



# DenverDA

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June 10, 2013

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

RE: Investigation of the shooting and wounding of the juvenile C.S., DOB: 7/11/96, in which Officers Jeff Heinis, 06140, and Kyle Smith, 00112, fired shots on March 18, 2013, at 3920 N. Wolff Street, Denver, Colorado.

Dear Chief White:

The investigation and legal analysis of the shooting and wounding of C.S., 7/11/96,<sup>1</sup> in which shots were fired by Officers Jeff Heinis and Kyle Smith has been completed. I conclude that under applicable Colorado law no criminal charges are fileable against either Officer Heinis or Officer Smith. 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.

## SYNOPSIS

At 6:13 p.m. on March 18, 2013, the Denver police dispatcher center received the first of several calls reporting a disturbance at 3920 N. Wolff Street. Between 6:13 p.m. and the arrival of police officers at about 6:21 p.m., callers from inside the residence and people living nearby or visiting, called to report a male armed with butcher knives “stabbing at people at the location”, “stabbing a door with knives” and “out of control.”

Officers Smith and Heinis each responded to the call. Officer Smith arrived first and Officer Heinis arrived shortly thereafter. Upon arrival, the officers saw the juvenile, C.S., on the front porch of the single family residence at 3920 N. Wolff Street. C.S. was holding a butcher-type knife in each hand. The officers stood on the front lawn, a short distance away from C.S. and implored him to put down the knives. He refused to do so and a short stand-off ensued which ended when C.S. turned and started moving to the front door of the house. Each officer separately concluded that if C.S. were to

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<sup>1</sup> As a result of his conduct in this incident, C.S. has been charged as a juvenile with two counts of Menacing, a class 5 felony (13J397). As this document will be released to the public, in accordance with C.R.S. § 19-1-304, he will be identified only by his initials.

enter the home the risk of injury to those inside the home was too great to contemplate. Each officer fired his pistol. C.S. fell to the ground and was taken into custody. He was transported to Denver Health Medical Center and treated for multiple gunshot wounds.

## THE INVESTIGATION

Pursuant to protocol, Denver Police Homicide, Crime Scene and District Attorney representatives were advised and quickly responded to the scene. Investigators located nine citizens who provided written and video-taped statements. Some of these witnesses saw some aspect of the shooting. Others were present inside the home at 3920 N. Wolff Street and were able to provide information regarding C.S.'s actions and statements before the police arrived. Several other citizens were identified who heard but did not witness the events. Written statements were obtained from all those willing to provide them.

One of the eyewitnesses was Mr. Gene McBride, who was visiting his mother across the street from the residence at issue. He was with his sister and nieces when his sister pointed out a "young man walking down the street with two butcher's knives. He didn't have his shoes on; he had socks on [and] looked a little disturbed." Mr. McBride described the knives as "huge".<sup>2</sup> He saw the man walk up to the door at 3920 N. Wolff Street and begin stabbing at the front screen door and an air conditioning unit next to the door. Mr. McBride indicated he heard "girls screaming inside [the residence] to call the cops". Mr. McBride did so.<sup>3</sup> He told investigators that the man, later identified as C.S., appeared to see him make the call and sat down on the front swing "I could tell he was crying; he looked a little disturbed." As or just after he terminated the 911 call, he heard sirens and saw a police car approach and he took his nieces inside his mother's house. Mr. McBride stepped back outdoors and saw

the cops tell the guy to get down on his knees. He just kind of stood on the porch with both knives in the air. [Unintelligible] watched him. Then he turned around and had one of the knives in the air towards the door again and that's when the second cop shot him four times and he went to the ground. My sister screamed for an ambulance [and] 'why didn't you use a TASER?' And then that's when more cops just kind of horded up and took over the whole situation.<sup>4</sup>

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<sup>2</sup> Pictures of the knives wielded by C.S. are attached on page 9.

<sup>3</sup> Computer Aided Dispatch ("CAD") records show Mr. McBride's call - "SOMEONE AT NEIGHBORS DOOR WITH A KNIFE" - was received at 6:19 p.m.

<sup>4</sup> Some of the witnesses expressed to investigators a belief that the officers should have used a TASER. While the issue what tactical response is one which may be addressed in the administrative review, the following discussion regarding the use of TASERS is found in Section 105.03 of the Denver Police Department's Operation's Manual:

6. Less lethal ERD/TASER Deployment

a. Use of an Electronic Restraint Device (ERD/TASER) shall be considered a use of force and must meet the requirements of all department policies and procedures and the Colorado Revised Statute.

b. Acceptable uses of the ERD/TASER include:

1. To incapacitate a combative or physically resistive person; whose conduct rises at least to the level of Active Aggression. The purpose is to neutralize the person to the point they can be safely controlled and taken into custody. This use of force option becomes necessary when other force options would be inappropriate or ineffective under the circumstances. (Active Aggression: A threat or overt act of an assault, coupled with the present ability to carry out the threat or assault, which reasonably indicates that an assault or injury to any person is imminent.), OR

2. In situations when its use is likely to prevent an officer or a third person from serious bodily injury, OR

3. To incapacitate a suicidal person who can't be safely controlled with other force options.

Mr. McBride estimated C.S. to be about twenty-two years old. He told investigators that two officers responded, both in marked police cars and both wearing police uniforms. He saw them go to the front yard at 3920 N. Wolff Street and confront C.S. He heard the officers tell C.S. several times to get on his knees. He never complied. Mr. McBride estimated the officers were about 10 feet away from C.S. when the shots were fired.

Other witnesses provided similar descriptions of C.S.'s actions. In her written statement, Mr. McBride's sister, Ms. Shamara Allen, wrote:

I pulled up to my mothers [sic] house @ [address]. I got out of my car and witnessed young male w/butcher knife in left hand walking south down street, then turned around, ran to residence across the street and apparently had another butcher knife in right hand. Mother of male was inside & locked & closed door, he then started stabbing the knives through the screen uncontrollably, and also stabbed into the water cooler to the right of the door. My brother (Gene McBride) called 911.

Prior to officers arriving he then sat on porch swing trying to calm down. Officers shortly arrived, he jumped off of the swing with knives in hand – couldn't hear what was said between officer and male, but he raised his knife and about 4 gunshots were fired at the male, ...

Other witnesses included Gerald McBride's mother, **Rhonda Hoeme**, who stated "the dude w/the 2 knives started stabbing the screen. ...My son, Gene McBride, called the police. Then almost immediately (2) police arrived and told him twice to drop the weapons. Then the boy raised his right arm as to throw the knife and the officer shot him 4 times quick shots!"; **John Powers**, who told investigators, "I witnessed 2 officers approach the suspect, he refused, after repeated verbal attempts, to drop his knife. I believe 4 shots were fired. I witnessed the officers discharge their weapons."; and **Dana Williams**, who reported

... a younger man ... ran out of the house with a butcher knife in each hand. He started walking away from me. Once I saw that he was holding knives that is when I made the call to 911. ... the young man was stabbing at the front door. The door was closed and locked but he was stabbing into the screen & house with both knives. The police started arriving. ... I think they told the man two or three more times to put the gun [sic] down. The man started yelling (I couldn't tell what he was saying) and it looked like he started clenching the knives harder. The officers moved closer and yelled at him and then the man jumped forward a bit and that is when the officers fired."

Officer Smith was the first officer to respond to the 911 calls. Officer Smith, who was driving a marked Denver police car and wearing a full blue Denver police uniform, was in the area of 38<sup>th</sup> Street and Federal Boulevard on his way to another call. He was aware that officers had been dispatched to a call in the 3900 block of Wolff Street but heard the dispatcher update that call advising officers the suspect was, as Officer Smith recalled the dispatch, "stabbing multiple people."<sup>5</sup> Officer Smith diverted from his assigned call, activated his emergency equipment and drove to the 3900 block of Wolff Street, arriving from the south. When he arrived, he saw people standing on the street, some

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d. Officers will not use the ERD/Taser in the following situations: ...

10. In a situation where deadly force is clearly justifiable, unless sufficient cover is present and is capable of providing deadly force (Lethal Cover) to protect the officers and or civilians as necessary.

<sup>5</sup> The dispatch tapes reveal that during transmissions starting at 18:19:49 [6:19 and 49 seconds], the dispatcher airs:

"And cars on Wolff, we're receiving a call from another caller advising now this is going to be a stabbing, there's a male stabbing people with butcher knives."

of whom were gesturing towards “the house”. Officer Smith got out of his car and approached 3920 N. Wolff where he saw a party matching the suspect’s description aired by the police dispatcher sitting in a chair on the front porch. Officer Smith told investigators he saw C.S. sitting down and

he didn’t have any weapons that I saw, then I heard a lady yell from inside the house “you better drop the knives or they’re gonna shoot you!” And so, again, I don’t know, the update we got was that there was multiple people that had been stabbed. So, I didn’t know if there was a stabbing victim or multiple victims inside the house, or if this was his house or what the circumstances were, and I made it to, I dunno know, I wanna say, about right here [indicating the area in front of the front porch on a photograph of the house] and he was still sitting down, I made it to about right here, and he stood up, and um ... he stood up and he, um, he has two knives by his side. And so I pull my gun out and I said, uh, “drop the knives! Drop the knives!”

Officer Smith told investigators he knew C.S. heard him because C.S. said something to the effect of “I’m not droppin’ the knives – you’re gonna have to shoot me.” C.S. kept raising and lowering the knives and Officer Smith continued to plead with him to drop the knives (he estimated he repeated the request “10 or 15 times”. Officer Smith heard at least one other officer issuing similar commands.) Officer Smith told investigators that C.S. raised one knife overhead in a manner which led Officer Smith to believe C.S. was intending on “throw it at me and stab me with it.” Officer Smith estimated no more than 5 or 6 yards separated him and C.S. and he was acutely aware that he had very little cover. Despite the increased threat C.S. presented when he raised the knife, Officer Smith did not discharge his weapon, but continued to train it on C.S. while ordering him to drop the knives. C.S. then lowered the knife and moved to the front door of the house. Officer Smith could hear people yelling inside the house. Officer Smith stated: “I was afraid he was going to go inside the house and stab people inside the house and that’s when I, I shot.”

Officer Smith heard another officer fire shots and he saw C.S. drop to the ground. As C.S. was no longer a threat and due to Officer Smith’s concern that individuals inside the house had been hurt, he made his way to the door and looked inside. Officer Smith asked if anyone was injured and someone inside stated that they were alright. Officer Smith then advised the police dispatcher that shots had been fired and requested the appropriate emergency response.

The officer who fired the other shots was Officer Heinis. Officer Heinis, who was also dressed in a full blue DPD uniform and driving a marked patrol car, told investigators he was responding to a call when he heard the police dispatcher air a “nature unknown [call] at the 3920 Wolff Street”. The call was not assigned to him but he continued to monitor as he was headed to the call he had been assigned. He was in the area of 29<sup>th</sup> and Federal when he heard the dispatcher add information that “several people had been stabbed at the location and they upgraded it to a stabbing.” Officer Heinis decided this was a higher priority call and proceeded toward 3920 Wolff Street with his overhead lights and siren activated. As Officer Heinis drove up to the scene, he heard Officer Smith tell the dispatcher he had arrived on scene. When he got out of his police car, he saw Officer Smith standing in the front yard, handgun drawn, ordering a male on the porch to “drop the knives”.

Officer Heinis saw that the male on the porch was holding “large butcher knives” in each hand, and he took a position just to Officer Smith’s right. Officer Heinis told investigators the subject was standing on the porch in an elevated position, “15 to 20 feet away from us”. Officer Heinis stated he was able to see the front door of the house was open but the metal screen door was closed and he heard “people screaming and yelling” behind the security door. Based upon the radio dispatches and

the sounds from inside the house, Officer Heinis “thought there was people injured and maybe possible seriously injured or mortally injured inside the house. He was blocking our entrance to go help them and he was armed with two knives.” Officer Heinis drew his handgun and he, also, began ordering C.S. to drop his weapons. According to Officer Heinis, C.S.’s response was “ ‘fuck you! Just fucking shoot me! I don’t care!’ Uh, he said that over and over again.”

The standoff continued for a brief period.<sup>6</sup> Officer Heinis tried to de-escalate the situation by lowering his voice, but C.S. persisted in his refusal to comply, at times moving towards the officers in a manner that Officer Heinis said “put me in fear for myself and Officer Smith, at that point, cause he was fairly close to us.” C.S. then turned to the front door and opened the screen door. Officer Heinis stated he could hear people yelling behind the door to the residence.

As soon as he opened the door I, um, was in fear that he was going to continually, er, to assault somebody inside – stab them, kill them. I thought there were already other people, um, assaulted inside, so I decided at that point to discharge my firearm. Um, I believe Officer Smith and I discharged our firearms at the exact same time when he turned and opened the door to go back in. And I continued firing until he fell to the ground.

Officer Heinis was carrying a model 17 Glock 9mm semi-automatic pistol. This firearm has a magazine capacity of 17 rounds and may be carried with an additional round in the chamber. Officer Heinis advised investigators that he carries his pistol fully loaded. Firearms examiners inspected this pistol and determined that Officer Heinis fired three rounds. Investigators at the crime scene recovered three spent 9mm shell casings in the front yard. Officer Smith was carrying a model 21 Glock .45 caliber semi-automatic pistol. This firearm has a magazine capacity of 13 rounds and may be carried with an additional round in the chamber. Officer Smith advised investigators that he carries his pistol fully loaded. Firearms examiners inspected this pistol and determined Officer Smith fired one round. Investigators at the crime scene recovered one spent .45 caliber shell casing in the front yard.

C.S. was taken by ambulance to Denver Health Medical Center (“DHMC”). The transporting paramedics advised investigators that their preliminary evaluation suggested C.S. suffered a gunshot wounds to the right shoulder, two wounds to the left abdomen, one to the right leg above the ankle and one to the mid-back. We have no information regarding which of those wound were entry wounds and which may have been exit wounds. Although medical privacy issues preclude us from obtaining additional information regarding C.S.’s condition, we are informed he is expected to survive his wounds and has been released to face charges in this event. The Denver police department records reflect no previous arrests for C.S. There is a record dated February 13, 2013, indicating officers were called to search for C.S. after he left DHMC while awaiting admission or evaluation for a Mental Health Hold. The comments section of that record reflects C.S. had threatened to kill himself and his grandmother. This record indicates police were successful in locating C.S. and returning him to DHMC.

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<sup>6</sup> CAD records show officers arrived on scene at 18:21:12; the notation “ONE AT GUNPOINT” was made at 18:21:52; the notation “EMS [CODE] 10 SHOTS FIRED” was made at 18:22:49.

## 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 C.S.'s injuries were caused by shots fired by Officer Heinis and Officer Smith, the determination of whether his conduct was criminal is primarily a question of legal justification.

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

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

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

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

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

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

or

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

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

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

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

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

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

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

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. As C.S. survived his wounds, the issue in this case revolves around the question whether each officer’s use of physical force was justifiable.

Therefore, the question presented in this case is whether, at the instant the officers fired the shots, each reasonably believed that C.S. was directing or was about to direct unlawful physical force against either him, the other officer, *or* another person. In order to establish criminal responsibility for an officer knowingly or intentionally causing injury to 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

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 either Officer Heinis or Officer Smith to fire the shots that struck and injured C.S. Each officer separately reached a conclusion that C.S. was about to injure or kill innocent citizens by using the knives he was wielding. That conclusion was based upon the information they had received from the police dispatcher and the facts available to them when they arrived at the scene – particularly the fact that there were people screaming inside the residence. Each officer used physical force when it was necessary “to defend a third person” against the imminent and potentially deadly threat posed by C.S. Accordingly, each officer’s actions were clearly justified under Colorado law. The use of force option each officer chose, a firearm, was reasonable under the facts of this case, where the officers had received information that C.S. had injured people before they arrived and that he confronted them, armed with two deadly weapons. The officers gave C.S. ample opportunity to resolve the situation without injury either to himself or others

– he chose not do so. The fact that the information relayed by the dispatcher, viz., that people had been stabbed, was inaccurate does not change the reasonableness of the officer’s response.<sup>7</sup> The officers attempted to resolve the situation without injury to C.S. or themselves. It was C.S. who took the final step which gave the officers no choice but to act to protect the lives of others. Therefore, no criminal charges are fileable against either Officer Heinis or Officer Smith for their respective 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.

As there is a pending prosecution in the juvenile court against C.S., we will open our file related to this Officer-Involved Shooting for *in-person review at our office* following the conclusion of that criminal proceeding. The Denver Police Department is the custodian of record related this to 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.

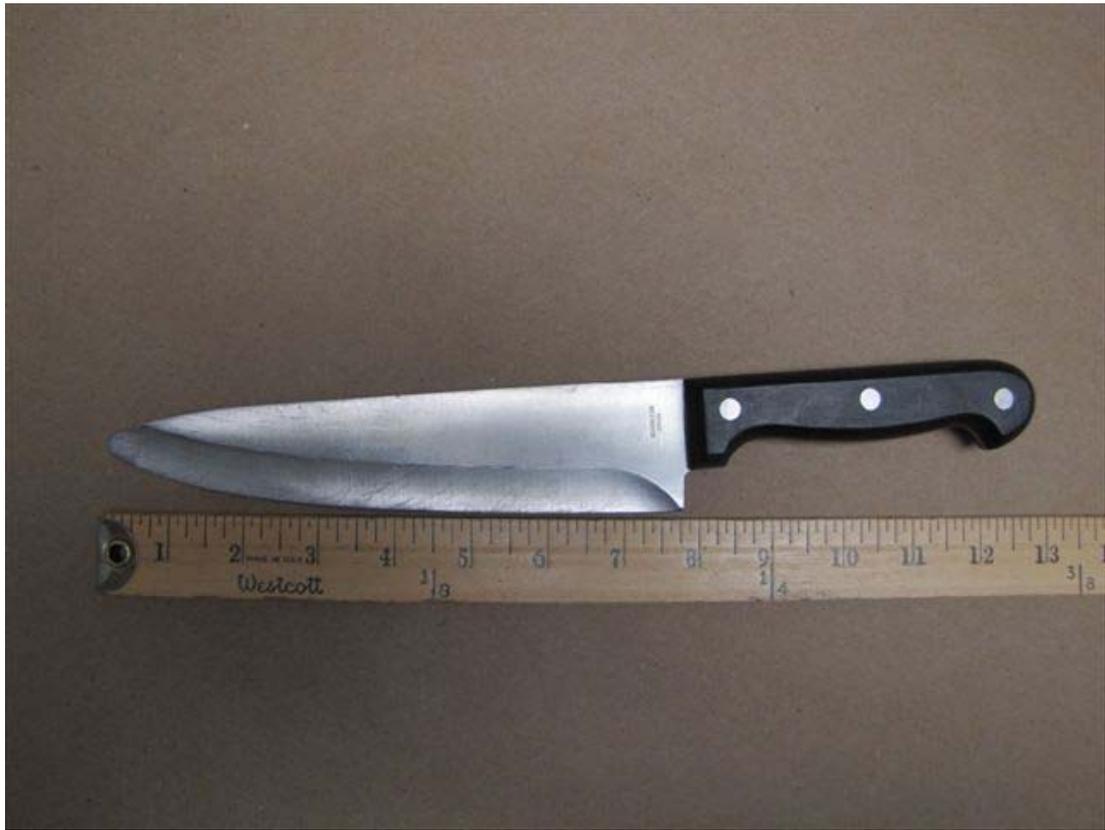
Very truly yours,

Mitchell R. Morrissey  
Denver District Attorney

cc: Officer Jeff Heinis; Officer Kyle Smith; Sean Olson, 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; Paul Pazen, District 1 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. Ed Leger, Homicide; Detective Tamara Molyneaux, Homicide; Detective Louis Estrada, 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.

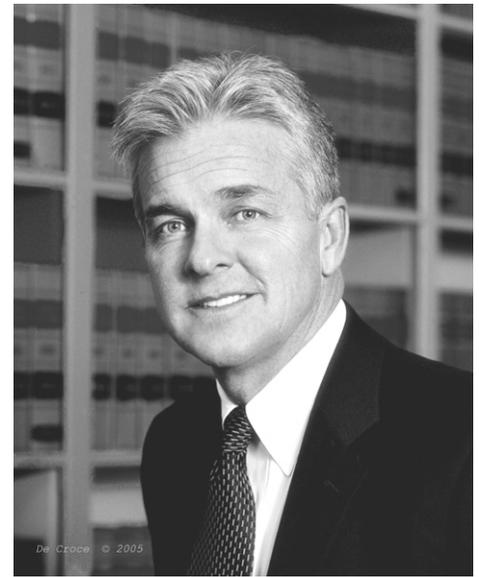
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<sup>7</sup> Call cards show one of the calls citizens made to 911 operators was “MALE IS STABBING AT PEOPLE AT LOCATION.” At 18:20:59 another call reads: “ADDITIONAL CALLER: CHRIS MONTOYA – 720-474 \*\*\*\* --LIVES IN THE NEIGHBORHOOD – SAYING HURRY UP AND SEND SOMEONE – CHRIS SAID NEEDS EMS AND POLICE – CALLER HUNG UP.”





## OFFICER-INVOLVED SHOOTING PROTOCOL 2013



*Mitchell R. Morrissey*  
*Denver District Attorney*

**T**he Denver District Attorney is a State official and the Denver District Attorney's Office is a State agency. As such, although the funding for the operations of the Denver District Attorney's Office is provided by the City and County of Denver, the Office is independent of City government. The District Attorney is the chief law enforcement official of the Second Judicial District, the boundaries of which are the same as the City and County of Denver. By Colorado statutory mandate, the District Attorney is responsible for the prosecution of violations of Colorado criminal laws. Hence, the District Attorney has the authority and responsibility to make criminal charging decisions in peace officer involved shootings.

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

When a peace officer shoots and wounds or kills a person in Denver, Colorado, a very specific protocol is followed to investigate and review the case. Officer-involved shootings are not just another case. Confrontations between the police and citizens where physical force or deadly physical force is used are among the most important events with which we deal. They deserve special attention and handling at all

levels. They have potential criminal, administrative, and civil consequences. They can also have a significant impact on the relationship between law enforcement officers and the community they serve. It is important that a formal protocol be in place in advance for handling these cases. The following will assist you in understanding the Denver protocol, the law, and other issues related to the investigation and review of officer-involved shootings.

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

When an officer-involved shooting occurs, it is immediately reported to the Denver police dispatcher, who then notifies all persons on the call-out list. This includes the 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.<sup>8</sup> As a result of the positive changes the Manager of Safety has now instituted and his personal involvement in the process, we will not open the criminal investigative file at the time our brief decision letter is released. Again, we are doing this to avoid in any way impacting the integrity and validity of the Manager of Safety and Denver Police Department ongoing administrative investigation and review. After the Manager of Safety has released his letter, we will make our file open for in-person review at our office by any person, if the City fails to open its criminal-case file for in-person review. The District Attorney copy of the criminal-case file will not, of course, contain any of the information developed during the administrative process. The City is the Official Custodian of Records of the original criminal-case file and administrative-case file, not the Denver District Attorney.

## THE DECISION

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

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

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<sup>8</sup> See the “Conclusion” statement in the “Decision Letter” in the December 31, 1997, shooting of Antonio Reyes-Rojas, where we first pointed out issues related to the importance of the Administrative review of officer-involved shootings. Subsequent letters continued to address this issue.

unanimously, to twelve jurors, at trial, after considering reasonable defenses. If this standard is met, criminal charges will be filed.

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

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

## 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.

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*Denver District Attorney*

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