



DenverDA

Mitchell R. Morrissey, District Attorney - Second Judicial District
201 W. Colfax Avenue, Dept. 801, Denver, CO 80202

Bus. Phone: 720-913-9000
Fax: 720-913-9035

August 19, 2011

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

RE: Investigation of the shooting death of David Jerome Maestas, dob 01-05-78, in which Officer David Ryan, #04072, and Officer Robert Warren, #04063, fired shots on August 6, 2011, at 22nd Avenue and Downing Street, Denver, Colorado.

Dear Chief Whitman:

The investigation and legal analysis of the shooting death of David Jerome Maestas in which shots were fired by Officers David Ryan and Robert Warren, have been completed. I conclude that under applicable Colorado law no criminal charges are fileable against the involved officers. My decision, based on criminal-law standards, does not limit administrative action by the Denver Police Department where non-criminal issues can be reviewed or civil actions where less-stringent laws, rules and legal levels of proof apply. A description of the procedure used in the investigation of this officer-involved shooting and the applicable Colorado law is attached to this letter.

STATEMENT OF FACTS

On August 6, 2011, beginning at 8:12 a.m., the Denver Police Department received multiple 911-citizen calls about a woman screaming, a gunshot fired and a naked woman bleeding outside her home in the 2900 Block of Lafayette Street. Denver officers were dispatched to the scene and determined that the woman and a man who lived in the home were victims of a home invasion robbery and very serious assault in which the assailant was armed with and fired a handgun. Both victims were tied up in separate locations with retractable dog leashes and pistol-whipped. They both received significant lacerations to the head and face. In addition to multiple lacerations, the female victim received numerous facial and body contusions from being struck repeatedly by the assailant. She bled profusely from the cuts to her head and face.

The male victim was the first to be assaulted at gunpoint in his bedroom where his hands were tied to his feet. The assailant then assaulted him and stole his computer, I-Pod, cell phone, watch, passport and wallet. The assailant then went to the female victim's

bedroom where he tied her hands behind her back, brutally assaulted her, and fired a shot from his handgun. She managed to run from the house. The assailant ran from the house and fled in the male victim's silver Jeep Wrangler Unlimited SUV. Among other items, the female victim's purse, wallet, and cell phone were stolen.¹ These and other items stolen by the assailant were later recovered in the Jeep.

The victim's Jeep was equipped with LoJack. The Colorado State Patrol fixed-wing airplane assisted Denver officers in locating the Jeep using the LoJack tracking. It was later determined the Jeep was being driven by the assailant, David Jerome Maestas ("Maestas").² At 9:10 a.m., Officer David Ryan spotted the Jeep in the vicinity of 30th Avenue and High Street. Maestas fled and led officers on a high-speed chase. Denver officers followed the department chase protocol with authorization to pursue Maestas. At 9:11 a.m., officers were given permission to employ a P.I.T. maneuver in an effort to end the pursuit.³ While pursuing Maestas southbound on Downing Street with their lights and sirens activated, the P.I.T. maneuver was successfully executed by Officer David Ryan at 9:13 a.m. Maestas spun out and struck a light pole at 22nd Avenue and Downing Street. Officers repeatedly ordered Maestas at gunpoint to "Stop ... Stop ... Stop ... Get out of the car." Rather than complying, Maestas revved the engine and backed rapidly into Officer Ryan's patrol car. A citizen witness indicated Maestas "hit the gas again ... lunged forward ... narrowly missing an officer." He continued his effort to escape by recklessly reversing his direction back northbound on the wrong side of Downing Street. Citizen witnesses said Maestas was trying to run over police officers who were attempting to stop him. He was immediately struck by Officer Robert Warren who was travelling southbound on Downing Street. This stopped his escape and caused the Jeep to strike and sever a large tree on the west side of Downing Street. Officer Ryan, Officer Warren, Technician Jeffrey Jenkins, and Officer John Repjar quickly exited their Denver patrol cars and moved rapidly to the now stalled stolen Jeep in an effort to place Maestas in custody.⁴

The four officers continued to order Maestas to "Stop and get out of the car." Officer Jenkins ran to a position on the driver's side just behind the front door. Maestas made no indication of any intention of getting out of the vehicle to surrender peacefully. Simultaneously, Officer Repjar moved to the rear of the passenger side; Officer Ryan moved to the front of the now stalled vehicle directly in front of Maestas who was still in the driver's seat; and Officer Warren positioned himself arm's length from the front passenger door. This all occurred within seconds of the final crash. The positions the officers took were in close proximity to Maestas and at angles that would avoid a cross fire if they were forced to shoot.

1 This home invasion case is still under investigation and there remains the possibility of a criminal filing if any other person was complicit in its commission. Therefore, we are minimizing the discussion of the case.

2 In addition to other identifying information, he was identified by his singular "full-sleeve tattoos" to both arms.

3 The Denver Police Department Operations Manual defines the P.I.T. Maneuver as follows: **P.I.T. MANUEVER** - Intentional contact between the front quarter panel of a moving police vehicle and the rear quarter panel of a moving suspect vehicle. The intention is to cause a suspect vehicle to spin away from its forward direction, thus terminating a pursuit. Wikipedia defines the **P.I.T. Maneuver** as a method by which one car pursuing another can force the pursued vehicle to abruptly turn sideways to the direction of travel, causing the driver to lose control and stop. This method is mostly used to end a car chase more safely.

4 See attached series of crime scene photos.

Technician Jenkins was unable to pull the driver's door open. He then attempted to break the tinted window to gain better visibility of Maestas and to make entry to extract him. The window cracked, but was still intact. At this same instant, Maestas made a quick movement down and to his right toward the console and floor area of the Jeep. This action by Maestas was observed, not only by the officers, but also by citizens. As Maestas began moving his head and torso back up and around to his left he had a semi-automatic pistol in his right hand. He brought the gun from right-to-left across his chest pointing it directly at Technician Jenkins' face. Instantly upon seeing the gun, Officers Ryan and Warren began firing at Maestas through the front window and front passenger door window, respectively. Technician Jenkins described this split second action as seeing what appeared to be a very large barrel of the gun pointed directly in his face. As he instinctively moved his head backward and spun face down to the ground he believed Maestas had fired two shots at him and that he had seen a muzzle flash. Technician Jenkins was not the only witness who perceived Maestas had fired shots. A number of citizen witnesses were certain Maestas had fired the first shots and that Technician Jenkins had been shot at close range. One woman thought she had witnessed the murder of a Denver police officer and was relieved when Technician Jenkins rose from the ground after the shooting stopped. Another citizen witness thought Maestas fired 3 shots before officers returned fire. Another citizen witness said when the officers ordered him out of the Jeep, Maestas stated—"No, I ain't coming out." This witness also indicated Maestas fired 3 or 4 shots before police returned 6 or 7 shots. Citizen witnesses expressed amazement that Technician Jenkins was not killed.

Maestas was struck multiple times by the shots fired by Officers Ryan and Warren. It is reasonable to conclude that the simultaneous timing of the shots fired by Officers Ryan and Warren with the barrel of Maestas' gun pointed at Technician Jenkins as he fell to the ground caused Technician Jenkins and the citizen witnesses to perceive shots were fired by Maestas. The instantaneous action by Officers Ryan and Warren neutralized the deadly threat. In fact, it was later determined that Maestas' pistol malfunctioned—preventing him from firing. Based on the bullet wounds to Maestas' head, it is reasonable to conclude he died instantly. Fortunately, no citizens or officers were injured in this life-threatening confrontation.

The officers approached the Jeep with caution to insure Maestas was no longer a threat, then extracted Maestas from the Jeep and placed him on the ground. He was pronounced at the scene by Dr. S. Kryzaniak at 9:24 a.m. On August 7, 2011, an autopsy was performed on the body of Maestas. The cause of death was determined to be the result of multiple gunshot wounds.

Officer Ryan was armed with his Sig Sauer, Model P220, .45 caliber semi-automatic pistol. The weapon was being carried with 8 rounds in the magazine and one additional round in the chamber—a total of 9 rounds. Denver Police Department Crime Laboratory personnel processed the weapon and magazines after the shooting and there were a total of 3 rounds in the weapon. This is consistent with Officer Ryan firing 6 rounds. The weapon was loaded with departmental issue Speer .45 Auto JHP cartridges.

Officer Warren was armed with his Sig Sauer, Model P220, semi-automatic pistol. The weapon was being carried with 8 rounds in the magazine and one additional round in the chamber—a total of 9 rounds when Officer Warren fired at Maestas. Denver Police Department Crime Laboratory personnel processed the weapon and magazine in the weapon after the shooting and there were a total of 8 rounds in the weapon. Officer Warren placed this magazine in his weapon in a tactical reload after he had fired all nine rounds at Maestas from his original magazine. So, Officer Warren fired 9 rounds and fired no additional rounds after the tactical reload. The weapon was loaded with departmental issue Speer .45 Auto JHP cartridges.

Maestas was armed with a Glock, Model 22, .40 caliber semi-automatic pistol. The weapon has a capacity of 15 rounds. When recovered from the driver's side floor of the stolen jeep the weapon contained one spent Federal .40 caliber round in the chamber and 7 live Federal .40 caliber rounds in the magazine.⁵ When Maestas fired the shot at the scene of the home invasion robbery and assault, the weapon slide did not function properly and eject the spent cartridge casing. When Maestas grabbed the weapon and pointed it at Technician Jenkins it would not fire because of the malfunction. A new round had not been chambered and therefore the weapon could not be fired. A federal firearms trace was conducted on the weapon. The firearm was stolen in a residential forced entry burglary in Aurora, Colorado on July 21, 2011. Another firearm and two pellet guns were also taken.

Among numerous other items recovered at the scene by Denver Police Department Crime Laboratory personnel were the items listed above that were stolen from the victims of the home invasion crime. Also, the 15 spent .45 caliber cartridges fired by Officers Ryan and Warren which is consistent with the 6 rounds fired by Officer Ryan and 9 rounds fired by Officer Warren. The scene was fully processed and documented. The results are consistent with the events described in this letter.

Maestas' lengthy adult criminal record began in 1996 when he turned 18. His arrests include 2nd Degree Burglary (multiple), 1st Degree Criminal Trespass, Escape, Parole Violation (multiple), 2nd Degree Assault, Possession of Controlled Substance (multiple), Conspiracy to Distribute Controlled Substance, Obstructing Police, False Information (multiple), Felony Theft, Felony Menacing, 1st Degree Assault with Deadly Weapon & Serious Bodily Injury, and other misdemeanor offenses. Maestas has served multiple sentences to prison in the Colorado Department of Corrections. His adult life has been a continuous pattern and cycle of committing crimes, victimizing citizens, residing in prison, being released on parole, violating parole, and committing more crimes. In January of 2011, he received an early parole from his latest sentence to the Colorado Department of Corrections. He then continued his criminal conduct and there was an active warrant for his arrest for parole violations at the time of these life-threatening events. Had he survived, Maestas would have been charged with multiple felony counts related to the home invasion robbery and serious assault; the multiple crimes committed during his attempt to escape apprehension; and with a high degree of probability for the armed robbery of a fast-food restaurant in Lakewood and cowardly shooting of an employee in the back. This senseless act was caught on surveillance video and shows Maestas' total

⁵ See attached crime-scene photographs of Maestas' firearm.

disregard for human life. He was identified from a call to Crime Stoppers by a person who knew Maestas and saw the restaurant's surveillance video on television. At the time of his death he was also a prime suspect in other recent home invasion robberies. His final crime was the attempt to murder a Denver police officer.

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 is generally prohibited as assault or homicide in Colorado, the Criminal Code specifies certain circumstances in which the use of physical force or deadly physical force by a peace officer is justified. As the evidence establishes that Maestas' death was caused by shots fired by the officers, 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 the officers fired the shots, each of them reasonably believed that Maestas was directing or was about to direct deadly physical force against any of them or another person. In order to establish criminal responsibility for an officer knowingly or intentionally causing the death of another, the state must prove beyond a reasonable doubt that the officer or officers doing the shooting either did not really believe in the existence of these requisite circumstances, or, if they did hold such belief, that belief was, in light of all available facts, unreasonable.

ADDITIONAL COMMENTS

Prior to articulating my conclusion in this case, I believe it is important to make some additional comments concerning this case and its relationship to officer-involved shootings in general.

This is the first officer-involved shooting in Denver in over a year. The twenty-year annual average is about seven shootings per calendar year. This is by far the longest period between shootings from records dating back to 1970.

All law enforcement officers on the front line of serving and protecting our communities arrive for their shift with no idea what the day will bring. We are fortunate to have officers who are willing to accept the difficult challenges of this work and the ever present danger associated with their profession. We are mindful of the sacrifices made by their families who also live with the uncertainty of every shift and the hope for a safe return home. The actions of the four Denver officers reflect the professionalism, character and courage these officers and others bring to duty every day.

I am certain these four Denver officers would have preferred to just return home safely after an uneventful tour of duty, but unfortunately our community has criminals such as Maestas from whom we need to be protected. We depend on our officers to stand between us and criminals like Maestas. While officers would prefer not to be placed in the position to have to use physical or deadly physical force to protect themselves or others, we are thankful they are prepared to do so professionally when circumstances require it.

Denver police officers have a very singular record of voluntary cooperation in their response to officer-involved shooting incidents. For the past 33 years, without exception, every Denver police officer who has fired his or her firearm in an officer-involved shooting has given a full voluntary statement to investigators immediately following the shooting, *in spite of the fact they have the right not to do so*. Since 1983 these statements have been conducted in the videotape interview rooms. It is this voluntary conduct by Denver officers, combined with sequestration of the officers prior to making the statements and the subsequent opening of the case file for review by anyone at the conclusion of the investigation, that is the bedrock of the Officer-Involved Shooting protocol that has been recognized as one the best in the country.

The voluntary cooperation of officers and the Department's long time strict compliance with the Officer-Involved Shooting Protocol allows for a complete, thorough, fair and after the fact verifiable investigation to be conducted in these important cases. As a result, we have been able to conduct the investigation and review as quickly as practicable and provide a full accounting of what occurred to the community in every officer-involved shooting in the past 33 years. While there will always be occasional controversial cases and differences of opinion of what the outcome should be, we have been fortunate to always achieve a *complete* and *thorough* investigation. This could not be accomplished without the voluntary cooperation of citizen and officer witnesses.

A full understanding of the circumstances in which these use of force encounters occur is important in properly assessing the statements of citizen and officer witnesses. Officers are often forced to make instantaneous life and death decisions in these fast moving, intense, armed confrontations, with their life hanging in the balance. Under these stressful circumstances, multiple factors influence the officer and citizen witness perceptions of the events.

The selective, hurried, or piecemeal presentation of facts in these cases has a high risk of inaccuracy—potentially leading to harmful consequences. Prematurely making judgments and reaching conclusions about these events is dangerous when done without waiting for and considering the *totality* of the pertinent facts in the investigation. In that regard, witness perceptions, be they those of citizen or officer witnesses, that appear to be or are inconsistent with the perceptions of other witnesses or the physical evidence are not necessarily the product of someone lying or departing from the truth.

It is the *totality* of the witness statements, physical evidence and other investigative information as a whole on which judgments and conclusions should be based. For a variety of legitimate reasons, there will be inconsistencies, inaccuracies and even totally incorrect perceptions, that are, in fact, not the product of lying, deceit or departing from the truth. When such accusations are made against a citizen or officer, it should be backed up with a high degree of proof and certainty. It should not be based on: “It appears to be” or “it might be” or “it could be” or “it is more likely than not to be” a lie or departing from the truth. Applying inappropriate standards to the assessment, or an abuse of discretion, judgment or power in this process, can lead to unjust results, break down trust in the system, and impact the willingness of officer and citizen witnesses to make voluntary statements. The Officer-Involved Shooting protocol involves a delicate balance that is dependent on fairness and trust in the system.

The current case is illustrative of this important issue. Technician Jenkins and a number of the citizen witnesses indicated that Maestas fired shots at Technician Jenkins before Maestas was shot by Officers Ryan and Warren. The citizen witnesses expressed certainty of this fact. In fact, one citizen witness was certain Office Jenkins was shot and killed by Maestas. Technician Jenkins stated he thought Maestas had fired two shots and thought that he had seen a muzzle flash. Officers Ryan and Warren stated they did not know whether Maestas fired shots before they shot him. Consequently, after the first 8 hours of interviewing the citizen witnesses and involved officers, it appeared to investigators that Maestas had fired shots at Technician Jenkins and was then fired at by Officers Ryan and Warren. [Note: Under the facts of this case the officers were justified whether or not Maestas fired.]

During the early stages of an investigation the media is seeking information about the shooting from the Denver Police Department through its Public Information Officer (PIO), as well as from other sources. Later that evening the results of the Denver Police Department Crime Laboratory analysis of Maestas’ firearm determined that the weapon malfunctioned and no shots had been fired by Maestas. If the information available to investigators from the witnesses prior to that finding had been provided to the media in a

press release or otherwise and reported by them, it would have been a significant inaccuracy. Possible headline: “*DENVER OFFICERS RETURN FIRE—KILL SUSPECT.*” This would have unnecessarily created a controversy in a clearly justified shooting. This is an example of why law enforcement must be cautious in releasing information—only doing so when permitted by law and ethics and with certainty of its accuracy.

In this case, Maestas did not fire his pistol at Technician Jenkins. He may well have attempted to, but, in fact, no shots were fired. Does this mean the citizen witnesses and Technician Jenkins are lying or departing from the truth? No. When fairly assessed in light of the *totality* of the facts established in the investigation these variations in their stated perceptions of the event are clearly understandable. This is the case in spite of the fact the citizen witnesses and Technician Jenkins’ perceptions were, in fact, 100% inaccurate. What if there had been no citizen witnesses or citizen witnesses with the same misperceptions as Technician Jenkins? Would a reviewer be finding that Officer Jenkins was lying or departing from the truth?

Statements of witnesses to the same event can and often do vary. They may be inconsistent with other witness statements and the physical evidence—even with a video of the event. This does not necessarily mean the witness is lying or departing from the truth. This case is an example of that fact. When you accuse someone of lying or departing from the truth you have, at a minimum, a moral and ethical duty to be right and to be able to prove it. If you make such accusations from a position of responsibility and authority; abuse of this power can lead to irreparable harm to the system.

CONCLUSION

Maestas committed a home invasion robbery and brutal assault. His semi-automatic pistol was fired during the attack. He later made the decision to attempt to escape apprehension by leading officers on a high-speed chase in the stolen Jeep while still in possession of the pistol. When the authorized P.I.T. maneuver was successfully executed by Denver police and he crashed, rather than surrender peacefully, he chose to continue his reckless driving—intentionally endangering officers and citizens. When struck by another Denver patrol car in an effort to stop him—he crashed again. With the stolen Jeep stalled, but still in gear, he chose to continue to refuse to surrender peacefully. Instead, he intentionally chose to grab the pistol and point it directly at a Denver police officer. This was his last bad decision.

Maestas’ life resume` is consistent with his decisions and actions in this life-threatening encounter. It includes committing multiple crimes against people and property, serving multiple prison sentences at taxpayer expense, followed by multiple paroles and parole violations, beating women, shooting hardworking people in the back, and threatening the lives of citizens and police officers. Maestas’ actions suggest he had no rules, no conscience and no respect for the value of human life.

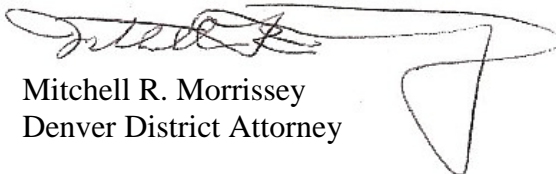
Based on a review of the totality of facts developed in this investigation, we could not prove beyond a reasonable doubt that it was unreasonable for the two officers to fire

the shots that caused Maestas' death. In fact, the officers acted with professional restraint, in spite of the obvious danger to them posed by Maestas' conduct, by not using deadly force at an earlier point in the confrontation as would have been legally permissible under C.R.S. 18-1-707(2)(b)(1)&(2). They only used deadly force when it was necessary "to defend" against the imminent deadly threat to their fellow officer. They were clearly legally justified to shoot Maestas under Colorado law. Therefore, no criminal charges are fileable against the involved officers for their conduct in this incident.

The attached document entitled Officer-Involved Shooting Protocol 2011 is incorporated by this reference. The following pertinent statement is in that document: "In most officer-involved shootings the filing decision and release of the brief decision letter will occur within two to three weeks of the incident, unless circumstances of a case require more time. The more compressed time frame will allow the Denver Police Department administrative investigation to move forward more quickly." In this case, there is still testing being conducted and the associated home invasion crime is still under investigation. However, in this case it is not necessary to delay the release of this letter to wait for those results because the results of the testing and further investigation are not of the type that could alter the ultimate decision in this matter. 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.

Because there will be no criminal prosecutions related to this shooting incident, we will open our file related to this Officer-Involved Shooting for *in-person review at our office* 60 days from the date of this letter. If there were a criminal filing against another person related to the home invasion case, we would simply protect the release of information concerning that crime consistent with applicable legal and ethical standards. The Denver Police Department is the custodian of records related to this case. All matters concerning the release of documents related to administrative or civil actions are controlled by the Civil Liability Division of the Denver Police Department. As in every case we handle, any interested party may seek judicial review of our decision under C.R.S. 16-5-209.

Very truly yours,



Mitchell R. Morrissey
Denver District Attorney

cc: Officer David Ryan; Officer Rob Warren; Officer Jeffrey Jenkins; Officer John Repjar; David Bruno, Attorney at Law; Sean Olson, Attorney at Law; Michael Hancock, Mayor; All City Council Members; Ashley Kilroy, Manager of Safety; Mel Thompson, Deputy Manager of Safety; David Broadwell, 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 Keese; Gregory LaBerge, Crime Lab Commander; Rhonda Jones, District 2 Commander; Ron Saunier, Captain; Jon Priest, Lieutenant, Homicide; Kathleen Bancroft, Lieutenant; Sergeant James Kukuris, Homicide; John Coppedge, Sergeant, Homicide; Detective Bruce Gibbs, Homicide; Detective Troy Bisgard, 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; Richard Rosenthal, Office of the Independent Monitor.



Scene of Maestas' vicious pistol whipping assault of the female victim during the home invasion robbery/assault.





Scene of Maestas' vicious pistol whipping assault of the female victim during the home invasion robbery/assault.





Bullet hole in the floor of the bedroom where Maestas' fired his pistol during the assault of the female victim.



Red rod placed through the bullet hole to show trajectory and to assist in locating the bullet in the crawl space.



Bullet recovered in the crawl space from the shot fired through the bedroom floor by Maestas.



Dog leash that was used to tie up one of the victims.

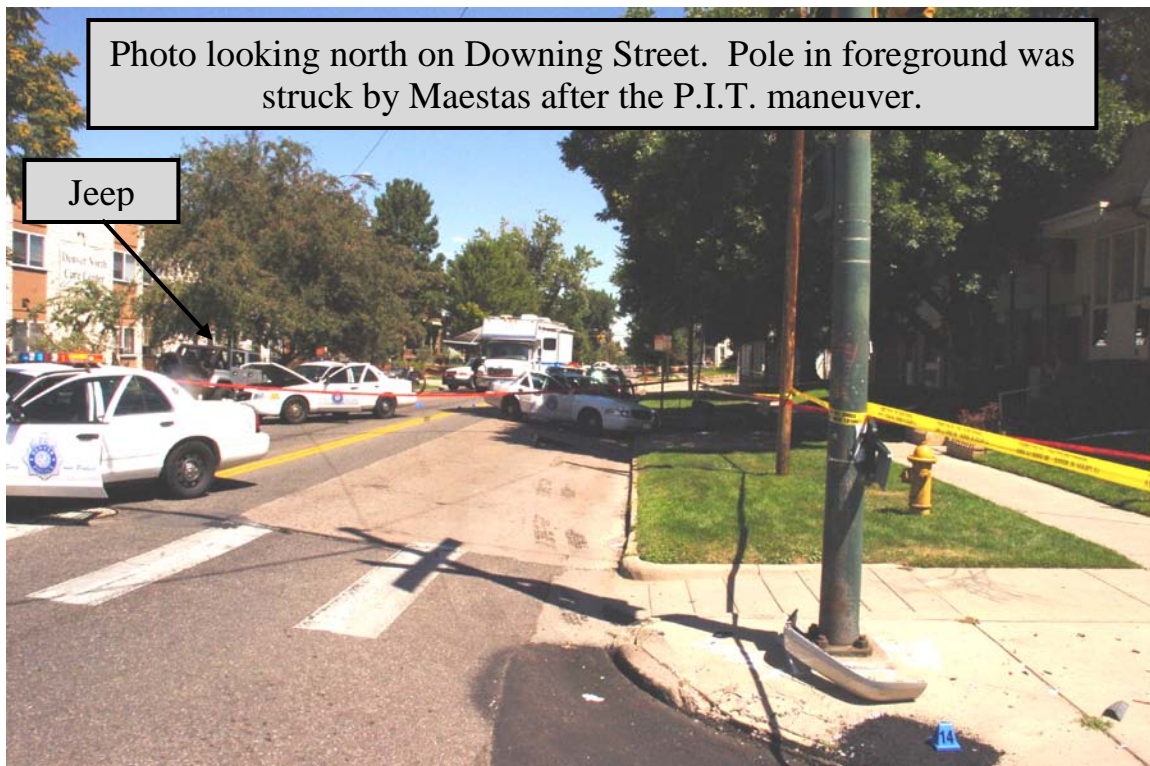
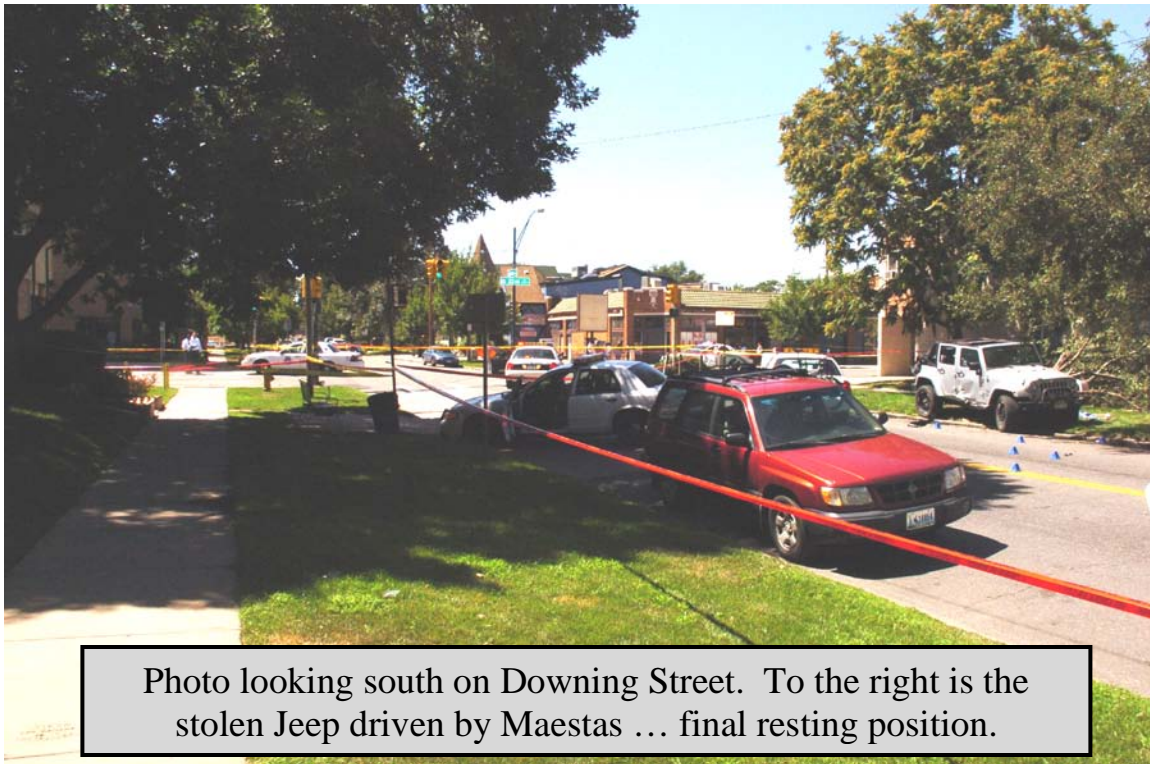





Photo looking south on Downing ... Jeep ...  location of Maestas after shooting ... location of officers during shooting



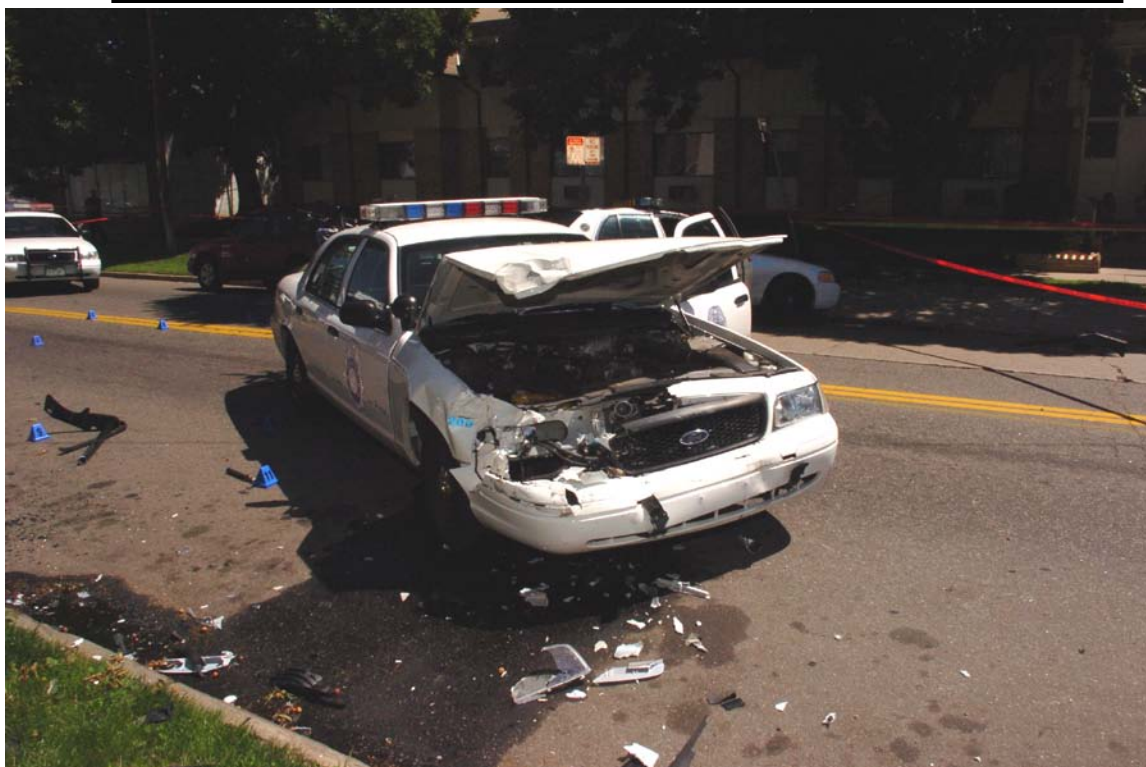


Photo looking south on Downing ... Jeep ... location of Maestas after shooting





Photo looking north on Downing ... Jeep ...  location of Maestas after shooting ... Officer Warren's patrol car



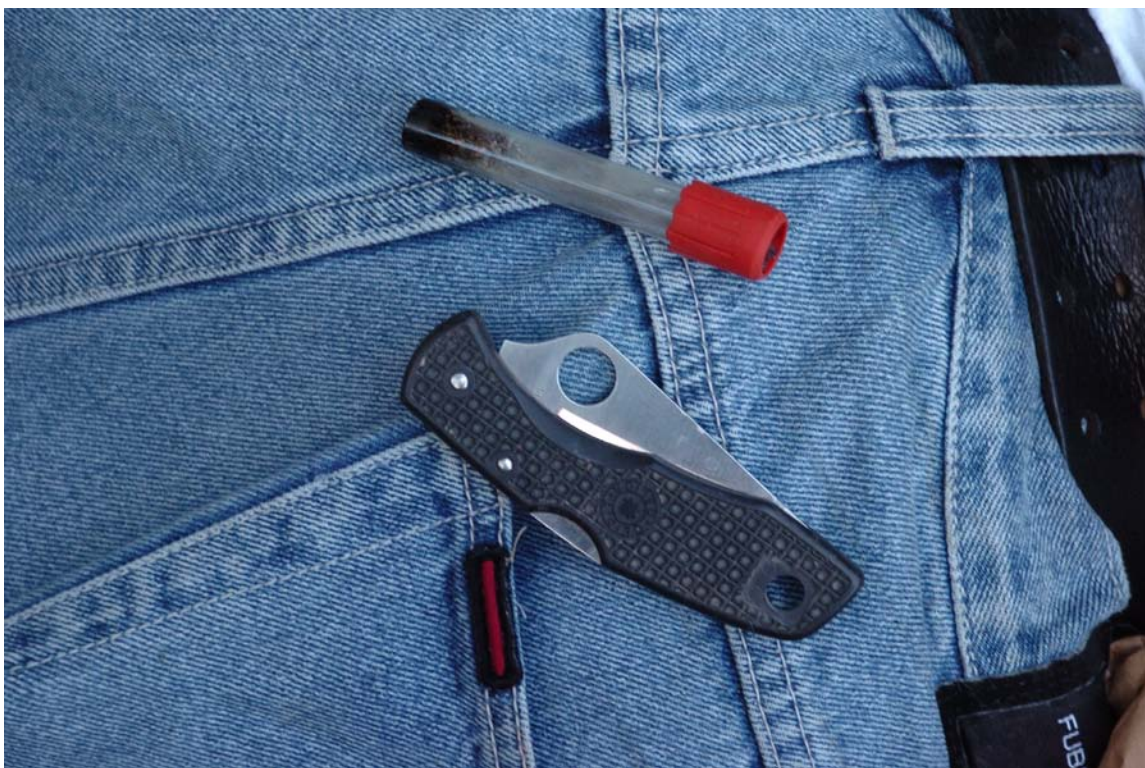
Interior of Jeep showing shots fired by Officer Ryan through front window & Officer Warren through passenger window ... location of Maestas' pistol on driver's side floor





Interior of Jeep showing location of Maestas' pistol on driver's side floor ... home invasion victim's wallet ... placed on seat after recovered in the Jeep

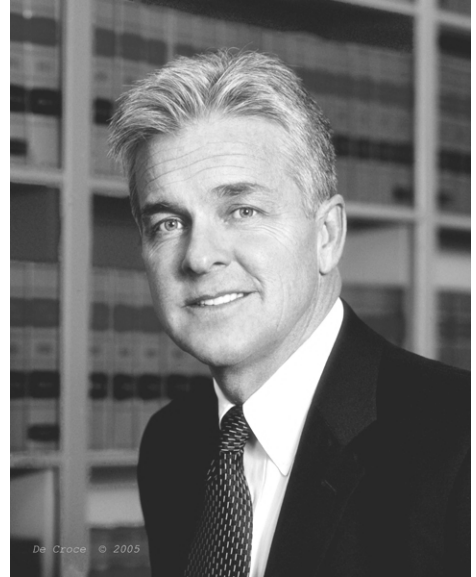




Knife and glass pipe used to smoke controlled substances recovered from pockets of Maestas' blue jeans



OFFICER-INVOLVED SHOOTING PROTOCOL 2011



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.⁶ 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.

⁶ 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.

One exception to the Denver District Attorney making the filing decision is if it is necessary to use the Denver Statutory Grand Jury. The District Attorney will consider it appropriate to refer the investigation to a grand jury when it is necessary for the successful completion of the 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 Fresquez committed the charged crime. In order to return a "no true bill," at least nine grand jurors must vote that the probable cause proof standard has not been met. In Colorado, the grand jury can now issue a report of their findings when they return a no true bill or do not reach a decision—do not have nine votes either way. The report of the grand jury is a public document.

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

THE COLORADO LAW

Criminal liability is established in Colorado only if it is proved beyond a reasonable doubt that someone has committed all of the elements of an offense defined by Colorado statute, and it is proved beyond a reasonable doubt that the offense was committed without any statutorily-recognized justification or excuse. While knowingly or intentionally shooting and causing injury or death to another human being is

generally prohibited as assault or murder in Colorado, the Criminal Code specifies certain circumstances in which the use of physical force or deadly physical force is justified. As there is generally no dispute that the officer intended to shoot at the person who is wounded or killed, the determination of whether the conduct was criminal is primarily a question of legal justification.

Section 18-1-707 of the Colorado Revised Statutes provides that while effecting or attempting to effect an arrest, a peace officer is justified in using deadly physical force upon another person . . . when he reasonably believes that it is necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force. Therefore, the question presented in most officer-involved shooting cases is whether, at the instant the officer fired the shot that wounded or killed the person, the officer reasonably believed, and in fact believed, that he or another person, was in imminent Danger of great bodily injury or death from the actions of the person who is shot. In order to establish criminal responsibility for knowingly or intentionally shooting another, the state must prove beyond a reasonable doubt that the person doing the shooting either did not really believe he or another was in imminent danger, or, if he did hold such belief, that belief was, in light of the circumstances, unreasonable.

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

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

GENERAL COMMENTS

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

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

When a police-citizen encounter reaches this split-second window, and the citizen is armed with a deadly weapon, the circumstances generally make the shooting justified, or at the least, difficult to prove criminal responsibility under the criminal laws and required legal levels of proof that apply. The fact that no criminal charges are fileable in a given case is not necessarily synonymous with an affirmative finding of justification, or a belief that the matter was in all respects handled appropriately from an administrative viewpoint. It is simply a determination that there is not a reasonable likelihood of proving criminal charges beyond a reasonable doubt, unanimously, to a jury. This is the limit of the District Attorney's statutory authority in these matters. For these reasons, the fact that a shooting may be "controversial" does not mean it has a criminal remedy. The fact that the District Attorney may feel the shooting was avoidable or "does not like" aspects of the shooting, does not make it criminal. In these circumstances, remedies, if any are appropriate, may be in the administrative or civil arenas. The District Attorney has no administrative or civil authority in these matters. Those remedies are primarily the purview of the City government, the Denver Police Department, and private civil attorneys.

Research related to officer-involved shootings indicates that criminal charges are filed in approximately one in five hundred (1-in-500) shootings. And, jury convictions are rare in the filed cases. In the context of officer-involved shootings in Denver (approximately 8 per year), this ratio (1-in-500) would result in one criminal

filing in 60 years. With District Attorneys now limited to two 4-year terms, this statistic would mean there would be one criminal filing during the combined terms of 8 or more District Attorneys.

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

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

The American Bar Association's *Prosecution Standards* state in pertinent part: "A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction. In making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved or to a desire to enhance his or her record of convictions. Among the factors the prosecutor may properly consider in exercising his or her discretion is the prosecutor's reasonable doubt

that the accused is in fact guilty.” The National District Attorneys Association’s *National Prosecution Standards* states in pertinent part: “The prosecutor should file only those charges which he reasonably believes can be substantiated by admissible evidence at trial. The prosecutor should not attempt to utilize the charging decision only as a leverage device in obtaining guilty pleas to lesser charges.” The standards also indicate that “factors which should **not** be considered in the charging decision include the prosecutor’s rate of conviction; personal advantages which prosecution may bring to the prosecutor; political advantages which prosecution may bring to the prosecutor; factors of the accused legally recognized to be deemed invidious discrimination insofar as those factors are not pertinent to the elements of the crime.”

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

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

force, and other conduct, both positive and negative.

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

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

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

It is clear not every officer will handle similar situations in similar ways. This is to be

expected. Some officers will be better than others at defusing potentially-violent encounters. This is also to be expected. To the degree officers possess skills that enhance their ability to protect themselves and our citizens, while averting unnecessary shootings, Denver will continue to have a minimal number of officer-involved shootings. Denver officers face life-threatening confrontations hundreds of times every year. Nevertheless, over the last 20 years officer-involved shootings have averaged less than eight annually in Denver. These numbers are sharply down from the 1970s and early 1980s when there were 12-to-14 shootings each year.

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

RELEASE OF INFORMATION

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

released prior to the conclusion of the investigation.

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

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

CONCLUSION

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

Mitchell R. Morrissey

Denver District Attorney

CONTACT FOR INFORMATION

Chuck Lepley, First Assistant District Attorney, Denver District Attorney’s Office, 201 West Colfax Avenue, Dept. 801, Denver, CO 80202 720-913-9018

