



DenverDA

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April 25, 2013

Robert White
Chief of Police
Denver Police Department
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RE: Investigation of the shooting death of John Montoya, DOB 3/24/75, DPD # 399519, and shooting and wounding of Michael Valdez, DOB 1/28/78, DPD # 504429, in which Officers John MacDonald, 86064, Robert Motyka, 96049, Pete Derrick, 04043, Jeff Motz, 93014, and Karl Roller, 96016, fired shots in the area of West 39th and Osage Streets, Denver, CO, on January 16, 2013.

Dear Chief White:

The investigation and legal analysis of the shooting death of John Montoya and shooting and wounding of Michael Valdez in which shots were fired by Denver Police Officers John MacDonald (“Lieutenant MacDonald”), Robert Motyka (“Sergeant Motyka”), Pete Derrick (“Officer Derrick”), Jeff Motz (“Technician Motz”) and Karl Roller (“Officer Roller”) have been completed. I conclude that under applicable Colorado law no criminal charges are fileable against any of these officers. 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.

During the incident, Sergeant Motyka was shot and injured by the suspects. Charges are pending against two of the individuals involved in the incident. As a criminal case is pending, we must necessarily be circumspect in detailing the facts established during the investigation in this forum. The file of the investigation will be open to the public at our office upon completion of those criminal proceedings and, at that time, any interested party is welcome to review the investigation and my decision in greater detail.

STATEMENT OF FACTS

At 11:42 a.m., on January 16, 2013, a “multi-agency” BOLO (“be on lookout”) was issued. According to the Denver Computer Aided Dispatch (“CAD”) records, the dispatch center received the following information from the Thornton police or Adams County dispatcher:

- THORNTON HAD AN ARMED CAR JACKING¹ AT 101ST JOSEPHINE
- VEH LSH SB [LAST SEEN HEADING SOUTHBOUND] YORK AT HWY 224 RED DODGE PICK-UP LIC#974REM
- OCCUX2 HM [TWO HISPANIC MALE OCCUPANTS] ONE IS ARMED WITH A GUN, ARMED PARTY IN WHT SHIRT AND JEANS JOHNY MONTOYA 2ND MALE IN A RED BANDANA AND POSS A FEMALE IN THE VEH AS WELL
- ADCOM CALLING TO BE ADV ON THE LOOKOUT FOR VEH POSS HEADING INTO OUR CITY

Between 11:45 and 11:53 that information was aired on Denver police channels 1, 2, 3, 4 and 6. Between 12:01 p.m., and 12:06, p.m. on the same date, the following CAD entries were made:

- THORNTON CALLED BACK . . . LIC 947RNM
- POSS HEADED TO MONTBELLO –FAM MEMBERS THAT LIVE IN AREA
- JOHN MONTOYA DOB 032475 **BLK GUN**DRIVING A STOLEN RED DOD[GE] PU LIC 947RNM – DK[DRUNK] – HAS WARRANTS FOR ASLT- ALSO FATHER OF INFANT WHO DIED THIS MORNING

This information was also aired to the Denver police patrol channels. At 1:10 p.m., the Denver police dispatcher received information that

AURORA HAD SHOTS FIRED IN AREA OF 2390 HAVANA RED DOD RAM TOOL BACK IN BACK OCCUP[IED] BY UNK NUMBER OF H/M’S [HISPANIC MALES] . . .

Less than 5 minutes later, the suspect vehicle was seen in Denver Police Patrol District 5 (northeast Denver):

- DIST 5 MAXWELL/DILLON ALSO HAS THIS VEH [INCIDENT #] 25063 VEH LIC/974RMN OCCUP X2 [BY TWO] H/MS LS [LAST SEEN] WB 51ST OR GATEWAY

The danger the occupants of this vehicle posed was patent. CAD entries at 1:50 p.m. and 2:18 p.m. advise dispatchers to air the information to new shift cars coming in service for officer safety. Patrol officers were aware of the information and, because some of the information aired included the facts that suspects Chuck Montoya and Johnny Montoya were both “Code 5”, meaning wanted for arrest and were “NORTH SIDE MAFIA” gang members, Denver police gang officers were actively looking for the vehicle in District 5. Among those officers were Officer Adam Bechthold, 01026, and Damon Bowser, 00075.

Officers Bechthold and Bowser had been apprised of the information set forth above. The two completed a computer search which disclosed the suspects had used a couple of

¹ Subsequent information received from Thornton clarified that the suspects were involved in a felony menacing, not a “car jacking”.

addresses in Denver Police District 1 (which comprises the northwest part of the city), and they decided to check that area. They were driving a marked DPD patrol car and both were wearing full blue DPD uniforms. Their radio call sign was TAC 22.

At 3:12 p.m., Officers Bechthold and Bowser saw the red Dodge pick-up truck (“pick-up” or “suspect vehicle”) near 40th and Lipan Streets.² The pick-up drove past them and the officers made a u-turn so as to pull in behind it and attempt a traffic stop. Officer Bechthold told investigators that the pick-up sped up. As it did so, someone in the pick-up started shooting at the officers. The pick-up, driving at a high rate of speed, began making evasive turns, at one point, driving across the lawn at a street corner. Officers Bechthold and Bowser lost sight of the pick-up and would not see it again until the chase ended some minutes later.

In response to TAC 22’s emergency transmissions³, officers began responding to the area. Within moments, Officer Jeremy Olive, 05129 (call sign 172), made contact and began chasing the pick-up. Officer Olive was now the primary pursuit vehicle. He later provided both written and video-taped statements to investigators in which he detailed his role. In his initial written statement, Officer Olive described his first contact with the pick-up:

As I traveled westbound on W. 46th Ave. approaching N. Shoshone St., a red in color truck swerved into my lane and was approaching me at a high rate of speed. I also observed and heard the following concerning it:

-Apparent gun fire coming from the truck

-The front windshield [of the pick-up] breaking w/apparent bullet holes ...

In an effort to both avoid [being] struck by the truck or apparent gunfire, I veered off the roadway. In doing so I missed a parked vehicle. . . . I turned around and immediately began a vehicle pursuit (with lights and sirens activated).

Officer Olive told investigators that he pulled in directly behind the pick-up and could see, in the bed of the pick-up, a Hispanic male, 20-25 years old, wearing “a red shirt, dark pants, and black shoes.” He then saw that the male was armed with what appeared to Officer Olive to be a “silver in color” semi-automatic handgun. The man “pointed [the gun] at me and began to fire several rounds. Several rounds were fired at me. . . .” Officer Olive described the events unfolding:

Prior to W. 38th Ave., ‘slick top’⁴ patrol car took lead of the pursuit and I attempted to call direction of travel. In the 3400 block of N. Osage St (approximate) I saw what appeared to be

² The CAD reflects the officers called out at 43rd and Lipan.

³ Among the CAD notations are these:

15:13:48 - **APPROVED TO PIT**** [Pursuant Intervention Technique]

15:14:23 – [Car] 116B Blowing NB Stop Signs;

15:14:33 - *****SHOTS WERE FIRED ***SHOT AT OFFICERS

15:15:15 - [The pick-up] JUST STRUCK VEHICLE

15:15:45 – PARTY FLASHING HANDGUN

15:16:19 –[Car] 120B NEED CARS PARRELLED (sic)//STILL FIRING

⁴ This was Sgt. Motyka’s vehicle. A “slick top” is a phrase used by officers to describe a patrol car that does not have an overhead light bar or police insignia on the sides, but may have emergency equipment – generally a siren and red & blue lights in the grill and front and rear windshields. Sgt. Motyka’s vehicle also had strobes in the side-view mirrors but did not have emergency lights in the grill.

glass flying from the front windshield of the 'slick top' patrol car. It immediately veered to the right.

As this patrol car went right I heard an officer "air" he had been hit. At about this same time, I observed the following:

- A marked patrol car (Denver) parked in the middle of the roadway
- A uniform officer on the n/e corner of N. Osage St. & W. 35th Ave (approx.).
- The red truck drove towards the officer (standing on the corner & not in the roadway) attempting to run him over.
- I then heard more gun fire.

At 3:18, a CAD notation states the pick-up: TRIED TO RUN OFFICER OVER. OFCR FIRED AT PARTY.

The officer referred to in that entry and described by Officer Olive was Officer Pete Derrick. Officer Derrick was the first officer to return fire.

Officer Derrick was assigned to the traffic bureau and was working traffic enforcement as car 771. He was wearing a full blue Denver police uniform and driving a white, unmarked police car which had emergency red and blue lights in the front and rear windshields, along with strobes on the side mirrors. He was in the traffic operations bureau office, near Park Avenue and I-25, when he heard TAC 22 air that the officers had attempted to make a traffic stop and were taking fire. Officer Derrick ran to his police car and proceeded west on 38th Avenue with his emergency equipment activated.

Officer Derrick monitored the chase on the police radio and was aware that the suspects were continuing to fire at officers. He drove to the area of 44th and Pecos and then turned southbound on Osage. As he neared the intersection at 34th and Osage, he saw the pick-up driving westbound on 33rd Avenue turn north on Osage. The red truck was now driving directly toward him and he was able to see the "front tire was blown out and I could see a yaw mark and then smoke, rubber, burning rubber coming off the wheel." The street is relatively narrow at the point where Officer Derrick stopped and there was a car parked next to where he had stopped. Officer Derrick put his car in park and jumped out, intending his car to serve as a road block.⁵ As he got out of his car, he heard the pick-up engine power up: "he, uh, punched the gas." It appeared to Officer Derrick that the driver was aiming at him – "he's lining me up." He ran up onto the sidewalk and the truck tracked him; the passenger wheel came up on the curb. Officer Derrick estimated the truck missed him by no more than one foot. As the truck passed, Officer Derrick saw a party in the bed of the pick-up truck, facing rearward, "almost like as a rear gunner." Officer Derrick saw the male had "something in his hands" and believed he was armed. Officer Derrick drew his pistol and fired several shots, ceasing when the truck was "probably three to four car lengths away" from him. As the truck pulled away, he advised the police dispatcher that he had fired his pistol.

Officer Derrick was carrying a model 21 Glock 45 caliber semi-automatic pistol. This firearm has a 13 round magazine capacity and may be carried with an additional round in the chamber. Officer Derrick told investigators he carries his firearm with 12 cartridges in the

⁵ See the photos on page 17.

magazine and an additional one in the chamber. His pistol was thus loaded with 13 rounds of DPD issued ammunition.

The pick-up sped past Officer Derrick and his car, followed by Sgt. Motyka in the lead pursuit vehicle and the police cars behind him. As noted previously, Sgt. Motyka was driving a “slick top.” Sgt. Motyka, assigned to a special “SCAT” team, was wearing plain clothes and had his badge suspended around his neck on a neck chain. He was carrying a model 92FS Beretta 9mm semi-automatic pistol. This firearm has a 15 round magazine and may be carried, as it was on the day in question, with an additional round in the chamber. It was fully loaded with DPD issued ammunition. He was at the District 1 substation when he heard TAC 22 advise the dispatcher that it was being fired on. He ran to his police car and started to drive toward the last known location of the pick-up, with his lights and siren activated.

Sgt. Motyka told investigators that as he headed in the direction of the chase, he was listening to the police radio and based upon the transmissions he made a calculation that he might intercept the pick-up. In the area of the 3800 block of Lipan, Sgt. Motyka saw smoke and then saw the source of the smoke – the pick-up (the smoke was coming from the blown right front tire). The pick-up was coming towards him, driving “like a bat out of hell”. Sgt. Motyka saw police cars following a distance behind the truck. Sgt. Motyka pulled to the side, the pick-up drove past him, and he made a u-turn in the intersection. He was now behind the pick-up and in position as the primary chase vehicle. It was when he pulled in behind the pick-up he became aware there was “a guy in the back of the pick-up – in the actual bed of the pick-up.”

Sgt. Motyka told investigators that in the 3600 block of Lipan, he saw the “gun come up” in the hands of the male riding in the bed of the pick-up truck. The male fires at least one shot at Sgt. Motyka at this point. The pick-up drove through the streets of the neighborhood with the police in pursuit. The pick-up turned on West 33rd Avenue from Kalamath Steet, and as it went up the hill, the gunman fired another shot at Sgt. Motyka. At Osage Street, the pick-up turned right and proceeded north on Osage. When the truck turned on Osage Street, Sgt. Motyka saw another Hispanic male lean out of the passenger window and look back at him. He was also able to see a party, whom he believed to be female, sitting in the middle of the cab.

As Sgt. Motyka followed the pick-up north on Osage Street, the party in the back of the truck started throwing items from the bed of the truck at the police car. “He was chucking stuff out of the back of the truck at me.” Sgt. Motyka then told investigators,

My day gets better because the guy in the passenger seat, uh, looks at me again except now he’s got a gun. And he starts shooting at me. Um, I’m trying to recall. He was quick about going in and out [of the window]. It appeared to be a black handgun. It was for sure a handgun. And, uh, I wanna say it was a semi-automatic, because, he wasn’t, he didn’t pop off one round at a time. It was multiple rounds that he shot at me.

Sgt. Motyka estimated that he was about 50 feet behind the pick-up truck as they proceeded on Osage Street and that at times the vehicle speeds were approaching 50 mph. Sgt. Motyka recalled that at either the intersection of the 3400 block or 3500 block of Osage, he saw the

pick-up truck swerve to the right “and then I found out why. There was a Denver police car parked in the middle of the intersection. It was kind of canted at an angle, 45 degree angle, facing towards me.” This was Officer Derrick’s patrol car. Sgt. Motyka also swerved around the car and saw the “truck went right at an officer, I caught out of the corner of my eyes. . . . [that officer] immediately pulled his firearm and engaged the truck.” The officer stopped firing as Sgt. Motyka passed him.

After the cars passed Officer Derrick, Sgt. Motyka stated *both* the male in back of the pick-up and the party in the passenger seat resumed firing at him. It was at some point in the area of the 3600 block of Osage that Sgt. Motyka was shot:

I remember, uh, getting sprayed in the face with glass – and seeing two bullet holes in my windshield, and immediately after I feel this sharp, searing pain, in my left shoulder. And I was, like, fuck! And I look over and see the blood coming already. . . . I remember grabbing the, uh, uh radio mike and I aired it. I think I said, “140 [his radio call sign]” And at this point the truck was approaching 39th and Osage, I think I said, “39th and Osage. I’ve been hit. They shot me through the windshield.”⁶

Sgt. Motyka told investigators that at the point he was shot, he could not determine which of the people in the truck fired the round that struck him as they were both shooting. He told investigators after he was shot he did a “quick assessment of [him]self”. He checked to assure that he could still flex and use his left hand. It was at about this time the pick-up “made a right-hand turn onto 39th [Avenue].” He saw the pick-up truck stop (he did not realize it had hit a tree until sometime after the incident concluded). He had his hand gun in his right hand and, as he came to a stop, he took off his seatbelt and got out of his car.

Now, um, there was a police car that had gotten in front of me behind the suspect vehicle. So he arrived there seconds before I did, behind the suspect vehicle. [A discussion between Sgt. Motyka and an interviewer regarding which photo to use as a reference takes place, and the Sgt. Motyka continues.] This car [indicating] had got there seconds before I did and this is my car . . .

Sgt. Motyka told investigators that he got out of his car and used the police car in front of him as cover. He got to the right rear corner of that police car and saw one Hispanic male running across the street away from the truck. Sgt. Motyka refocused his attention on the truck as two men had been shooting at him from the truck. He told investigators that he saw a “Hispanic male coming out of the passenger side.” Sgt. Motyka saw the man – whom he had concluded was one of the men who had been shooting at him, get out of the truck, look around a little bit, and reach into the pick-up.”⁷

When I saw him go back to that, uh, passenger compartment of that truck, it wasn’t to help the lady out, it wasn’t time to be a gentleman, my perception? And so I started firing at him.

⁶ A CAD entry at 15:18:41 reads: 140B****HIT SHOT OFFICER THRU WINDSHIELD

⁷ When they searched the pick-up, investigators found several live cartridges on the right front passenger’s seat.

Sgt. Motyka told investigators that he believed he fired five or six rounds⁸

but he didn't go down. It appeared to me that he just, kinda, went to a knee . . . He looked like he was improving his platform. To fire back. And, uh, so, there was a slight pause and then, uh . . . I told myself, twice, 'front sight. Front sight.' . . . and then I started shooting again. I probably shot another five or six time. Just as I was finishing shooting, an officer to my right, slightly behind me, started firing. So, we simultaneously fired, briefly, and then I saw three people that came out of the truck, they kinda went to the ground.

Sgt. Motyka stated that as he began to move to a better position he started feeling the effects of his wounds. He realized there were other officers present and that if he did not disengage he might either become a liability, or, because he was not in uniform, a perceived threat by another officer. He stepped back and walked to the side of his car. Based upon his description of the ensuing events, it is apparent he was going into shock. Another officer, Det. Jason Valdez, came to his aid and had him sit on the curb. Sgt. Motyka handed Det. Valdez his pistol and Det. Valdez started to check the Sergeant for injuries. Shortly after Det. Valdez helped Sgt. Motyka to the curb, Technicians Bowser and Bechthold arrived on the scene. The two officers, concerned that an ambulance might not be able to get to the scene while it was still active, loaded Sgt. Motyka into the front seat of their police car, and Technician Bowser drove him to Denver Health Medical Center. Technician Bechthold remained at the scene to assist in taking the suspects into custody.

Lt. John MacDonald, dressed in a full blue Denver police uniform, was a shift commander for District One. He was driving a "slick top" patrol car and, in addition to monitoring the chase, was the supervisor who authorized the continuation of the chase (and, early on, authorized officers to attempt to disable the pick-up by use of a pursuit intervention technique or "PIT" maneuver – no officer was able to position a car in PIT attempt). Lt. MacDonald monitored the chase and, indeed, as he was driving in one direction on West 46th Avenue, he saw the pick-up headed toward him. He told investigators he backed up and out of the way and ducked down as the pick-up passed. He heard additional shots but did not feel or hear anything impact his car, and began following the truck. Lt. MacDonald caught up with primary and secondary chase vehicles. He heard Sgt. Motyka tell the police dispatcher that he had been shot and within a few moments, a marked police car took the primary chase position, Sgt. Motyka was now the secondary chase car and Lt. MacDonald was behind Sgt. Motyka's slick top.

Lt. MacDonald told investigators that when the procession made the right turn at the park at 39th and Osage, he saw Sgt. Motyka get out of this patrol car and start to "engage" a male who had gotten out of the passenger's side of the pick-up. Lt. MacDonald told investigators this party was dressed in dark clothing and was holding a dark-colored handgun. The male was not complying with commands to surrender⁹ and, as Lt. MacDonald approached Sgt. Motyka, he concluded that the suspect was going to fire additional rounds and he began shooting at this party. Lt. MacDonald told investigators the party he saw was the man who had been shooting from the passenger's seat; he was not aware there was another

⁸ Firearms examiners determined that Sgt. Motyka fired 12 rounds.

⁹ Lt. MacDonald stated that he heard officers yelling "on the ground!" and "show your hands!"

gunman shooting from the bed of the pick-up truck. Lt. MacDonald saw the male he was shooting at go down to the ground and he ceased firing.

Lt. MacDonald was armed with a .45 caliber Heckler- & Koch model USP semi-automatic pistol. This firearm has a 12 round magazine and may be carried with an additional round in the chamber. Lt. MacDonald told investigators that during the firefight he inserted a second magazine. Firearms examiners inspected the empty and partially emptied magazines and determined that Lt. MacDonald had fired 20 rounds.

Corporal Karl Roller was assigned to car 115, a marked Denver patrol car, and was wearing a full blue police uniform. He was in the area of the 2800 block of Osceola when he heard TAC 22's initial call-outs. He listened as officers called out the chase as it wound through the neighborhood and proceeded in the direction of the chase. Cpl. Roller arrived at 39th and Osage after the pick-up truck crashed into the tree and just as Sgt. Motyka was withdrawing from the affray. He told investigators that he saw Sgt. Motyka holding his arm and "I could see that he's been shot." Sgt. Motyka indicated that he was alright and Cpl. Roller turned his attention to the area of the pick-up. He took a position at the rear of the marked patrol car which had stopped behind the pick-up.¹⁰ From this position, he could see two people, a woman and a man, lying on the ground, apparently injured. Standing in the same area, he saw another man, dressed in dark clothing, moving around "yelling and screaming, just going berserk: 'Look what you did to my family. I'm going to fucking kill you!'" Cpl. Roller told investigators that at some point, a man who had been lying in the bed of the pick-up rose or stood. He was wearing a red shirt and, according to Cpl. Roller, he also went "berserk."

Another officer, armed with a long-gun, took Cpl. Roller's position and moved a short distance to another position of cover where he had a "clear shot" down the passenger's side of the pick-up. Both of the suspects continued to act in an aggressive manner, yelling at the officers and "doing the false charge things." After some time, Cpl. Roller saw the party with the red shirt move to the driver's side of the pick-up. The other party reached into the passenger's side of the pick-up "clearly looking for something." The male reaches into the truck two or three times and, ultimately, he comes out and Cpl. Roller can "clearly see he's got a gun in his right hand." The gun was a black handgun. Cpl. Roller saw the man turn toward the officers "and starts bringing the gun up." Cpl. Roller fired a single shot. Almost simultaneously, he heard another officer fire a shot. The gunman dropped the handgun, turned toward the pick-up, and collapsed.

The man at the back of the pick-up became even more agitated at this point. Cpl. Roller and other officers continued to yell commands at him in an attempt to have him surrender, without success. A request is made for an officer to bring a "forty" (40 mm less lethal projectile). Cpl. Roller recounted one officer deployed the 40mm but the projectile missed. Another officer deployed a less-lethal round which struck near the suspect's legs but had no apparent effect. The male moved to the passenger side of the truck and then to an area in front of the truck and somewhat out of Cpl. Roller's view. A short time later, Metro-SWAT

¹⁰ This patrol car can be seen in the first photo showing the suspect vehicle on page 19. It is the patrol car with the overhead lights illuminated in the middle of the photo.

officers approached this party and took him into custody by deploying another 40 mm and releasing a police canine.

Cpl. Roller was carrying a .45 caliber Colt Commander loaded with DPD issued ammunition. This firearm has a 7 round magazine and may be carried with an additional round in the chamber. Firearms examiners determined that Cpl. Roller fired one round during the confrontation.

The officer described by Cpl. Roller as armed with a long gun was Technician Jeff Motz. Tech. Motz was assigned to the Denver Police Metro-Swat unit and was dressed in the green “BDU’s (battle dress uniforms)” worn by that unit. He was driving a white, unmarked, Ford Expedition with tinted windows and covert emergency lights¹¹ and was working a solo car. Tech. Motz and some other Metro-Swat officers were assisting the Denver Police Fugitive Unit which was looking for an individual in an unrelated investigation when he heard TAC 22’s emergency call. In addition to his handgun, Tech. Motz was armed with a .223 caliber M4 Colt rifle. This rifle has a 30 round magazine and Tech. Motz informed investigators that he does not carry the firearm with a round in the chamber and must charge it before firing it. This firearm may be set to fire in a single shot or fully automatic mode. It was this firearm that Tech. Motz used – he did not take his handgun out of the holster – and he relied upon the “single shot” mode.

Tech. Motz was in area of 24th and Gaylord when he heard the emergency call and started driving toward District One. He arrived at the intersection of 39th and Osage shortly after the pick-up crashed into the tree. As he was driving past the intersection of 38th and Osage, he heard an officer tell the dispatcher that one party ran from the suspect vehicle. He briefly considered going after that party but when he saw the scene and the number of suspects in or next to the pick-up he decided to assist the officers at the scene. Tech. Motz originally took a position to the north of the suspect vehicle in order to establish what is referred to as an “L-ambush” position, but he realized that his position might expose him to friendly fire and he moved to a position behind the patrol car Cpl. Roller and other officers were using for cover.

Tech. Motz told investigators that he and the other officers were issuing commands but that the suspects were “not complying.” According to Tech. Motz, there was a male party in the back of the pick-up truck and another male in a red shirt moving around at the passenger’s side of the pick-up. He also saw a female party and a male party, the latter in a black jacket, lying on the ground near the pick-up. The female party was not moving; the male on the ground was “writhing” as if injured. The stand-off went on for a few minutes. The party in the red shirt was acting in a defiant manner, challenging the officers shouting: “Fuck you! Kill me.” This male did not have anything in his hands and Tech. Motz was “reasonably confident” he and other officers would be able to take him into custody before he could have accessed a weapon.

Tech. Motz also stated that the party by the side of the pick-up truck was going “back and forth” by the door. He and the man in the back of the truck continued to challenge the officers. After a few minutes, the man in the bed of the truck climbed off the pick-up and for a

¹¹ Technician Motz’s vehicle can be seen in the top photo on page 19 to the right of the marked patrol car.

short while he and the other man were both at the side of the truck. Tech. Motz described the party who had been in the truck as wearing a “grey shirt.” He told investigators the guy in the grey shirt reached in the vehicle one or two times.

The guy in the grey shirt actually reaches in the vehicle again and this time he comes out with a gun. It was in his right hand. I definitely saw a gun. He turned toward us, facing us and then I heard a shot from my left.

Tech. Motz told investigators when he heard the shot, the party in the red shirt and the two people on the ground were in his field of fire. He paused for a

second, the guy in the red shirt cleared my field of fire and I fired once. When the first shot went off it kind of staggered him back. When my shot went off, he was, he was down. I saw the gun drop. It dropped pretty much below that open passenger door.

The gunman had fallen at the pick-up’s open passenger door. Tech. Motz and the other officers held their position because the man in the red shirt was still not in custody. He described the manner in which this party was taken into custody in much the same way as did Cpl. Roller.¹²

STATEMENT OF INVESTIGATION

The investigation was massive. According to the after-action report prepared by DPD crime-lab investigators, spent bullets, spent shell casings, bullet strikes various items of property, e.g., houses and vehicles were documented at 18 separate locations.¹³ The investigators prepared two crime scene videos and took “approximately 2000 photos”. Major Crime investigators located over 35 civilian witnesses. In addition to those officers directly involved in the initial traffic stop or the shooting incidents which followed, more than 100 law enforcement officers were involved, either responding to assist in the chase, or in securing various scenes, identifying witnesses, recovering evidence, or establishing and maintaining the necessary perimeters.

Statements were obtained from those citizens who reported they saw or heard parts of the chase, the shots fired by Officer Derrick at the first location or the shots fired by

¹² The time the officers on scene took to resolve the standoff can be understood by reviewing the following CAD entries:

15:22:38: 3900 BLK NAVAJO-OSAGE TWO SHOTS FIRED
 15:30:07: 3 [parties] down – 2 on ground not moving 1 moving.
 15:30:49: 1 male actively walking around
 15:31:50: MET1 WILL FIRE 40MM TO BE DEPLOYED
 15:32:09: MET7 – MOVE UP ON TH[E] SUSPECT HITTING WITH 40, LESS LETHAL FIRST

¹³ According to the “after-action” report prepared by Crime Lab investigators, evidence was recovered at the following locations:

“W. 42nd @ Lipan St., 4236 Lipan St., 4600 Shoshone St., W. 43rd Ave. @ Lipan St., W. 36th Ave. @ Kalamath St., W. 39th Ave. @ Navajo St., 38th @ Lipan St., 3734 Osage St., 2021 W. 46th Ave., W. 46th @ Pecos St., W. 33rd Ave. @ Navajo St., W. 37 Ave. @ Osage St., W. 42nd Ave. @ Quivas St., 3638 Osage St., 3348 Osage St., 36th Ave. @ Lipan St., W. 34th Ave. @ Mariposa St., 4697 Tejon St.”

Lieutenant McDonald, Sergeant Motyka, Corporal Roller and Technician Motz at the second and final location.

When investigators responded to the 3300 block of Osage, Officer Derrick's car was still in the middle of the street, mid-block, with the driver's door open and the overhead emergency lights activated. Crime scene investigators recovered nine spent shell casings in the sidewalk area in front of 3348 Osage Street. An additional spent shell casing was found in the street as was a live cartridge and two bullet fragments. Investigators found a Honda Accord, which was parked on the street and not otherwise involved in this incident, which had been struck by one bullet, which was recovered on the dashboard. Tire and wheel marks documented by investigators were evidence that the Montoya's vehicle was driving on one rim and it had hit the curb in front of 3348 Osage Street.¹⁴

The crime scene at 3900 Osage was extensively documented. Two handguns were found at the scene, one next to John Montoya's body and the other underneath the passenger's side of the pick-up. The handgun next to Montoya's body was determined to be a black semi-automatic, .40 caliber model 27 Glock handgun; the handgun underneath the pick-up was determined to be a black semi-automatic 9 mm model C9 Hi-Point. An empty handgun magazine was also recovered near the passenger's side of the pick-up. Thereafter, the suspect vehicle was transported to a secure area and a search warrant executed. During this search, investigators found a Smith & Wesson .357 revolver in the bed of the truck. Among the other items recovered during the search of the truck were: *ninety-eight* 9mm cartridges and three .40 caliber cartridges in a bag placed in the door panel on the passenger's side; nine .40 caliber cartridges in door panel storage pockets on the passenger door panel; thirty-four more .40 caliber cartridges on and around the front passenger seat; six other live rounds with no caliber indicated on the search warrant return and inventory; another live round and two spent shell casing were found in a bag in the back of the pick-up truck; three spent shell casings from the revolver were located in the bed of the pick-up; eleven other spent shell casing were found in the pick-up bed; four other spent shell casings and handgun magazines for a 9mm Glock pistol and a .22 caliber Ruger pistol were recovered in the passenger compartment (no pistol suitable for the .22 caliber magazine was located); *and* large plastic trash bags containing suspected marijuana in the bed of the pick-up and the passenger compartment.

Five individuals were in the suspect vehicle during and at the termination of the pursuit. Jude Montoya, 07/20/91, was the male whom Sgt. Motyka and others saw run away from the vehicle. He was arrested shortly thereafter. Chuck Montoya, 01/28/78, was the man - variously described as wearing the red shirt - who was taken into custody by the Metro-Swat Canine Officers. The female party described by the officers was identified as Alyssa Morales, 03/07/91. The male described by some officers as lying on the ground, apparently injured, was identified as Michael Valdez, 12/23/74. The male who engaged Cpl. Roller and Technician Motz was John Montoya, 03/24/75.

John Montoya was pronounced dead at the scene. On January 17, 2013, an autopsy was performed on Montoya's body by Dr. Garth Warren working under the supervision of

¹⁴ See photo of scene at 3300 block of Osage.

Chief Medical Examiner Dr. Amy Martin.¹⁵ Dr. Warren documented three gunshot wounds, one to the lower left chest, one to the back of the right shoulder and one to the left mid-back. The bullet that struck the chest fractured a rib, passed through the stomach and diaphragm and came to “rest in the subcutaneous tissue of the right mid to lower back.” This “deformed, large caliber, copper-jacketed bullet” was recovered at autopsy. The shoulder wound was described as a “perforating” (commonly referred to as a “through and through”) wound which entered the “posterior right shoulder”, fractured bones in the shoulder joint and exited the “anterior right shoulder.” No bullet or jacket associated with this wound was recovered at autopsy. The bullet which struck the left back, passed through the left lung, severed the “upper portion of the left common carotid artery and internal jugular vein” and came “to rest and embedded within the right tonsil.” This “deformed, small caliber, copper jacketed bullet” was recovered at autopsy. The cause of death was determined to be “multiple gunshot wounds.” Toxicology screens were positive for ethanol, amphetamines, methamphetamines, and “Delta-9 THH” and Delta-9 Corboxy THC.” Montoya’s blood-alcohol concentration (BAC) level was 0.092 g/100 mL. Colorado law defines a person driving with BAC of 0.08 or more as being under the influence of alcohol.

The two bullets recovered from Montoya’s body at autopsy were taken by Denver police investigators for analysis. Preliminary analyses by Denver Crime Lab firearms examiners suggest the bullet recovered from the muscle tissue in the back was consistent with the test fired bullets from Cpl. Roller’s Colt Commander. The bullet removed from Montoya’s throat has characteristics consistent with the .223 rounds fired from Technician Motz’s M4 rifle.¹⁶

Michael Valdez was taken by ambulance to Denver Health Medical Center. He had suffered a gunshot wound near his midsection and, upon arrival, was rushed into surgery. He survived his wounds. Because of medical privacy concerns nothing more can be written here about his medical condition. The bullet was recovered during surgery. Preliminary analysis by firearms examiners determined the projectile was similar to the test fired bullets from Sgt. Motyka’s Berretta.

Chuck Montoya was also transported to Denver Health Medical Center. It was determined that he had suffered an impact wound to this left chest from a less-lethal weapon and apparent dog bits to his right thigh, left armpit and left bicep. He was treated by medical staff and released to the custody of the Denver Sheriff.

Alyssa Morales suffered injuries in the automobile accident. She was taken to Denver Health Medical Center for treatment and thereafter released. She was not charged and has been endorsed as a witness in the pending cases against Chuck and Jude Montoya.¹⁷ Ms. Morales did speak to investigators. Her statement, briefly summarized in a search warrant affidavit, was:

¹⁵ The final report was issued on April 18, 2013, and received by our office on the same date.

¹⁶ We have not yet received the final report from the firearms examiners.

¹⁷ Valdez was initially charged in this matter; prosecutors dismissed those charges after reviewing Morales’s statement and other evidence and witness statements.

...she had been with men known to her as Psycho, Chucky, JuJu and a fourth unknown male. They had been in a red truck and that Psycho was driving. She heard sirens and then Psycho, Chuck and JuJu started shooting first. Moralez said Chucky was shooting a revolver. Moralez said she saw Psycho hand JuJu a semi-automatic pistol and tell him to reload. She said JuJu had a black, “fanny pack” that she believed contained ammunition.¹⁸

Sgt. Motyka was shot in the left front shoulder. The bullet did not pass through his body and was removed from his back during surgery by physicians at the Denver Health Medical Center. After completing the preliminary analysis of this bullet firearms examiners concluded it could have been fired from a .40 caliber OR .357 caliber handgun.¹⁹ Sgt. Motyka is expected to make a full recovery.

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 suggests John Montoya’s death and Michael Valdez’s injuries were caused by shots fired by Officers Motyka, Motz and Roller, the determination of whether their conduct was criminal is primarily a question of legal justification.

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

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

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

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

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

¹⁸ Ms. Moralez identified John Montoya as “Psycho”; Chuck Montoya as “Chucky”, and Jude Montoya as “JuJu”.

¹⁹ As of April 15, 2013, no final firearms analyses had been completed.

(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. In this investigation, the legal analysis as concerns Michael Valdez is one involving the use of physical force by the officers; the legal analysis as concerns John Montoya involves the use of deadly physical force.

Therefore, the questions presented in this case are 1) at the instant Officers Motz and Roller fired the shots that caused the death of John Montoya, did each reasonably and *individually* believe that John Montoya was directing or was about to direct deadly physical force against either him or another person, and 2), at the instant Sgt. Motyka fired the shots that injured Michael Valdez, did he reasonably believe that Michael Valdez 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 the death or injury of another, the state must prove beyond a reasonable doubt that the officer doing the shooting either did not really believe in the existence of these requisite circumstances, or, if he did hold such belief, that belief was, in light of all available facts, unreasonable.

CONCLUSION

The actions of the Montoya brothers were first, those of men seeking to harm or kill any who would prevent their escape and second, demonstrated a wanton disregard for public safety – they simply didn't care who or how many innocent people they injured. The fact that no other officers or bystanders were injured or killed is remarkable.

The discipline and professionalism of the involved officers cannot be overstated. This includes those who fired only when confronted by men holding weapons who had already fired numerous times as well as those who thereafter held their fire and used less-lethal force to take the others into custody cannot be overstated. The officers involved in this incident were chasing a car-load of individuals who had fired shots at uniformed officers who had simply tried to make a traffic stop; attempted to run over an officer who had established a road block; fired numerous shots at officers pursuing them with emergency equipment activated, and shot and injured one of the officers leading the pursuit. When Sgt. Motyka saw Valdez reach back in the car, his belief that Valdez was reaching for a deadly weapon was eminently reasonable; Valdez was one of the individuals he reasonably believed had already fired at him. When Cpl. Roller and Technician Motz fired at John Montoya it was only after numerous commands to surrender had been issued *and then* only after he reached into the pick-up, came out with a firearm, and started to turn toward the officers. There can be no question that each officer acted reasonably and in response to a threat that deadly physical force was about to be used against them. The restraint displayed by the officers involved in this situation can be best highlighted by noting that *sometime after* the shots were fired that injured Valdez and killed John Montoya, Chuck Montoya was subdued by use of less-lethal projectiles and a police dog.

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 this case, additional time was

required as the autopsy report and final firearms examination and comparison reports were not completed until mid-April and time was needed to review the voluminous reports and numerous videos. In accordance with the protocol, the administrative and tactical aspects of the event will be addressed by the Manager of Safety and Chief of Police in their review and administrative decision letter.

Because of the pending criminal cases, we will open our file related to this Officer-Involved Shooting for *in-person review at our office* after those cases have been resolved. The Denver Police Department is the custodian of record as concerns 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: Lt. John MacDonald; Sgt. Robert Motyka; Cpl. Karl Roller; Technician Jeff Motz; Officer Pete Derrick; Sean Olsen, Attorney at Law; Brian Reynolds, Attorney at Law; David Bruno, Jamie Wynn, Attorney at Law; 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; Gerald Whitman, Metro-Swat Captain; 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 Bruce Gibbs, Homicide; Detective Michael Martinez, 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.



OFFICER DERRICK'S PATROL CAR
3300 BLOCK OF OSAGE



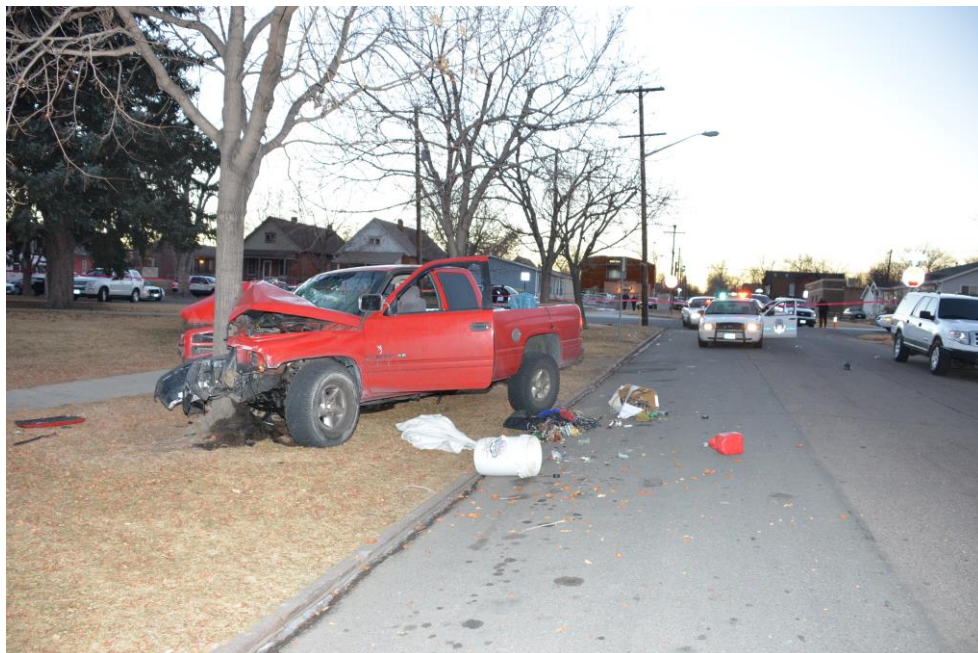
3300 BLOCK OF OSAGE
TIRE AND RIM SCUFF MARKS - IMPACT TO CURB



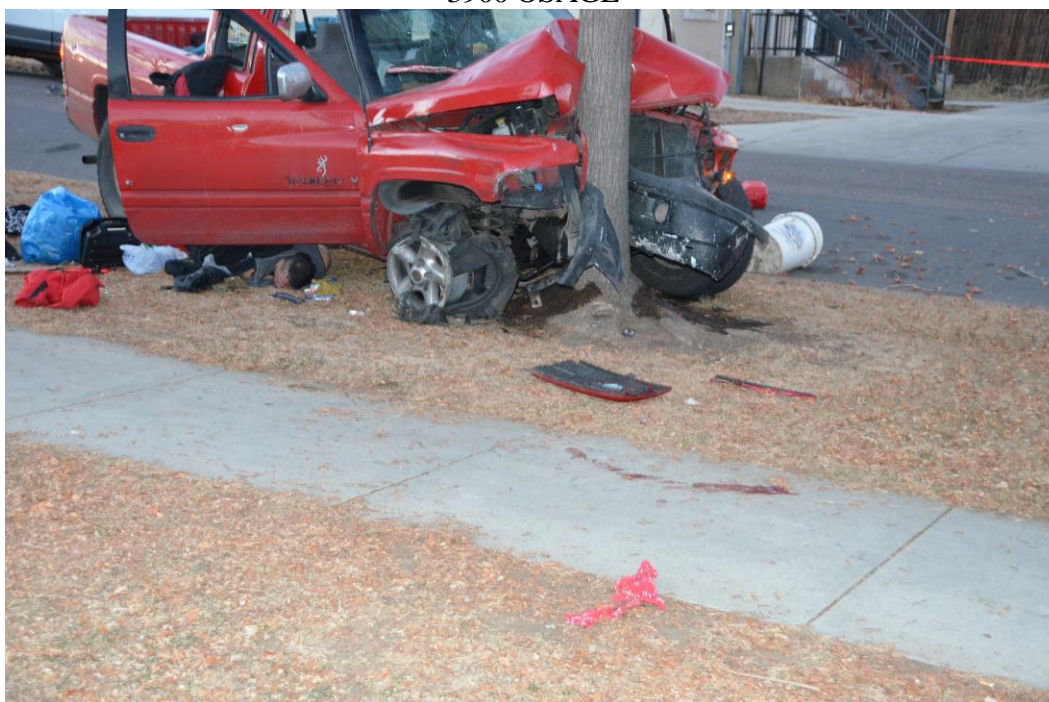
39TH AND OSAGE
HOOD AND FRONT WINDSHIELD
SGT. MOTYKA'S VEHICLE



39TH AND OSAGE
BULLET STRIKES TO SGT. MOTYKA'S WINDSHIELD



SUSPECT VEHICLE
3900 OSAGE



SUSPECT VEHICLE
RIGHT WHEEL – RIM DISPLAYED
3900 OSAGE



3900 BLOCK OF OSAGE
HANDGUN NEXT TO BODY OF JOHNNY MONTOYA



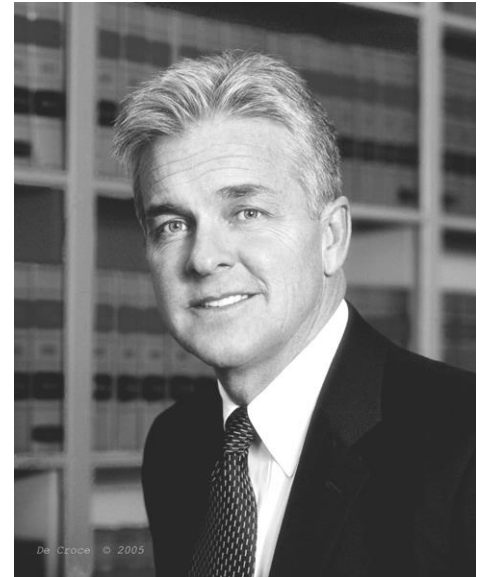
3900 BLOCK OF OSAGE
HANDGUN



3900 & OSAGE
PISTOL RECOVERED FROM BENEATH SUSPECT VEHICLE



OFFICER-INVOLVED SHOOTING PROTOCOL 2013



Mitchell R. Morrissey
Denver District Attorney

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

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

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

be in place in advance for handling these cases. The following will assist you in understanding the Denver protocol, the law, and other issues related to the investigation and review of officer-involved shootings.

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

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

The criminal investigation is conducted under a specific investigative protocol with direct participation of Denver Police Department and Denver District Attorney personnel. The primary investigative personnel are assigned to the

Homicide Unit where the best resources reside for this type of investigation. The scope of the investigation is broad and the focus is on all involved parties. This includes the conduct of the involved officer(s) and the conduct of the person who is shot. Standard investigative procedures are used at all stages of the investigation, and there are additional specific procedures in the Denver Police Department's Operations Manual for officer-involved shootings to further insure the integrity of the investigation. For example, the protocol requires the immediate separation and sequestration of all key witnesses and all involved officers. Involved officers are separated at the scene, transported separately by a supervisor to police headquarters, and sequestered with restricted visitation until a formal voluntary statement is taken. Generally the officers speak with their attorney prior to making their voluntary statement. A log is kept to document who has contact with the officer. This is done to insure totally independent statements and to avoid even the appearance of collusion.

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

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

The Denver Chief of Police and Denver District Attorney commit significant resources to the investigation and review process in an effort to complete the investigation as quickly as practicable. There are certain aspects of the investigation that take more time to complete. For example, the testing of physical evidence by the crime lab—firearm examination, gunshot residue or pattern testing, blood analyses, and other testing commonly associated with these cases. In addition, where a death occurs, the autopsy and autopsy report take

more time and this can be extended substantially if it is necessary to send lab work out for very specialized toxicology or other testing. In addition to conducting the investigation, the entire investigation must be thoroughly and accurately documented.

Officer-involved shooting cases are handled by the District Attorney, and the Senior Chief Deputies District Attorney specifically trained for these cases. At least two of these district attorneys respond to each officer-involved shooting. They are notified at the same time as others on the officer-involved shooting call-out list and respond to the scene of the shooting and then to police headquarters to participate in taking statements. They are directly involved in providing legal advice to the investigators and in taking video-taped statements from citizens and officer witnesses, and from the involved officer(s). They continue to be involved throughout the follow-up investigation.

The Denver District Attorney is immediately informed when an officer-involved shooting occurs, and if he does not directly participate, his involved personnel advise him throughout the investigative process. It is not unusual for the District Attorney to personally respond and participate in the investigation. At the conclusion of the criminal investigation the District Attorney personally makes the filing decision.

If criminal charges are not filed, a brief decision letter describing the shooting is sent to the Chief of Police by the District Attorney, with copies to the involved officer(s), the Mayor, City Council members, other appropriate persons, and the media. The letter is intentionally brief to avoid in any way impacting the integrity and validity of the Denver Police Department administrative investigation and review, which follows the criminal investigation and review. This represents a 2005 change from the very thorough decision letters that have previously been written by the District Attorney in these cases.

This change has been made because the Denver Manager of Safety now writes an exhaustive letter at the conclusion of the administrative review of the shooting. The Manager of Safety's letter can include additional facts, if any, developed during the administrative investigation. Therefore, the Manager of Safety's letter can provide the most comprehensive account of the shooting. In contrast to the criminal investigation phase, the administrative process addresses different issues, is controlled by less stringent rules and legal levels of proof, and can include the use of investigative techniques that are not permissible in a criminal investigation. For example, the department can, under administrative rules, order officers to make statements. This is not permissible during the criminal investigation phase and evidence generated from such a statement would not be admissible in a criminal prosecution.

The Manager of Safety has taken a more active role in officer-involved shooting cases and has put in place a more thorough administrative process for investigating, reviewing, and responding to these cases. The critical importance of the administrative review has been discussed in our decision letters and enclosures for many years.²⁰ 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

²⁰ See the "Conclusion" statement in the "Decision Letter" in the December 31, 1997, shooting of Antonio Reyes-Rojas, where we first pointed out issues related to the importance of the Administrative review of officer-involved shootings. Subsequent letters continued to address this issue.

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

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

THE COLORADO LAW

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

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

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

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

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

GENERAL COMMENTS

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

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

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

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

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

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

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

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

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

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

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

The Denver Police Department's administrative review of officer-involved shootings improves police training and

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

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

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

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

Skill in the use of tactics short of deadly force is an important ingredient in keeping officer-involved shootings to a minimum. Training Denver officers receive in guiding

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

RELEASE OF INFORMATION

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

Officer-involved shooting cases always present the difficult issue of balancing the rights of the involved parties and the integrity of the investigation with the public’s right to know and the media’s need to report the news. The criminal investigation and administrative investigation that follows can never keep pace with the speed of media reporting. This creates an inherent and unavoidable dilemma. Because we are severely restricted in releasing facts before the investigation is concluded, there is the risk that information will come from sources that may provide inaccurate accounts, speculative theories, misinformation or disinformation that is disseminated to the public while the investigation is progressing. This is an unfortunate byproduct of these conflicted responsibilities. This can cause irreparable damage to individual and agency reputations.

It is our desire to have the public know the full and true facts of these cases at the earliest opportunity, but we are required by law, ethics, and the need to insure the integrity of the investigation to only do so at the appropriate time.

CONCLUSION

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

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