Bus. Phone: 720-913-9000 Fax: 720-913-9035

December 4, 2014

Hon. David C. Walcher Sheriff, Arapahoe County Sheriff's Office Administration Building 13101 E. Broncos Pkwy Centennial, CO 80112

RE: Investigation of the death of Ian Santamaria, DOB 10/18/83, DPD # 669981, in which Sheriff's Deputy Robert Dahlberg, 12005, fired shots on November 9, 2014, at the Tamarac Street exit ramp from Interstate 225.

Dear Sheriff Walcher:

The investigation into the death of Ian Santamaria, in which shots were fired by Deputy Robert Dahlberg, has been completed. I conclude that under applicable Colorado law no criminal charges are fileable against Deputy Dahlberg. My decision, based on criminal-law standards, does not limit administrative action by the Arapahoe County Sheriff's Office, 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

On Sunday evening, November 9, 2014, Arapahoe County Deputy Sheriff Robert Dahlberg was working a patrol assignment in Arapahoe County Sheriff's District 3. Deputy Dahlberg was driving a fully marked Arapahoe County Sheriff's vehicle and wearing a blue Arapahoe County Sheriff Deputy's uniform. Sometime after 11:00 p.m., Deputy Dahlberg completed a routine traffic stop in the area of Interstate 25 and Arapahoe. He then drove a short distance north on the highway to cover and assist Arapahoe County Sheriff Sergeant Steve O'Brian, who was engaged in an unrelated traffic stop. The stopped vehicle and Sgt. O'Brian's patrol car were stopped on the right shoulder of the highway and Deputy Dahlberg had positioned his vehicle, overhead lights engaged, in the far right lane to provide some protection. As the deputies were completing this action, a grey sedan passed the police cars in the lane immediately adjacent to Deputy Dahlberg's patrol car, traveling at a speed Deputy Dahlberg would later estimate to be about 65 mph. The driver made no attempt to slow or move to his left to one of the open lanes, despite the fact that traffic was not heavy. Deputy Dahlberg

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opted to conduct a traffic stop of the sedan for violation of the "move over law"¹, and he pulled out onto the highway and accelerated. The deputy caught up to the car as it "was exiting onto [Interstate] 225" and "activated [his] lights to stop the vehicle. It continued traveling." (The vehicle, a 1992 grey Pontiac Bonneville 4 door sedan, will, henceforth, be referred to as the "Pontiac.")

The Pontiac exited the highway at Tamarac but did not come to an immediate stop. Deputy Dahlberg told investigators that after he hit the air horn and "cycled" his siren a "couple of times" the Pontiac finally came to a stop. Arapahoe County Computer Aided Dispatch records indicate Deputy Dahlberg advised the dispatcher of the traffic stop at 11:19 p.m.

Deputy Dahlberg walked up to driver's side of the vehicle, confirmed the male driver, later identified as Santamaria, was the only occupant of the vehicle, and advised him of the reason for the stop. He and Santamaria had a brief discussion during which Santamaria admitted his driving privileges were "suspended." Santamaria handed Deputy Dahlberg a current registration for the vehicle and a purported receipt for insurance. Deputy Sheriff told investigators:

I looked at the registration. I asked him if the name, the registered owner, I asked him if that was him. He said that it was. I handed him my notepad and my pen. I told him to write his name and his birth date down. He did. He – I asked him to – after he told me that he was suspended, I asked him to turn the car off. He did. Then I asked him for the keys and he was a little hesitant in that. He asked me "Why" – you know, "why do you want the keys? Are you going to tow my car?" I told him, "I don't know but based on you being suspended and as long as it took you to stop, I want the keys to make sure you're not going to drive off on me." He hesitated a little bit still but did give me the keys.

Deputy Dahlberg returned to his patrol car and ran Santamaria's name on his mobile computer. The initial report he received provided the information that Santamaria was a "revoked

(2)(a) A driver in a vehicle that is approaching or passing a stationary authorized emergency vehicle that is giving a visual signal by means of flashing, rotating, or oscillating red, blue, or white lights as permitted by section 42-4-213 or 42-4-222... shall exhibit due care and caution and proceed as described in paragraphs (b) and (c) of this subsection (2).

(b) On a highway with at least two adjacent lanes proceeding in the same direction on the same side of the highway where a stationary authorized emergency vehicle or stationary towing carrier vehicle is located, the driver of an approaching or passing vehicle shall proceed with due care and caution and yield the right-of-way by moving into a lane at least one moving lane apart from the stationary authorized emergency vehicle or stationary towing carrier vehicle, unless directed otherwise by a peace officer or other authorized emergency personnel. If movement to an adjacent moving lane is not possible due to weather, road conditions, or the immediate presence of vehicular or pedestrian traffic, the driver of the approaching vehicle shall proceed in the manner described in paragraph (c) of this subsection (2).

(c) On a highway that does not have at least two adjacent lanes proceeding in the same direction on the same side of the highway where a stationary authorized emergency vehicle or stationary towing carrier vehicle is located, or if movement by the driver of the approaching vehicle into an adjacent moving lane, as described in paragraph (b) of this subsection (2), is not possible, the driver of an approaching vehicle shall reduce and maintain a safe speed with regard to the location of the stationary authorized vehicle or stationary towing carrier vehicle, weather conditions, road conditions, and vehicular or pedestrian traffic and proceed with due care and caution, or as directed by a peace officer or other authorized emergency personnel.

[Emphasis added.]

[Emphasis added.]

Violation of the cited subsection of this statute constitutes Careless Driving as defined by Colorado traffic laws.

¹ The "move over law" implemented in 2005, is found at C.R.S. § 42-4-705(2) and provides, in pertinent part,

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Habitual Traffic Offender" and was also subject to a protection order. At this point Deputy Dahlberg requested that an additional car respond to provide cover. This request was made at 11:24 p.m.

Sheriff's Deputy James Mason, 13022, responded to cover Deputy Dahlberg. He arrived at the location at 11:32 p.m. Deputy Dahlberg briefed him on the situation and of his decision to arrest Santamaria. The two officers then approached the Pontiac. Deputy Dahlberg walked to the driver's side and took a position at the "B-pillar" where he could address Santamaria, who had the driver's side window partially open. Deputy Mason took up a position on the passenger's side where he could watch Santamaria's hands. Both deputies saw Santamaria was holding a cell phone and, in Deputy Mason's words, "appeared to be talking on the phone." Deputy Mason told investigators

I heard [Deputy Dahlberg] say something to the effect of, you know, "We need you to get off the phone. Step out of the vehicle." And the driver seemed to ignore Deputy Dahlberg's request. And Deputy Dahlberg then started to escalate his commands.

As Deputy Dahlberg recounted the events,

When I got back to the driver's side window, the door – or the window was open, maybe five inches rolled down. The driver was on the phone, and, yeah, he was on the phone. At that point, I told him, you know, "Get off the phone. I'm going to have you step out of the car. You're, you're under arrest." He told me to hang on and continued talking on the phone. He had something – I didn't know who he was talking to. I heard – he, he had the phone on speaker in the left hand. I heard like a female voice on the other, you know, on the other line, end of the line. I heard him say something about, you know, "I'm sorry. I'm going to have to do this." Something to that effect. At that point, I was telling him, "Get off the phone! You're under arrest! You're going to come out of this car. Get off the phone. You're under arrest. You're going to come out of this car!"

As he issued these commands, Deputy Dahlberg saw Santamaria reach down toward the floor near his right leg. The deputy immediately drew his gun and began ordering Santamaria to show his hands. As he gave these commands, Deputy Mason came around the back of the Pontiac and took a position near Deputy Dahlberg. After a few moments Santamaria brought his hands up, however he continued in his refusal to open the car door. Deputy Dahlberg returned his handgun to the holster and attempted to open the car door, only to find it locked. Santamaria was

Continuing to talk on the phone. He's saying, telling, talking to whoever he's talking to, saying, you know, "I'm sorry. I need to do this," or, "I'm sorry. I'm going to do this. I hate – I mean, I hate that I have to do this, but I..." You know, just, I don't exactly, you know, I don't' want to quote, say direct quotes, but stuff along the lines of he's regretting something that he's about to do.

The two officers were now confronted with the issue of how to extricate Santamaria from his vehicle. Deputy Mason recalled Deputy Dahlberg had taken Santamaria's car keys and he walked back to Deputy Dahlberg's patrol car, got the keys, and walked back toward the Pontiac while attempting to unlock the doors by using the key fob. He thought he heard the lock activate and told Deputy Dahlberg the doors were open. Deputy Dahlberg tried the door, again, but to no avail. Santamaria was still on the phone. Deputy Dahlberg told investigators he heard Santamaria say something "like, 'I'm, I just, I need to do this' or, 'I'm sorry. I'm going to do this.' "He then saw Santamaria reached down towards his right leg, again. As Deputy Dahlberg recalled the ensuing moments,

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[Santamaria] started to bring his hand back up and I heard a gunshot. Out of the corner of my eye, I saw Deputy Mason move backwards and I, I, I thought I had seen him fall down on his back. At that point, I thought he had been shot. I had looked, I, I could still kind of see out of my peripheral vision. I saw a glass, or, not glass, but like blood on his face, Deputy Mason's face. I thought he had been shot.

Deputy Dahlberg immediately drew his service pistol, moved back and behind the Pontiac, firing several rounds at Santamaria as he retreated. He then saw Deputy Mason moving back toward him and ceased firing to assure Deputy Mason was not hit in the crossfire. The two deputies retreated to a position at the passenger's side of Deputy Dahlberg's patrol car. The deputies quickly determined Deputy Mason was bleeding from cuts to his face, but had not been shot. Deputy Dahlberg advised the police dispatcher they had been involved in a shooting and remained at their position until additional cars arrived. The "shots fired" call was made at 11:37 p.m.

In his video-taped statement, Deputy Mason stated that as he tried to unlock the door with the remote device he moved to a position just behind Deputy Dahlberg who was standing to the back of the driver's door. When the remote didn't work, he decided to try the key. He told investigators he was "right behind Deputy Dahlberg, kind of to his side, reaching around to try to put the key in the door. I was probably almost touching [Deputy] Dahlberg." When, Deputy Mason first tried the key, Santamaria was still on the phone. As he recalled it, he was unable to get the key in the door lock. At this point,

The, the driver then looked over [at] me, I mean briefly looked up. And I, I don't recall seeing the phone in his hand anymore. And he made the statement, "I'm sorry. I have to."

The investigators follow with some clarifying questions and then Deputy Mason continues:

I looked down at the, the lock again. I flipped the key around to try to put in the key in the door again, and I mean this is really fast And as I, as I looked down again, I heard a pop and everything went white, and I could feel pain in my face, and I knew that it was the window blowing out, that it was glass and it felt like, just like percussion, you know, like – and I, I assumed that it was a gunshot, that it was a loud pop and uncontrollably, like I said, everything went white, and I fell backwards.

Deputy Mason fell to the ground. He heard several more gunshots and, at first, was fearful he was still under fire. He regained his footing, drew his handgun and moved to the passenger side of Dahlberg's police car.

The deputies maintained their position until other cars arrived. At one point, they and a third officer approached the Pontiac but as they did so, they believed they saw movement within the Pontiac. They retreated. Numerous officers responded and took up tactical positions so as to contain Santamaria in the event he remained a threat. Deputy Mason was removed from the scene and taken to an area hospital and Deputy Dahlberg moved back and took a seat in a supervisor's patrol car. Ultimately, officers approached the Pontiac and introduced a K9 through the shattered back window opening. Santamaria, seated behind the wheel, was found to be non-responsive. He was pronounced dead at 12:05 a.m., November 10, 2014. While these later efforts to contact Santamaria made by officers and the police dog were courageous, the evidence is Santamaria died from a self-inflicted gunshot wound some time before law enforcement officers were able to get him out of the Pontiac.

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The physical evidence at the scene and the autopsy report compel the conclusion that, as the deputies attempted to open the driver's door, Santamaria reached down, grabbed a pistol hidden near his right foot, brought it to the right side of his head and pulled the trigger. The bullet perforated his head, exited the left side and then blew out the driver's side window. Shards of glass flew into Deputy Mason's face and eyes. Deputy Mason also suffered a deep laceration to a finger. This may have resulted from his fall to the ground. That Deputy Mason was not shot in the face appears to be purely his good fortune.

THE INVESTIGATION

The only witnesses to this incident were the participants, Deputy Sheriff Dahlberg, Deputy Sheriff Mason and Santamaria. Deputy Dahlberg provided investigators with a video-taped statement in the hours immediately following the incident. Deputy Mason was taken from the scene to a hospital for treatment of his injuries. He provided investigators with a video-taped statement on November 11, 2014.³

Deputy Dahlberg was armed with a 9mm Smith & Wesson M&P semi-automatic pistol. This firearm has a 17-round magazine and may be carried with an additional round in the chamber. Deputy Dahlberg carried his pistol loaded, in this fashion, with ammunition issued by the Arapahoe County Sheriff's Office. Investigators and firearms examiners with the Denver Police Crime Laboratory determined Deputy Dahlberg fired his pistol either six or seven times (Crime Scene investigators recovered six spent shell casings at the scene which were identified to the deputy's pistol – either he was mistaken in the manner in which he had loaded the pistol or investigators failed to locate the seventh shell casing).

Santamaria was armed with a 9mm Glock 17 which was located at his feet in front of the driver's seat. This firearm has a 17 round magazine. When investigators examined the firearm it had one live round in the chamber and one additional round in the magazine. A spent 9mm casing was recovered from the passenger compartment of the Pontiac. Firearms examiners determined this shell casing was ejected from Santamaria's weapon. Investigators also examined the Pontiac and determined the projectile that perforated the driver's side window came from within the vehicle. (See FN #2.)

Investigators recovered Santamaria's phone. A search of the telephone disclosed the party Santamaria had been speaking with immediately before the shooting was Vadim Guralnik, 9/16/86. Mr. Guralnik told investigators he was speaking with Santamaria on the telephone and Santamaria told him he had been stopped by the police. Mr. Guralnik stated Santamaria sounded depressed and told him he was scared of going to jail and did not want to go to jail. Mr. Guralnik advised investigators he did hear voices ordering Santamaria to step out of the car.

² Beveling on the exterior portion of the glass on the driver's side window is consistent with a projectile traveling from within to without. Investigators recovered what appears to be biological material on the inside of the glass. Investigators also recovered suspected biological material from within the barrel of Santamaria's pistol. These items of evidence are being tested by the DPD Crime Lab's Forensic Biology Unit.

³ Deputy Mason told investigators he had viewed a news broadcast regarding the shooting sometime before he provided his statement. One of the virtues of the protocol we follow in this jurisdiction is the sequestration of witnesses immediately following an incident. This avoids the risk of contamination which may arise from exposure to outside sources. In this case, nothing in the news broadcast is likely to have impacted Deputy Mason's statement.

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On November 13, 2014, Denver police investigators executed a search warrant at Santamaria's apartment, 7665 East Eastman Avenue, Denver, CO. Investigators recovered a gun box for a Glock 17. The serial number on the box matched the serial number on the pistol recovered from the Pontiac. A records trace established Mr. Guralnik purchased the handgun on July 19, 2014.

On November 10, 2014, Dr. Kelly Kobylanski, a pathologist and Forensic Pathologist Fellow with the Denver Office of the Medical Examiner, performed an autopsy on Santamaria's body. Dr. Kobylanski detailed a perforating gunshot wound to Santamaria's head; the entry wound was to the right side temple and the exit wound was to the left side temple. Dr. Kobylanski also documented three additional gunshot wounds to Santamaria's body. All three wounds were to Santamaria's back. The manner of death was determined to be suicide. Dr. Kobylanski determined that the head wound was not survivable and, accordingly, the other wounds were not listed as contributing factors to Santamaria's death.

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. In this investigation, the evidence establishes Santamaria shot himself, inflicting on himself a fatal injury. However, within seconds of Santamaria's suicidal act, Deputy Dahlberg fired shots which struck Santamaria. Arguably such conduct could constitute Criminal Attempt to Commit Murder or First Degree Assault. The determination whether Deputy Dahlberg's conduct was criminal is primarily a question of legal justification.

- C.R.S. 18-1-707 defines the circumstances under which a peace officer can justifiably use physical force and deadly physical force in Colorado. In pertinent part, the statute reads as follows:
 - (1) Except as provided in subsection (2) of this section, a peace officer is justified in using reasonable and appropriate **physical force** upon another person when and to the extent that **he reasonably believes it necessary**:
 - (a) To effect an arrest or to prevent the escape from custody of an arrested person unless he knows that the arrest is unauthorized; or
 - (b) To defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force while effecting or attempting to affect such an arrest or while preventing or attempting to prevent such an escape.
 - (2) A peace officer is justified in using **deadly physical force** upon another person ... only when he reasonably believes that it is necessary:

⁴ These latter wounds were caused by Dahlberg's shots.

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(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 in determining whether an officer's use of deadly physical force to defend himself or another individual was appropriate is whether the nature and degree of force used is objectively reasonable after considering the totality of the circumstances.

The question presented in this case is whether, at the instant Deputy Dahlberg fired his handgun, he reasonably believed his actions were necessary to defend to himself or a third person from what he reasonably believed to be the use or imminent use of deadly physical force directed

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against him or Deputy Mason. 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. In this instance, the doctrine of "apparent necessity" is critical to the analysis.

CONCLUSION

The issuance of this letter is somewhat unique in that Santamaria took his own life. In most such situations, the use of force by law enforcement officers is not at issue. In this event, however, shots were fired by Deputy Dahlberg within split seconds of the shot fired by Santamaria and some of these shots appear to have struck Santamaria as he died. As such is the case, we think this discussion appropriate.

The evidence shows Deputy Dahlberg made an appropriate traffic stop and, once he contacted Santamaria, quickly determined there was a basis for arresting Santamaria rather than simply citing him for the traffic violation. Deputy Dahlberg and, when he arrived, Deputy Mason, attempted to reason with Santamaria and convince him to exit his vehicle. Santamaria, on the other hand, complied, somewhat grudgingly, with small requests (i.e., surrendering his keys), but refused to comply with others ("get off the telephone"; 'step out of the vehicle'). Both deputies attempted to resolve the situation with minimal force (using the key to open the door). It was as they were engaged in these actions that Santamaria quickly reached down, grabbed a pistol, and fired once. The gunshot, Deputy Mason's injuries and the fact that he fell back and down, would have led any reasonable officer to believe he and his partner were under fire. Deputy Dahlberg's quick actions to save the life of his partner and, perhaps his own, were objectively reasonable, appropriate, courageous and justified under C.R.S. § 18-1-707 (1) & (2). As in every case we handle, any interested party may seek judicial review of our decision under C.R.S. § 16-5-209.

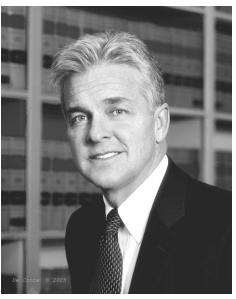
Very truly yours,

Mitchell R. Morrissey Denver District Attorney

cc: Deputy Sheriff Robert Dahlberg; Jamie Wynn, Attorney at Law; David Bruno, Attorney at law; Michael Hancock, Mayor; All City Council Members; Scott Martinez, Denver City Attorney; Stephanie O'Malley, Executive Director, Department of Safety; David Quinones, Deputy Chief of Police; Mary Beth Klee, Deputy Chief of Police; Ron Saunier, Commander of Major Crimes Division;; Greggory LaBerge, Crime Lab Commander; Lt. Ron Thomas, Commander of Internal Affairs; Lieutenant Steve Addison, Major Crimes Division; Sgt. James Kukuris, Homicide; Sgt. Ed Leger, Homicide; Detective Mark Crider, Homicide; Detective Troy Bisgard, Homicide; Lamar Sims, Senior Chief Deputy District Attorney; Doug Jackson, Senior Chief Deputy District Attorney; Nicholas E. Mitchell, Office of the Independent Monitor; Rev. William T. Golson, Jr.



OFFICER-INVOLVED SHOOTING PROTOCOL 2014



Mitchell R. Morrissey
Denver District Attorney

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

The Denver Police Department was created by the Charter of the City and County of Denver. Under the Charter, the police department is overseen by the Office of the Denver Manager of Safety, headed by the Executive Director of the Department of Safety. The Executive Director of the Department of Safety ("Executive Director"), 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, Executive Director, 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 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 Executive Director now writes an exhaustive letter at the conclusion of the administrative review of the shooting. The Executive Director's letter can include additional facts, if any, developed during the administrative investigation. Therefore, the Executive Director'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 Executive Director 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.⁵ As a result of the positive changes the Executive Director has now instituted and that office's 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 Department of Safety and Denver Police Department ongoing administrative investigation and review. After the Executive Director has released her 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

⁵ 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 three 4-year terms, this statistic would mean there would be one criminal filing during the combined terms of 5 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 officerinvolved 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 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 This creates an inherent and unavoidable dilemma. Because we are severely restricted in releasing facts before the investigation is concluded, there is the risk that information will come from sources that may provide inaccurate accounts, speculative theories, misinformation or disinformation that is disseminated to the public while the investigation is progressing. This is an unfortunate byproduct of these conflicted responsibilities. This can cause irreparable damage to individual and agency reputations.

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

CONCLUSION

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

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