



# DenverDA

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September 14, 2012

Robert White  
Chief of Police  
Denver Police Department  
1331 Cherokee Street  
Denver, CO 80204

RE: Investigation of the wounding of **Jacob Allen Wagner**, dob 11/19/1988, DPD # 780692, by **Officer Jay Otey**, #P00046, on August 28, 2012, at 3415 West Colfax Avenue, Denver, Colorado.

Dear Chief White:

The investigation and legal analysis of the wounding of Jacob Wagner have been completed, and I conclude that under applicable Colorado law no criminal charges are fileable against Officer Jay Otey. 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.

## SUMMARY OF FACTS

Mr. Eric Piperni called the 911 emergency line at 12:27:25 a.m. on Sunday, August 28, 2012. Piperni asked the 911 call taker to have police check on his nephew, Jacob Wagner, at 3415 West Colfax Avenue in Denver. Piperni was concerned because Wagner had made troubling comments about his own life, such as his "life was crap", during a telephone conversation with another relative and because the relative reported hearing a gunshot over the phone, then silence. Afterward, neither the relative nor Piperni were able to contact Wagner again on his phone. Piperni also indicated that Jacob Wagner is bipolar, takes anti-anxiety medications and recently obtained a gun.

The police dispatcher transmitted information regarding a possible "suicidal party" to officers in District 1, requesting that officers check on Wagner. In response, several officers proceeded to 3415 West Colfax Avenue. DPD records indicate that at 12:33:23 a.m. Officers Travis Jackson and Rod Romero arrived at the address. Shortly thereafter,

Officers Kevin Dryfuss, Kenneth Reiner, Frank Kerber, and Jay Otey arrived. 12:35:49 a.m. is the time noted for Officer Otey arriving “at scene”. Other officers arrived later.

The location the officers were directed to is Jacob Wagner’s residence at 3415 West Colfax Avenue, Denver, Colorado. [Attached is a photograph of the front of this residence]. At the front doorway there are two doors, an interior door and an exterior black metal security door. The exterior security door consists partly of wire mesh or screening which allows visibility through the door. As shown in the photograph, there are no objects or places in front of the doorway that provide safe cover from a gunman standing in the doorway.

Officer Kevin Dryfuss approached the front door of the residence by climbing the few steps leading up to the elevated front porch and doorway. He heard the voice of a male inside who seemed agitated. Dryfuss knocked at the exterior security door, which was locked, while standing just east of the door on the steps so as not to be directly in front of the door. A shirtless man, Jacob Wagner, ultimately opened the interior door inward and stood in the doorway looking out through the security door. Due to Officer Dryfuss’ position on the steps to the side of the door he could not see Wagner’s left side or left hand.

Officer Dryfuss explained to Wagner that police were there to check his welfare and asked him to come out of the residence to talk to officers. Wagner refused to come out. Dryfuss spoke to Wagner for several minutes. Other officers present heard Officer Dryfuss speaking in a calm voice to Wagner, but Wagner remained agitated and hostile. They recounted various comments made by Wagner, including his yelling obscenities, and that he knew the police were trying to take him to jail, that he wasn’t coming out of the house, that nothing was wrong and that he was fine, that he was on six different medications that weren’t working, that his life is “shit” and he makes only fifteen dollars an hour, that he wanted to “end it”, etc. Wagner said that he was in his house and if he wanted to end it he could end it. Wagner was repeatedly cursing and was agitated the entire time. Officer Dryfuss was the only officer speaking to Wagner during this time.

At one point, Officer Dryfuss asked Wagner if shots had been fired earlier. Wagner answered that, yes, he had fired his gun earlier and that he was holding the gun. He turned and showed the gun in his left hand. He was holding the gun down by his left side. Officer Dryfuss told investigators that he unsnapped his own holster at this time.

Officer Dryfuss continued to speak to Wagner, telling him repeatedly to put the gun down but Wagner refused. Dryfuss estimated that he asked or told Wagner perhaps ten to twenty times to put the gun down. Instead, Wagner ultimately raised the gun up from his side to approximately chest level. Wagner’s movements at this point caused Officer Dryfuss to fear that Wagner was going to shoot himself or an officer so Dryfuss quickly went down the stairs to get farther away from Wagner. He then heard three gunshots.

Other officers who were at the scene gave consistent descriptions of the situation and events leading up to the shooting. Officer Travis Jackson told investigators he was

standing at ground level directly in front of the doorway. Officer Jay Otey was to his left and behind him. Officer Jackson was using his flashlight to illuminate Wagner in the doorway. He described Wagner as being “hostile” towards the officers and was agitated the whole time. When Wagner acknowledged having fired a shot earlier, Wagner turned and Officer Jackson then saw a gun in Wagner’s left hand. He noted the hammer of the gun was back and it was cocked. Officer Jackson then pulled his own gun out.

Officer Jackson said Wagner seemed to get more and more agitated despite Officer Dryfuss’ attempts to calm him. Wagner began moving the gun around as he started “talking with his hand”. Officers Jackson and Otey both yelled at Wagner to not point the gun at them. Officer Jackson noticed at this time that Officer Dryfuss backed down the steps. When Wagner pointed the gun at Officers Jackson and Otey for about the third time Officer Otey fired three shots. In his video interview, Officer Jackson demonstrated that Wagner’s gun was pointed at them at the moment Officer Otey fired. He said that Wagner’s gun “was up and right in front of us”. Officer Jackson was asked if he felt threatened by Wagner’s actions with the gun. He said yes, he felt threatened, but he wasn’t quite ready to shoot.

Officer Jay Otey, who was standing a few feet to the southwest of Officer Jackson in front of the doorway, described that Wagner was irritated and Dryfuss was trying to calm him down. At one point, Wagner moved to showed officers that he was holding a gun in his left hand. Officer Otey drew his weapon and kept it at a “low ready position”. Multiple commands were given for Wagner to put his gun down. Officer Otey also communicated on the police radio that Wagner had a gun. This was noted at 12:39:27 a.m. Officer Dryfuss continued to speak with Wagner to try to defuse the situation.

Officer Otey explained that just before the shooting Wagner seemed to get a little more “amped up” and raised his gun and moved it back and forth so that he was pointing the muzzle directly at Officers Otey and Jackson. Although Otey felt that Wagner was not “aiming” the gun at the officers, he directed the muzzle at them. Officer Otey raised his own weapon into a position ready to fire and he and other officers yelled multiple times for Wagner to put the gun down, or to lower his weapon. Wagner did not comply with these commands either. Moments before shooting, Officer Otey described thinking: “I’m going to die. I can’t wait for him to shoot me first.” Otey explained: “I thought he was going to shoot Officer Jackson or myself. That’s when I shot.” Officer Otey said he fired three shots. At 12:45:10 a.m. another officer radioed that shots had been fired.

Wagner received wounds to his left wrist and torso. (His medical records are “privileged” and were not available to be reviewed). After the shooting, Wagner was taken to the hospital and treated. Paramedics and firemen indicated that Wagner was uncooperative during the ride to the hospital. At the hospital, Wagner was observed to spit on medical personnel who were trying to help him.

Later, at 11:55 a.m., Wagner was interviewed at the hospital by Detectives Crider and Meoni. Wagner acknowledged firing his handgun inside when he was on the phone with his father earlier. After the police arrived, he was holding his handgun when he opened

the door. He acknowledged being told by officers to put his gun down but he refused. Wagner claimed he never pointed the gun at the officers. He said just before the shots were fired he turned to his left to put his gun down on a counter and he was shot as he turned away from officers. He said: "As soon as I set it down, I got shot."

There were no eye witnesses to the shooting other than Denver police officers and Wagner. One of the neighbors in 3417 West Colfax, which is immediately to the west of Wagner's, heard shots but did not see the shooting. Others at this address saw nothing and heard nothing because they were asleep. No other neighbors or witnesses indicated they saw any portion of this shooting.

Outside of the residence, three .45 caliber cartridge casings were observed on the ground and recovered by DPD crime lab detectives. These casings were located to the south and west of the front door near the area where Officer Jay Otey indicated he was standing when he fired his weapon. The DPD crime lab later identified these casings as having been fired in Officer Otey's gun. Investigators at the scene observed a mark, indicative of a bullet strike, to the cement exterior of the residence just inches to the west of the front door where Wagner had been standing. Nearby, immediately to the south of the residence in the street, was a spent bullet that had "mushroomed" by impact. The location and condition of this damaged bullet is consistent with it having ricocheted off of the exterior of the residence, causing the strike mark on the wall next to the front door.

Two bullet holes in the wire mesh of the black security door were noted by the crime lab detectives. Inside the residence, two bullet strike marks were found in the wood trim on the east wall. These strike marks lined up with the bullet holes in the front door. Digging into the wood trim at one strike mark, crime lab detectives recovered one spent bullet. The second strike mark appeared to be a ricochet mark without a bullet in the wood trim. However, another spent bullet was found on the floor in the room where these strike marks were noted.

Note: [An additional .45 caliber cartridge casing was found inside the front "living" room on the floor under a pull-out bed. A bullet hole in the ceiling near this was also noted. Upon inspection above the ceiling, bullet fragments and a bullet strike mark were found by crime lab detectives. This evidence relates to Wagner firing his gun into the ceiling before the police arrived. The casing found inside and the bullet fragments found above the ceiling were identified to Wagner's gun by DPD crime lab firearms experts].

The handgun Wagner had been holding was found inside the front room on the floor near the front door. It is a black .45 caliber semi-automatic handgun. It was found with the hammer in the cocked position. There was a bullet in the chamber positioned for firing. There were two bullets in the magazine. Investigators noted what appeared to be "high velocity mist type blood droplets on the surface of the gun". This is consistent with Wagner having hold of the gun when he was shot in the wrist by Officer Otey.

## LEGAL ANALYSIS

Criminal liability is established only if it is proved beyond a reasonable doubt that all of the elements of an offense defined by a statute have been committed and it is proved, also beyond a reasonable doubt, that the offense was committed without legal justification or excuse. While shooting another human being is generally prohibited as assault, Colorado law specifies certain circumstances in which the use of physical force, and even deadly physical force, is justified. Because the evidence in this case establishes that Officer Otey shot and wounded Jacob Wagner, the determination of whether the shooting amounts to criminal conduct is primarily a question of justification under Colorado law.

C.R.S. 18-1-704 is the Colorado statute pertaining to the legal justifications of “self-defense” and “defense of others” most directly applicable to this case. As pertinent here it provides as follows:

(1) ... a person is justified in using physical force upon another person in order to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by that other person, and he may use a degree of force which he reasonably believes to be necessary for that purpose.

In Colorado, when this defense is raised by evidence in a case, the prosecution must disprove the defense. In other words, the prosecution must prove beyond a reasonable doubt that the facts do not support the defense.

Therefore, the ultimate question presented in this case is whether the evidence proves beyond a reasonable doubt that Officer Otey was not acting in self-defense or in defense of another at the instant he fired the shots that wounded Wagner.

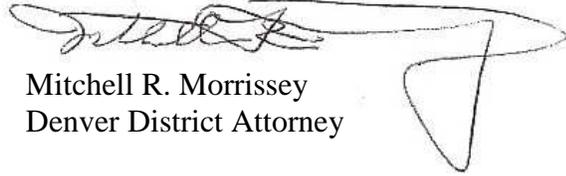
## CONCLUSION

Wagner was armed with a deadly weapon, loaded and ready to fire. He had fired this same weapon earlier when he was upset. He was still obviously upset and agitated as he confronted the police officers outside his door. He refused multiple commands to put his weapon down. Rather than de-escalating the situation, he escalated it by moving the gun, raising it up from his side, and pointing it at the officers despite the officer's yelled commands. Officers were clearly in jeopardy of being wounded or killed if Wagner had made the blink-of-an-eye quick decision to pull the trigger. Officer Otey said he fired his weapon because he feared that Wagner was about to shoot him or Officer Jackson and he feared for his life when Wagner was directing his gun at them. Officer Otey's description of this event is credible and is consistent with the statements and actions of the other officers. Officer Otey had the lawful right to defend himself and Officer Jackson in this situation. The truth is, had Wagner simply complied with the officers' many commands this event would have ended peacefully with no injuries to anyone.

In this case, I conclude that Officer Otey fired the shots that wounded Wagner in self-defense and in defense of Officer Jackson. Therefore, I conclude that no criminal charges should be filed against Officer Otey. Conversely, criminal charges against Wagner for his conduct are appropriate and have already been filed.

We will open our file for in-person review at our office at the conclusion of the criminal prosecution of Wagner or 60 days from the date of this letter, whichever is later. The Denver Police Department is the custodian of records related to this case. As in every case we handle, any interested party may seek judicial review of our decision under C.R.S. 16-5-209.

Very truly yours,

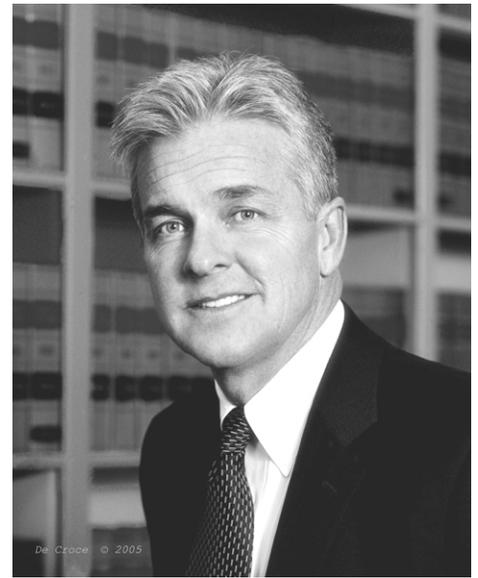


Mitchell R. Morrissey  
Denver District Attorney





## OFFICER-INVOLVED SHOOTING PROTOCOL 2012



*Mitchell R. Morrissey*  
*Denver District Attorney*

**T**he 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.<sup>1</sup> As a result of the positive changes the Manager of Safety has now instituted and his personal involvement in the process, we will not open the criminal investigative file at the time our brief decision letter is released. Again, we are doing this to avoid in any way impacting the integrity and validity of the Manager of Safety and Denver Police Department ongoing administrative investigation and review. After the Manager of Safety has released his letter, we will make our file open for in-person review at our office by any person, if the City fails to open its criminal-case file for in-person review. The District Attorney copy of the criminal-case file will not, of course, contain any of the information developed during the administrative process. The City is the Official Custodian of Records of the original criminal-case file and administrative-case file, not the Denver District Attorney.

## THE DECISION

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

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

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

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<sup>1</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.

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

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

## THE COLORADO LAW

Criminal liability is established in Colorado only if it is proved beyond a reasonable doubt that someone has committed all of the elements of an offense defined by Colorado statute, and it is proved beyond a reasonable doubt that the offense was committed without any statutorily-recognized justification or excuse. While knowingly or intentionally shooting and causing injury or death to another human being is generally prohibited as assault or murder in Colorado, the Criminal Code specifies certain circumstances in which the use of physical force or deadly physical force is justified. As there is generally no dispute that the officer intended to shoot at the person who is wounded or killed, the determination of whether the conduct was criminal is primarily a question of legal justification.

Section 18-1-707 of the Colorado Revised Statutes provides that while effecting or attempting to effect an arrest, a peace officer is justified in using deadly physical force upon another person . . . when he reasonably believes that it is necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of

deadly physical force. Therefore, the question presented in most officer-involved shooting cases is whether, at the instant the officer fired the shot that wounded or killed the person, the officer reasonably believed, and in fact believed, that he or another person, was in imminent danger of great bodily injury or death from the actions of the person who is shot. In order to establish criminal responsibility for knowingly or intentionally shooting another, the state must prove beyond a reasonable doubt that the person doing the shooting either did not really believe he or another was in imminent danger, or, if he did hold such belief, that belief was, in light of the circumstances, unreasonable.

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

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

#### GENERAL COMMENTS

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

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

When a police-citizen encounter reaches this split-second window, and the citizen is armed with a deadly weapon, the circumstances generally make the shooting justified, or at the least, difficult to prove criminal responsibility under the criminal laws and required legal levels of proof that apply. The fact that no criminal charges are fileable in a given case is not necessarily synonymous with an affirmative finding of justification, or a belief that the matter was in all respects handled appropriately from an administrative viewpoint. It is simply a determination that there is not a reasonable

likelihood of proving criminal charges beyond a reasonable doubt, unanimously, to a jury. This is the limit of the District Attorney's statutory authority in these matters. For these reasons, the fact that a shooting may be "controversial" does not mean it has a criminal remedy. The fact that the District Attorney may feel the shooting was avoidable or "does not like" aspects of the shooting, does not make it criminal. In these circumstances, remedies, if any are appropriate, may be in the administrative or civil arenas. The District Attorney has no administrative or civil authority in these matters. Those remedies are primarily the purview of the City government, the Denver Police Department, and private civil attorneys.

Research related to officer-involved shootings indicates that criminal charges are filed in approximately one in five hundred (1-in-500) shootings. And, jury convictions are rare in the filed cases. In the context of officer-involved shootings in Denver (approximately 8 per year), this ratio (1-in-500) would result in one criminal filing in 60 years. With District Attorneys now limited to two 4-year terms, this statistic would mean there would be one criminal filing during the combined terms of 8 or more District Attorneys.

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

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

The American Bar Association's *Prosecution Standards* state in pertinent part: "A prosecutor should not institute,

cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction. In making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved or to a desire to enhance his or her record of convictions. Among the factors the prosecutor may properly consider in exercising his or her discretion is the prosecutor's reasonable doubt that the accused is in fact guilty." The National District Attorneys Association's *National Prosecution Standards* states in pertinent part: "The prosecutor should file only those charges which he reasonably believes can be substantiated by admissible evidence at trial. The prosecutor should not attempt to utilize the charging decision only as a leverage device in obtaining guilty pleas to lesser charges." The standards also indicate that "factors which should **not** be considered in the charging decision include the prosecutor's rate of conviction; personal advantages which prosecution may bring to the prosecutor; political advantages which prosecution may bring to the prosecutor; factors of the accused legally recognized to be deemed invidious discrimination insofar as those factors are not pertinent to the elements of the crime."

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

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

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

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

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

It is clear not every officer will handle similar situations in similar ways. This is to be expected. Some officers will be better than others at defusing potentially-violent encounters. This is also to be expected. To the degree officers possess skills that enhance their ability to protect themselves and our citizens, while averting unnecessary shootings, Denver will continue to have a minimal number of officer-involved shootings. Denver officers face life-threatening confrontations hundreds of times every year. Nevertheless, over the last 20 years officer-involved shootings have averaged less than eight annually in Denver. These numbers are sharply down from the 1970s and early 1980s when there were 12-to-14 shootings each year.

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

#### RELEASE OF INFORMATION

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

Officer-involved shooting cases always present the difficult issue of balancing the rights of the involved parties and the integrity of the investigation with the public’s right to know and the media’s need to report the news. The criminal investigation and administrative investigation that follows can never keep pace with the speed of media reporting. This creates an inherent and unavoidable dilemma. Because we are severely restricted in releasing facts before the investigation is concluded, there is the risk that information will come from sources 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.

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