



# DenverDA

Mitchell R. Morrissey, District Attorney - Second Judicial District

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February 11, 2015

Randy Nelson,  
Chief of Police  
Thornton Police Department  
9551 Civic Center Drive  
Thornton, CO 80229

RE: Investigation of shooting and injury to Adams County Sheriff's Deputy Michael "Mike" Robbins, 0320, in which Thornton Police Officer Brent Mullen, 95-9, fired shots on December 12, 2014, at 2614 W. 40<sup>th</sup> Avenue, Denver, CO.

Dear Chief Nelson:

The investigation into the shooting of Adams County Sheriff's Deputy Mike Robbins, in which Thornton Police Officer Brent Mullen fired shots, has been completed. I conclude that under applicable Colorado law no criminal charges are fileable against Officer Mullen. My decision, based on criminal-law standards, does not limit administrative action by the Thornton Police Department, where non-criminal issues can be reviewed, or civil actions where less-stringent laws, rules and legal levels of proof apply. A description of the procedure used in the investigation of this officer-involved shooting and the applicable Colorado law is attached to this letter.

## STATEMENT OF FACTS

In the morning hours of December 10, 2014, a triple homicide was committed in Adams County, Colorado. Adams County ("AdCo") Sheriff's detectives quickly identified two suspects. In the late afternoon of that same day, one of the suspects, Gabriel Flores, was arrested in Jefferson County, Colorado, following a high speed chase. AdCo detectives also obtained an arrest warrant for a second suspect, Furmen Lee Leyba, 7/27/84 ("Lebya"). A BOLO<sup>1</sup> issued on December 11, 2014, in conjunction with the arrest warrant included this alert: "Triple Homicide Suspect; Considered Dangerous."

On the morning of December 12, 2014, AdCo investigators received a crime stopper's tip that Leyba might be in an apartment complex in Thornton, CO. As the address was in Thornton, AdCo investigators contacted detectives with the Thornton Police Department so the two agencies could work together. One of the AdCo investigators working the investigation was Det.

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<sup>1</sup> "Be On Lookout".

Mike Robbins, 0320.<sup>2</sup> Det. Robbins met with Thornton P.D. Detective Sergeant Chris Fusetti, 69-32, and three Thornton officers, one of whom was Det. Brent Mullen, 95-9.

The investigators met briefly at a Walgreen's near 88<sup>th</sup> Avenue and Washington Street and set up a surveillance team at the apartment. Det. Robbins was driving an undercover van outfitted for surveillance purposes; Sgt. Fusetti was driving an unmarked pick-up truck with Det. Mullen in the passenger seat. The investigation team had obtained information about a phone believed to be in Leyba's possession and other investigators were working on establishing setting up real time surveillance on that phone. Those efforts were successful. Investigators at the Thornton location were advised the attempt to obtain geo-location information on Leyba's phone had been successful and investigators were getting location information.<sup>3</sup> The first location report investigators received suggested the phone was in the area of Yale and Zuni, in Denver. The decision was made to leave a surveillance team at the Thornton location and other investigators would respond to Yale and Zuni. Det. Robbins was among those who went to this new location. When he arrived, AdCo Sheriff's Det. Daniel Monares, 0211, joined him as passenger. Sgt. Fusetti was also dispatched to Yale and Zuni and he and Det. Mullen drove to that location.

The phone information was being updated "every 15 minutes." The information indicated the phone was at a residence in this area. Det. Robbins told investigators they had set up in the area and were about to contact Denver Police and coordinate efforts to apprehend Leyba, when "out of nowhere, a small motorcycle" with two riders left the property they were focused on and headed north. Det. Robbins stated he got on the radio and advised surveillance officers "this might be nothing, but we should follow it."

After Sgt. Fusetti and Det. Mullen arrived in the area, other surveillance officers, already in place, advised they had observed a small motorcycle or "minibike" leave the area with two male riders. Sgt. Fusetti and Det. Mullen were asked to attempt to catch up with the bike and determine whether the suspect was one of the riders. Sgt. Fusetti told investigators that they drove north on Zuni, looking in the area of Zuni and Evans, but were unable to locate the bike. However, other members of the surveillance team were continuing the geolocation efforts on the suspect's phone. Sgt. Fusetti stated the phone was "pinging" about "every fifteen minutes" and indicated the target was moving north. Based upon these facts, investigators concluded the motorcycle they had seen leave the area was related to the phone they were tracking. The phone surveillance information led them to 6<sup>th</sup> Ave. and Kalamath St., then to 36<sup>th</sup> and Vallejo St. and, finally, "to the northwest of 40<sup>th</sup> and Bryant" where separate returns over a period of time indicated the target's phone had "gone to ground."

Sgt. Fusetti and Detective Mullen arrived in the area of 40<sup>th</sup> Avenue and Bryant Street and set up surveillance in the area of 41<sup>st</sup> Avenue and Clay Street. AdCo detectives were also in the area. Sgt. Fusetti recalled that about 15 minutes after he and Det. Mullen arrived, another "ping" was received in the same area. The Thornton detectives drove down the alley west of Bryant between 41<sup>st</sup> and 40<sup>th</sup> Avenues and, as they did so, they saw a "black minibike" parked by

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<sup>2</sup> Other members of the AdCo Sheriff's department involved in the surveillance operations were Sergeants Kevin Currier and Jeremy Whytlock and Detectives Danial Monares and Mark Michieli.

<sup>3</sup> Obtaining this information is often referred to as "pinging" a phone. The returns are similarly referred to as "pings".

one of the houses. They provided that information to the AdCo surveillance team and then returned to the north end of the alley, at 41<sup>st</sup> Avenue.<sup>4</sup> Investigators now believed they knew Lebya's location. At 3:17 p.m., an AdCo sergeant contacted Denver Police and requested uniformed assistance and support at 40<sup>th</sup> Avenue and Clay Street.

Dets. Robbins and Monares had also relocated to the area of 40<sup>th</sup> and Bryant. They heard the Thornton P.D. surveillance team state they saw the bike in the alley. Det. Robbins set up his van on the south side of the alley at 40<sup>th</sup> and Bryant and waited for additional officers to get into position. It was while they were waiting they heard one of the Thornton detectives radio that two people were on a motorbike, headed down the alley. Det. Robbins then saw "two people on this little bike" come out of the alley.

The call Det. Robbins heard alerting the surveillance teams to the fact the motorbike was moving was made by Sgt. Fusetti. In his video-taped statement, Sgt. Fusetti told investigators he heard someone on the surveillance team advise that there was some activity at the house under surveillance. A few minutes thereafter, Sgt. Fusetti saw two people, in dark clothing, come out of a house, enter the alley, and get on the "minibike." He advised the other cars in the area of this fact and that the motorcycle proceeded south, down the alley. It did not appear to him that the marked Denver police cars had picked up the bike, so he decided to follow it "until a marked car [could] get behind it." At this point, Thornton detectives were to the north of the motorbike and AdCo detectives to the south. The Thornton detectives were in an unmarked pick-up truck; Sgt. Fusetti and Det. Mullen were both wearing civilian clothes.<sup>5</sup>

The bike came down the alley toward Det. Robbins. It crossed the street at 40<sup>th</sup> and continued south toward 39<sup>th</sup>. Det. Robbins decided to "parallel" the bike. He drove his undercover vehicle down to 39<sup>th</sup> and stopped in the intersection at 39<sup>th</sup> and Bryant. The surveillance team was communicating by phone and on an Adams County tactical channel – they were not in direct contact with the DPD cars in the area. Det. Robbins stated that he aired "we're on 39<sup>th</sup>, now. We need Denver cars here." As he waited there, he saw two DPD patrol cars come into the area. At almost the same time, Det. Monares said, "Mike! He's right there! The bike is right there!" Det. Robbins looked to his right and saw the suspect stopped in the middle of Bryant Street, about 20 yards away from the undercover van.

Det. Robbins got out of his vehicle and came around his car. There were two people with the bike, both of whom had stepped off of it and let it fall to the ground. He recognized one of them as Leyba; the other party he did not recognize and he could not tell whether the party was male or female. Det. Robbins drew his handgun and began issuing commands: "Police! Don't Move! Police! Don't Move!" Leyba ignored his commands and started running west, up a driveway and toward the alley. Det. Robbins gave chase, with Det. Monares either next to or

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<sup>4</sup> A black Ford Explorer had pulled into the area and stopped. The detectives thought this was suspicious – they and the AdCo surveillance team started watching this car. Eventually, it circled around the block and stopped at or near the house where the minibike was parked.

<sup>5</sup> Both officers were also wearing tactical vests which have embroidered police badges on the front and the word "POLICE" prominently displayed on the back. Det. Robbins, by contrast, was dressed in plain clothes, wearing black slacks, a blue undershirt, a black sweatshirt-jacket and a dark blue "Chicago Bears" ballcap. Emblazoned on the front of the sweatshirt, in silver was "BROOKLYN". None of his articles of clothing identified him as a police officer.

just behind him. Det. Robbins told investigators he was “gaining on [Leyba],” and saw him trip and fall in the driveway, jump back up and continue running. When Leyba fell, Det. Robbins saw a handgun fall from Leyba’s possession and slide on the pavement. Leyba did not pick up the gun. Leyba “hook[ed] into the alley” with Det. Robbins “right on his heels,” estimating he trailed the suspect by about 10 yards.<sup>6</sup> What Det. Robbins did not know was that Sgt. Fusetti and Det. Mullen were in the alley to which he was heading.

As noted above, Sgt. Fusetti had been following the motorbike down the alley. At one point, he and his partner lost sight of the bike (they did not realize the motorcycle had exited the alley and was driving south on Bryant). The Thornton detectives crossed 40<sup>th</sup> and, as Sgt. Fusetti told investigators, realized “this alley is a dead end. This is not a good spot for us to be in.” He later explained his concern that “this could be an ambush situation.” Sgt. Fusetti told investigators that as he was putting his truck into reverse,

I see a male subject run out from behind the fence, um, toward us. So, I go all the way into park, I open my truck door [and] I’m drawing my gun and I come out to the edge of the truck door and I am, uh, drawing my weapon on him. We’re yelling “get down! Get down! Get down!” At that point, um, my truck hood is kind of blocking my vision, but I see this torso kind of go down behind [in front] of my truck. Um, at that exact same time, I am here [demonstrating how he was holding his handgun on the suspect in front of the truck] and I see, from my peripheral vision a, a gun coming out from behind the fence. Um, and then I hear shots starting to be fired from my right. And, as that’s happening, um, I kinda look up and the figure comes out from behind the fence and he, kind of, turns a little bit, and as he turns a little bit, I could see what I thought was a badge on his, um, I don’t recall if it was a coat or a shirt, but I thought I saw a badge there [indicating the upper chest], so I started yelling at Brent, um, “Cease fire! Cease fire! Cease fire! Friendly! Friendly! Friendly!” And then I’m yelling at those guys, “Crossfire! Crossfire! Crossfire!” And I start backing up, toward the rear of my truck. Uh, because at that point I was afraid that if there were other officers behind that fence they might start returning fire toward us, um, so I was trying to take cover.

The shots Sgt. Fusetti heard were indeed being fired by Det. Mullen from his position in the front passenger seat. Det. Mullen confirmed he and Sgt. Fusetti were watching the address in the area of 40<sup>th</sup> and Clay or Bryant when he “saw someone in dark clothing pushing the scooter out of the yard or driveway into the alley, they had – they had pushed it out into the alley, and then somebody else in dark clothing had come out and got on it.” The two officers followed the motorcycle down the alley and, as they crossed 40<sup>th</sup>,

It looked almost like the, the, the alley had turned left because [the suspects] kind of disappeared [to the] left. And we go –as we – as we drove down and got closer we realized that that alley actually comes to a dead end. There’s a, there’s a fence there. The alley doesn’t go through to any street. And then there’s a fence on the left and a fence on the right, and there’s an opening here and there’s an opening there, but truly, there’s nowhere to go if you’re a car. And as we got up to there, I said to Chris, to Sergeant Fusetti, I said, “this doesn’t go through. We need to back up!”

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<sup>6</sup> The first four photos attached to this letter show the motorbike dropped by Leyba, the driveway which led up to the alley (taken in daylight hours), the handgun dropped by Leyba just before he got to the alley and a close-up of that pistol.

Det. Mullen told investigators that almost simultaneously with his making that statement, he saw a guy, wearing a black jacket, come through the break in the fence and run towards them. He told investigators the party was running at the passenger side of the truck. Det. Mullen was still in his seat. He was aware Sgt. Fusetti had gotten out of the truck on the driver's side. From his position in the truck, he drew his hand gun, but he was able to see the subject has

got nothing in his hand. And he goes down right, which would be like right in front of the truck to the right. He goes down. And as he's down and I could hear Sergeant Fusetti over hear shouting "Let me see your hands! Let me see your hands!" Out of the corner of my eye, I see the, the, the second person come around what I believe was the second person come around that wooden fence. And I, and I from here [demonstrating] and I come up here and I see a silver handgun and I know [this second party] is not wearing a uniform. I, I know there's no uniform. I just see the handgun and I know it's not a police uniform.

Unbeknownst to Sgt. Fusetti and Det. Mullen, although the two people on the motorcycle who were confronted by Dets. Robbins and Monares both ran, they ran in different directions. Leyba ran west toward the alley with Robbins in close pursuit. The second party, later identified as Vanessa Sanchez-Lopez, 1/31/82, took off in different direction. She was apprehended by police after she forced her way into a residence and attempted to hide. The occupants of that residence, which was in the 2500 block of 39<sup>th</sup> Avenue, alerted the police to her presence.<sup>7</sup>

Det. Mullen stated that when he saw a second person, dressed in dark clothing and armed with a handgun, come around the corner close on the heels of the person who had gone to the ground in front of the truck, he thought

we're getting ambushed. This is the second guy – this is the second guy who just got off the scooter. We're getting ambushed. And [the second party] comes and he takes, I don't know it was one step or two steps. I don't know. It happened – it happened extremely fast.

He comes toward me and I'm thinking, I'm going to hear bullets hit the windshield because he's got his gun out like this as he comes running, just like this guy did. And I don't know the distance – I would say it's no more than, I don't know, 8 to 15 feet between where I'm at and where he's charging. And, as I come up [on target], I remember thinking "he's going to start shooting me through the windshield! He's going to start shooting me through the windshield!" And I, I start shooting through the windshield, and as I'm shooting, I hear Sergeant Fusetti say, "Friendly! Friendly! Friendly!" And I immediately stop.<sup>8</sup>

Leyba was still down on the ground in front of the pick-up. Det. Mullen stepped out of the truck and held Leyba at gunpoint while Sgt. Fusetti took him into custody. Leyba was not struck by any of the rounds fired. Officers also alerted the Denver police dispatcher that shots were fired – "officer down." This broadcast was aired at 3:53 p.m.

As was stated earlier, Det. Robbins was in close pursuit of Leyba when he ran up the driveway and into the alley. Det. Robbins told investigators that when he came around the fence into the alley, he saw Leyba "skid to a stop." He then saw Leyba had stopped directly in front of a big

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<sup>7</sup> Sanchez-Lopez was charged by my office for crimes relating to her uninvited entrance into the residence.

<sup>8</sup> Photo # 5 shows the front windshield of the pick-up truck. Photograph # 6 shows the view down the alley from the passenger seat of the pick-up truck. A yellow evidence marker in the left center of the alley is positioned at the fence break through which Leyba and Det. Robbins entered the alley.

truck he knew to be a Thornton police vehicle. Det. Robbins had his police radio in his left hand and his pistol in his right hand. He pointed his gun at Leyba and yelled "Police! Get on the ground." At that point "that's when I hear rounds . . . round start coming." Det. Robbins first thought he was caught "in a crossfire." He told investigators he heard Leyba yelling, "I'm down! I give up." At about the same time he realized he had been hit by a bullet. He went down to one knee to check on his arm and said to Det. Monares, who he knew was behind him, "I'm hit."

Det. Robbins saw Leyba taken into custody but his role as part of the arrest team had ended. An ambulance was called for him and he was transported to Denver Health Medical Center, suffering from a gunshot wound to his lower left arm. He was advised by attending physicians the bullet had fractured a bone in his arm.

Det. Robbins was armed with a silver/chrome .45 caliber Sig Sauer semi-automatic pistol. He did not fire. Det. Mullen was armed with a .40 caliber Smith & Wesson M&P Compact. This firearm may be loaded with ten rounds in the magazine and carried with an additional round in the chamber. It was fully loaded with ammunition issued by the Thornton Police Department. Firearms examiners and crime scene investigators recovered evidence indicating Det. Mullen fired seven times.

The handgun dropped by Leyba was recovered by Crime Scene investigators. It was determined to be a Taurus, 9mm semi-automatic pistol. There was no evidence this firearm was discharged during this incident. It was delivered to AdCo Sheriff's investigators for analysis relating to the triple homicide under investigation by that agency.

Leyba was the only witness to the shooting incident other than the officers whose statements are discussed above.<sup>9</sup> He was interviewed by investigators and, insofar as concerns this shooting investigation, gave no information which contradicted or called into question the statements of the officers. As he is being prosecuted in Adams County, it would be inappropriate for us to provide details of any statements he made to law enforcement.

## **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 Officer Mullen intentionally fired the shots which wounded Deputy Robbins. The determination whether Officer Mullen's conduct was criminal is primarily a question of legal justification.

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<sup>9</sup> Officers and investigators contacted numerous citizens who lived in the neighborhood. Several heard shouts and gunshots and one or two saw the initial foot chase but none indicated they saw the actual shooting.

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

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

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

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

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

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

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

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

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

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

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

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

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

Officers are entitled to rely on the doctrine of “apparent necessity” so long as the conditions and circumstances are such that a person would reasonably believe, erroneously or not, that action was necessary. See, *People v. La Voie*, 155 Colo. 551, 395 P.2d 1001 (1964), *People v. Silva*, 987 P.2d 909 (Colo. App. 1999). It is immaterial whether the individual shot by the officer 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).

As the shots Det. Mullen fired did not result in the death of another person, the force he used is characterized as physical force, rather than deadly physical force. The test in determining whether an officer's use of 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 Det. Mullen 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 physical force directed against him or Sgt. Fusetti. In order to establish criminal responsibility for an officer knowingly or intentionally causing injury to another, the state must prove beyond a reasonable doubt that the officer doing the shooting either did not really believe in the existence of these requisite circumstances, or, if he did hold such belief, that belief was, in light of all available facts, unreasonable.

## CONCLUSION

In order to determine the reasonableness of Det. Mullen's actions, we must consider what he knew (or should have known) at the time he fired the shots, in light of his training and experience. As the United States Supreme Court has made clear, "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396 (1989).<sup>10</sup>

The investigators were attempting to apprehend Fermin Leyba, a dangerous felon suspected in a triple homicide in which handguns were the weapons of choice. Det. Mullen had every reason to believe Leyba was one of the two people on the motorcycle he and his partner were following and every reason to believe Leyba was armed. There were two people on the motorcycle and, because, Sgt. Fusetti and Det. Mullen had lost sight of the motorcycle briefly, Det. Mullen had no basis for knowing the two people who came through the fence break were not the same two individuals who he and his partner had been following. Det. Robbins was not wearing anything which readily identified him as a police officer and he, like the second person on the motorcycle, was dressed in dark clothing. Det. Mullen's belief that he and his partner were at risk of being shot was, in light of these facts, objectively reasonable. As such is the case, we would not be able to disprove, beyond a reasonable doubt, the affirmative defense established by C.R.S. § 18-1-707.

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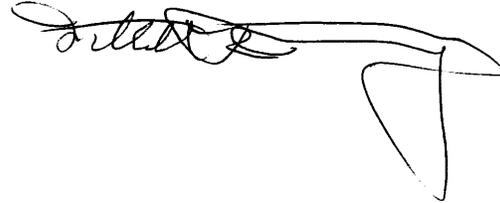
<sup>10</sup> Officer-involved shootings, locally and nationally, are and should be a subject of great scrutiny. However, to the extent that observers and commentators fail to understand the constitutional prism through which they must be viewed and focus more on what the community learns later, rather than what the officers knew or should have known at the time of the incident, those observers and commentators do a grave disservice to public understanding.

February 11, 2015

It is worth noting that each of the officers involved in this incident were courageous in their attempts to apprehend a violent and dangerous criminal. We are gratified they were successful in that effort and grateful the injuries Det. Robbins sustained were not life threatening.

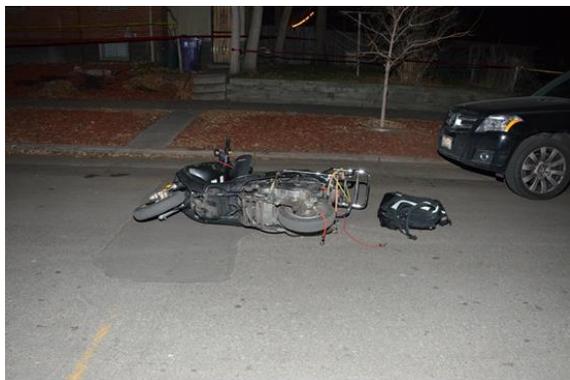
As in every case we handle, any interested party may seek judicial review of our decision under C.R.S. § 16-5-209.

Very truly yours,

A handwritten signature in black ink, appearing to read "Mitchell R. Morrissey". The signature is written in a cursive style and is positioned above a horizontal line that extends to the right, ending in a large, stylized flourish.

Mitchell R. Morrissey  
Denver District Attorney

cc: Det. Brent Mullen; Donald Sisson, Attorney at Law; Det. Michael Robbins; 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; Gregory LaBerge, Crime Lab Commander; Lt. Ron Thomas, Commander of Internal Affairs; Lieutenant Matt Clark, Major Crimes Division; Sgt. James Kukuris, Homicide; Sgt. Ed Leger, Homicide; Detective James Meoni, Homicide; Detective Randall Denison, 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.



Photograph # 1



Photograph #2



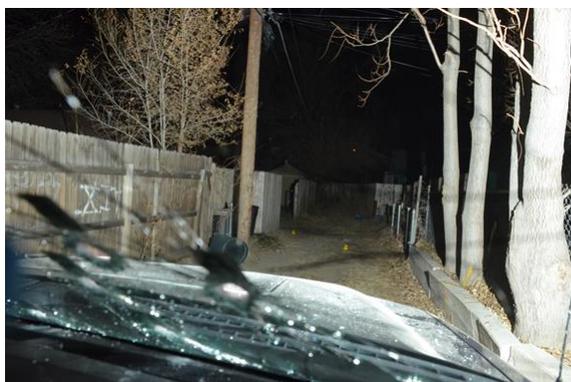
Photograph # 3



Photograph # 4



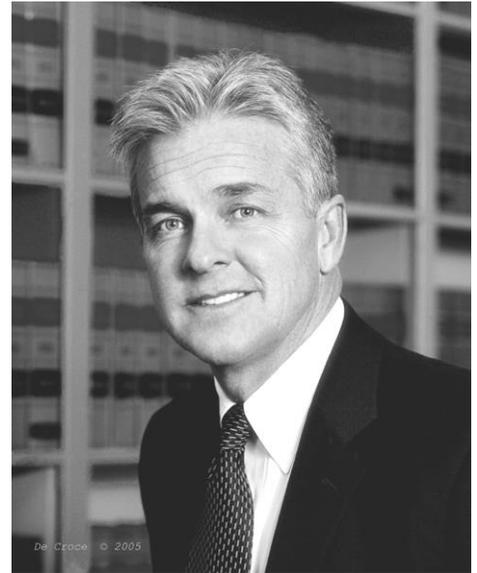
Photograph # 5



Photograph # 6



## OFFICER-INVOLVED SHOOTING PROTOCOL 2015



*Mitchell R. Morrissey*  
*Denver District Attorney*

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

The Denver Police Department was created by the Charter of the City and County of Denver. Under the Charter, the police department is overseen by the Office of the Denver Manager of Safety, 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 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 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.<sup>11</sup> 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

<sup>11</sup> See the "Conclusion" statement in the "Decision Letter" in the December 31, 1997, shooting of Antonio Reyes-Rojas, where we first pointed out issues related to the importance of the Administrative review of officer-involved shootings. Subsequent letters continued to address this issue.

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 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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