



# DenverDA

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November 11, 2011

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

RE: Investigation of the shooting death of Mark Sepulveda, dob 01/19/87, DPD # 566212, in which Officer Tim Sullivan, #90007, and Officer Derek Hancock, 05004, fired shots on October 18, 2011, in front of the 7-Eleven store at Krameria Street and East 14<sup>th</sup> Avenue, Denver, Colorado.

Dear Chief Whitman:

The investigation and legal analysis of the shooting death of Mark Sepulveda in which shots were fired by Officer Tim Sullivan ("Officer Sullivan") and Officer Derek Hancock ("Officer Hancock"), 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

The building complex in the 6000 block of East 14<sup>th</sup> Avenue comprises a "strip mall" in which is found several different businesses. The front doors to the businesses face to the south where they are separated from East 14<sup>th</sup> Avenue by a large parking lot. Krameria Street is on the west side of the complex; Leyden Street is on the east. A 7-Eleven store, at 6201 E. 14<sup>th</sup> Avenue, anchors the mall on the west end and the "14<sup>th</sup> Avenue Liquor" store

at 6245 E. 14<sup>th</sup> Avenue. Just west of the liquor store is “Hook-Up Tech”, a cellular telephone store (the “cell phone store”) at 6239 E. 14<sup>th</sup> Avenue.<sup>1</sup>

On October 18, 2011, Mr. Adam Cho, 24, and Mr. Joshua Hart, 42, were working at the cell phone store. Mr. Hart owns the store in partnership with Adam Cho’s father, Mr. Jerry Cho, 51. At about 12:15 p.m., two men entered the store. One, a Hispanic male in his twenties, was wearing dark clothes, a patch over his left eye and a bandana over the lower part of face. The other, also a Hispanic male in his twenties, was described by Adam Cho as having a “round face” and dark hair cut into a “fade.” The man with the eye patch was later identified as Mark Sepulveda, (“Sepulveda”); the second man was later identified as Justin Martinez, 9/12/90, DPD 764111, (“Martinez”). Sepulveda was armed with what Adam Cho described as a silver and black handgun.<sup>2</sup>

Adam Cho provided investigators with written and video-taped statements. In a portion of his written statement, he described the initial entry of the assailants:

“...the two men came running through the door. One had a ski mask or a bandana on his face ... they were yelling get down and the one with the ski mask had a silver gun and was pointing it at me and [Mr. Hart] then he told us to get down and then [Mr. Hart] didn’t get down right away so he fired at him and missed hitting a TV. Then we were both on the ground and they made us empty our pockets and open the register ... then they told me to open the safe. I said I didn’t know the combo so [then] the one with the mask hit me with his gun on the top of my head, the one without [a gun] kneed me in the face.”

Mr. Hart also provided investigators with written and video-taped statements in which he described the robbery in similar terms. He stated that only the man wearing the mask had a silver-colored handgun, and that after making the initial demands, the gunman fired the gun once. Mr. Hart told investigators that the bullet passed through a television monitor and hit the back wall, but that he thought the gunman was aiming at him. The gunman continued to issue commands and Mr. Hart thought he recognized the voice as belonging to “Markie”, a customer. The gunman ordered Mr. Hart to open the safe and he complied. The robbers also bound Adam Cho with a computer cable. The gunmen fled and Mr. Hart and Adam Cho both called 911.<sup>3</sup>

During the course of the robbery at least two patrons entered or attempted to enter the store. One, Ms. Karen Sherman, walked into the store during the robbery. She was ordered, at gunpoint, to sit in a chair. Another, Kurt Imhof, attempted to enter but was told by one of the robbers that the store was closed. Mr. Imhof stepped away and called Mr. Jerry Cho, whom he knew, and asked him whether the store was, in fact, closed. Jerry

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1 Attached in the appendices is an aerial photograph showing the mall and parking lot. This photo was not taken on the date of the incident. Also in the appendices is a crime scene diagram which identifies each store in the strip mall and depicts some of the cars discussed in this letter.

2 See attached photos of the firearm Sepulveda was wielding during his crime spree and at the time he was shot.

3 People in business adjacent to the cellphone store heard the gunshot. At least two of them called “911” after hearing the shots. (See, e.g., the statements of Stephanie Mailhot.) The first was made 12:18:36; the second at 12:18:45

Cho, who was driving to work, told him that the store was open. Jerry Cho arrived shortly after he received the phone call from Mr. Imhof and saw:

“Two people ... one with red mask ran to east and another one took off to west (without mask. . . . [a] police officer pulled up and chased the one with the mask so I went after the one without [the] mask west in my car. The[n] more police pulled up so I turned around in the parking lot back to the shop. Then I saw one with mask running towards me point the gun at me. As I passed him he shot at me. I have a bullet hole in my car. Then I saw officer shot [sic] at man with mask on.”

The Denver police 911 call-center began receiving calls at 12:18:36 p.m. One of the first CAD (“Computer Aided Dispatch”) notations reads: “CLR [caller] JUST HEARD GUNS SHOT POSS ROBBERY”. At 12:19:34, the police dispatcher aired a “Robbery in Progress” simulcast.<sup>4</sup> Denver police officer Tim Sullivan, 90007, was in the area of 6<sup>th</sup> Avenue and Krameria Street when he monitored the radio call. Officer Sullivan, driving a marked Denver Police patrol car and wearing a full blue DPD uniform, responded “Code 10” [Emergency lights and siren]”. The CAD report indicates that he began responding at 12:19:51 and arrived less than 90 seconds later at 12:21:18.

Narcotics Officer Derek Hancock, 05004, was also driving in the area of 6<sup>th</sup> Avenue and Krameria Street when the simulcast aired. Officer Hancock, who was in a plain clothes assignment, was wearing blue jeans and a grey shirt and was driving an under-cover vehicle. He saw the lights of Officer Sullivan’s marked police car activate and, as the dispatcher indicated “shots fired,” decided to the cover and assist other responding officers. Officer Hancock did not have emergency equipment on his car and thus was not able to keep up with Officer Sullivan. Officer Hancock arrived shortly after Officer Sullivan and was the second officer on scene.

Officer Sullivan provided a voluntary video-taped statement to investigators. As noted above, he was in the area of 6<sup>th</sup> Avenue and Krameria Street when the simulcast aired. He arrived on scene and drove in the parking lot from the west side. As he proceeded east across the lot he saw the two suspects running out of the cell phone store. They were running toward his police car but when he came into view, both reversed their direction. Officer Sullivan saw one of them crouch behind a car in front of the store and he stopped his car, got out and looked for that individual without success. He then got back into his car and drove east to Leyden Street. As he rounded the liquor store, he saw the other suspect standing at a car on the east side of Leyden Street and north of his position. Officer Sullivan started driving toward the individual (later identified as Sepulveda) who then pointed a handgun at him. Officer Sullivan, fearing he was about to be shot, ducked down behind the dashboard and accelerated toward Sepulveda. He told investigators that he was attempting to hit the suspect with his car in an effort to disable him but was unsure whether he made impact. Officer Sullivan stopped his car behind the liquor store, looked up and found the suspect was no longer in sight.

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4 The simulcast was as follows: “Attention all cars on a robbery in progress. 6237 East 14<sup>th</sup>. We’ve had shots fired inside there. 6237 East 14<sup>th</sup>. Cars responding switch to Dispatch Three.”

Officer Sullivan got out of his police car and was walking along the side of the liquor store when he heard a gunshot. He “pied” around the corner of the building and saw citizens pointing toward a black Jeep parked in front of the 7-Eleven store. He started approaching the Jeep, with his service pistol drawn, and saw Sepulveda apparently trying to get into the driver’s door of the Jeep. As he got closer to the Jeep, Officer Sullivan saw an individual to his left, also approach the Jeep. He concluded that this individual was a police officer and continued to focus on Sepulveda whom he saw run from the driver’s side of the vehicle to the passenger side and attempt to enter. As he closed distance on Sepulveda, Officer Sullivan issued repeated commands to “get down” and “drop it.” He then saw Sepulveda raise his gun and aim it at him. Officer Sullivan fired numerous shots at Sepulveda (later determined to be 6 shots). He ceased fire when Sepulveda dropped to the ground next to the right front tire of the Jeep. He and the other officer, whom he later learned was Officer Hancock, approached Sepulveda and placed him into custody. As he got close to Sepulveda, he saw a handgun, on the ground in front and on the inside of the front tire a few inches away from Sepulveda’s hand.<sup>5</sup> DPD CAD reports show that the call “shots fired” was aired at 12:22:43 and the further advisement “1 SUSP [suspect] DOWN” aired at 12:23:09. Denver Fire and Paramedics arrived quickly<sup>6</sup> and Sepulveda was taken to Denver Health Medical Center where he was pronounced dead at 12:48 p.m.

When Officer Hancock monitored the simulcast, he started driving north on Krameria Street. He was at about 13<sup>th</sup> Avenue when he heard what he described as “screaming” coming over the police radio. He drove through the Safeway parking lot, crossed 14<sup>th</sup> Avenue midblock between Krameria and Leyden Streets and stopped on the south edge of the strip mall parking lot. As he did so, he saw two men running from the scene; one was wearing orange pants.<sup>7</sup> Officer Hancock saw that this individual had nothing in his hands and focused his attention on the other male who had a mask covering part of his face and was wielding a handgun (Sepulveda).

When Officer Hancock first saw Sepulveda, the suspect was attempting to “car-jack” a silver Volkswagen, yelling at the occupant and trying to open the driver’s door. The driver refused to open the door and Sepulveda, apparently frustrated with his lack of success, fired a shot at the Volkswagen. The driver then drove off. Sepulveda ran across the parking lot to a dark colored SUV parked in the south west corner of the lot. A marked

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5 See the attached photos of Sepulveda’s firearm in the location where it was later recovered by Denver Police Department Crime Laboratory personnel.

6 DPD CAD entry at 12:36:23 states “PER [Command car on scene] 2 OFFICERS INVOLVED//1 SUSPECT TRANSPORTED [to hospital]//1 SUSPECT IN CUSTODY] . . .”

7 This individual, later identified as Deandre Jenkins, 22, ran across the street and stopped at the Conoco station where he watched the shooting along with other witnesses. Because Officer Hancock and several other citizens saw him running from the area of the cell phone store, he was initially arrested by police and taken to headquarters. He was extremely cooperative and investigators determined he was not involved but a witness who started running when he heard gunshots and saw people with masks on their faces. He provided investigators with written and video-taped statements in which he generally corroborates Officer Sullivan’s recitation of his initial encounter. Mr. Jenkins told investigators he was coming from King Soopers and was at the liquor store when:

“I seen [sic] two guys running out with red rags on their face, and the police officer got one on the ground. The other guy took off the opposite way. The cop chased the guy who ran. The guy who was on the ground got up with a chrome 9 [mm handgun]. I got up and ran for my life.”

police car drove into the lot and Sepulveda hid behind the SUV.<sup>8</sup> After the marked DPD unit passed, Sepulveda ran across the lot to a Jeep parked in front of the 7-Eleven store. In his video-taped statement, Officer Hancock told investigators that Sepulveda was attempting to get the driver to exit the Jeep at gunpoint. Sepulveda then ran around to the passenger's side of the Jeep and attempted to gain entry. Officer Hancock, gun drawn, moved toward Sepulveda and yelled, several times "Police Officer! Drop the gun!" Officer Hancock was aware there was a uniformed officer (later determined to be Officer Sullivan), to his right, also approaching Sepulveda. When Sepulveda started to raise his pistol in Officer Sullivan's direction, Officer Hancock began firing his handgun. [This action by Sepulveda was recorded by a 7-Eleven surveillance camera.]<sup>9</sup> He told investigators he did so because he thought Sepulveda was going to fire at Officer Sullivan or him. Officer Hancock estimated he had closed to between 20 and 30 feet from Sepulveda when he fired. It was his estimate that the distance between Officer Sullivan and Sepulveda was about 20 feet.

The driver of the Jeep was Robert Oudenhoven, 52. Mr. Oudenhoven later gave investigators written and video-taped statements.<sup>10</sup> Mr. Oudenhoven's written statement is as follows:

"I was at 7-11 on 6201 E. 14<sup>th</sup> Ave. As I came out I heard gunshots. As I was walking to my Jeep, saw a guy, maybe Hispanic, shooting toward 14<sup>th</sup> Ave hiding behind a car. I tried to get into my car quickly. The same man ran up to me and put the gun to my face, said "drive". I got out [and] told him to take it. He shook the gun at my face and told me I would drive. I got back into my Jeep. . . As he went around the Jeep to get in, Gunshots ensued. I layed [sic] down 'til officer told me to exit Jeep."

Officer Thomas Violette, 95006, responded to the crime scene. When he arrived, he was directed by a detective to ride with the suspect in the ambulance taking him to the hospital. In his written statement, Officer Violette wrote:

"I entered the ambulance and we immediately left for DHMC. I observed the suspect on the gurney with a paramedic and 2 firefighters performing life saving measures. The suspect appeared to be a Hispanic male with 2 large paw print tattoos on this chest. His shirt was cut open as [were] his pants. I observed a blue

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8 Witness Casey Etheredge, 25, corroborates Officer Hancock. He told investigators that he was driving out of the Safeway parking lot but stopped at the corner of 14<sup>th</sup> Avenue and Krameria Street to yield to a police car approaching with emergency equipment activated. He then saw a male hiding behind a gray Nissan SUV. The man appeared to be holding a gun. After the police car passed, the man "turned and ran in a ducked low run towards the Jeep [parked at the 7-11]". Mr. Etheredge saw that Sepulveda was armed and saw him attempt to carjack the Jeep. He then heard gunshots.

9 A video surveillance camera inside the 7-Eleven store showed some of the actions of Sepulveda and Martinez before the shooting and of Sepulveda at the time he was shot. Attached is a Supplementary Report that describes what is seen on the videotape. Homicide Detective Mark Crider states in pertinent part: "Sepulveda raises his right arm parallel to the ground, with an apparent pistol in his hand, and then drops to the ground." This is further corroborated by an entry bullet wound to Sepulveda in the area of his armpit under his right arm—consistent with his armed being raised to expose this area which would be covered if his right arm was not raised.

10 As might be expected with an incident taken place in a business district in mid-day, there were numerous witnesses. Investigators obtained written statements from fifty-six civilians. Twenty-seven of those were identified either as initial victims or eye or ear witnesses to the shooting. Video-taped statements were also obtained from those individuals.

and red bandana pulled down around the suspect[‘s] neck. The paramedic cut that off and put it on the bench. The suspect also had a white gauze ‘eye patch’ that was covering his left eye but had been pulled to the left side temple. . . .”

Officer Violette also stated that, at the hospital and after the individual was pronounced dead, medical staff handed him a Colorado I.D. card they had removed from the suspect’s wallet which was in his pants. The I.D. card [bore] the name of “Mark Anthony Sepulveda / 01-19-87.”

As the officers confronted Sepulveda, other witnesses watched Martinez hide from Officer Sullivan and then run from the scene. One of these witnesses was Ms. Lindsey Brent, 24. Ms. Brent was working at the Dependable Cleaners when two people ran into the store and asked her to call the police. She was "talking to the Dispatcher while I [saw] a guy running from the shopping center to the alley of Aqua Lounge.” She then heard a “bunch of shots”. The man was a Hispanic male “wearing red pants, white shirt short sleeve.” Sometime after the scene was secured, an investigator took Ms. Brent to the area of the alley behind the Aqua Lounge where she saw and identified an individual as being the party she observed running from the “Cricket Center” [cellular telephone store]. The individual identified by Ms. Brent was Martinez.

Another witness to Martinez’s flight was Mackenzie O’Shea, 40. Ms. O’Shea was fueling her car at the Safeway gas pump at 14<sup>th</sup> Avenue and Krameria Street when she saw a Hispanic man holding a gun. She then heard several gunshots. Moments before she heard the shots she:

“ . . . saw a man run across the street from 14<sup>th</sup> and Krameria on the NE side to the NW side. He jumped into a blue dumpster. The police arrived shortly after. Two officers searched the dumpsters on the NW side of the restaurant on 14<sup>th</sup> and Krameria. I saw a man with a white t-shirt exist the dumpster with his hands up and be handcuffed by police officers.”

Officers Jay Rahala, #04097, and Reyes Trujillo, #96044, were the officers Ms. O’Shea saw searching the dumpster. In his statement, Officer Rahala indicated they

“were clearing dumpsters when we heard someone from inside a blue dumpster (approximately the middle of the alley) say that he was coming out. I then saw a pair of hands come out of the dumpster. The suspect, later identified as Justin Martinez, 09/12/90, was then taken into custody without incident.”

Officers found a “large bundle of cash, mostly \$1 and \$5 in Martinez’s right pocket.”<sup>11</sup>

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<sup>11</sup> After he was in custody, Martinez said “do you want me to help you out? I threw the gun on the roof.” This claim led scene investigators to engage in a massive search of the area rooftops. No handgun was found. At no point from the initial aggravated robbery to Martinez’s apprehension did any witness, with the possible exception of Deandre Jenkins, state that Martinez was armed with a handgun. Investigators later determined that he had simply fabricated the claim that he was armed.

Officer Sullivan was armed with a model P220 Sig-Sauer .45 caliber semi-automatic pistol. This firearm has an 8-round magazine capacity and may be carried with an additional round in the chamber. Officer Sullivan's pistol was fully loaded with 9 rounds of DPD issued ammunition. Officer Sullivan also carried, as a back-up pistol, a MK9 Kahr 9mm semi-automatic pistol. Officer Sullivan did not draw or fire the secondary pistol during the incident. In compliance with our established protocol, Officer Sullivan's Sig-Sauer pistol was delivered to the DPD Crime Laboratory for evaluation after he responded to headquarters for his interview. Officer Sullivan told investigators that after Sepulveda went to the ground, he ejected his magazine and inserted a fresh magazine. As he did so, he "racked" the slide, ejecting the live round from the chamber and re-charging his firearm. crime scene investigator recovered the ejected magazine at the scene and a live .45 caliber round near that location. This indicates that Officer Sullivan fired six (6) rounds.

Officer Hancock was armed with a Glock model 17, 9mm semi-automatic pistol. This firearm has a 17 round magazine capacity and may be carried with an additional round in the chamber. Officer Hancock's firearm was fully loaded with 18 rounds of DPD issued ammunition. In compliance with our established protocol, Officer Hancock's Glock pistol was delivered to the DPD Crime Lab for evaluation after he responded to headquarters for his interview. The unloading sheet shows there were 12 rounds in the magazine and one in the chamber. This indicates Officer Hancock fired five (5) rounds.

Sepulveda was armed with a model P-89DC Ruger 9mm semi-automatic handgun. When it was recovered it had one round of Winchester 9mm ammunition in the chamber and six (6) additional rounds in the magazine. This firearm magazine capacity is normally 15 rounds. As there is no evidence establishing how Sepulveda had loaded the pistol, we can rely only on eyewitness accounts and evidence recovered at the scene to provide a possible number of rounds fired.

Among other items recovered at the scene by Denver Police Department Crime Laboratory personnel were 13 spent shell casings. Of those – six (6) were .45 caliber shell casings which were fired from Officer Sullivan's firearm. Five (5) were 9mm shell casings identified as being fired from Officer Hancock's firearm. The remaining two 9mm shell casings were not fired from Officer Hancock's firearm. The DPD Crime Laboratory has not completed the comparison of these two unknown shell casings to the Sepulveda's 9mm Ruger, but they are consistent with that firearm and thus the evidence suggests that Sepulveda fired at least twice. As described in this letter, witnesses indicate one shot was fired in the cellular telephone store and a second at the VW during the attempt car-jacking. The scene was fully processed and documented. The results are consistent with the events described in this letter.

An autopsy was performed on the body of Sepulveda on October 19, 2011, by Dr. Lindsey Harle with the presence of Dr. John Carver. The cause of death was determined to be the result of a gunshot wound to the chest.<sup>12</sup>

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<sup>12</sup> The written Autopsy Report is still pending at the time of this letter release. The cause of death was verbally provided to the primary homicide detective along with other pertinent information.

Sepulveda's criminal history reveals multiple commitments to the Colorado Department of Youth Corrections for a variety of offenses as a juvenile. As an adult, Sepulveda was sentenced three (3) separate times to the Colorado Department of Corrections (Prison). His criminal conduct included arrests for First Degree Criminal Trespass-Vehicle, FTA, 3<sup>rd</sup> Degree Assault, Felony Menacing, Felony Assault, First Degree Criminal Trespass-Dwelling, 2<sup>nd</sup> Degree Burglary, Weapons charge, 2<sup>nd</sup> Degree Burglary-Dwelling, 2<sup>nd</sup> Degree Burglary-Dwelling, Theft, Felony Escape from Felony Conviction, Obstructing Police, False Information, FTA on Escape charge, Flight-Escape Attempt, Vehicular Eluding, Possession of Weapon by Previous Offender, 2<sup>nd</sup> Degree Aggravated Motor Vehicle Theft, False Reporting, Possession of Burglary Tools, Vehicular Eluding, Leaving the Scene of an Accident, Fugitive-Parole Violation, 2<sup>nd</sup> Degree Burglary, Fugitive-Motor Vehicle Theft, and Felony Escape,

Arrest warrants were active on both Sepulveda and Martinez for a murder that occurred on September 17, 2011, one month before this incident, at 1305 South Harlan Street, Lakewood, Colorado. Had he survived, Sepulveda would have been facing multiple felony charges for his crimes against citizen and police officer victims in this crime spree.

## 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 Sepulveda's 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 Sepulveda 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.

## **CONCLUSION**

Prior to police arrival, Sepulveda and his accomplice were committing an aggravated robbery, felony assault and menacing at the cellular telephone store. Sepulveda fired his handgun at one of the victims during that crime and a victim was struck with the handgun by Sepulveda and kneed in the face by Martinez. Sepulveda then made the decision to attempt to escape apprehension while still in possession of the firearm. During his escape effort he felony menaced another innocent citizen with his firearm in an attempt car-jacking. He fired his weapon at this victim. He then felony menaced another innocent citizen with his firearm while attempting to car-jack his vehicle to aid his escape. When confronted by the two Denver officers, he chose to continue to refuse their lawful commands to drop his firearm and surrender peacefully. Instead, he intentionally chose to raise his firearm at Officer Sullivan. This decision resulted in Sepulveda being shot multiple times by Officers Sullivan and Hancock—ending the confrontation.

We commend these officers for their professionalism and willingness to confront this armed and dangerous criminal to protect our citizens and community from his senseless acts of violence. They displayed good judgment and measured restraint in firing at precisely the instant it was clearly necessary. It is a positive testament to their character and training that when faced with this fast moving, tense, and deadly confrontation they were able to make the ultimate split-second decision to fire with precision and accuracy. This is clearly an encounter in which innocent citizens and these officers could have been seriously injured or killed. Fortunately, Officers Tim Sullivan and Derek Hancock survived the deadly encounter to return safely home to their families after another tour of duty protecting and serving us. Sepulveda was transported to the Denver Health Medical Center where he was pronounced dead and was transferred to the Denver Morgue.

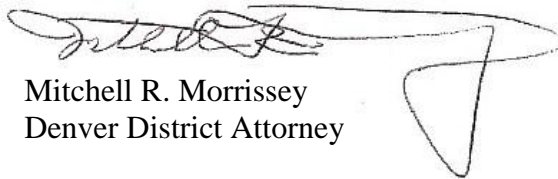
Based on a review of the totality of facts developed in this investigation, we could not prove beyond a reasonable doubt that it was unreasonable for Officer Sullivan and Officer Hancock to fire the shots that caused Sepulveda's death. In fact, they only used

deadly force when it was necessary “to defend” against the imminent deadly threat posed by Sepulveda. They were clearly legally justified to shoot Sepulveda 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 some testing being conducted and there are charges pending against Martinez—Sepulveda’s accomplice in the aggravated robbery. However, in this officer-involved shooting investigation it is not necessary to delay the release of this letter because the results of the testing are not of the type that could alter the ultimate decision that the officers’ were justified in shooting Sepulveda. 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.

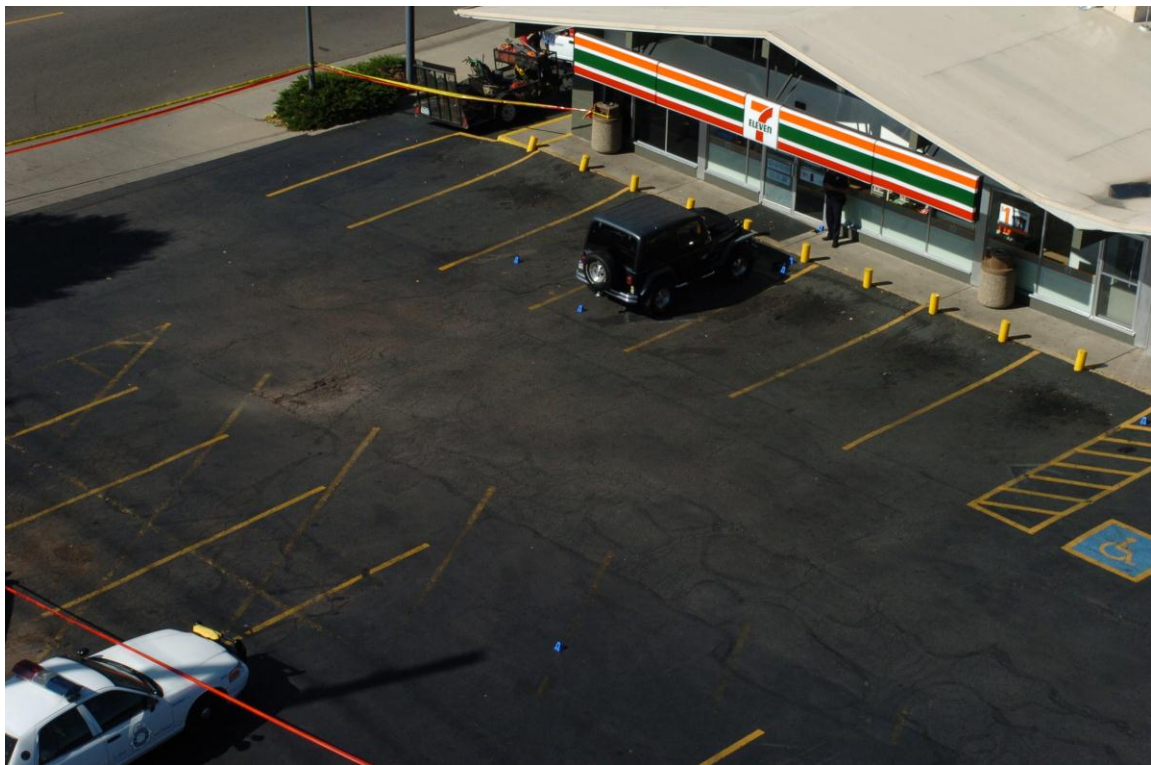
Because there is a criminal prosecution pending concerning the aggravated robbery, we will open our file related to this Officer-Involved Shooting for *in-person review at our office* at the conclusion of the criminal prosecution or in 60 days from the date of this letter, whichever is later. The Denver 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

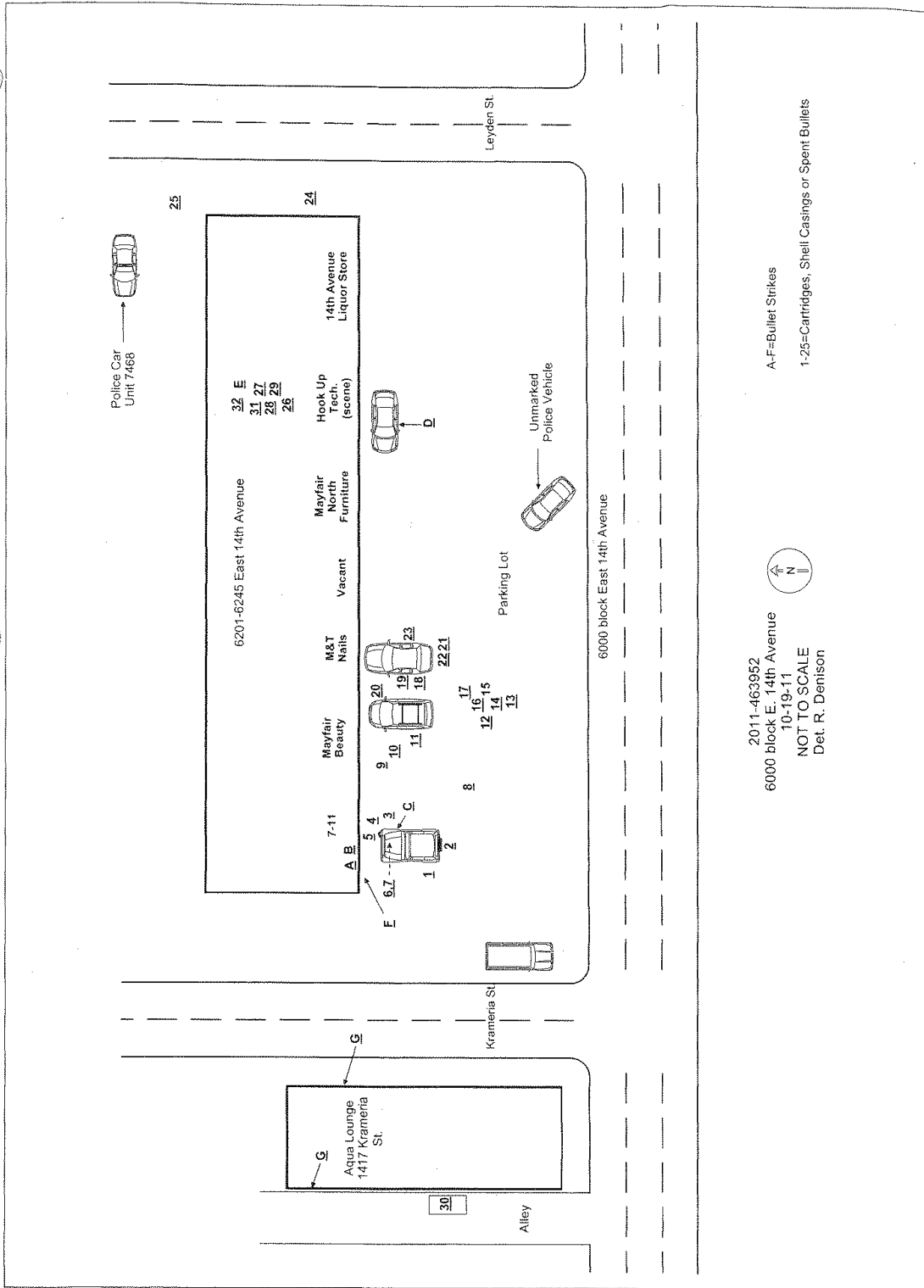
cc: Officer Tim Sullivan; Officer Derek Hancock; David Bruno, Attorney at Law; Sean Olson, Attorney at Law; Michael Hancock, Mayor; All City Council Members; Doug Friednash, Denver City Attorney; Alex Martinez, Manager of Safety; Mel Thompson, Deputy Manager of Safety; Ashley Kilroy, Deputy Manager of Safety; 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; Kris Kroncke, District 3 Commander; Ron Saunier, Captain; Homicide; Kathleen Bancroft, Lieutenant; Sergeant James Kukuris, Homicide; John Coppedge, Sergeant, Homicide; Detective Michael Martinez, Homicide; Detective Randy 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; Richard Rosenthal, Office of the Independent Monitor.













**Crime Scene Diagram Legend**  
**6000 block E. 14<sup>th</sup> Avenue**  
**10-18-11**

- Placard 1- Live cartridge, Winchester brand, 9 mm. Located in the parking lot near the front of the 7-11 Store.
- Placard 2- Spent bullet/fragment – located near the front of the 7-11 Store behind the black Jeep Wrangler.
- Placard 3- Blue ball cap – located near the right front tire of the Jeep Wrangler in front of the 7-11 Store.
- Placard 4- Spent bullet fragment – located near the front of the black Jeep Wrangler.
- Placard 5- Black glove – located by the front door of the 7-11 Store.
- Placard 6- Silver or stainless steel colored Ruger, 9 millimeter, semiautomatic pistol, Serial Number 30525247 – located underneath the black Jeep Wrangler in front of the 7-11 Store.
- Placard 7- Spent bullet/fragment – located underneath the black Jeep Wrangler in front of the 7-11 Store.
- Placard 8- Shell casing, Winchester brand, 9 millimeter – located in the parking lot out from the front of Mayfair.
- Placard 9- Live cartridge, .45 caliber Speer brand.
- Placard 10- Magazine from semi-automatic pistol, containing two live cartridges.
- Placard 11- Spent bullet – located from the parking lot in front of Mayfair next to a Mercedes SUV.
- Placard 12- Spent shell casing, 9 millimeter, Speer brand – located in the middle of the parking lot out from Mayfair.
- Placard 13- Spent shell casing, Speer brand, 9 millimeter.
- Placard 14- Spent shell casing, Speer brand, 9 millimeter.
- Placard 15- Spent shell casing, Speer brand, 9 millimeter.



Placard 16- Live cartridge, Winchester brand, 9 millimeter.

Placard 17- Spent shell casing, Speer brand, 9 millimeter.

(Placards 12, 13, 14, 15, 16, and 17 are all located within the same general area of the parking lot)

Placard 18- Spent shell casing, Speer brand, .45 caliber.

Placard 19- Spent shell casing, Speer brand, .45 caliber.

Placard 20- Spent shell casing, Speer brand, .45 caliber.

Placard 21- Spent shell casing, Speer brand, .45 caliber.

Placard 22- Spent shell casing, Speer brand, .45 caliber.

Placard 23- Spent shell casing, Speer brand, .45 caliber.

(Placards 18, 19, 20, 21, 22, and 23 are located in the same general area in the parking lot)

Placard 24- Live cartridge, Winchester brand, 9 millimeter – located on the east side of the liquor store.

Placard 25- Live cartridge, Winchester brand, 9 millimeter – located on the east side of the liquor store towards the rear parking lot.

**The following items were located inside the Hook-Up Tech cell phone store.**

Placard 26- Black power/charge cord for a cellular telephone – located on the floor in the business.

Placard 27- Spent shell casing, Winchester brand, 9 millimeter – located on a desk on the office floor.

Placard 28- Portion of black, cut or torn power/charge cord for a cellular telephone tied with a knot– located on the floor in the office area.

Placard 29- Portion of a black, cut or torn power/charge cord for a cellular phone – located on the floor in the office area.

Placard 31- Blue and grey colored computer cord – located on the floor in the office area.

Placard 32- Spent bullet – located on the floor in the bathroom.

2011463952



- Denver County (Boundary)
- Street Centerline
- Interstate
- US Highway
- Other
- 2010 Color
- Denver County (Shaded)
- Denver County
- Adams County
- Arapahoe County
- Jefferson County

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## Supplementary Report

### AGGRAVATED ROBBERY CASE #2011-463952 OFFICER INVOLVED SHOOTING CASE #2011-5012458

#### 7-ELEVEN STORE SURVEILLANCE RECORDINGS:

On **October 18<sup>th</sup>, 2011** at approximately **1:30 p.m.**, Detective Mark CRIDER, 95014, makes the following observations while viewing the surveillance recordings on a monitor inside of the business. The time stamp on the recording is approximately five minutes fast from the actual time.

Please review the recording for complete details.

**11:50:29 a.m.** - A small green colored car parks in front of the parking lot of the 7-Eleven. The suspect, later identified as Mark SEPULVEDA 10/19/1987, exits the car from the front passenger seat and it appears the second suspect, Justin MARTINEZ 09/12/1990, was driving the vehicle. Both suspects enter the store.

**11:56:25 a.m.** - SEPULVEDA walks out of the 7-Eleven and gets into the front passenger seat of the green car.

**11:57:08 a.m.** - MARTINEZ walks out of the store and walks towards the driver's side of the green car. The car is not in full view and it cannot be determined if MARTINEZ gets into the driver's side door.

**12:19:26 p.m.** - Both suspects walk back into the 7-Eleven. The green car is not observed. It appears that SEPULVEDA has a bandanna over his face when he walks into the store, but quickly pulls it down from his face. MARTINEZ is wearing a pair of gloves, which he takes off when he enters the store.

**12:20:57 p.m.** - Both suspects walk out of the 7-Eleven.

**12:25:18 p.m.** - A dark colored Jeep parks in front of the 7-Eleven. The driver, later identified as Robert OUDENHOVEN, walks in to the store.

**12:25:46 p.m.** - a marked police car drives through the parking lot from west to east.

**12:26:03 p.m.** - The suspect, MARTINEZ, runs west in on the sidewalk in front of the 7-Eleven. MARTINEZ drops a glove on the sidewalk in front of the store.

**12:26:18 p.m.** - The Jeep driver, OUDENHOVEN, walks out of the store and gets into the driver's seat of his Jeep.

**12:27:00 p.m.** - The suspect, SEPULVEDA, approaches OUDENHOVEN and it appears he attempts to steal the Jeep with a pistol in his hand. OUDENHOVEN gets out of the Jeep and the jeep appears to stall. OUDENHOVEN gets back into the driver's seat and SEPULVEDA walks around the back of the Jeep to the front passenger side.

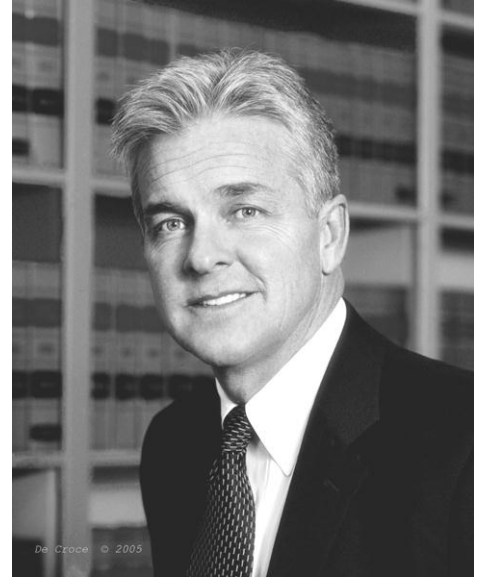
**12:27:13 p.m.** - SEPULVEDA raises his right arm parallel to the ground, with an apparent pistol in his hand, and then drops to the ground.

**12:27:32 p.m.** - Officer SULLIVAN approaches the suspect at gunpoint.

MC



# 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.<sup>13</sup> As a result of the positive changes the Manager of Safety has now instituted and his personal involvement in the process, we will not open the criminal investigative file at the time our brief decision letter is released. Again, we are doing this to avoid in any way impacting the integrity and validity of the Manager of Safety and Denver Police Department ongoing administrative investigation and review. After the Manager of Safety has released his letter, we will make our file open for in-person review at our office by any person, if the City fails to open its criminal-case file for in-person review. The District Attorney copy of the criminal-case file will not, of course, contain any of the information developed during the administrative process. The City is the Official Custodian of Records of the original criminal-case file and administrative-case file, not the Denver District Attorney.

## **THE DECISION**

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

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

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<sup>13</sup> See the "Conclusion" statement in the "Decision Letter" in the December 31, 1997, shooting of Antonio Reyes-Rojas, where we first pointed out issues related to the importance of the Administrative review of officer-involved shootings. Subsequent letters continued to address this issue.

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**

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