



DenverDA

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July 5, 2013

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

RE: Investigation of the shooting and wounding of Samuel Clementi, 03/15/55, in which Kevin Dreyfuss, 99033, fired shots on April 29, 2013, at 3289 Grove Street, #406, Denver, Colorado.

Dear Chief White:

The investigation and legal analysis of the shooting and wounding of Samuel Clementi, in which shots were fired by Corporal Kevin Dreyfuss, has been completed. I conclude that under applicable Colorado law no criminal charges are fileable against Corporal Dreyfuss. 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 6:59 p.m. on April 29, 2013, Denver police officers were called to the Heather Grove Assisted Living (“Heather Grove”) facility at 3289 Grove Street on a report of a suicidal party. Heather Grove is a Veteran’s Administration residential facility for military veterans, many of whom suffer from mental disabilities. The person who called the police was Ms. Mary Rose, the office manager of the facility. Ms. Rose told the call taker “I just went upstairs to give one of my residents his medication and he’s up there with a giant pair of scissors, uh, threatening to kill himself, [saying] ‘get out of here. Get out of here!’ . . . his name is Sam Cle, Clementi”. When asked whether there were any safety concerns for first responders, Ms. Rose cautioned, “well, he has a big - giant pair of scissors in his hand, and he won’t give ‘em back and he won’t let go of ‘em or anything.” Ms. Rose further advised the call taker that Clementi suffered from “schizo-affective, PD, PTSD, schizophrenia, yeah.”

In her statements to investigators, Ms. Rose described the facts which led her to make the 911 call and her observations after Cpl. Dreyfuss arrived. Ms. Rose told investigators that earlier in the day Clementi had seemed fine. However, sometime after 6 p.m., she was making rounds and administering medicines to residents and she came to Clementi’s room on the fourth floor and found

the door partway open. She knocked on the door and Clementi yelled at her to “get out of here.” She stepped into the doorway and saw him sitting in his chair, somewhat hunched over, and holding a “pair of big scissors” between his legs. Ms. Rose asked Clementi what he was doing and whether he was attempting to harm himself to which he responded, “I’m gonna hurt somebody!” Clementi added that he was not going to hurt Ms. Rose but insisted she leave. Ms. Rose told investigators that Clementi had never acted in this way toward her before and she “knew he was going to do something.” Ms. Rose left Clementi’s room, warned a resident who roomed nearby that Clementi was acting strangely, and went downstairs to call the police.

Ms. Rose stated she remained downstairs until Cpl. Dreyfuss arrived, went back upstairs with him, and stood somewhat down the hall. She watched Cpl. Dreyfuss approach Clementi’s door and then heard Clementi yell, in what she described as an aggressive tone of voice, words to the effect of “what are you doing here? Get the hell out of here!”

From her position, Ms. Rose was unable to see into Clementi’s room and therefore could not see Clementi. She watched as Cpl. Dreyfuss said, “you need to calm down. What’s going on?”, and heard Clementi yell, “get the hell out of here!” and also heard him say “something about raping his mother.” She then saw Cpl. Dreyfuss display what she referred to as a “big, black . . . bean bag” gun¹ and begin to order Clementi to step back. She told investigators “the officer kept telling Clementi, “calm down! You need to step back! Put it down. Step back!” She then heard Cpl. Dreyfuss warn Clementi he would have to shoot to which Clementi responded, “ ‘go ahead. Give it your best shot’ . . .or something like that.” According to Ms. Rose the officer repeated his warnings and then discharged the 40 mm less-lethal weapon. After this round was deployed, Ms. Rose heard Clementi say, “*is that all you got?*”

And the officer [unintelligible] ‘you need to put that down and sit down– have a seat.’ And [Clementi] must have been coming [at the officer] cuz [Clementi’s] voice was getting meaner, you know, like he was, sounded he was going-- and that’s when the officer put that gun [the 40 mm launcher] down, and it sounded like [Clementi] was coming out and that officer [Ms. Rose pantomimes Officer Dreyfuss drawing a pistol, saying] ‘I’m gonna have to, you need to, I’m gonna end up shooting you. You need to calm down, you know, sit down! Don’t come at!’ And [Clementi] must have came [sic] at him and . . . [Ms. Rose pantomimes Officer Dreyfuss firing his handgun].

In answer to a follow-up question put to her by an investigator, Ms. Rose described Cpl. Dreyfuss’s voice as “calm, cool . . . he was very professional in his manner.” Later in her statement she added, “[the officer] had to act the way he did because of the way it went down, you know, these guys are mentally unstable sometimes – with a big pair of scissors coming at you, I mean, you know.”

Cpl. Dreyfuss told investigators he was responding to a shooting call in the area of 6th Avenue and Knox Court. He was at approximately 33rd Avenue and Federal Boulevard when the police dispatcher “call[ed] out a suicidal party at 3289 Grove”. He was, thus, a block away when the call came out and he decided to divert. He was familiar with the facility being a Veteran’s home as he had been there on calls in the past and advised the dispatcher he was “Code 6.”² Cpl. Dreyfuss, dressed in a full blue Denver police uniform and driving a marked patrol car, drove to the facility and parked in front of the residence.

¹ The weapon she was describing was the less-lethal 40 mm launcher Cpl. Dreyfuss had brought with him. It is seen in the picture attached at page 8.

² The Denver Police radio code signifying an “[o]fficer’s arrival at the scene.”

Cpl. Dreyfuss was initially unclear whether the dispatcher said that the party was wielding “fake scissor.” He attempted to get clarification but the dispatcher was focused on the shooting call. Cpl. Dreyfuss, who is C.I.T. trained and had been to the facility “many, many” times on calls involving military veterans and stated he was “always cognizant, ok, we have the PTSD potential, we have the possibility that they will need to go for psychiatric treatment . . .” With this awareness he went and met Ms. Rose.

Cpl. Dreyfuss stated Ms. Rose told him Clementi was usually not a concern but that he had a “pair of scissors.” Officer Dreyfuss asked Ms. Rose to remain in the office, returned to his patrol car and got and charged the 40 mm less-lethal weapon he kept in his patrol car. When he returned to the building he found Ms. Rose had gone back upstairs to the fourth floor.³ Although he was aware that a cover car was responding, Cpl. Dreyfuss determined that he could not wait as Ms. Rose had returned to an area of potential danger. He went up to Clementi’s room on the fourth floor.

Cpl. Dreyfuss approached Clementi’s room with the 40 mm launcher in his hands. He carefully looked into the room and saw Clementi sitting in a chair with the scissors in his hand. Clementi looked at Cpl. Dreyfuss and said “what the fuck do you want?” in what Cpl. Dreyfuss described as an “agitated” tone of voice. Cpl. Dreyfuss answered that he wished to talk and Clementi responded “why did you do that to my fucking mother?” Cpl. Dreyfuss attempted to talk with him and calm him down. As he did so, Clementi stood and moved to the edge of the bed, holding the scissors at chest level.⁴ Cpl. Dreyfuss repeatedly asked Clementi to sit down and put the scissors down. Cpl. Dreyfuss told the investigators at this point he was thinking “alright, he might be agitated but maybe I can gain some, uh, compliance just by raising my voice a little bit”. Clementi said, “I’m not going to fucking sit down.” Cpl. Dreyfuss continued to plead with him from an estimated distance of no more than ten or twelve feet.

Cpl. Dreyfuss told Clementi, “I shit you not. This is going to hurt. Don’t make me shoot you [with the 40 mm]”, at which point Clementi, using both hands, began opening and closing the scissors. Cpl. Dreyfuss was becoming increasingly concerned for his safety and began telling Clementi “Sir! Don’t take any more steps towards me!” Clementi ignored Cpl. Dreyfuss’s commands and took a couple of steps toward him. Cpl. Dreyfuss aimed the 40mm directly at Clementi and fired a projectile. In Cpl. Dreyfuss’s words,

Well, the round hits around his left, ah, lower rib cage area -- he’s wearing this Carhartt jacket -- and it bounces off! And, uh, I mean we’re like *ten feet away*, and I’m thinkin’ ‘how ineffective!’ It bounced off of him! And he says to me, ‘it’s gonna hurt, huh?’ He didn’t flinch. [It] didn’t back him up. [It] didn’t stagger him. [It was] loud as hell – accomplished nothing. Um, I see, I see it bounce off. And uh, and now I know I don’t have a loaded round [in the 40 mm]. I immediately switch to my firearm.

Clementi took at least one more step toward Cpl. Dreyfuss who continued to order him to stop and, relying on his C.I.T. training, continued to warn Clementi “this is going to hurt”. Clementi did not comply and, instead, reached over to the table top or counter which was to his left, picked up what Cpl. Dreyfuss believed was the “shredded” 40 mm projectile, and threw it back at Cpl. Dreyfuss.

³ Ms. Rose states she went back upstairs with Cpl. Dreyfuss. Although this discrepancy is not material, the evidence suggests Cpl. Dreyfuss is accurate on this point.

⁴ Photos showing the room through the doorway and the bed are found on page 9. A photo showing the scissors is found on page 10.

Cpl. Dreyfuss realized that Clementi was so close he would not be able to reload the 40 mm launcher so he stooped down, placed it on the floor next to the wall⁵, stood up with his handgun aimed at Clementi and ordered him not to come any closer. Despite this command, Clementi took

at least one or two more steps and now we're, we're this close. [A brief discussion follows with Cpl. Dreyfuss demonstrating the distance by using points in the interview room]. And I'm thinking, he is going to stab me with this thing, it's gonna go right into my chest. That's all I was thinking, the scissor is gonna go right into my chest. And, uh, I fired what I thought were four rounds.

Cpl. Dreyfuss ceased firing when Clementi fell to the floor. Cpl. Dreyfuss immediately advised the dispatcher that shots had been fired and requested an ambulance. A cover officer arrived and the two officers placed Clementi in custody. Clementi was taken by ambulance to Denver Health Medical Center. He was treated for gunshot wounds to the left lower rib area, the right hand and left arm. He survived his wounds.⁶

Cpl. Dreyfuss was armed both with the 40 mm less-lethal projectile launcher and a .45 caliber Glock model 21 handgun, loaded with DPD issued ammunition. The 40 mm is a single shot launcher and must be manually reloaded by opening the breech and inserting a new cartridge. Cpl. Dreyfuss's firearm has a 13 round magazine capacity and may be carried with an additional round in the chamber. Cpl. Dreyfuss told investigators that his practice varied – at time he carries his magazines fully charges and at other times he will load only 12 rounds in the magazine to preserve spring tension. He was unsure how he had the magazine loaded on April 29, 2013. Scene investigators located five spent shell casings at the scene. They and firearms examiners determined Cpl. Dreyfuss had, in fact, fired five rounds.

Although there were other residents in their rooms on the fourth floor, none witnessed the incident. Investigators obtained written or video-taped statements from all who indicated they had heard any of the events or witnessed Clementi's actions before Cpl. Dreyfuss arrived. Officer Jared Purdy was the first cover officer to arrive. He told investigators he was in the stairwell approaching the fourth floor when he heard gunshots. Cpl. Dreyfuss was standing in the hallway, handgun pointed into the open doorway, when Officer Purdy approached. It was he who assisted Cpl. Dreyfuss in placing Clementi in custody.

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 Clementi's injuries were caused by shots fired by Officer Dreyfuss, the determination of whether his conduct was criminal is primarily a question of legal justification.

⁵ See the photo on page 8.

⁶ Clementi's wounds required his hospitalization. He was released from the hospital to a mental health facility for observation and treatment. We are informed that as of July 2, 2013, he remained in this facility on a 90 day civil commitment order. Upon his release he will face charges for his conduct in this incident.

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 Clementi survived his wounds, the issue in this case revolves around the question whether Cpl. Dreyfuss's use of physical force was justifiable.

Therefore, the question presented in this case is whether, at the instant Cpl. Dreyfuss fired his handgun, he reasonably believed Clementi was directing or was about to direct unlawful physical force against either him 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

Cpl. Dreyfuss responded to the 911 call and was confronted by a man who was hostile, agitated and wielding a deadly weapon. The corporal, realizing the gravity of the situation, sought to de-escalate the matter by using his CIT training. He was, however, in a difficult position in that he was aware there were other individuals in rooms near Clementi and, thus, once he engaged Clementi, he could not leave him. Corporal Dreyfuss made every effort to resolve the situation without injury to anyone. He brought and deployed less-lethal force even though he did not have a cover officer present. This action increased the risk he faced. He fired his weapon only when Clementi advanced to less than ten feet in an area where Corporal Dreyfuss had neither cover nor concealment available. He fired because he believed if he did not do so he would be killed. Corporal Dreyfuss showed great personal courage and acted with great restraint.

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 Cpl. Dreyfuss to fire the shots that injured Clementi. Accordingly, no charges are fileable against Cpl. Dreyfuss for 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 after the prosecution against Clementi has concluded. 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: Officer Kevin Dreyfuss; 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; Mary Beth Klee, Deputy Chief of Police; Ron Saunier, Commander of Major Crimes Division; Paul Pazen, District 1 Commander; 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 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.



The hallway outside of Clementi's Room:
The 40 mm launcher is seen on the floor to the left of the door to Clementi's room.
Other placards mark the location of spent shell casings documented by investigators.



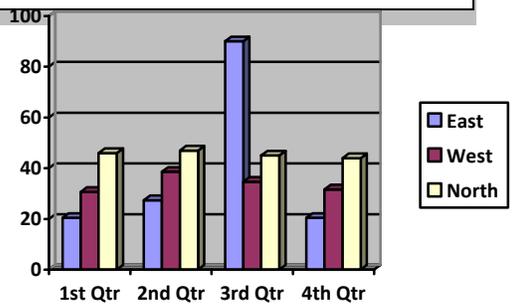
Clementi's room
seen through the
open doorway.

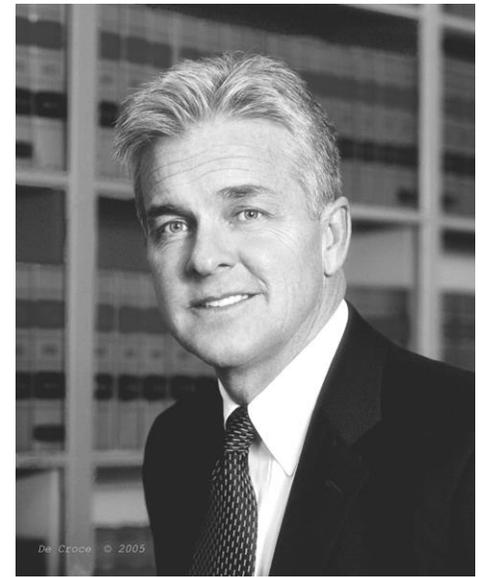


Interior of Clementi's room showing
approximate position where he first stood
and faced Cpl. Dreyfuss.



Scissors wielded by Clementi
 Length of 215 mm (8.46 inches)





Mitchell R. Morrissey
Denver District Attorney

OFFICER-INVOLVED SHOOTING PROTOCOL 2013

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.⁷ 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

⁷ 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.

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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