



DenverDA

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October 29, 2013

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

RE: Investigation of the shooting death of Mark Reed, DOB: 5/14/55, DPD # 226322, in which Sergeant Sean Faris, 99068, fired shots on September 21, 2013, at 6333 East Colfax Avenue, Denver, Colorado.

Dear Chief White:

The investigation and legal analysis of the shooting death of Mark Reed, in which shots were fired by Sergeant Sean Faris, has been completed. I conclude that under applicable Colorado law no criminal charges are fileable against Sergeant Faris. 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 about 10:40 a.m. on Saturday, September 21, 2013, a male party wearing sunglasses, a grey hooded sweatshirt with the hood pulled over his head, and a Band-Aid on either side of his face, entered the US Bank at 6333 East Colfax Avenue, Denver, CO, through the north doors. The male, later identified as Mark Reed (hereinafter "Reed"), 5/14/55, can be seen on the bank's surveillance video as he enters the bank and walks up to and stands behind a patron waiting for a teller. Denver Police Sergeant Sean Faris, who was working in an off-duty capacity providing police presence and security at the bank¹, also took note of Reed's suspicious clothing as he entered the bank. Sergeant Faris, who was dressed in a full blue Denver Police Department uniform, told investigators that a few minutes earlier he had heard, over his police radio, the dispatcher air a possible "robbery in progress" call at a liquor store. That call had come from a payphone at 6115 East Colfax, two blocks away from the bank. Police cars had been dispatched to the liquor store and determined the call was unfounded. Because of the call's temporal and physical proximity to the US Bank, Sgt. Faris became concerned that parties might be attempting to divert police resources away from the bank. He had begun to walk

¹ Sgt. Faris told investigators the bank had arranged for Denver Police Officers to work off-duty a few months before the incident following a previous robbery.

around the bank, looking for possible threats, when Reed made his entrance.² Surveillance videos show Reed entering the bank at 10:40:32 on the camera's clock. His hood is pulled up over his head and he is carrying a large bag. He can be seen walking up to a counter where customers wait for a teller to become available. He is then seen waiting as a customer moves up to conduct business with a teller. He waits for a brief time until a teller becomes available and is then seen walking up to the teller's station.

Mr. Sean Stokes was the teller Reed approached. A surveillance camera behind him shows Reed walk up to his station.³ As Reed approaches the station, he pulls a note out of the bag, leans over the counter as he hands the note to Mr. Stokes, and then opens his bag toward Mr. Stokes. Mr. Stokes then can be seen opening a drawer at his station, remove several small stacks of U.S. currency and placing the bundle into the bag. Reed remains in position leaning over the teller station and blocking the view of anyone standing behind him. Mr. Stokes returns the note Reed had handed him and Reed turns and begins to walk away. As Reed leaves the frame provided by this camera angle, Sgt. Faris enters the frame, walking rapidly behind Reed. Mr. Stokes then ducks below his counter and appears to push a panic button. He stands and he and one patron⁴ can be seen looking towards Reed and Sgt. Faris. Mr. Stokes then picks up a telephone and places a call.

Another surveillance video shows Reed walking toward the door with Sgt. Faris walking behind him and closing the distance between them. One can see Sgt. Faris remove his handgun from his holster with his right hand as the two near the front door. Reed is holding the bag in his right hand; his left hand appears to be empty. As they approach the door, Sgt. Faris reaches out with his left hand. The two men move out of camera range as they pass through the door. Eight seconds later patrons and employees in the bank can be seen reacting to some event taking place at or outside the door. No surveillance video shows the area immediately outside the front doors.

There were few employees and customers in the bank that morning. Investigators obtained written statements from those individuals and two other people who were outside the bank and heard some part of the incident. Video-taped statements were obtained from those individuals who indicated they had noticed Reed when he was in the bank, saw him and Sgt. Faris as they left the bank, or heard the confrontation outside of the bank. No eyewitnesses were identified who saw the actual shooting. Sgt. Faris also provided a video-taped statement taken in accordance with the Denver protocol.

Mr. Stokes told investigators he was on the phone with a bank customer when he looked over to the teller line and saw a male waiting in line. Mr. Stokes noted he was wearing sunglasses and had a sweatshirt with the hood pulled over his head. He told investigators,

² A surveillance camera shows Sgt. Faris seated at a desk. About five minutes before the robbery, Sgt. Faris can be seen rising quickly from his seat and moving to look outside a window while listening to his police radio. He then begins moving around the bank. At 10:42:43 (the time reflected on the surveillance tape), this camera shows a customer moving from the waiting position to the teller station; Reed moves into that vacated position within two seconds. Three seconds later, Sgt. Faris comes into view as he walks behind Reed with his eyes on him. A few seconds later, Reed looks over in Sgt. Faris's direction and then back to the teller area. About 90 seconds later, Reed walks to the teller station and out of the frame of this surveillance camera.

³ A different surveillance camera shows Reed leave the counter and walked toward Mr. Stokes's station. Within seconds Sgt. Faris, right hand near his holstered service pistol, steps to the position vacated by Reed.

⁴ This customer was Mr. Ken Gilsdorf. In his video-taped statement, he corroborates the statements given by Mr. Stokes and Sgt. Faris regarding Reed's actions as he left the teller station.

I kinda figured something was up already cuz, you got a hood on, glasses on and then he had bandages on his face? So I was like, ah, this is probably not a good idea.

Because of these concerns, while he was on the phone with the customer, Mr. Stokes removed the large denomination bills from one drawer and placed them in another drawer “so that money would be secure”. He also noted that Officer Faris had already moved to a position where he could watch the teller line. He then turned to Reed and asked how he could assist him. Reed approached, carrying a reusable grocery bag. Mr. Stokes stated Reed tossed him a “demand note”⁵ and said, “don’t do anything funny, don’t give me any funny money, don’t give me any dye packs.” Reed also stated “Don’t look at the cop! Don’t look at the cop!” Mr. Stokes placed the money remaining in the first drawer into Reed’s bag. In accordance with his training, he attempted to place the demand note to the side and retain it but Reed ordered him to return the note and he complied. As Reed turned and started walking out of the bank, Mr. Stokes “looked at [Officer Faris] and just nodded at him. He’s like, ‘yep’. He just followed [Reed] out.” Mr. Stokes was able to hear Sgt. Faris yell “Stop! Police!”⁶ However, due to the layout of the bank and the position of his station, he was unable to see beyond the door. Thus, he did not see the events that transpired after the two men stepped outside. He stated he heard three shots and ducked down because he did not know “who shot who.” He immediately pulled the hold-up alarm under his workstation. Mr. Stokes told investigators that while he did not see Reed display a weapon, “I just know he was pretty intent on getting whatever money he was gonna get and I just wasn’t willing to test my luck.”

In his video-taped statement, Sgt. Faris described the events which lead up to his decision to contact Reed, most of which can be seen on surveillance videos and are discussed above. Sgt. Faris also discussed his background, stating he is currently assigned as a detective sergeant in the Sex Assault Investigations Unit of the Major Crimes Division. Sgt. Faris has 23 years of law enforcement experience: He served as an Adams County Sheriff’s deputy from 1990 to 1999 when he joined the Denver Police Department. Of note, in terms of his relevant training and experience, is the fact he served as an instructor at the Denver Police Academy where one of the subjects he taught was arrest control and defensive tactics (“A.C.T.”).

Sgt. Faris told investigators that when he saw Reed walk in, dressed as previously described,

There was no doubt in my mind, whatsoever, at that point, that guy was a bank robber and he was here to rob this bank. He looked at me, or appeared to look at me – I’m in my uniform – he had the opportunity, right then and there, to exit that bank and leave. And I still would have went out [sic] and contacted this individual. But he didn’t. He came and got in the line where the tellers are. ...

Sgt. Faris stated that, as can be seen on the video, he pushed the release on his holster and placed his hand on his handgun but did not pull it from his holster, explaining, “The reason I did not confront this individual in the bank is I did not want anybody inside this bank to be harmed.” Sgt. Faris watched Reed hand Mr. Stokes the note and open the bag he was carrying and saw Mr. Stokes empty “large sums of money” into the bag. Sgt. Faris confirmed that as Reed walked away, he saw the nod Mr. Stokes told investigators he had given “and I know, at this point, we’ve just had a bank robbery done right in front of me while I’m in uniform.”

⁵ A photo of the note is seen on page 9.

⁶ Yvette Sylvestre, the teller working to Mr. Stokes’s right, told investigators she heard the officer yell something to the effect of “Denver Police Department! Stop!”

Sgt. Faris told investigators the bank entryway has an inner door, a small space or sally port, and an outer door. As Reed stepped past the inner door, Sgt. Faris grabbed his shoulder and his hoodie and said, "Police! Do not move!" Reed started to pull away and Sgt. Faris yelled, back to Mr. Stokes, "hit the hold-up alarm." Reed opened the outer door and Sgt. Faris stated he "kinda push[ed] him halfway out" the outer door so that people inside the bank would be further protected. Sgt. Faris stated it was his intent to take Reed to the ground outside the bank and handcuff him

but before I could do that, this guy reaches either in the waistband or the hoodie pocket and pulls out a grey handgun, a revolver. It was grey. And starts turning very fast towards me while I still have a hold of him. So now, there's no time for a take down and there's no doubt in my mind, this guy has a handgun, he's done a bank robbery! Now this guy's gonna shoot and kill me! And I have a hold of him and I'm drawing my gun at the same time. And I'm turning the same way he is [demonstrating] so this guy can't get his gun on me. And, again, I mean, it's fast, I mean it's coming just as fast as I've ever seen something happen. And I'm turning and, uh, there's no doubt this guy's gonna kill me! I had no alternative but to fire my weapon and to defend myself at that point. And I shot, uh, total of three rounds. Very quickly.

After the third shot, Reed fell to the ground with his hands and weapon⁷ underneath him. Sgt. Faris ceased fire, made the appropriate radio calls, and held his position until covering officers arrived. Sgt. Faris did not touch or inspect Reed's weapon and as soon as sufficient cover officers arrived, he was removed from the scene in accordance with the officer-involved shooting protocol. He gave his interview to investigators over three hours later and it does not appear even at this later time he was aware Reed's weapon was actually a toy.

Sgt. Faris was carrying an H&K USP 45. This firearm's magazine has a 12 round capacity and may be carried with an additional round in the chamber. Sgt. Faris carried it fully loaded and it was his belief, later verified by crime scene investigators and firearms examiners, that he had fired three rounds.

On September 22, 2013, Dr. Garth Warren, a forensic pathologist with the Denver Office of the Medical Examiner ("OME"), conducted an autopsy on Reed's body. As of this writing, the final autopsy report has not been released. However, on October 18, 2013, Dr. Amy Martin, the Chief Medical Examiner with OME confirmed with investigators that the primary cause of death was multiple gunshot wounds. Reed suffered gunshot wounds to the head and back.

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 Reed's death was caused by shots fired by Sergeant Faris, the determination of whether his conduct was criminal is primarily a question of legal justification.

⁷ In fact, Reed had armed himself with a replica or toy revolver. See the photo on page 10.

C.R.S. § 18-1-707 defines the circumstances under which a peace officer can justifiably use physical force and deadly physical force in Colorado. In pertinent part, the statute reads as follows:

(1) Except as provided in subsection (2) of this section, a peace officer is justified in using reasonable and appropriate physical force upon another person when and to the extent that he reasonably believes it necessary:

(a) To effect an arrest or to prevent the escape from custody of an arrested person unless he knows that the arrest is unauthorized; or

(b) To defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force while effecting or attempting to affect such an arrest or while preventing or attempting to prevent such an escape.

(2) A peace officer is justified in using deadly physical force upon another person ... only when he **reasonably believes that it is necessary:**

(a) **To defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force;** or

(b) **To effect the arrest or to prevent the escape from custody of a person whom he reasonably believes:**

1. Has committed or attempted to commit a felony involving the use or threatened use of a deadly weapon; or

2. Is attempting to escape by the use of a deadly weapon; or

3. Otherwise indicates, except through a motor vehicle violation, that he is likely to endanger human life or to inflict serious bodily injury to another unless apprehended without delay.

Section 18-1-901(2)(e) of the Colorado Revised Statutes defines the terms “Deadly weapon” and “Deadly physical force” as follows:

“**Deadly weapon**” means any of the following which in the manner it is used or intended to be used is capable of producing death or serious bodily injury: (I) A firearm, whether loaded or unloaded; (II) A knife; (III) A bludgeon; or (IV) Any other weapon, device, instrument, material, or substance, whether animate or inanimate.

“**Deadly physical force**” means force, the intended, natural, and probable consequences of which is to produce death, and which does, in fact, produce death.

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 Sgt. Faris fired the shots, he reasonably believed that Reed was directing or was about to direct deadly physical force against either him, or another person, or that he reasonably believed Reed had committed or attempted to commit a felony involving the use or threatened use of a deadly weapon. 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

There is no reasonable doubt Reed robbed the US Bank. Robbery is a felony. Sgt. Faris, alerted by police radio traffic to the possibility the bank was going to be robbed, immediately recognized the threat Reed presented when he entered the bank. Reed's actions after entering the bank, coupled with Mr. Stokes's *reaction* and the meaningful eye contact he made with Sgt. Faris after Reed turned away from the teller station, made it apparent to Sgt. Faris that the bank had been robbed. Sgt. Faris, in order to assure that bank employees and customers would not be endangered, followed Reed out of the bank and attempted to place him under arrest. That Sgt. Faris had probable cause to do so is manifest. When Reed turned around, pulling what appeared to be a handgun (and making his crime now an Aggravated Robbery), Sgt. Faris's determination to fire his duty firearm was not only reasonable but, in view of the totality of the circumstances, the only reasonable option available to him. Sgt. Faris's belief Reed was turning on him with a deadly weapon was reasonable and supported by the facts known to him; his immediate response and action was justified to save his life.

Accordingly, and 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 Sgt. Faris to fire the shots that killed Reed. Accordingly, no charges will be filed against Sgt. Faris arising from his actions in this incident.

The attached document entitled Officer-Involved Shooting Protocol 2013 is incorporated by this reference. The following pertinent statement is in that document: "In most officer-involved shootings the filing decision and release of the brief decision letter will occur within two to three weeks of the incident, unless circumstances of a case require more time. The more compressed time

frame will allow the Denver Police Department administrative investigation to move forward more quickly.” In 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.

In accordance with the protocol attached below, our file *may* be open for in person review in accordance with the provisions of the Officer-Involved Shooting Protocol 2013. The Denver Police Department is the custodian of record related to 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: Sergeant Sean Faris; Sean Olson, Attorney at Law; David Bruno, Attorney at law; Michael Hancock, Mayor; All City Council Members; Doug Friednash, Denver City Attorney; Ashley Kilroy, Acting Manager of Safety; David Quinones, Deputy Chief of Police; Mary Beth Klee, Deputy Chief of Police; Ron Saunier, Commander of Major Crimes Division; Gregory Laberge, Crime Lab Commander; Ron Thomas, Commander of Internal Affairs; Lieutenant Steve Addison, Major Crimes Division; Lieutenant James Haney, Major Crimes Division; Sgt. James Kurukis, Homicide; Sgt. Ed Leger, Homicide; Detective Ken Klaus, Homicide; Detective Aaron Lopez, 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.



Bank lobby – the teller stations and tables at which customer wait are shown.



Still photographs captured from the surveillance video show Reed at Mr. Stokes's station

I'm SORRY
THIS IS A DEMAND
FOR CASH !!
GIVE ME \$100's
AND \$50's.
NO GPS BILLS AND
NO DYE PACKS !!!
HURRY !!!

A photo of the note Reed handed Mr. Stokes



Area outside north door where shooting occurred – the toy gun wielded by Reed may be seen in the center of the photo and in photo below.





OFFICER-INVOLVED SHOOTING PROTOCOL 2013



Mitchell R. Morrissey
Denver District Attorney

The Denver District Attorney is a State official and the Denver District Attorney's Office is a State agency. As such, although the funding for the operations of the Denver District Attorney's Office is provided by the City and County of Denver, the Office is independent of City government. The District Attorney is the chief law enforcement official of the Second Judicial District, the boundaries of which are the same as the City and County of Denver. By Colorado statutory mandate, the District Attorney is responsible for the prosecution of violations of Colorado criminal laws. Hence, the District Attorney has the authority and responsibility to make criminal charging decisions in peace officer involved shootings.

The Denver Police Department was created by the Charter of the City and County of Denver. Under the Charter, the police department is overseen by the Office of the Denver Manager of Safety. The Manager of Safety and the Chief of Police are appointed by and serve at the pleasure of the Mayor of Denver. The District Attorney has no administrative authority or control over the personnel of the Denver Police Department. That authority and control resides with City government.

When a peace officer shoots and wounds or kills a person in Denver, Colorado, a very specific protocol is followed to investigate and review the case. Officer-involved shootings are not just another case. Confrontations between the police and citizens where physical force or deadly physical force is used are among the most important events with which we deal. They deserve special attention and handling at all levels. They have potential criminal, administrative, and civil consequences. They can also have a significant impact on the relationship between law enforcement officers and the community they serve. It is important that a formal protocol be in place in advance for handling these cases. The following will assist you in understanding the Denver

protocol, the law, and other issues related to the investigation and review of officer-involved shootings.

For more than a quarter century, Denver has had the most open officer-involved shooting protocol in the country. The protocol is designed to insure that a professional, thorough, impartial, and verifiable investigation is conducted and that it can be independently confirmed by later review. The fact that the investigative file is open to the public for in-person review at the conclusion of the investigation and review process, permits not only formal legal reviews to occur, but also allows for any citizen to review the case. This, perhaps more than any other single factor, helps to insure that the best possible investigation is conducted by all involved parties.

When an officer-involved shooting occurs, it is immediately reported to the Denver police dispatcher, who then notifies all persons on the call-out list. This includes the Major Crimes Commander, Senior Chief Deputy District Attorney, Division Chief of Patrol, Captain of Crimes Against Persons Bureau, Homicide Unit personnel, Director of the Crime Lab, Crime Lab Technicians, and others. These individuals respond first to the scene and then to DPD headquarters to take statements and conduct other follow-up investigation. The Denver District Attorney, Manager of Safety, and Chief of Police are notified of the shooting and may respond.

The criminal investigation is conducted under a specific investigative protocol with direct participation of Denver Police Department and Denver District Attorney personnel. The primary investigative personnel are assigned to the Homicide Unit where the best resources reside for this type of investigation. The scope of the investigation is broad and the focus is on all involved parties. This includes the conduct of the involved officer(s) and the conduct of the person who is shot. Standard investigative procedures are used at all stages of the investigation, and there are

additional specific procedures in the Denver Police Department's Operations Manual for officer-involved shootings to further insure the integrity of the investigation. For example, the protocol requires the immediate separation and sequestration of all key witnesses and all involved officers. Involved officers are separated at the scene, transported separately by a supervisor to police headquarters, and sequestered with restricted visitation until a formal voluntary statement is taken. Generally the officers speak with their attorney prior to making their voluntary statement. A log is kept to document who has contact with the officer. This is done to insure totally independent statements and to avoid even the appearance of collusion.

In most cases, the bulk of the criminal phase of the investigation is concluded in the first twelve to twenty-four hours. Among other investigative activities, this includes a thorough processing of the crime scene; a neighborhood canvass to identify all possible witnesses; the taking of written statements from all witnesses, and video-taped statements from all key witnesses and the involved officer(s). The involved officer(s), like any citizen, have a Constitutional Fifth Amendment right not to make a statement. In spite of this fact, Denver officers have given voluntary sworn statements in every case, without exception, since 1979. Since November of 1983, when the videotape- interview room was first used, each of these statements has been recorded on videotape. *No other major city police department in the nation can make this statement.*

Officers are trained to properly secure their firearm after an officer-involved shooting. The protocol provides for the firearm to be taken from the officer by crime lab personnel for appropriate testing. The officer is provided a replacement weapon to use pending the completion of the testing. The protocol also allows for any officer to voluntarily submit to intoxicant testing if they chose. The most common circumstance under which an officer might elect to do so would be in a shooting while working at an establishment that serves alcohol beverages. Compelled intoxicant testing can be conducted if there are indications of possible intoxication and legal standards are met.

The Denver Chief of Police and Denver District Attorney commit significant resources to the investigation and review process in an effort to complete the investigation as quickly as practicable. There are certain aspects of the investigation that take more time to complete. For example, the testing of physical evidence by the crime lab—firearm examination, gunshot residue or pattern testing, blood analyses, and other testing commonly associated with these cases. In addition, where a death occurs, the autopsy and autopsy report take more time and this can be extended substantially if it is necessary to send lab work out for very specialized toxicology or other testing. In addition to conducting the investigation, the entire investigation must be thoroughly and accurately documented.

Officer-involved shooting cases are handled by the District Attorney, 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.⁸ As a result of the positive changes the Manager of Safety has now instituted and his personal involvement in the process, we will not open the criminal investigative file at the time our brief decision letter is released. Again, we are doing this to avoid in any way impacting the integrity and validity of the Manager of Safety and Denver Police Department ongoing administrative investigation and review. After the Manager of Safety has released his letter, we will make our file open for in-person review at our office by any person, if the City fails to open its criminal-case file for in-person review. The District Attorney copy of the criminal-case file will not, of course, contain any of the information developed during the administrative process. The City is the Official Custodian of Records of the original criminal-case file and administrative-case file, not the Denver District Attorney.

THE DECISION

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

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

One exception to the Denver District Attorney making the filing decision is if it is necessary to use the Denver Statutory Grand Jury. The District Attorney will consider it appropriate to refer the investigation to a grand jury when it is necessary for the successful completion of the investigation. It may be necessary in order to acquire access to essential witnesses or tangible evidence through the grand jury's subpoena power, or to take testimony from witnesses who will not voluntarily cooperate with investigators or who

⁸ 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.

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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