



# DenverDA

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August 29, 2014

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

RE: Investigation of the shooting death of Joseph S. Valverde, DOB 9/18/83, DPD # 554778, in which Officer Justin Dodge, 97011, fired shots on July 2, 2014, at Overland Pond Park (1075 West Florida Avenue), Denver, Colorado.

Dear Chief White:

The investigation and legal analysis of the shooting death of Joseph Valverde, in which shots were fired by Sergeant Justin Dodge, has been completed. I conclude that under applicable Colorado law no criminal charges are fileable against Sergeant Dodge. My decision, based on criminal-law standards, does not limit administrative action by the Denver Police Department where tactical 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 late 2013, officers and agents with the Metro-Gang Task Force ("MGTF"), a task force comprised of federal, state and local law enforcement officers, began an investigation into a group of individuals engaged in the buying and selling of controlled substances and firearms. Joseph Valverde ("Valverde") was identified as one of the members of this group. MGTF member and Adams County Sheriff's Deputy Fabian Rodriguez, 01-28, went undercover and during the course of the investigation, purchased AK-47 assault rifles from Valverde on three separate occasions. MGTF agents decided to arrest Valverde on July 2, 2014, by executing a "buy-bust" "reverse" operation wherein agents would "sell" to Valverde a quantity of cocaine and immediately arrest Valverde after he exchanged cash for the contraband. The operation planned that Det. Rodriguez, acting in his undercover capacity, would sell Valverde 2 kilograms of cocaine for \$53,000.00. Valverde was led to believe that if the transaction went well, Det. Rodriguez would sell him two more kilograms of cocaine on a different occasion.

The operation plan called for the exchange to take place at a parking lot at Overland Pond Park, a location at which Det. Rodriguez and Valverde had met on previous occasions. Plainclothed investigators and uniformed Denver Police Metro-Swat officers, constituting surveillance, rescue and arrest teams, were in place in the vicinity. When the transaction was completed, Det. Rodriguez was to make a call which Valverde would believe was to the undercover officer's "contact" but was in fact a call to give the "bust signal." Once the signal was given, Metro-Swat officers were to come in and make the arrest. Surveillance teams had been watching Valverde for some time prior to the meeting; these surveillance teams included ground and air surveillance. In addition, MGTf agents had placed a "pole camera" near the parking lot.

Det. Rodriguez, driving a brown Chevrolet Tahoe, arrived at the parking lot shortly after 2:00 p.m., July 2, 2014, and parked on the north side of the lot, next to a white sedan. Valverde had not yet arrived so Det. Rodriguez sent him a text message to which Valverde responded, indicating he would arrive in 5 minutes.<sup>1</sup> Within a few minutes of these communications, Valverde arrived as the passenger in a white pick-up truck driven by his girlfriend, Patricia Milnes, 1/18/85 ("Milnes"). Det. Rodriguez recognized the truck, as Valverde had used it on prior meetings. Milnes parked the pick-up truck on the south side of the lot, next to a FedEx truck which had been parked in the lot before Det. Rodriguez arrived.<sup>2</sup> Det. Rodriguez got out and moved to the front of his Tahoe and Valverde got out of the white pick-up, carrying a backpack over his left shoulder, and walked toward Det. Rodriguez. The men met in front of the Tahoe. Det. Rodriguez asked whether Valverde had the money. Valverde answered in the affirmative and opened the backpack, displaying a large amount of cash, whereupon Det. Rodriguez made the "pretext" call on his cell phone, "letting [his] surveillance people know that everything is here – have SWAT come in."

Det. Rodriguez told investigators he and Valverde stood and talked for "twenty - thirty seconds." Det. Rodriguez then saw a white SUV come into the parking lot, followed by a blue vehicle. Valverde then

"turned around and he saw them coming . . . he turned around and looked at me and said 'are these guys with you, or what?' And I said, 'no. I don't know who they are. And when I said that, the vehicle stops, the doors open and the SWAT team comes out and starts giving commands.'<sup>3</sup>

Because he was familiar with the operations plan, Det. Rodriguez knew the SWAT officers might deploy a "flash bang" device, so when the officers started getting out of the vehicle, he moved west and away from Valverde. Once he was two or three steps away from Valverde, Det. Rodriguez "threw" himself to the ground while keeping his eye on Valverde who was standing near the white sedan, still holding the backpack over his left shoulder. Det. Rodriguez stated

"[Valverde's] looking at the SWAT team [members that are coming this way and this way [gesturing to indicate the directions] and he's basically, he's holding his backpack, and he's

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<sup>1</sup> Surveillance operatives advised Det. Rodriguez that Valverde was driving toward the park.

<sup>2</sup> The FedEx truck was driven by witness S.C., who was sitting in the truck on a break.

<sup>3</sup> He later clarified what he described as commands were the officers yelling "POLICE!"

looking at the SWAT team members and he starts to dig in his pocket [demonstrating with his right hand into his right pocket], and, and you can see he's looking and he's digging in his pocket, he's digging in his pocket. Well, he finally, he's able to manage to get it out of his pocket—I saw it all – he pulled out a black gun, uh, it came out of his pocket and it got to, 'bout, just a little bit above his waist and then I heard somebody yell 'Gun!' and then I heard gunshots. . . . Um, he had the gun in his hand when the shots went off, uh, I saw, I saw him drop the weapon. He basically just opens his hand and he drops the weapon.

Det. Rodriguez saw Valverde take one or two steps around the front of the white car and collapse on the other side of the car. He then heard someone requesting medics “right away.”

When the “bust” signal was given, a DPD Metro-Swat arrest team, which had staged approximately ¼ mile away from the parking lot and was watching the surveillance by live video-feed, immediately drove to the parking lot. While the “arrest team” responded in three vehicles, five officers in an unmarked van were the primary team.<sup>4</sup> Driving this van and supervising the team was Sergeant Justin Dodge. In the van were Technicians Josh Bollwahn; 00015, Kenneth Brown, 98039, a Metro-K9 officer who had his canine with him as a less-lethal force alternative; Technician Chris Gruenther, 79023, Technician Vincent Matthews, 95003; and Technician Craig Moen, 91027. All of the Metro-Swat officers were dressed in green DPD utility uniforms with a DPD badge embroidered on the chest and wearing Kevlar helmets. The plan called for Technicians Matthews and Moen to deploy from the side door, followed closely by Tech. Brown and his dog, while Technicians Bollwahn and Gruenther exited simultaneously from the van's rear door. As they deployed, Technician Matthews was to deploy a “noise-flash” device, commonly referred to as a “flash-bang” to distract Valverde and provide the arrest team time to take him into custody.

The arrest team vehicles pulled into the lot and stopped between Valverde's white pick-up truck and Det. Rodriguez's Tahoe. Aerial surveillance captured the ensuing moments. A photo captured from that surveillance showing the positions of the involved individuals at the approximate moment the shots were fired is attached. Technician Matthews and Moen exited the van by the side door. Technician Matthews was armed with his handgun; Technician Moen was armed with a rifle. They approached Valverde from his left side. As they approached, Technician Matthews deployed the flash-bang and yelled at Valverde to raise his hands. Valverde failed to comply and Technician Matthews saw him reaching for something with his right hand but, because of his position, the officer was unable to see Valverde's hand. Technician Gruenther and Bollwahn exited the van by the back door, with Technician Gruenther in the lead. The two officers reached the front of the Tahoe. Technician Gruenther saw Valverde was armed with a handgun and yelled “Gun!” He then heard several rifle shots.

The shots heard by Technician Gruenther were fired by Sgt. Dodge. Following the incident, Sgt. Dodge provided a video-taped statement to investigators in which he discussed the operation plan and recounted the events of the shooting. Sergeant Dodge was the team leader and, as noted previously, the driver of the van. Sergeant Dodge told investigators that as supervisor he had reviewed the arrest warrant and some of the facts included served to heighten his awareness:

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<sup>4</sup> The other two cars were “layoff” vehicles, one a Ford Expedition, the other a Ford Explorer. Each was manned by a two-officer team. These cars were assigned to set up a perimeter and cover the arrest team.

...in reading the warrant, talking about the suspect we knew he had dealt a fully automatic sub-machine gun. We knew that he had dealt a couple AK47's, so we knew that he was a high-level narcotics dealer, and that he was actually dealing arms to, back-and-forth, to this Task Force during this – Um, and the [undercover operative] told us that he never actually seen a gun on [Valverde] except for the guns that were exchanging hands. But [Valverde] had told him that every time he provided an automatic he had an automatic with him. So there, there was a good idea based on everything in my training – all this kind of stuff – that he was probably going to be armed when, when we actually did this. So knowing that, we had plans to use noise-flash diversion devices; we were going to try to come in from multiple angles, and try to overwhelm him to make it so that he would just give up and we'd be able to take him into custody.

Sergeant Dodge told investigators that when he drove the van into the parking lot, Valverde “locked eyes” on him. He saw Det. Rodriguez back away and then he saw Valverde start backing up while reaching his right hand into his pants pocket. Based upon his experience, Sgt. Dodge calculated that Valverde was either about to try to “ditch dope” or he was attempting to pull a pistol. The clarification came within moments when

“on the second pull [from the pocket] I can see a black object, so I know he's not ditching dope. And so now I'm – I'm out of the van and I grab my rifle. And because I didn't know where the other guys were – I didn't know if they were in a position that they could engage him, because they had a pretty good—significant distance to go around both cars.

Sgt. Dodge estimated he was about a car length from Valverde when he got out of the van. He began moving toward him, at first, unsure of the nature of the black object in his hand “but on the third [pull] when I came up there was absolutely no question in my mind – 100% that's a gun in his hand.” Valverde, eyes on Sgt. Dodge, moved slightly to his left. As Sgt. Dodge recalled the next instant,

So again he's pulling [something from his pocket] and I think it was on the third or maybe the fourth time, but it's, it's somewhere he's pulling. And the gun comes out and I actually now can see to only just the butt of it where I – I knew it was a gun based on what I saw, but then I actually saw it break his, his pants. At which point I'm now coming up [on target] – you know and he – again steps – he's, he's moving at the same time he's bringing it up. And his wrists – I can see wrist break. And right as wrist breaks I c-...I see the muzzle. And it was at that point that I started moving, because I knew I was going to engage him at this point. So I started moving – as soon as I saw his wrist break and I saw that muzzle, because it looked like it was coming up to me, and that's when I shot him.

Sgt. Dodge fired several shots in rapid succession. Valverde fell to the ground and Sgt. Dodge saw the pistol “pop out.” The threat was over.

Investigators identified seven citizens who had been in the area. None of them admitted to having seen the actual shooting; at least two heard loud booms or “bangs” and then gunshots. Witness S.C. was the driver of the FedEx truck. He was on a break and sitting in his truck in the parking lot. In a written statement, he told investigators he saw a Brown Tahoe enter the parking lot, leave and return a short while later. Shortly after the Tahoe re-entered the lot, a white pick-up truck, with a female driver (Milne) and a male passenger (Valverde) drove into the parking lot and parked

a couple [of] spaces from my truck. The male got out and went to speak to the male from the Tahoe at the front of the Tahoe. The younger male [Valverde] had a yellow backpack on his shoulders. I wasn't really paying that much attention to what they were doing. Then the white van and SUV came rolling

in and officers jumped out. I heard a flash grenade and commands of “Show me your hands!” and “Don’t move!” from the officers. The younger male moved to the east and the van and SUV blocked my view of him so I didn’t see what he may have done. I heard “Stop!” command and heard multiple gunshots (about 5 – 8). . . .

On the surveillance video, a woman can be seen walking a dog through the area of the incident just before the arrest team arrived. She was identified as Witness S.F. This witness provided written and video-taped statements to investigators in which she stated she had parked her car and, while in her car, saw two men, one, a “heavy set Hispanic male [Det. Rodriguez] and the other a “shorter, skinny Hispanic male [Valverde]” approach each other and shake hands. She stated she got out of her car and started walking past the men to the trail when she heard a loud boom and felt something impact her in the back. She looked back and saw “the guys in green standing there with guns.” Witness S.F. was not injured – there is no evidence establishing what struck her – it may have been a shard from the noise-flash device or simply the concussion produced by that instrument.<sup>5</sup>

Milnes, the woman who drove Valverde to the scene, provided a video-taped statement to investigators in which she disavowed any knowledge of Valverde’s activities and claimed that, while they were in the parking lot, she was texting with a friend and was not aware anything unusual was occurring until a person in a green uniform took her into custody at gunpoint.<sup>6</sup>

## **PHYSICAL AND FORENSIC EVIDENCE**

Valverde was armed with a .380 caliber Davidson Industries semi-automatic pistol. When recovered, it was loaded with one live round in the chamber and six additional rounds in the magazine. A Firearms Trace Summary conducted by the Federal Bureau of Alcohol, Tobacco, and Firearms and Explosives disclosed that on September 27, 2010, the pistol was listed as stolen by the Colorado Springs, Colorado Police Department.

Sgt. Dodge was armed with his handgun and with a DPD approved Colt AR-15 semi-automatic rifle, which is loaded with .223 caliber ammunition. (The handgun was not used in this incident.) This model AR-15 has a 30 round magazine and may be carried with an additional round in the chamber. Sgt. Dodge advised investigators he will occasionally carry the firearm with 29 cartridges in the magazine. When firearms examiners unloaded the rifle it was found to contain one live round in the chamber and 24 rounds in the magazine. Five spent .223 caliber cartridge casings were recovered at the scene, establishing Sgt. Dodge fired five times.

On July 3, 2014, Dr. Dawn Holmes of the Office of the Medical Examiner performed an autopsy on Valverde’s body. The cause of death was determined to be multiple gunshot wounds.

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<sup>5</sup> While we rarely comment on tactical issues, this operation plan – which was not one devised by the Denver police department’s Metro-Swat unit but, rather, by MGTF commanders – does give me cause for concern. The decision to execute the take down in a well-used park near a popular bike trail in the middle of the afternoon on a summer day could very well have resulted in injury or death to innocent by-standers. In fact, it did affect an innocent bystander, and that she and others were not injured is a tribute to the training and professionalism of Denver’s Metro-Swat bureau. I voiced my concerns with the MGTF Board.

<sup>6</sup> Milnes is a subject of an active federal investigation and we have no further comment about statements she made to investigators.

Valverde was struck by at least three rounds. One projectile was recovered from his chest at autopsy. Two others bullets passed through his body and were not recovered at the scene or at autopsy. X-rays showed the presence of “multiple minute lead fragments” in the chest, upper abdomen and “right upper extremity” with a fracture of the right humerus.

## 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. The evidence establishes that the shots fired by Sergeant Dodge caused the Valverde’s death. The determination of whether his conduct was criminal is primarily a question of legal justification.

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

- (1) Except as provided in subsection (2) of this section, a peace officer is justified in using reasonable and appropriate physical force upon another person when and to the extent that he reasonably believes it necessary:
  - (a) To effect an arrest or to prevent the escape from custody of an arrested person unless he knows that the arrest is unauthorized; or
  - (b) To defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force while effecting or attempting to affect such an arrest or while preventing or attempting to prevent such an escape.
  
- (2) A peace officer is justified in using **deadly physical force** upon another person ... only when he reasonably believes that it is necessary:
  - (a) **To defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force;**  
**or**
  - (b) To effect the arrest or to prevent the escape from custody of a person whom he reasonably believes:
    1. Has committed or attempted to commit a felony involving the use or threatened use of a deadly weapon; or
    2. **Is attempting to escape by the use of a deadly weapon; or**
    3. Otherwise indicates, except through a motor vehicle violation, that he is likely to endanger human life or to inflict serious bodily injury to another unless apprehended without delay.

In order to establish criminal responsibility for an officer knowingly or intentionally causing deadly 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 those requisite circumstances, or, if he did hold such a belief, that belief was, in light of all available facts, unreasonable.

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 question presented in this case is whether, at the instant Sgt. Dodge fired his rifle, he reasonably believed that level of force was necessary to defend against Valverde’s imminent use of deadly physical force.

## CONCLUSION

Based upon the facts presented here, Sgt. Dodge’s decision to use deadly physical force was objectively reasonable and, accordingly, must be considered justifiable under Colorado Law. Accordingly, I will not file criminal charges against the officers involved in this incident.

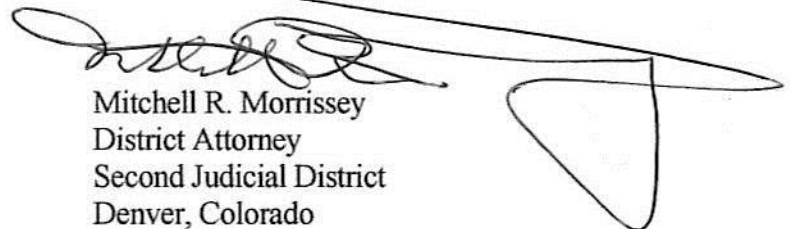
Metro-Swat tactical operations rely on speed, distraction and show of force. As a result, such operations rarely result in casualties – the tactics usually result in the subject’s arrest before he or she can react. However, Metro-Swat officers are trained to act quickly and decisively when a subject does

attempt to bring deadly physical force to bear, and they are equipped to assure -- as much as is possible -- that they will prevail in a deadly force encounter. In this case, Sgt. Dodge's quick actions assured neither that he, Det. Rodriguez nor any of the other Metro-Swat team members were injured or killed. It is clear from the witness statements, the physical evidence and the surveillance video that Sgt. Dodge acted to save his own life and the lives of the other officers approaching Valverde from Valverde's imminent use of a deadly weapon. As such, Sgt. Dodge is to be commended for his bravery and the leadership he displayed.

The attached document entitled Officer-Involved Shooting Protocol 2014 is incorporated by this reference. The following pertinent statement is in that document: "In most officer-involved shootings the filing decision and release of the brief decision letter will occur within two to three weeks of the incident, unless circumstances of a case require more time. The more compressed time frame will allow the Denver Police Department administrative investigation to move forward more quickly." In accordance with the protocol, the administrative and tactical aspects of the event may be addressed by the Manager of Safety and Chief of Police in their review and administrative decision letters they choose to issue.

In accordance with the protocol attached below, our file may be open for in person review in accordance with the provisions of the Officer-Involved Shooting Protocol 2014. The Denver Police Department is the custodian of record related to this case. All matters concerning the release of records related to administrative or civil actions are controlled by the Civil Liability Division of the Denver Police Department. As in every case we handle, any interested party may seek judicial review of our decision under C.R.S. § 16-5-209.

Very truly yours,



Mitchell R. Morrissey  
District Attorney  
Second Judicial District  
Denver, Colorado

cc: Sgt. Justin Dodge; Sean Olson, 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; Pat Phalen, Commander of Special Operations; Gregory Laberge, Crime Lab Commander; Lt. Ron Thomas, Commander of Internal Affairs; Capt. Gerald Whitman, Metro-Swat; Lieutenant Steve Addison, Major Crimes Division; Sgt. James Kukuris, Homicide; Sgt. Ed Leger, Homicide; Detective Jamie Castro, Homicide; Detective Martin Smith, Homicide; Scott Torpen, MGTf; Joseph Unser, MGTf; 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.





- Valverde's pick-up truck is on the left side of the photo, just to the right of the FedEx Truck.
- Det. Rodriguez's vehicle is shown on the right side of the photo, behind the small white sedan. (The white sedan is referred to by Det. Rodriguez in his statement.)
- The Metro-Swat vehicles are in the center of the photo.



These photos show the front of the small white sedan where Valverde's gun was recovered.



Close-up of pistol carried by Valverde.



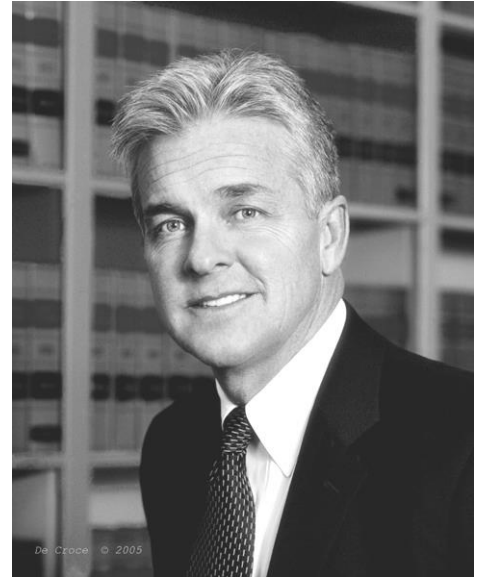
An investigator holds open the back-pack Valverde was carrying.  
(This backpack may be seen in the far right side of the first photo in this series.)



This photo is taken from the aerial surveillance video. Valverde is seen standing at the front of the white sedan. Det. Rodriguez is seen lying in front of his undercover vehicle. Sgt. Dodge is between the white sedan and the brown Tahoe. The white smoke in the left center of the photo emanated from the noise-flash diversionary device. Witness S.F. may be seen at the bottom right of the photo.



## OFFICER-INVOLVED SHOOTING PROTOCOL 2014



*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>7</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

<sup>7</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.

charges to be filed, the District Attorney must find that there is a reasonable likelihood that all of the elements of the crime charged can be proven beyond a reasonable doubt, unanimously, to twelve jurors, at trial, after considering reasonable defenses. If this standard is met, criminal charges will be filed.

One exception to the Denver District Attorney making the filing decision is if it is necessary to use the Denver Statutory Grand Jury. The District Attorney will consider it appropriate to refer the investigation to a grand jury when it is necessary for the successful completion of the investigation. It may be necessary in order to acquire access to essential witnesses or tangible evidence through the grand jury's subpoena power, or to take testimony from witnesses 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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