



DenverDA

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

BUS. PHONE: 720-913-9000
FAX: 720-913-9035

August 30, 2012

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

RE: Investigation of the shooting death of Kevin C. Ryberg, DOB 4/30/90, DPD # 772731, in which Officer Randall Krouse, 99059, fired shots on July 31, 2012, in the 6300 block of E. 39th Avenue, Denver, Colorado.

Dear Chief White:

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

STATEMENT OF FACTS

At 10:44 a.m., Tuesday, July 31, 2012, the Denver Police Dispatch received a call from the manager of the Niagara House Motel, 6701 East Colfax Avenue, Denver, Colorado. The Computer Aided Dispatch ("CAD") notes the complaint as follows:

*-MALE SLEEPING IN THE BED AT LOC - HANDGUN LAYING NEXT TO HIM
-SUSP[SUSPECT] NOT DOING ANYTHING WITH GUN - RP [REPORTING PARTY] JUST WANTS OFFICERS TO CHECK IT OUT
-SUSP WAS SUPPOSED TO CHECK OUT AT 1030 BUT IS SLEEPING IN THE BED - RP AFRAID TO TALK TO HIM WITH THE GUN LAYING THERE*

Investigators later determined that a hotel employee, Alicia Harrod, had gone to the room to see whether the guest was going to pay or check out. Ms. Harrod provided a written statement in which she indicated she had used a pass key to enter the room and saw a man sleeping on the bed.

She stated she

pulled the comforter to wake him up and that's when I saw the gun. The gun was on the corner of the bed. The gun was black and large semi-automatic. I couldn't wake him up so I left and told Mr. Kim. He called the police.

The hotel manager, Choon-Tae Kim, went to the room and verified Ms. Harrod's observations. He then made the 911 call noted above.

Officer Tim Luke, 98047, was dispatched. Due to the nature of the call, Sgt. John Sullivan, 94044, and Officer Alvin Thompson, 95041, also responded to provide cover. Officer Luke checked the hotel registration to determine who had rented the room and cleared that party. When the covering officers arrived, Officer Luke told them a male with the first name of "Timothy" was registered in the room and a records check showed an outstanding misdemeanor warrant for that party.¹

The officers met, obtained a passkey and a layout of the room from Mr. Kim and then responded to the room. The three officers, all dressed in full DPD uniforms, entered the room and saw the male party, later identified as Ryberg, sleeping on the bed. A black semi-automatic handgun was on the bed next to Ryberg. For safety reasons, Officer Luke picked the gun up and moved it out of the way. After a brief struggle, Ryberg was taken into custody. At that point, Officer Luke determined that Ryberg was not the party whose I.D. card was provided to hotel staff at registration. Officer Luke patted Ryberg down and found some suspected methamphetamine in his right front pocket. Ryberg was placed under arrest.

In his written statement, Officer Thompson, detailed the aftermath of the arrest:

Once [Ryberg] was secured, I cleared the handgun. There was no round in the chamber but there was [sic] several rounds in the weapon's magazine. I looked around the room and saw several small baggies around the room and I found a home made plastic pipe in the kitchenette. I placed this on the table with gun. The party was ID as Kevin Ryberg (043090). He was taken out by ofc. Luke. I then started taking pitures (sic) of the evidence found in the room. A glass pipe was found on the front desk. Small baggies and a journal was (sic) found on the left night stand. Lose (sic) baggies were found in a dress. \$14 found on the bed.²

Ryberg was taken to the parking lot to Officer Luke's marked police car. Officer Luke obtained Ryberg's identification and then placed him in the back of the patrol car. Officer Luke then conducted a computer check which showed a felony warrant issued out of Denver for Ryberg.³ Officer Luke and Ryberg had a brief conversation during which Ryberg asked him to loosen the

¹ The room was registered to Timothy A. Bibby, 9/11/82. Bibby had provided a driver's license when he registered. The officers looked at the copy of that license and when they entered the room determined the party on the bed was not Bibby.

² Items recovered from the room included: two small baggies, each containing suspected methamphetamine; two small baggies, each containing suspected marijuana; one 9mm Astro Handgun ; 12 rounds of 9 mm ammunition; and thirty-nine (39) small baggies. Detectives submitted 6.55 grams of suspected methamphetamine and 1.07 grams of marijuana for analysis.

³ A copy of Ryberg's criminal history is found in the investigative file. Among the entries is a warrant dated 06/28/2012 for "MENACING (DEADLY WEAPON), 3RD DEGREE ASSAULT & FALSE IMPRISONMENT/DOMESTIC VIOLENCE" A caution is added indicating Ryberg: "MENACED VICTIM W/KNIFE & CROWBAR, PER VICTIM--SUBJ **THREATENED TO KILL HIMSELF & ARRESTING OFFICER.**" (Emphasis added.)

handcuffs. In his video-taped statement, Officer Luke recalled that he had “Officer Krouse come with me, loosened them up and I doubled locked them again. Put him back in the car.” Ryberg was in the back seat, behind the safety partition, hands cuffed behind him. Officer Luke and Officer Krouse decided that Officer Luke would transport Ryberg to the Denver Police District Two Substation – a drive time that Officer Luke estimated to be five to ten minutes. Because of the nature of the call, Officer Krouse indicated that he would follow Officer Luke to District Two.

Officer Luke described the “cage” in the back seat of the patrol car as being the plexiglass type with a sliding window or portal which officers sitting in front can open or lock close. Officer Luke had the window open so as to be able to talk to his prisoner and because he knew Ryberg’s hands were cuffed behind him. Officer Luke recalled that during the drive, he and Ryberg spoke casually, with Ryberg saying that “his dad, was a cop . . . Said he was, I think, Jefferson County that he worked for. . .” However, when they turned from Monaco Parkway onto 39th Avenue, Officer Luke noted Ryberg began asking specific questions regarding their destination in a manner Officer Luke felt was unusual. He told investigators that just as he was thinking “why is he asking all these weird questions - It was like instantaneously, and then all of a sudden he shoots through the sliding window.” Officer Luke told investigators that Ryberg came through the portal, head first:

He dove right through there, through the, uh, slider window. So I grabbed onto him, went like this [indicating grabbing around head and shoulders]. Well he dove down and grabbed the TASER which was in the center median [console] down below, the yellow TASER. So he grabbed on to that so I grabbed on that and we were fighting with it. . . .

Officer Luke told investigators that when Ryberg “came through the window” He was able to slam the brakes on the car and put it in park. He described the close quarters struggle that ensued, stating that he was in the driver’s seat, and Ryberg had come all the way though the “window,” and was facing him and over or on top of him, forcing him down in the driver’s seat and against the door and window. Both men were struggling over the TASER and Ryberg was also striking or punching Officer Luke in the face. Officer Luke was able to twist the muzzle of the TASER toward Ryberg and deploy it. Officer Luke said that the TASER had some effect, as Ryberg was moaning in pain, but Officer Luke, in contact with Ryberg, was also feeling the effect of the TASER charge. Things quickly deteriorated. Officer Luke stated:

Then the TASER somehow falls down. Then he’s coming down back at me, I’m like holding, *he’s reaching for my gun.* . . .

Well, the gun falls - the TASER gun and then I’m like pushing him back like this way. Well then he keeps coming after me. Then he’s like, it didn’t phase him, it’s like it didn’t phase him at all. He comes after me, he starts fighting with me, trying to reach for the [hand] gun [demonstrating by reaching down to the right hip]. He keeps reaching for my gun. I’m like ‘this, this, this, this’ [demonstrating the struggle] and I’m trying to hold it. And that’s when, you know, I’m telling [Officer Krouse] ‘shoot him! Shoot him!’

In answer to a follow-up question, Officer Luke provided additional detail:

... but then I feel, like, he’s grabbing the gun. I don’t know which hand or anything like that ‘cuz it’s so tight, but I’m caught between here, so I’m like, oh, Jeez, I’m scre – you know what, this is it, I’ve got to do something! He’s gonna get my gun. He’s getting my gun . . . [I’m] trying to lock it [demonstrating holding his arm tight to his side], you know, fight him off, and then I felt that, there was

something [indicating] that he's got my gun, that's when I said, I believe I said 'Randy! Shoot him! Shoot him!' Cuz' I think he's getting my gun. You know. I mean, he was getting my gun. . . .

Officer Luke later estimated the time from the moment Ryberg came through the window to the time he shouted to Officer Krouse to shoot was "a minute to two minutes . . . my adrenaline was going so much. I mean, you're in fear of your life. You feel that, you know, basically, someone's trying to take your life . . .

Later in the interview, Officer Luke was asked why he called for Officer Krouse to shoot. He answered: "That I was going to get killed. That he was going to get my gun and shoot me. And I thought, my life was in danger. That's why—if I had the gun, I woulda shot. But I couldn't get the gun. That's why I screamed for, ah, Randy, t'shoot." Moments after he yelled, he heard two gunshots and felt Ryberg cease fighting. Officer Luke got out of his car and went to the passenger side where he saw that Officer Krouse had pulled Ryberg from the front seat of the police car and placed him on the pavement. Officer Luke noted one of Ryberg's hands was free; the cuffs were only locked around one of his wrists. Officer Luke immediately made the appropriate radio call-outs.

When cover officers and medical personal arrived they determined that Officer Luke sustained some scrapes during the altercation and there was some glass in his eye. He was taken to Denver Health Medical Center for treatment. He was then brought to Denver Police Headquarters where he made his video-taped statement.

Officer Krouse also provided a video-taped statement to investigators. He told investigators he was among several officers who responded to the Niagara House in the event additional officers were needed. He went up to the room after Ryberg was placed in custody and stood by while other officers conducted an initial search of the room. He then returned to the parking lot. Ryberg had already been placed in Officer Luke's police car. Officer Krouse noticed that Ryberg was "fidgeting around" to the extent that Officer Luke's police car was moving. Officer Krouse walked over to the car and confirmed that Ryberg was still in handcuffs. When Officer Luke returned to his car, he advised Officer Krouse that Ryberg was complaining about his handcuffs. Officer Krouse watched as Officer Luke loosened the left handcuff. When Officer Luke indicated that he was taking Ryberg to District Two, Officer Krouse stated that he would follow him to the sub-station.

Officer Krouse was following closely behind Officer Luke. When Officer Luke turned onto 39th Avenue, Officer Krouse was two to three car-lengths behind him. Officer Krouse noticed that Officer Luke's car was "swaying back and forth." He looked more closely through the back window of Officer Luke's car and saw "the back of the suspect [going] through the cage window." As Officer Krouse recounted the events:

I see the suspect literally in there [the front seat area]. I go "Oh! Shit!" so I pull up next to him and I'm thinking how do I get this vehicle stopped and [Officer Luke] has slowed down to, I don't know for sure but between 5 and 10 miles an hour. So I rammed my police car in front of him. [Officer Luke's car] still moved a little bit. I threw my door open. I recall trying to open up the passenger door – it was locked. I run around the back of the car and I see [Officer Luke] struggling with this guy inside. Um, the driver's side is also locked. Um, the suspect's more toward the center of the car because he's still – his legs are still through the window and, so I take my expandable [baton] out and smash that window out – the driver's front window. Once I smash it out, I'm thinking to myself, I can't get to the suspect, I can't help [Officer Luke] there, so I reached through, unlocked the door, ran back around to the passenger side, tried to open [the door] and it wouldn't open. Smashed that window out, so I got two

windows smashed out now and, as I'm opening up the door – I still have my baton in my hand and I hear [Officer Luke] say “shoot him! Shoot him!” I don't know what I did with the baton but it was a natural instinct to pull the gun. And then I stopped, before I shot him, because I was scared I was going to shoot [Officer Luke] because they were right-struggling with each other. So I kind of leaned more in [demonstrating] and then shot. I shot him twice.

Later in the interview, Officer Krouse was asked why he fired his handgun. He responded his concern was “for [Officer Luke's] life – this guy was trying to do something. . . . I thought this guy was trying to hurt [Officer Luke] bad. I thought he was trying to kill him. When I saw him from way back when – he was trying to hurt him . . .”

Officer Krouse pulled Ryberg out of the car and onto the pavement. At that time he noticed that Ryberg's left hand, the one on which Officer Luke had loosened the handcuff, was no longer restrained by that handcuff.

Officer Krouse was armed with a model 17 Glock semi-automatic pistol, fully loaded with DPD issued ammunition. This pistol has a magazine capacity of 17 rounds and may be carried with an additional round in the chamber. When Denver Crime Lab firearms examiners inspected the pistol, it had 15 rounds in the magazine and one in the chamber. This is consistent with Officer Krouse firing two rounds. Two spent 9mm shell casings were recovered at the scene.

Both Officers Krouse and Luke separately indicated, based on their training and prior experience, they believed that Ryberg was under the influence of some kind of controlled substance. Officer Luke told investigators that one of the facts that led him to this belief was Ryberg seemed extraordinarily strong when the two men were struggling.

Investigators located four witnesses who saw at least part of the incident. All four agreed to provide video-taped statements at Denver police headquarters. Each witness corroborated the statements of Officers Krouse and Luke.

Jeff Hegstrom, 10/13/59, was driving eastbound on 39th Avenue when he noticed two police cars approaching him. He told investigators that he was a few car lengths away from the first car when it veered into his lane. He stopped. From his vantage point “it looked like there was somebody horizontally in the front window with their back to me and it's at that point that I noticed there was a struggle going on.” Mr. Hegstrom pulled over to the side of the road and watched as the second police car stopped and the police officer driving that car got out and moved to the driver's side door of the first police car. Mr. Hegstrom

noticed that there was a struggle going on in the driver's side – looked like somebody was reaching for the gun on the officer – that's when the other officer came and started to pound on the window.

Mr. Hegstrom later described the fight in greater detail, stating “there were arms going about striking the driver . . . the passenger appeared to be assaulting the driver.” Mr. Hegstrom pulled further off the road, drove behind a delivery truck, coming to a rest south and east of the police cars, and called 911.⁴

⁴ The CAD shows this call came in an 11:39.42. The first entry reads: “SOMEONE FIGHTING WITH OFCR INSIDE VEH”

When Mr. Hegstrom next looked, he saw a police officer standing at the passenger's side door of the first police car and stated "I believe at that point he was firing shots into the vehicle. Um, and then he had the door open and he pulled somebody out of the vehicle . . ."

Kenneth Theobald, 8/29/59, is the general manager of Classic Wines, a wholesale distributor located at 6489 East 39th Avenue, a building on the north side of the street. Mr. Theobald was in his office, which overlooks the street, and he saw much of the incident. He provided a written statement to investigators, followed by a video-taped statement in which he confirmed the facts in the written statement and provided additional detail. From his written statement are taken the following facts:

. . . At approximately 11:45, I saw a police cruiser traveling slowly westbound in the middle of 39th Avenue. A second police car approached from the rear and passed on the north side – when even with the other car, it stopped. An officer exited the driver's side door, ran to the driver's door of the other vehicle, withdrew his night stick and broke the driver's door window and poked the club inside. He then ran [to] the passenger side front door, broke the window with his club, withdrew his pistol and fired 2 or 3 shots. He reached into the vehicle through the window and pulled a man through the window (I believe the man was also pushed out from inside). . . .

Two other men, Corey Thompson, 6/18/87, and Robert Michael Sager, 11/10/64, were at the loading dock at International Technifab, 6300 E. 39th Avenue. Mr. Thompson, an International Technifab employee, was assisting Mr. Sager, a customer. Both men provided written statements to investigators and each thereafter provided video-taped statements in which they confirmed the facts in the written statements and provided additional detail.

Mr. Thompson wrote, in pertinent part,

I was helping a customer load his truck outside when I [saw] the rear cop car slam his brakes and get out. Thats [sic] when I went around the corner to see what was going on. The officer that got out was yelling drop it a couple of times. Then he smashed out the windows yelling get out of the car. He then pulled his gun yelling drop it or something to that extent. Then we heard 2 shots go off.

In his video-taped statement, Mr. Thompson added that, although it was difficult for him to see inside the police car, before he heard the shots "I thought I saw the guy and then the officer were tussling, almost."

Mr. Sager wrote:

I saw two marked police cars stop in the middle of 39th street. I saw an officer out of his vehicle run around to the driver's side of the other police car. He was shouting get out of the car several times. At that time he broke out the driver's side window, and was still yelling get out of the vehicle. I noticed then that there was a struggle in the front seat and the person driving was unable to get out of the vehicle. The officer outside ran to the other side of the car, shouting get out of the car, then he broke out the passenger window. As he bent down I lost visual contact with him. Then I heard two or three gunshots.

In his video-taped statement, Mr. Sager further described the struggle he had observed, indicating when the officer broke the window, he saw, inside the police car, a person "down like this against the door – he was crushed against the door – couldn't get out – there was someone fighting with him. . . .I

didn't know he was a police officer until he got out of the vehicle. . . ." Mr. Sager added that after he heard the gunshots he looked up and was able to see both officers were out of the car and had their handguns trained on someone on the ground. He also noted that the subject on the ground "didn't have both hands cuffed" – he saw that one hand was free.

The officers maintained their position until covering officers arrived. The cover officers immediately began resuscitative efforts on Ryberg until paramedics arrived and transported him to Denver Health Medical Center. Ryberg was pronounced dead by medical staff at Denver Health Medical Center at 12:10 p.m.

On Wednesday, August 1, 2012, Dr. Garth Warren, a forensic pathologist fellow with Denver Medical Examiner's Office, under the supervision of Dr. Dawn Holmes, conducted an autopsy on Ryberg's body. Dr. Warren documented an entry and exit gunshot wound to the left wrist and two gunshot wounds to the left chest. The wounds are consistent with one projectile perforating the wrist and re-entering the chest and the other projectile penetrating the chest. Dr. Warren recovered two deformed medium caliber copper jacketed bullets from Ryberg's body and two bullets fragments from the wrist. Dr. Warren documented some bruises and abrasions elsewhere on the body, notably bruises and scrapes on the left wrist. The cause of death was determined to be multiple gunshot wounds. Blood toxicology screens were positive for methamphetamine and THC.

Denver police crime lab firearms examiners compared the bullet recovered from Ryberg's body with projectiles test-fired from Officer Krouse's Glock model 17. One bullet was "microscopically identified as having been fired in the Glock pistol. . ." The other bullet removed at autopsy was found to have the same class characteristics as the test-fired bullet "[h]owever, the bullet was damaged and the results of the comparison were inconclusive". The bullet fragments recovered at autopsy had "no value for comparison."

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 Ryberg's death was caused by shots fired by Officer Krouse, 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 use justifiably 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.

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 Krouse fired the shots, he reasonably believed that Ryberg was directing or was about to direct deadly physical force against either Officer Luke, 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

Following a lawful arrest, and while being transported, handcuffed in the back seat of a patrol car, Kevin Ryberg attacked a uniformed Denver Police Officer. The facts are clear: after getting the officer to loosen one of his handcuffs, Ryberg slipped his hand through that cuff and, with both hands free, slid through the partition separating the front and back of the patrol car and attacked the officer. The attack was of sufficient force and violence that one police officer, driving behind the patrol car, one citizen approaching the police car from the front, and at least one citizen, standing near the road side saw it *through the police car windows*. It is worth noting that once free, Ryberg's first efforts were not to open the passenger door and flee; rather, he first attempted to arm himself with Officer Luke's TASER and then attempted to grab and *had his hand on* Officer Luke's gun. It is thanks only to Officer Luke's resistance and, then, Officer Krouse's quick response in coming to Officer Luke's aid, that Ryberg was unable to obtain Officer Luke's handgun and use it to harm or kill Officer Luke.

We commend Officer Krouse for his alert reaction to the quickly evolving situation. He displayed courage and good judgment in making a determination that firing his pistol was necessary to save the life of another at the moment he fired. This was clearly an encounter when, but for Officer Krouse's actions, Officer Luke would likely have been seriously injured or killed. We cannot know what Ryberg was thinking, but the caution added to the June 28, 2012, warrant (noted in footnote 3, above) does provide some context for his actions.

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 Krouse to fire the shots that caused Ryberg's death. He only used deadly force when it was necessary "to defend" against the imminent deadly threat posed by Ryberg and his actions were clearly justified under Colorado law. Therefore, no criminal charges are fileable against Officer Krouse for his conduct in this incident.

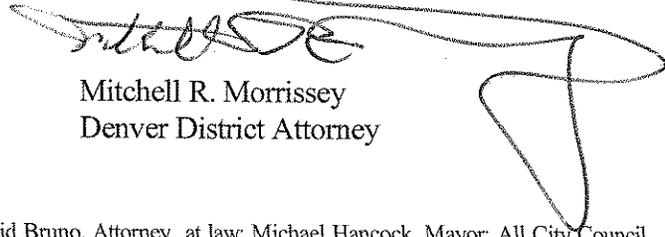
The attached document entitled Officer-Involved Shooting Protocol 2012 is incorporated by this reference. The following pertinent statement is in that document: "In most officer-involved shootings the filing decision and release of the brief decision letter will occur within two to three weeks of the incident, unless circumstances of a case require more time. The more compressed time frame will allow the Denver Police Department administrative investigation to move forward more

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quickly.” In this case, some additional time was taken in order to obtain preliminary laboratory results. In accordance with the protocol, the administrative and tactical aspects of the event will be addressed by the Manager of Safety and Chief of Police in their review and administrative decision letter.

Because there will be no criminal prosecutions related to this shooting incident, we will open our file related to this Officer-Involved Shooting for *in-person review at our office* 60 days from the date of this letter. The Denver Police Department is the custodian of record related this case. All matters concerning the release of records related to administrative or civil actions are controlled by the Civil Liability Division of the Denver Police Department. As in every case we handle, any interested party may seek judicial review of our decision under C.R.S. § 16-5-209.

Very truly yours,



Mitchell R. Morrissey
Denver District Attorney

cc: Officer Randall Krouse; Sean Olsen, Attorney at Law; David Bruno, Attorney at law; Michael Hancock, Mayor; All City Council Members; Doug Friednash, Denver City Attorney; Alex Martinez, Manager of Safety; David Quinones, Deputy Chief of Police; William Nagel, Deputy Chief of Police; Ron Saunier, Commander of Major Crimes Division; Michael Calo, District 2 Commander; Gregory Laberge, Crime Lab Commander; Mary Beth Klee, Commander of Internal Affairs; Captain Kris Kroncke, Major Crimes Division; Lieutenant Steve Addison, Major Crimes Division; Lieutenant James Haney, Major Crimes Division; Sgt. James Kurukis, Homicide; Sgt. James Dixon, Homicide; Sgt. Tony Parisi, Homicide; Detective Tamara Molyneaux, Homicide; Detective Mark Crider, Homicide; Lamar Sims, Senior Chief Deputy District Attorney; Doug Jackson, Senior Chief Deputy District Attorney; Henry R. Reeve, General Counsel, Chief Deputy District Attorney; Nicholas E. Mitchell, Office of the Independent Monitor.



Position of the patrol cars following the incident – Officer Luke's Patrol car is to the right.



Angled view of the patrol cars – broken glass may be observed under the driver's door of Officer Luke's Patrol car.



Driver's side interior of Officer Luke's patrol car. The yellow TASER gun is visible on the seat.



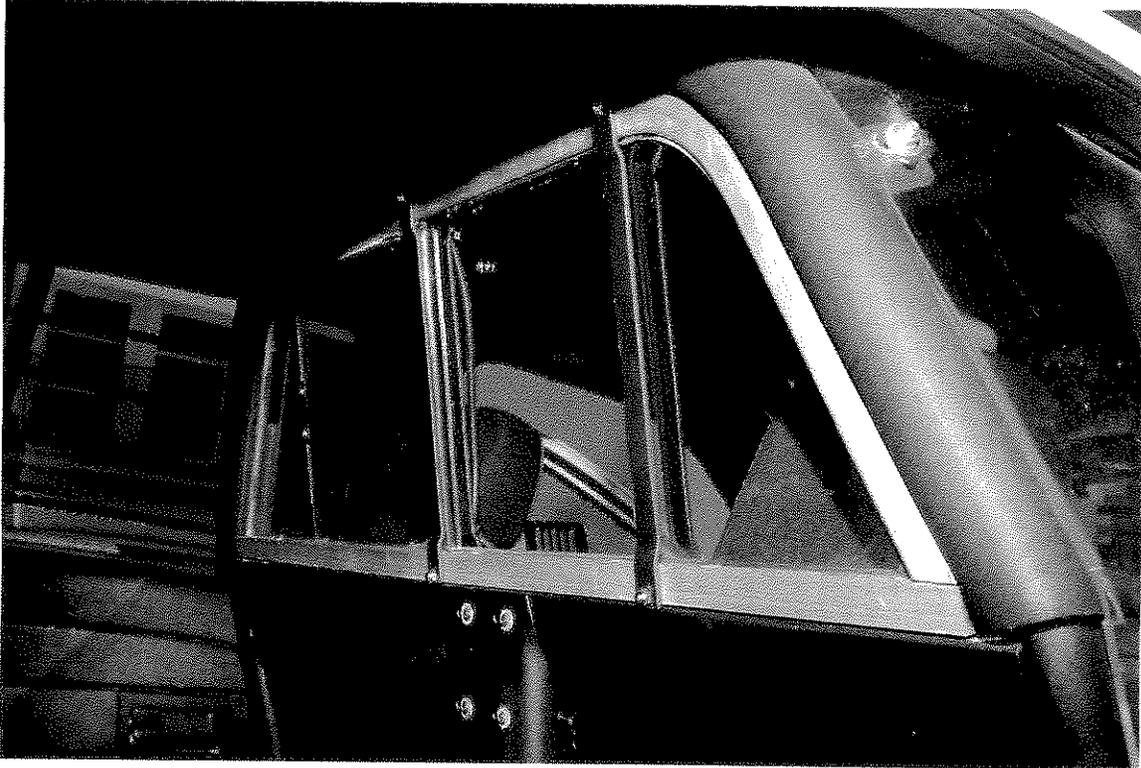
A close-up of the driver's seat of Officer Luke's car. An expandable baton is visible on the passenger's seat.



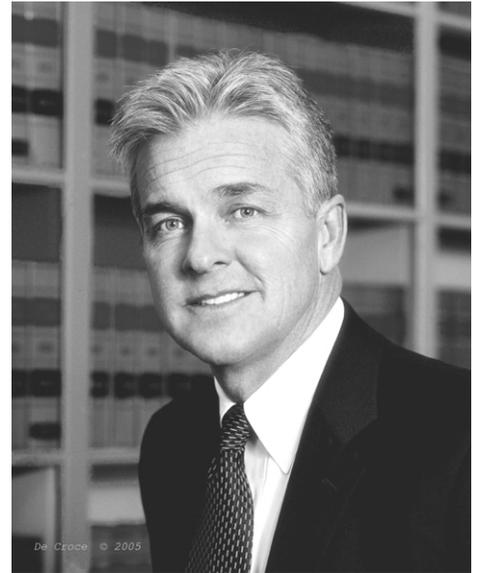
Front passenger's seat of Officer Luke's car. One of Ryberg's shoes is on seat.



Front passenger's seat – Officer Luke's car



Photos showing the cage-partition separating the front and back seats of Officer Luke's patrol car.



Mitchell R. Morrissey
Denver District Attorney

**OFFICER-INVOLVED SHOOTING
PROTOCOL
2012**

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.¹ 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

¹ 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 required by law, ethics, and the need to insure the integrity of the investigation to only do so at the appropriate time.

CONCLUSION

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

Mitchell R. Morrissey

Denver District Attorney

CONTACT FOR INFORMATION

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