstrates showing his right arm up and bent at the elbow.) He did not drop the gun.

I fired and he fell down. I rose up and saw that he was on the ground. Technician Wilcox and I went up and I grabbed the gun from under his leg and put it up on the ironing board in the hallway. We called for an ambulance. When the paramedics arrived, Technician Wilcox helped carry him down to the gurney. That is the last I saw him. I went outside and the neighbors started coming over. We told them to go back to their houses. I then went and sat in Sergeant Beveridge’s police car until Sergeant Brown brought me down to headquarters.

In pertinent part, Officer Oestmann provided the following additional information in response to investigator questions. He estimated that he fired two shots. He said it could have been more, but he remembered firing at least twice. He said he fired at center mass. He said the reason he fired was because the suspect was walking toward Technician Wilcox with the gun up and “I didn’t want him shooting Technician Wilcox or me—so I shot him.” He said the gun fell out of his hand and under his leg and he picked it up and put it on the ironing board. He didn’t do anything with the gun other than set it on the ironing board out of the suspect’s reach. He told investigators, “When he had it in his hand waving it outside the door—I could tell it was a gun.”

Officer Oestmann said while waiting for paramedics to respond, Sergeant Beveridge would administer chest compressions when he stopped breathing and he would start breathing again.

The following is a paraphrasing of Technician Wilcox’s voluntary videotaped statement to investigators. In accordance with the protocol in officer-involved shootings, he was also sequestered from other officers and citizen witnesses prior to giving his statement.

The dispatcher requested officers to respond on a family disturbance at 4503 Fillmore Street. Officer Oestmann and Sergeant Beveridge took the call. I finished my current call in about 5 minutes and then responded to assist. Officer Oestmann and Sergeant Beveridge were out front when I arrived. I learned from Officer Oestmann that there was a party in the house with a psychiatric history who had a gun ... unclear whether real or not ... and had assaulted his stepfather. He had taken medication ... unclear what meds ... and may have overdosed.

After discussing our approach to entering the residence, I approached the front door with my TASER in hand and announced "Denver Police" before going in. This was repeated a couple of times. There was no response. We cleared the rooms on the 1st floor. I went up the stairs first with TASER in hand. There were 3 doors—two were open and one was closed. I looked into the open doors. They were clear. I then went to the side of the closed door. We stated, "Hector ... Denver Police ... we need to talk to you." I pushed the door open a little. As I pushed on the door I could feel resistance ... I could not push the door open. He said, "I'm going to shoot you." He said it twice. Officer Oestmann and Sergeant Beveridge were positioned on the other side of the door. We tried to establish a dialogue with him—it did not work. I backed off to the bedroom next to me for a position of cover. I transitioned from my TASER to my firearm—this is because he said he was going to shoot us.

After a while it became clear he was not responding to us. Officer Oestmann and Sergeant Beveridge backed down to the stair landing. They motioned for me to come over to join them on the landing. They were to the left of me on the stairs.

Sergeant Beveridge then called for Metro-SWAT to respond. After a few minutes, Hector said a couple things that I could not understand. I told him we could not understand him. A Chihuahua was barking in the doorway to the bedroom across the hallway. We told Esparza to come out with his hands up so we could talk. About a minute later he opened the door briefly and looked out the door. He did this again. He then put his hand out with gun in it and raised it in our direction. We were telling him to put the gun down and come out so we could talk. A couple seconds later he opened the door all the way and came out at a brisk walk. He brought the handgun up at me. I put my flashlight on him. Simultaneously Officer Oestmann and I opened fire. I fired approximately 3 or 4 times. Hector fell back into the doorway area. I came up the stairs and holstered my gun. Sergeant Beveridge asked where the gun was. Officer Oestmann picked it up from under his left leg and put it on ironing board. I tried to talk with Hector. Sergeant Beveridge was calling for an ambulance. A couple of times while waiting for paramedics, Hector stopped breathing. Sergeant

Beveridge pushed on his chest and he started breathing again. I went out and asked if anyone had a “pocket mask.” Paramedic “Otis” then came up the stairs. I know him from prior calls. He moved into a position behind Hector’s head to carry him out. I took his feet and helped carry him down to the gurney—then out to the ambulance. A firefighter then helped remove blood from my hands.

In pertinent part, Technician Wilcox provided the following additional information in response to investigator questions. He said that Hector spoke English during the confrontation. He stated when he went upstairs his main concern was a welfare check on Hector for a possible overdose ... to get him medical attention ... he did not have information that he had the gun at that time ... he didn’t have anything other than his assaultive behavior ... he wanted to be able to take him into custody without hurting him. He indicated before entering they planned that he would have the less lethal force weapon. Their intent was to get him medical attention. Technician Wilcox described the suspect’s gun as a silver and black semiautomatic. He said he did not know the caliber. He again described the final frames of the confrontation for investigators. He said, he (Esparza) covered half the distance from the door to his position on the landing ... he was 6 or 7 feet away ... he was holding the gun in his right hand ... he did not know if his other hand was on the gun.

The following is a paraphrasing of additional answers to investigator questions. He was looking right at me ... I had gotten his attention with the flashlight on him ... I used the flashlight to distract him ... to try to disorient him with the light in his face ... I yelled, “Drop the Gun! Drop the Gun! Don’t do it!” The gun was pointed directly at me. Officer Oestmann and I shot almost simultaneously. I fired because I thought he was going to shoot me. I fired 3 to 4 times. I stopped firing because he fell backward and the immediate threat of him shooting me was over. I saw the gun was no longer in his hand. Officer Oestmann and Sergeant Beveridge saw the gun under his leg. It happened very quickly.

Pathologist, Dr. Amy Martin, performed an autopsy on the body of Esparza at 10:00 a.m. on July 2, 2009. She determined the cause of death was multiple gunshot wounds. She identified four gunshot wounds of entry: one to the right temple (did not exit); one to the chest (did not exit); one to the upper left arm (exited back left shoulder); and one to the right side above the hip (exited back right side above buttocks).

Technician Wilcox fired four shots from his model 17, Glock 9mm semi-automatic pistol. His weapon has a magazine capacity of seventeen rounds. At the time of the shooting he was carrying his weapon with the magazine loaded with seventeen rounds and one additional round in the chamber—a total of eighteen rounds. When the weapon was unloaded by Denver Police Department Crime Laboratory personnel after the shooting there were 13 live rounds in the magazine and one live round in the chamber. Four 9mm

cartridge cases were recovered at the scene in locations consistent with Technician Wilcox's position at the time of the shooting.⁶

Officer Oestmann fired three shots from his model 37, Glock .45 caliber semi-automatic pistol. His weapon has a magazine capacity of ten rounds. At the time of the shooting he was carrying his weapon with the magazine loaded with ten rounds and one additional round in the chamber—a total of eleven rounds. When the weapon was unloaded by the Denver Police Department Crime Laboratory personnel after the shooting there were 7 live rounds in the magazine and one live round in the chamber. Three .45 caliber cartridge cases were recovered at the scene in locations consistent with Officer Oestmann's position at the time of the shooting. These cartridge cases were ejected from his pistol from his position on the stairs leading down to the first floor and were likely moved to their final recovery position by the foot traffic to and from the stairs.

At the time of this incident, Esparza was armed with a model 93, CO2 powered BB pistol. It is described by its manufacturer as a "CO2 powered semi-automatic" with a "maximum muzzle velocity of 400 feet per second." Its overall length is 7.9 inches and it fires 4.5 mm BB. The barrel is "smooth bore steel." It has a capacity of "15 shots from a drop-in clip" and a "maximum shooting distance of 235 yards." The side of the barrel is engraved with the statement: "WARNING: MISUSE OR CARELESS USE MAY CAUSE SERIOUS INJURY OR DEATH. FOR USE BY AGES 16 OR OLDER."⁷ The weapon was not loaded with a CO2 cartridge or the drop-in clip when recovered at the scene after the shooting.



On July 2, 2009, Lieutenant Jon Priest assisted the Crime Laboratory detectives with the analysis of the bullet trajectories. The main purpose of this analysis was to determine, as best as practical, the position of the officers and the subject at the time the shots occurred. Lieutenant Priest stated his findings are consistent in all respects with the statements of Officer Oestmann and Technician Wilcox. Lieutenant Priest concluded the following:

After review of the pertinent documents, photographs, conversations with the pathologist, and scene visit, this analyst concludes the following with respect to the various bullet trajectories at 4503 Fillmore Street:⁸

The two officers fired a total of seven rounds (3-.45 caliber and 4-9mm). Officer Oestmann fired the .45 caliber rounds from a position low on the stairway and to the subject's right as the subject approached the officers.

6 See attached diagram and photos.

7 See additional information and photographs of the weapon.

8 See attached diagrams showing the location of the evidence described in Lieutenant Priest's Trajectory Analysis.

Two of the .45 caliber bullets passed through the openings in the stairway balusters at an approximate angle of 15 degrees. These rounds terminated in the wall and the door frame (Markers J and L). Additional exploration of these defects found two .45 caliber bullets imbedded. The third round passed through the baluster at marker A, struck the subject in the left lateral bicep, traversed the left upper arm and exited at the top of the left rear shoulder, struck the south wall (Marker H), the ceiling (Marker I), the east wall (Marker K) and terminated on the north hallway floor at Marker 10.

Officer Wilcox fired the 9mm rounds from a position low on the stairway and in front of the subject as he approached the officer positions. One of the rounds passed through the top of the baluster post (Marker P), and struck the subject in the torso below the sternum. The pathologist recovered a bullet consistent with a 9mm near the subject's spinal column. A second round struck the subject in the right temple. The pathologist recovered a round consistent with a 9mm in the skull of the subject. A third round struck the subject on the lower right abdomen, traversed the abdomen, exited from the right lower back, and perforated the east bedroom window (Marker M). A scene search did not recover the bullet. The fourth round struck the south wall at Marker F and terminated there. Additional exploration found a 9mm bullet in the wall stud.

All bullet trajectories are consistent with the statements of Officers Wilcox and Oestmann. Although the firearms report is not complete at the time of this evaluation, the recovered bullets are consistent with the firearm types of the involved officers.

Esparza has been arrested multiple times for a variety of criminal acts. The following are the crimes for which he has been arrested, which includes commitments as a juvenile and a sentence to the Colorado Department of Corrections as an adult. His first arrest was just after turning 12 for damaging property and public order crimes. At age 13 he was arrested for possession of a firearm by a juvenile, possessing a defaced firearm, carrying a concealed weapon, possession of marijuana and for being a theft fugitive from Arapahoe County. At age 14 he was arrested for careless driving, hit and run, eluding police, and no operator's license. At age 15 he was arrested for contempt of court for failure to comply with juvenile probation. He was later arrested for possession of a firearm by a juvenile and possession of marijuana. He was incarcerated in a juvenile facility. At age 18 he had his first adult arrest for second degree assault (felony) and later had another arrest for assault. At age 19 he was arrested for failure to appear on an assault case and driving under restraint. Two weeks later he was arrested in Jefferson County for harassment. Two weeks later he was arrested for first degree assault with serious bodily injury and a deadly weapon (felony). After a series of contempt of court and failures to appear he was incarcerated in November 2004 in the Department of Corrections on a 2 year sentence. In April 2005 he had a flight-escape from felony conviction. He was later arrested for making false reports. In January 2007 he was arrested for a domestic violation of restraining order. On May 11, 2009 he was arrested for third degree assault,

harassment, theft and obstruction of a telephone. And finally, on July 2, 2009 he assaulted his stepfather.

LEGAL ANALYSIS

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

C.R.S. 18-1-707 defines the circumstances under which a peace officer can use physical force and deadly physical force in Colorado. In pertinent part, the statute reads as follows:

- (1) Except as provided in subsection (2) of this section, a peace officer is justified in using reasonable and appropriate physical force upon another person when and to the extent that he reasonably believes it necessary:
 - (a) To effect an arrest or to prevent the escape from custody of an arrested person unless he knows that the arrest is unauthorized; or
 - (b) To defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force while effecting or attempting to affect such an arrest or while preventing or attempting to prevent such an escape.
- (2) A peace officer is justified in using **deadly physical force** upon another person ... only when **he reasonably believes that it is necessary**:
 - (a) **To defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force;** or
 - (b) To effect the arrest or to prevent the escape from custody of a person whom he reasonably believes:
 1. Has committed or attempted to commit a felony involving the use or threatened use of a deadly weapon; or
 2. Is attempting to escape by the use of a deadly weapon; or
 3. Otherwise indicates, except through a motor vehicle violation, that he is likely to endanger human life or to inflict serious bodily injury to another unless apprehended without delay.

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

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

“Deadly physical force” as force the intended, natural, and probable consequences of which is to produce death, and **which does, in fact, produce death.**

Officers are entitled to rely on the doctrine of “apparent necessity” so long as the conditions and circumstances are such that a person would reasonably believe, erroneously or not, that action was necessary. See, *People v. La Voie*, 155 Colo. 551, 395 P.2d 1001 (1964), *People v. Silva*, 987 p.2d 909 (Colo. App. 1999). It is immaterial whether the suspect was actually trying to injure the officers or another, so long as a reasonable person, under like conditions and circumstances, would believe the appearances were sufficient to require the action taken.

It is fundamental that the law of self-defense, which is emphatically a law of necessity, involves the question of one’s right to act upon appearances, even though such appearances may prove to have been deceptive; also the question of whether the danger is actual or only apparent, and as well the fact that danger is not necessary, in order to justify one in acting in self-defense. Apparent necessity, if well grounded and of such a character as to appeal to a reasonable person, under like conditions and circumstances, as being sufficient to require action, justifies the application of the doctrine of self-defense to the same extent as actual or real necessity. *Young v. People*, 107 P.274, (Colo. 1910).

The test for justifiable self defense or defense of others requires that, given the totality of the circumstances, a person reasonably believed that he or another person was being subjected to the use or imminent use of unlawful physical force or deadly physical force and that he used a degree of force that he reasonably believed to be necessary to protect himself or another person.

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

CONCLUSION

Officer Oestmann and Technician Wilcox are C.I.T. trained.⁹ When they initially entered the residence, Technician Wilcox was armed with a less-lethal force TASER. He was covered by Officer Oestmann and Sergeant Beveridge who were armed with their service pistols. The intent of the officers was to take Esparza into custody and get him medical treatment for the possible drug overdose. Esparza did not permit that result. At the time of Esparza's attack on the officers, they had retreated to the stair landing with the intent to contain Esparza in the bedroom so he was not a threat to others until Metro-SWAT could respond. They called for Metro-SWAT assistance because Esparza was armed, non-compliant with their commands and was contained in the bedroom.

It is a tragic event for these two officers and the family and friends of Esparza that he chose to commit suicide and forced the officers to shoot him. Based on his prior attempts to commit suicide, his numerous statements to family and friends that he wanted to die, his statements that he was going to get in a shootout with police and was ready to die; his possession of an *unloaded*, authentic-looking-BB pistol, his comments at the scene, and his final act of coming out of the room with gun in hand raised at Technician Wilcox while closing distance, clearly suggest an intent to force the officers to shoot him. It would be impossible for anyone, under the specific facts of this case, to determine when attacked in this manner by Esparza that the gun he was wielding was a BB pistol.¹⁰ His mother and stepfather, when being menaced and assaulted by him, both believed it was a "real" gun.

Officers have a right to defend themselves from a perceived imminent attack. There is no justification to attack a police officer who is performing his lawful duty. The officers were attempting to protect Esparza, family members and citizens outside the house by containing him in the bedroom. It was Esparza's non-compliant and aggressive conduct throughout the confrontation with his mother, stepfather and then the officers, combined with his clear intent to commit "suicide by cop" that ultimately forced Officer Oestmann's and Technician Wilcox's split-second decision to shoot. Had Esparza complied with the officers' lawful commands, the confrontation would have ended peacefully at that time. Esparza had a different ending in mind. Unfortunately, it was an ending no one else wanted.

Based on a review of the totality of facts developed in this investigation, we could not prove beyond a reasonable doubt that it was unreasonable for Officer Oestmann and Technician Wilcox to fire the shots that caused Esparza's death. Therefore, no criminal charges are fileable against either officer for his conduct in this incident.

The attached document entitled Officer-Involved Shooting Protocol 2009 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

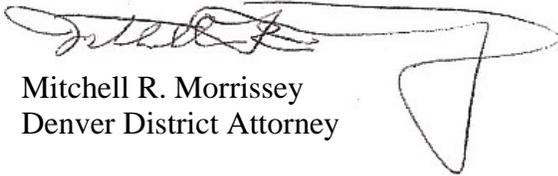
⁹ C.I.T. (Critical Incident Team) officers are trained to respond and assist on calls of this nature. Information about the C.I.T. program can be accessed through the Denver Police Department website.

¹⁰ In fact, this weapon, according to the manufacturer, is capable of producing serious injury or death. This is worth noting even though the justification for this shooting is not reliant on the BB pistol being a "deadly weapon."

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 file for in-person review at our office 60 days from the date of this 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 Christopher Wilcox; Officer Michael Oestmann; David Bruno, Attorney at Law; Doug Jewell, Attorney at Law; John W. Hickenlooper, Mayor; All City Council Members; Alvin J. LaCabe, Jr., Manager of Safety; Mel Thompson, Deputy Manager of Safety; Mary Malatesta, Deputy Manager of Safety; David Fine, Denver City Attorney; John Lamb, Deputy Chief; Michael Battista, Deputy Chief; Dave Fisher, Division Chief; David Quinones, Division Chief; Mary Beth Klee, Division Chief; Tracie Keesee, Division Chief; Rhonda Jones, Commander District 2; Gregory LaBerge, Crime Lab Commander; Joe Montoya, Captain; Jon Priest, Lieutenant, Homicide; Kathleen Bancroft, Lieutenant; Sergeant James Kukuris, Homicide; John Coppedge, Sergeant, Homicide; Detective Martin Vigil, Homicide; Detective Randal Denison, 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, Chief Deputy District Attorney; Justice William Erickson, Chair, The Erickson Commission; Richard Rosenthal, Office of the Independent Monitor.

**East bedroom
Window Esparza's
brother fled through
to call 9-1-1.**



4503 Fillmore Street



Stairs to 2nd floor

Front Door

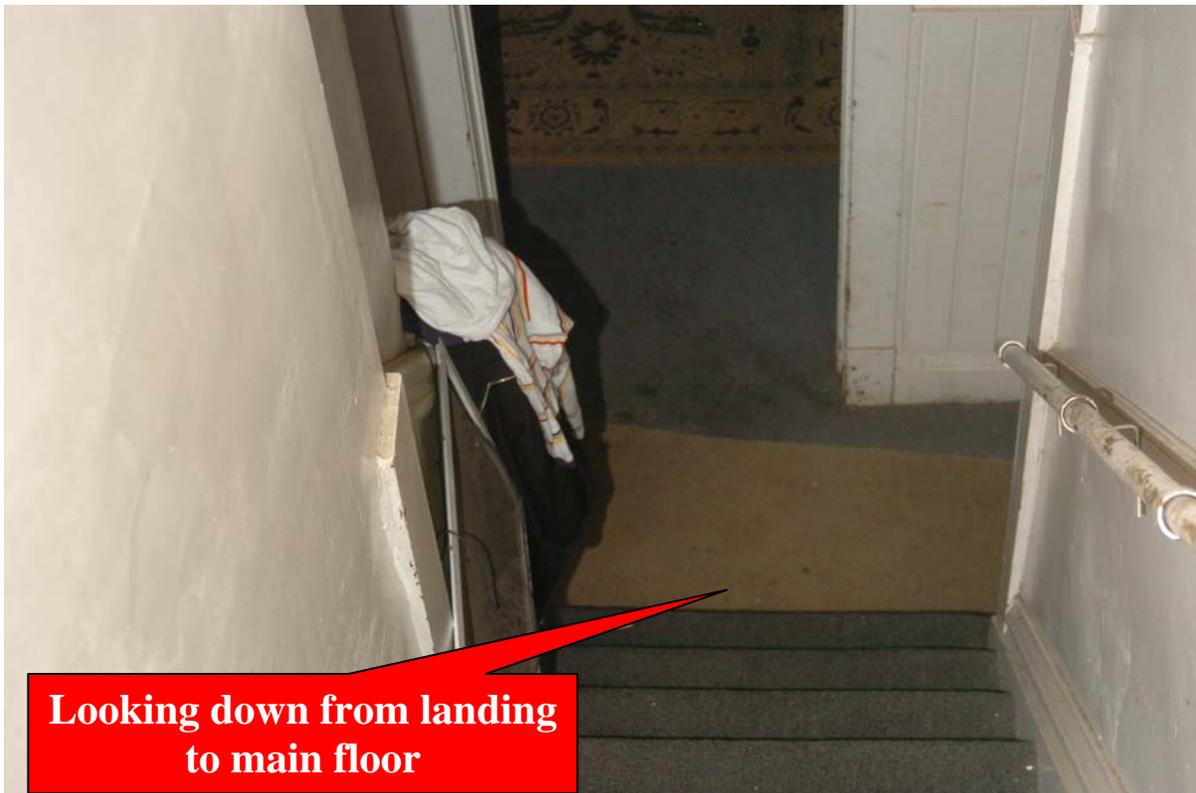
Living Room



Stairs going up to 2nd floor



Landing



Looking down from landing to main floor



Esparza's gun was placed here by Officer Oestmann after shooting

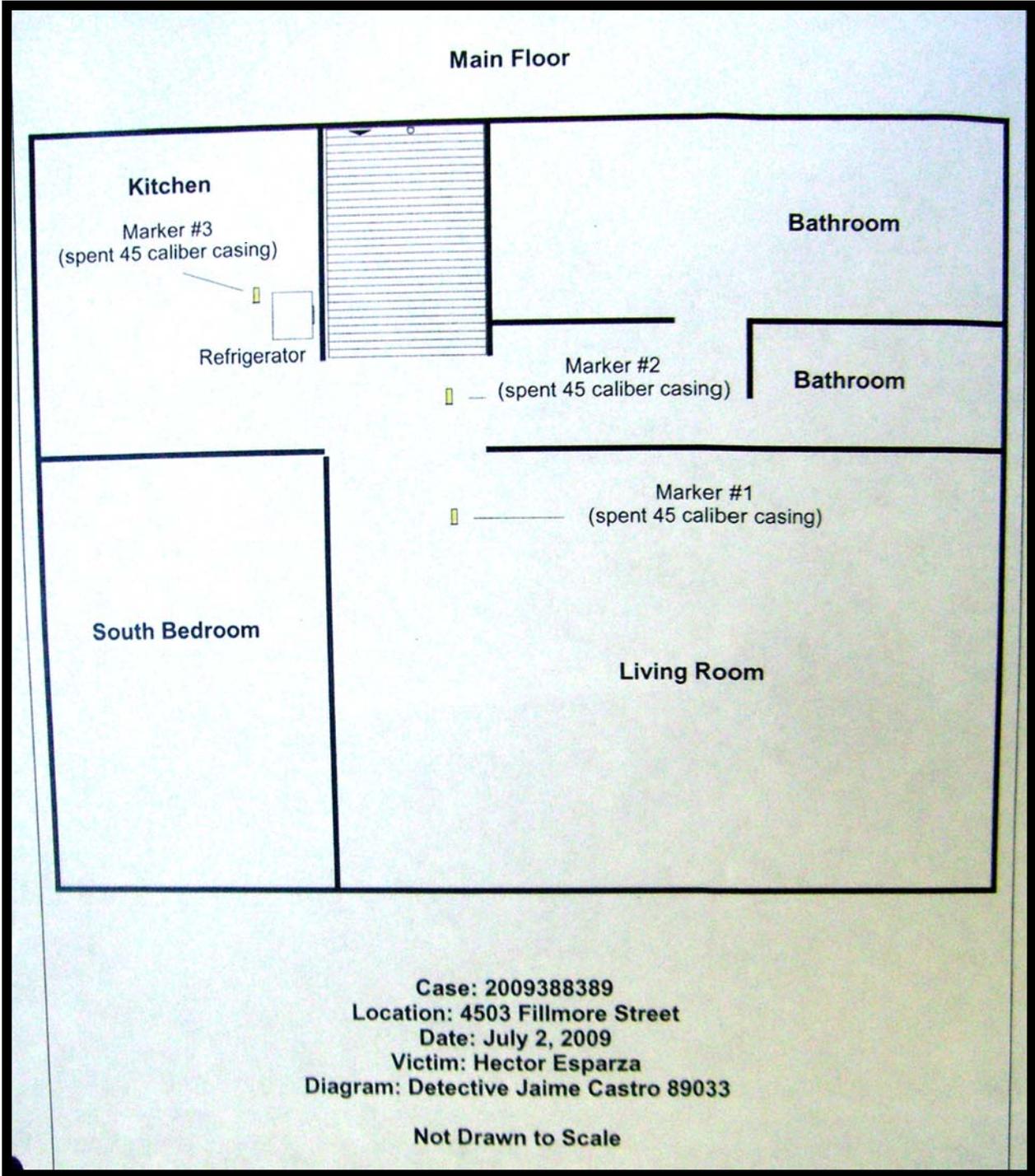
Bedroom Esparza came out of with gun in hand

Landing where Technician Wilcox and Officer Oestmann were positioned

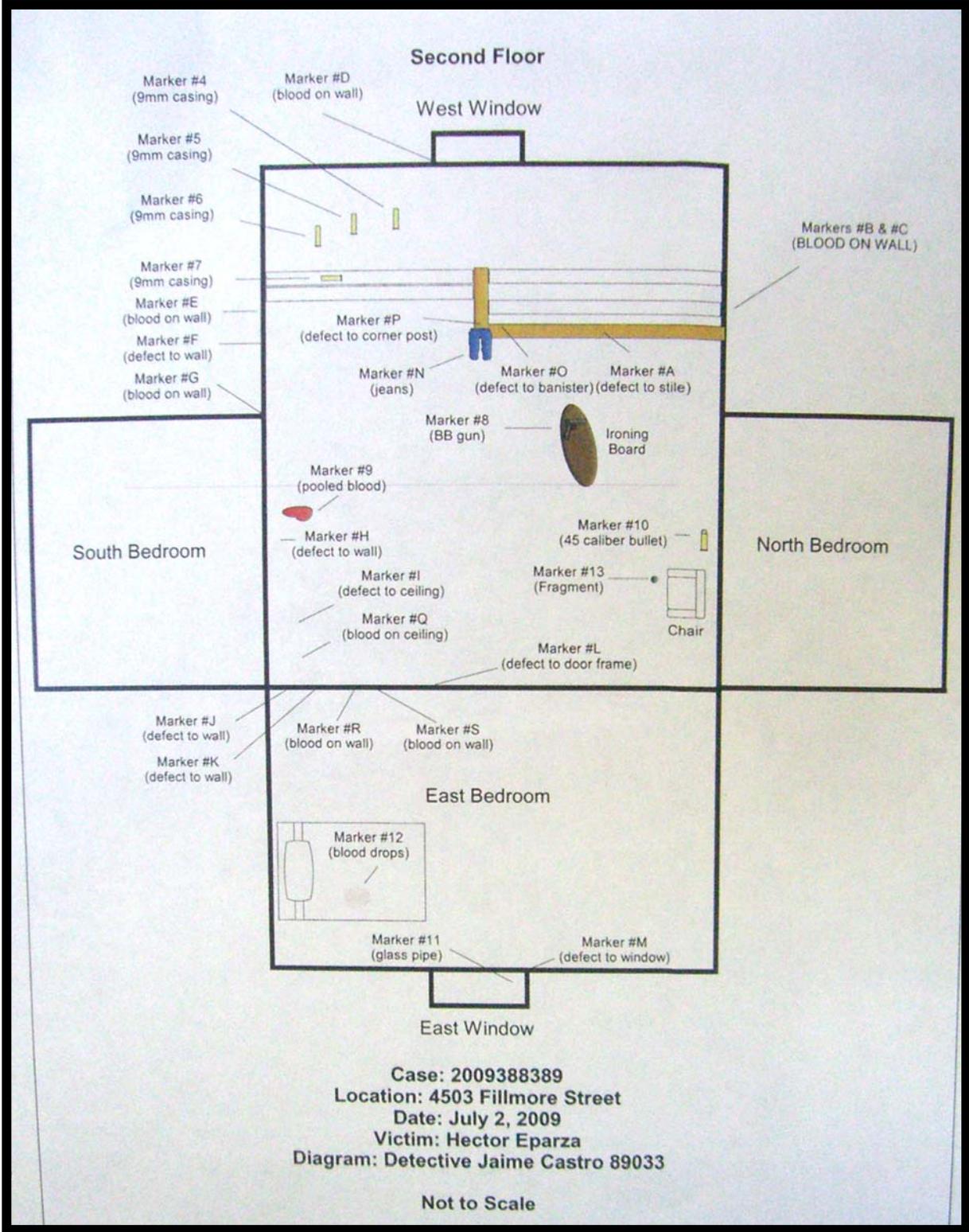




**4503 Fillmore Street
Floor plan of main floor
With location of evidence**



**4503 Fillmore Street
Floor Plan of 2nd Floor
With location of evidence**





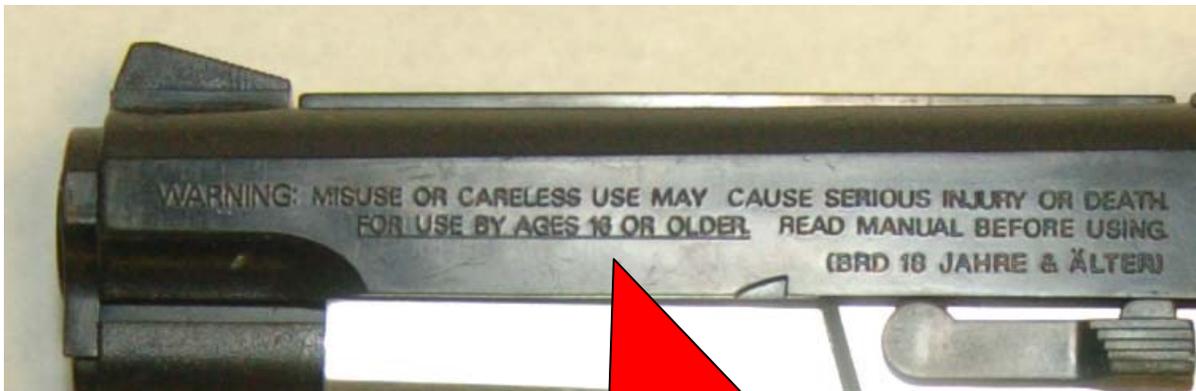


Location of the three .45 caliber cartridge cases from shots fired by Officer Oestmann

Stair Landing



Location of the four 9mm cartridge cases from shots fired by Technician Wilcox



Manufacturer's WARNING on barrel.



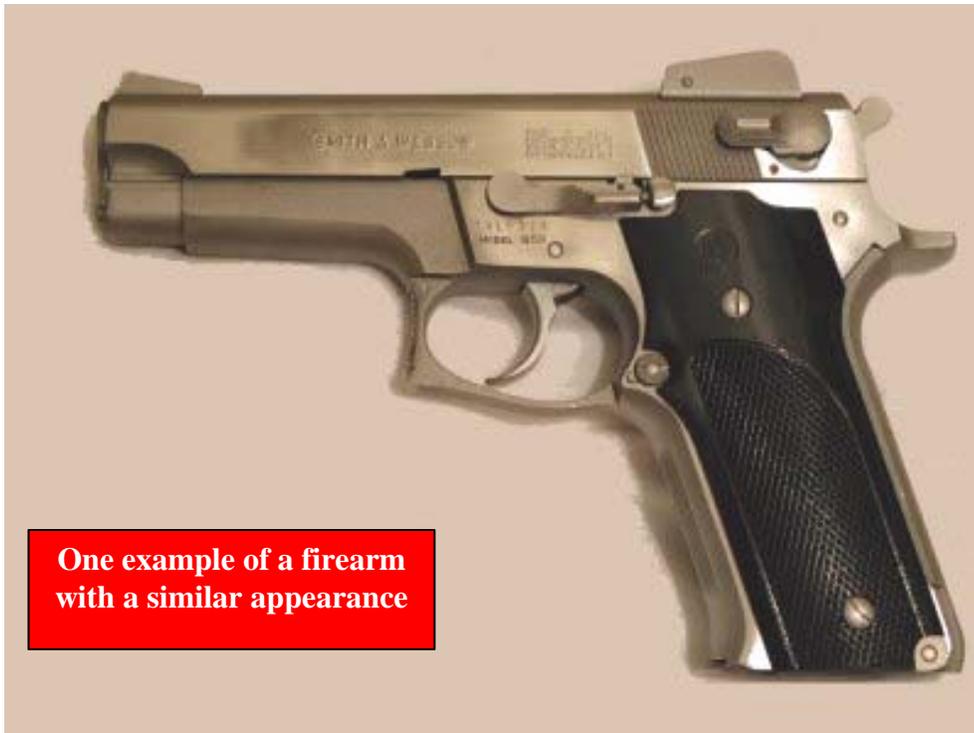
CO2 cartridge compartment



**“Drop-in clip” for the 4.5mm BB
Clip holds 15 shots**



Daisy BB pistol recovered from 4503 Fillmore Street



One example of a firearm with a similar appearance

Actual Smith & Wesson model 659, 9mm semi-automatic pistol



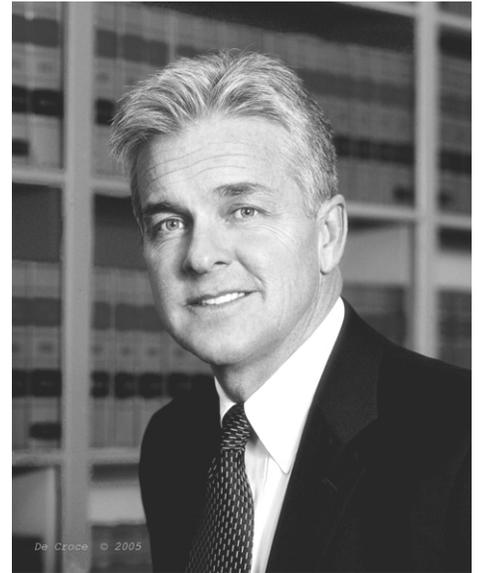
Esparza struck his stepfather with the gun causing injury and bleeding



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OFFICER-INVOLVED SHOOTING PROTOCOL 2009



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.¹¹ As a result of the positive

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

THE DECISION

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

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

One exception to the Denver District Attorney making the filing decision is if it is necessary to use the Denver Statutory Grand Jury. The District Attorney will consider it appropriate to refer the investigation to a grand jury when it is

¹¹ 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.

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.

Mitchell R. Morrissey

Denver District Attorney

CONTACT FOR INFORMATION

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