



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

December 3, 2012

John Mackey
Chief of University Police
Auraria Higher Education Center
1201 5th Street, Box E
Denver, CO 80204

RE: Investigation of the shooting death of Jeffrey A. Musick, DOB 4/15/74, DPD # 691235, in which Auraria Campus Police Officer Robert Burnett, 1101, fired shots on November 10, 2012, in the intersection of 9th and Walnut Streets, Denver, Colorado.

Dear Chief Mackey:

The investigation and legal analysis of the shooting death of Jeffrey A. Musick (“Musick”), in which shots were fired by Auraria Campus Police Officer Robert Burnett (“Officer Burnett”), have been completed. I conclude that under applicable Colorado law no criminal charges are fileable against Officer Burnett.

Musick is deceased. Therefore, no criminal charges are necessary related to his criminal conduct in this incident. Because this shooting involved a law enforcement agency from your department, which is a state agency within the Second Judicial District but independent from the City and County of Denver, the administrative aspect of the shooting will be addressed by your agency. When we have been advised by you that your agency has concluded the administrative investigation and review of the shooting, we will open our Office-Involved Shooting file in this case for in-person review at our office in compliance with our long-standing policy. This decision letter is open to the public at this time on our website at www.denverda.org. As is always the case, the physical evidence will be in the possession of the Denver Police Department. The Denver Police Department is the official custodian of records related to this investigation. 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 Saturday, November 10, 2012, many Veterans Day observations were conducted around the country. One such event was the Army Reserve Officer’s Training Corps (“ROTC”) Five Kilometer Run/Walk event held on the Auraria Higher Education Center Campus near downtown

Denver. Shortly before 6 a.m., ROTC cadets were setting up stations for the event. ROTC Cadet Matthew McCrary was working with a group of cadets when he saw

... a person in an all black outfit walked by our table. He had his face covered, and stared me down as he walked past the group of four cadets. I saw he seemed to have two ninja swords on him, and he was walking around briskly in an odd manner. His presence startled the other three cadets and myself, so as he walked around the other side of the Tivoli building, I asked the others if they had the campus emergency phone #. CDT [Cadet] Connell had it, so I instructed him to call & let them know the situation. Very shortly after, I saw several cop cars speed by with lights on, and then I heard 3 shots, I believe. I rushed over to see what happened in fear of cops, civilians or CDTs being injured, and I saw cop cars surrounding the intersection right by the Tivoli parking garage.¹

The Auraria Police Dispatch recording reflects this call: “there’s a guy all dressed up in black walking around the Tivoli center with what looks like a sword.” The dispatcher inquired as to the individual’s location and is told that he was last seen walking toward the parking structure.² At 5:55 a.m., the dispatcher dispatched Auraria police cars 305 and 306:

- *And 305, 306. I’m getting report of a[sic] individual, dressed all in black headed toward the Tivoli parking structure reported with a sword. Trying to get more information.*
- *305, I’m in route . . .*

Assigned to car 305 was Officer Burnett. Officer Nicole Markham, 1103, was working car 306. In the video-taped statement she provided investigators, Officer Markham stated she was in a building on the south end of campus, near the light rail station at 10th and Colfax Boulevard, when she got the call. She left the building, got in her car and started driving toward the Tivoli building. She was a couple of blocks away when she heard Officer Burnett “screaming on the radio”. She stated she immediately turned on her emergency equipment and, proceeding as quickly as possible, and arrived within 20 seconds. When she arrived, she saw her supervisor standing over a figure on the ground and Officer Burnett standing nearby by. Officer Markham told investigators she looked at Officer Burnett’s hand, saw he had been seriously injured, and immediately told him to go sit down. By the time Officer Burnett monitored the call and drove across the campus the incident was over.³

The supervisor Officer Markham referred to was Sergeant Greg Stahl, 8801. In his video-taped statement, Sgt. Stahl told investigators he was at approximately 5th and Walnut when he monitored the call. He was four blocks west of the location and he immediately drove toward the Tivoli Center with his overhead lights activated. He estimated that his response time was 30-45 seconds. As Sgt. Stahl was responding, he heard Officer Burnett tell the dispatcher he was in contact with the “subject with the sword”. Sgt. Stahl was coming along the south side of the Tivoli building when he saw two figures in “close proximity” to one another in the intersection at 9th and Walnut. He could not distinguish more detail because it was “very dark in that roadway”. Sgt. Stahl stated “the suspect was dressed in dark clothing and Officer Burnett’s uniform is dark”⁴ and they “were right clustered together in the center of that intersection.” He also noted that there were no other people in

¹ This is from Mr. McCrary’s complete written statement. He also provided a video-taped statement to investigators. Neither he nor any of the other cadets saw the actual shooting.

² Photographs of the scene, Musick’s clothes and Musick’s weapon follow the body of this letter.

³ The basic boundaries of the campus are formed by Auraria Parkway, southbound Colfax Avenue, westbound Colfax Avenue and Fifth Street.

⁴ Officer Burnett was dressed in a full blue Auraria Police Department uniform (as were Sgt. Stahl and Officer Markham).

the intersection. Sgt. Stahl estimated he was approximately 180 feet away from the intersection when he heard 2 to 3 gunshots. He quickly closed the remaining distance and parked his police car in the intersection. Sgt. Stahl told investigators that Officer Burnett was in extreme distress, “moaning and wailing.” He saw “a subject, all in dark clothing, crumpled up and lying on his back” in the intersection. Sgt. Stahl told investigators events were transpiring so quickly he did not at first realize Officer Burnett had been “hit by the samurai sword”. Sgt. Stahl recalled that he looked down and saw that the subject, later identified as Musick and referred to by that name hereafter, had fallen on a “large samurai sword” which was “unsheathed” and trapped behind his calves. Sgt. Stahl described it as a very, very large “samurai sword”. Sergeant Stahl immediately aired that shots had been fired, that an officer was “down” and an ambulance and emergency equipment was needed, “CODE 10”. This call was made at 05:53:37

Sgt. Stahl and Officer Burnett kicked the sword away from Musick. It was only after they had done so Sgt. Stahl realized Officer Burnett had suffered a serious injury to one of his hands. Officer Markham and another Auraria Police Officer arrived, and Sgt. Stahl began to establish and take command of what was now a crime scene. One of the first things he did was to check on Musick’s condition. A female ROTC officer or cadet approached, indicated she was a paramedic, offered to assist and began CPR on Musick⁵. Sgt. Stahl was able to more closely observe him and he told investigators Musick was dressed in what he described as a “homemade ninja outfit.”

Officer Burnett was transported to Denver Health Medical Center where he was treated for deep lacerations to his hand. Due to his condition, investigators were unable to interview him until Monday, November 12, 2012, on which date he provided a video-taped statement to investigators.

Officer Burnett stated that he was driving a marked police car, wearing a full blue Auraria Police Department uniform and also wearing a police uniform windbreaker which has cloth or stenciled police badge on the front breast pocket and “POLICE” in large print on the back. He was armed with a Sig Sauer model 226, 9mm semi-automatic pistol. This pistol has a 15 round magazine capacity and Officer Burnett told investigators his practice was to carry the pistol with the magazine fully loaded with another round in the chamber. His firearm was loaded with ammunition issued by the Auraria Police Department.

Officer Burnett recalled he was in the area of 9th and Lawrence when he monitored the call. As he approached 9th and Walnut, he asked for and received additional information, specifically, that the subject was on the north side of the Tivoli building. As Officer Burnett approached the location he saw Musick, whom he described as being dressed “for lack of a better term, ninja uniform – costume.” Officer Burnett advised the dispatcher that he was going to contact the subject who, at that point, still

⁵ This individual was Ms. Cahte Dewyer. In a written statement provided to investigators, she stated she ran to the scene when she heard gunshots and, when stopped by an officer, identified herself as a paramedic and offered to assist. She was directed to

the down party. The man was unresponsive with another officer attempting to assist him. I could see one gsw [gunshot wound] to right anterior thorax. He was pale and when I checked for a pulse I could not find one. I began chest compressions and continued to assess for bleeding. There was an obvious exit wound through posterior thorax. I had the assisting officer apply pressure to that wound as it was causing life threatening bleeding. I continued chest compressions until a Denver Paramedic took control of patient assessment and treatment.

had his sword sheathed on his belt. This call was made at 05:53:07.⁶ Officer Burnett at first thought Musick might have been someone in costume engaged in something related to the Veterans Day observations and, for that reasons, was not – at the outset – greatly concerned. Officer Burnett stopped his police car, got out and

said something to the effect ‘Police Officer. I need to talk to you.’⁷ And he turned around, looked at me -- that’s when he drew the sword– to the best of my recollection, that’s when he drew the sword out. And then I ordered him to ‘drop the sword! Drop the sword!’ And then, uh, I kind of went into a defense mode.

Officer Burnett told investigators that Musick did not obey his commands and he began to back away. Officer Burnett heard Musick say “I’m gonna get you! I’m gonna get you!” Musick started “flailing” his sword around his head but Officer Burnett felt he had “plenty of distance” and so he continued to try to reason with Musick. Officer Burnett told investigators that initially he had his hand on his firearm but had not drawn it from his holster. Officer Burnett had moved to a position in the middle of the intersection when Musick raised the sword overhead and brought it “down with both hands.” In Officer Burnett’s words, Musick “literally tried to, uh, slice me in half, I guess.” The sword traveled so fast and hard that it struck the asphalt and “sparks flew.” Officer Burnett backed farther away from Musick and recalled that he tried to call out on the radio to have the covering officers “picked up – I needed CODE 10 cover *then!*” Officer Burnett retreated farther and pulled his pistol out of his holster. Musick was still swinging his sword around and started, again, approaching Officer Burnett. Officer Burnett stated that

I lift[ed] my [left] arm up [demonstrating a defensive gesture] and I have a, he’s coming at me, I have a clear sight picture. And I fire two shots. In sequence, he was still in motion forward, I fired a third shot and then that’s when he stopped moving forward. And then I re-holstered my weapon.

Officer Burnett later told investigators Musick was “8 to 10 feet away” when he fired his pistol. He told investigators he felt “this guy is trying to kill me and there’s no getting around it and so I got to put a stop to this.” He fired all three shots holding his pistol in one hand.

Just after he fired the third shot, Officer Burnett saw Sgt. Stahl arrive. It was after Sgt. Stahl and Officer Markham arrived Officer Burnett realized his left hand had been lacerated. He told investigators he did not know when he was injured but it was his surmise it happened when he raised his left arm to ward away the threat just before he discharged his pistol.

THE INVESTIGATION

The Auraria Police Department has, by mutual aid agreements with the Denver Police Department, limited authority for the enforcement of municipal ordinances and some State laws on campus. The Denver Police Department has the responsibility for the investigation of felony incidents

⁶ According to Auraria Police CAD reconstruction, the “shots fired” call was made **29 seconds** after Officer Burnett advised the dispatcher he was contacting a party at 9th and Walnut.

⁷ It is a class 6 felony under Colorado state law to “knowingly, and unlawfully and without legal authority[carry, bring or have in a person’s]] possession a deadly weapon . . . in or on . . . any public or private college, university, or seminary . . .” Officer Burnett’s attempt to conduct a stop of Musick was clearly supported by a reasonable and articulable suspicion.

occurring on campus grounds. The Auraria Police dispatcher made the notification to Denver Police Dispatch at 05:54:18. The Auraria Police officers who covered the shooting had already started taping off and securing the scene. Denver Police officers, on their arrival, continued that process and awaited the Denver Police Department's Crime Lab and Homicide Bureau investigators and the Denver District Attorney's representatives.

There were no witnesses to the actual shooting, other than Sergeant Stahl. Police investigators identified those civilian witnesses who had observed Musick walking with the sword and called the police. Those individuals provided written and video-taped statements. Investigators obtained video-taped statements from the officer and sergeant who arrived just after the shots were fired. Written statements were obtained from other Denver and Auraria police officers who responded to cover and assist in the investigation.

Police investigators located a surveillance camera in the parking garage on the north-east corner of the intersection. The camera was set to record a stair or entry way in the garage, but the intersection can be seen in the background. The incident can be barely seen on the video – the image is grainy and blurred but one can see Officer Burnett retreating and Musick advancing. One can then observe Musick fall out of frame.

Officer Burnett's firearm was taken by investigators with the Denver Police Department's Crime Lab. Investigators determined that he had fired three rounds and three spent 9 mm shell casings were recovered at the scene. Firearms examiners identified these spent shell casings as coming from Officer Burnett's pistol. Two spent bullets were recovered at the scene. These bullets were determined to have the same class characteristics as the bullets test-fired from Officer Burnett's firearm but "the results of the microscopic comparison were inconclusive."

Musick's sword was measured by investigators and found to have a blade length of just over 27 inches and a grip or handle length of 10 inches. The overall length of the weapon is just over 3 feet and one inch.

Musick was transported by ambulance to Denver Health Medical Center where he was pronounced dead at 6:14 a.m. Dr. Dawn Holmes, Assistant Medical Examiner for the Office of the Denver Medical Examiner conducted the external post-mortem examination on November 10, 2012, and the internal post-mortem examination on November 12, 2012. Dr. Holmes documented three gunshot wounds to Musick's body, two to the right chest and one to the abdomen. All three wounds were "through and through wounds" which exited the back. One of the wounds "involve[d] the heart and left lung", another "involve[d] the left lung" and the third "involve[d] the stomach, small intestine, and large intestine." The cause of death was determined to be "multiple gunshot wounds." Toxicological screens were "[p]resumptive positive" for Cannabinoids". The report goes on to note that "examination of the specimen(s) submitted did not reveal any positive findings of toxicological significance.

The section of the autopsy report entitled "Circumstances of Death", includes the following notation:

The decedent is a 38-year-old (DOB: 04/15/1974) Caucasian male with a history of paranoid-type schizophrenia with visual hallucinations, audio hallucinations, and homicidal ideation; and non-

compliance with medications. The decedent [has] been noted in the past to become psychotic when non-compliant with his medications. . . .

There is no evidence that Musick was a student at any of the institutions that comprise the Auraria Higher Education Center and no evidence explaining what business he had on campus and why he was armed. Musick did have extensive contacts with law enforcement in the Denver metropolitan area, including arrests for Menacing (Arapahoe County Sheriff, 1996), Carrying a Concealed Weapon (Arapahoe County Sheriff, 1999), Resisting Arrest and Second Degree Assault – in custody/fluids (Sheridan Police, 2000). In 2008, Musick was convicted of Possession of Controlled Substances in Denver (08CR3349) and granted the privilege of probation with the condition he be “supervised by the Mental Health Unit”. Musick had contacts with Denver Police in 2011 and 2012 and field contact notes include the following caution: “DRUG ABUSE, MENTALLY HANDICAPPED/DISTURBED/SUICIDAL”.

Officer Burnett was also taken to Denver Health Medical Center where he was treated for deep lacerations to the hand. He was told by his doctors that he had suffered a deep cut to the forefinger – the blade severed a tendon and broke or severed the finger bone. That bone was repaired with screws. He suffered another broken bone in his wrist. These wounds would be characterized by state law as “serious bodily injury.”

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 Musick’s death was caused by shots fired by Officer Burnett, the determination of whether his 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 justifiably 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**” means force, the intended, natural, and probable consequences of which is to produce death, and which does, in fact, produce death.

Section 18-12-101(1)(f) defines the term “Knife” as follows:

“**Knife**” means any dagger, dirk, knife or stiletto with a blade over three and one-half inches in length, or any other dangerous instrument capable of inflicting cutting, stabbing, or tearing wounds, but does not include a hunting or fishing knife carried for sports purposes . . .

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

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

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

Therefore, the question presented in this case is whether, at the instant Officer Burnett fired the shots, he reasonably believed that Musick was directing or was about to direct deadly physical force against him, 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 doing the shooting either did not really believe in the existence of these requisite circumstances, or, if he did hold such belief, that belief was, in light of all available facts, unreasonable.

CONCLUSION

This tragic incident brings focus to two recurrent issues in use of force events, both of which often lead to public misperceptions. The first is the rapidity with which the events may unfold. The second is the lethality of edged weapons. Officer Burnett arrived at what he at first believed would be a situation where he would be called upon to warn someone about campus policy. Within moments, he was attacked by an adversary armed with a sword who was able to close the distance between them and injure him severely. Officer Burnett attempted to retreat *and* reason with Musick, without success. He then drew and fired his pistol. He stopped firing immediately when the threat ceased. The incident – from the time Officer Burnett advised dispatch he was contacting a party to the time shots were fired – took less time than it would take the average American reader to read this paragraph.⁸

Knives, regardless of their length, can maim and kill. Although peace officers, through training and tactics, regularly disarm knife-wielding suspects without injury to themselves or the subject, the danger that sharp-force instruments present cannot be overstated. In this case, Musick was able to inflict a severe wound on Officer Burnett within a matter of moments. Officer Burnett responded quickly and appropriately and fired his pistol to save his life. He is fortunate to have survived this encounter.

Based on a review of the totality of the facts developed in this investigation, we could not prove, beyond a reasonable doubt, that it was unreasonable for Officer Burnett to fire the shots that caused Musick's death. He only used deadly force when it was necessary "to defend" against the imminent deadly threat posed by Musick and his actions were clearly justified under Colorado law. Therefore, no criminal charges are fileable against Officer Musick for his conduct in this incident.

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 when we are notified that the Auraria Police Department has completed its administrative review. The Denver Police Department is the custodian of record as to the criminal actions related this case. All matters concerning the release of records related to administrative or civil actions are controlled by the Auraria Higher Education Center University Police. As in every case we handle, any interested party may seek judicial review of our decision under C.R.S. § 16-5-209.

⁸ Current research suggests the average American adult reads prose text at 250 to 300 words per minute.

Very truly yours,

Mitchell R. Morrissey
Denver District Attorney

cc: Officer Robert Burnett; Brian Reynolds, Attorney at Law; Barbara Weiske, Executive Vice President for Administration/CEO Auraria Higher Education Center; Michael Hancock, Mayor; All City Council Members; Doug Friednash, Denver City Attorney; Alex Martinez, Manager of Safety; Robert White, Chief of the Denver Police Department; David Quinones, Deputy Chief of Police; William Nagel, Deputy Chief of Police; Ron Saunier, Commander of Major Crimes Division; Gregory Laberge, Crime Lab Commander; Captain Kris Kroncke, Major Crimes Division; Lieutenant Steve Addison, Major Crimes Division; Lieutenant James Haney, Major Crimes Division; Sgt. James Kukuris, Homicide; Sgt. James Dixon, Homicide; Sgt. Tony Parisi, Homicide; Detective Martin Smith, Homicide; Lamar Sims, Senior Chief Deputy District Attorney; Doug Jackson, Senior Chief Deputy District Attorney; Henry R. Reeve, General Counsel, Chief Deputy District Attorney, Detective Sergeant Jason Mollendor, Auraria Police Department.



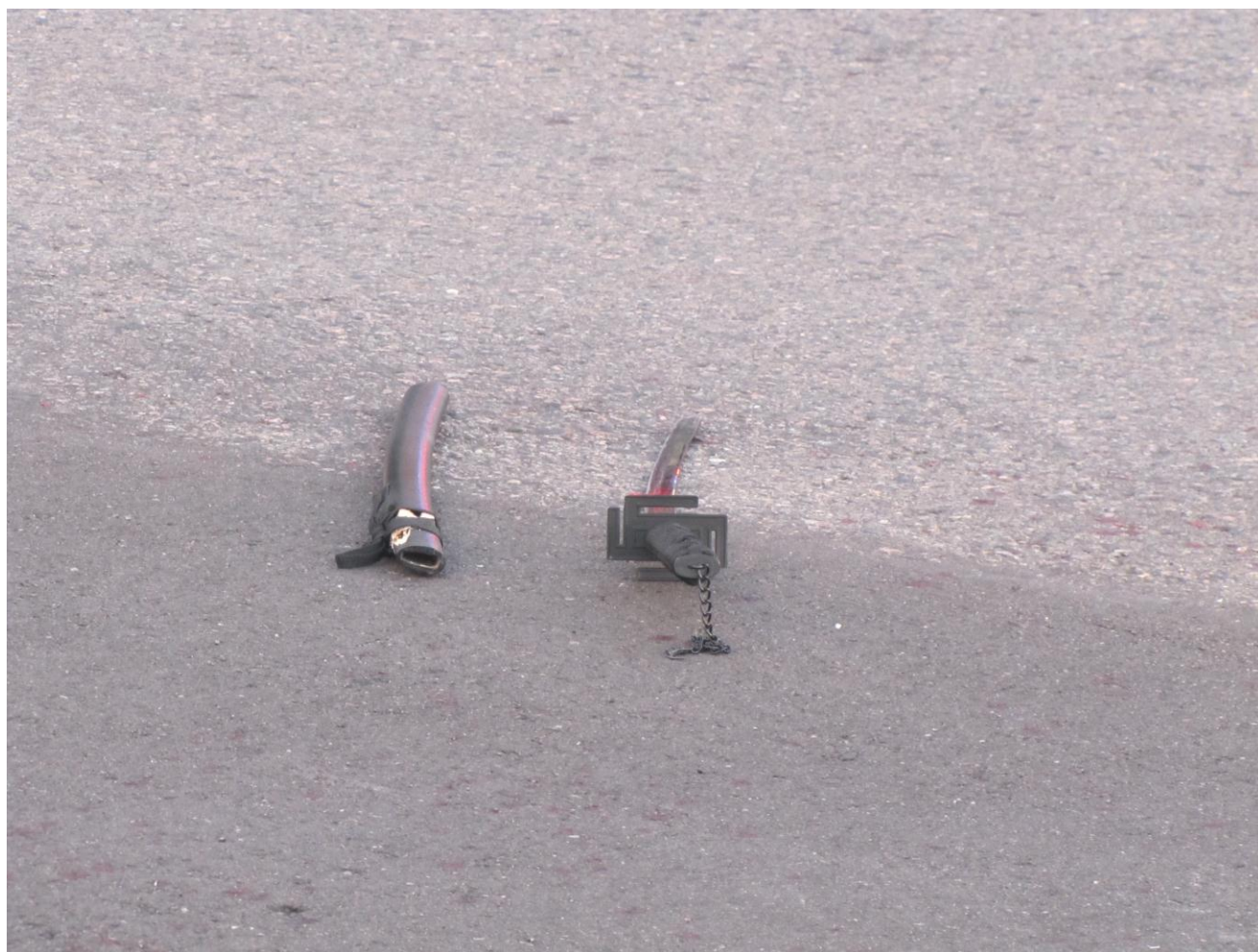
The intersection of 9th and Walnuts Streets.

The Tivoli Center appears on the left; the parking structure on the right. Officer Burnett's car is on the right facing away from the camera; Officer Markham's car is facing the camera with the emergency lights on. Articles of clothing removed from the suspect can be seen on the right side in the middle of the frame; the sword can be seen near the center of the photo.



The Intersection of 9th and Walnut Streets

The photo looks to the northeast and shows the Tivoli Center. Sergeant Stahl's cruiser is shown on the right side of the photo, facing the camera.



The Intersection of 9th and Walnut Streets

The sword and scabbard carried by Musick after being moved away from his body by Sgt. Stahl and Officer Burnett.



Photo of the clothes worn by Musick



Photos of the Musick's sword and sheath set against a yardstick



Photos showing overall length of sword and length of sword grip



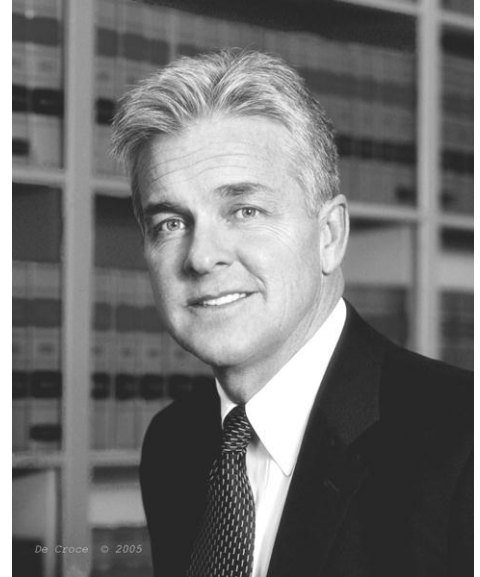
PHOTO DEPICTING WOUNDS TO OFFICER BURNETT'S HAND



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



OFFICER-INVOLVED SHOOTING PROTOCOL 2012

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, Senior Chief Deputies 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, and the Senior 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.⁹ As a result of the positive changes the Manager of Safety has now instituted and his personal involvement in the process, we will not open the criminal investigative file at the time our brief decision letter is released. Again, we are doing this to avoid in any way impacting the integrity and validity of the Manager of Safety and Denver Police Department ongoing administrative investigation and review. After the Manager of Safety has released his letter, we will make our file open for in-person review at our office by any person, if the City fails to open its criminal-case file for in-person review. The District Attorney copy of the criminal-case file will not, of course, contain any of the information developed during the administrative process. The City is the Official Custodian of Records of the original criminal-case file and administrative-case file, not the Denver District Attorney.

THE DECISION

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

Police Department administrative investigation to move forward more quickly.

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

One exception to the Denver District Attorney making the filing decision is if it is necessary to use the Denver Statutory Grand Jury. The District Attorney will consider it appropriate to refer the investigation to a grand jury when it is necessary for the successful completion of the investigation. It may be necessary in order to acquire access to essential witnesses or tangible evidence through the grand jury's subpoena power, or to take testimony from witnesses who will not voluntarily cooperate with investigators or who claim a privilege against self-incrimination, but whom the district attorney is willing to immunize from prosecution on the basis of their testimony. The grand jury could also be used if the investigation produced significant conflicts in the statements and evidence that could best be resolved by grand jurors. If the grand jury is used, the grand jury could issue an indictment charging the officer(s) criminally. To do so, at least nine of the twelve grand jurors must find probable cause that the defendant committed the charged crime. In order to return a "no true bill," at least nine grand jurors must vote that the probable cause proof standard has not been met. In Colorado, the grand jury can now issue a report of their findings when they return a no true bill or do not reach a decision—do not have nine votes either way. The report of the grand jury is a public document.

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

⁹ 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.

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 that 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

S. Lamar Sims, Senior Chief Deputy District Attorney, Denver District Attorney’s Office, 201 West Colfax Avenue, Dept. 801, Denver, CO 80202 720-913-9019