



DenverDA

Mitchell R. Morrissey, District Attorney - Second Judicial District

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October 1, 2014

Colonel Scott Hernandez
Chief, Colorado State Patrol
700 Kipling Street
Lakewood, CO 80215

RE: The officer-involved shooting at 4849 Bannock Street, Denver, CO, on August 8, 2014, by **Sgt. Matthew Beaudin** of the **Colorado State Patrol**, which caused the death of Austin David Uncles, DOB 2/25/88.

Dear Colonel Hernandez:

I have reviewed the investigation of the shooting on August 8, 2014, in which Sgt. Matthew Beaudin of the Colorado State Patrol fired one shot while engaged in a struggle to apprehend Austin David Uncles in Denver. I conclude that the use of deadly force by Sgt. Beaudin was defensive in nature and was justified under Colorado law because of Uncles' attempt to use deadly force while resisting arrest. Therefore, criminal charges related to this incident will not be filed by my office.¹

SUMMARY OF FACTS

Witnesses to this event were interviewed by Denver Police Department investigators assigned to the DPD homicide bureau. Sgt. Beaudin was also interviewed. Sgt. Beaudin's statement and the statements of two independent witnesses who had the best vantage points are mentioned below. While each of them provided different details, the two independent witnesses corroborate Sgt. Beaudin's account as it relates to the critical issue of Uncles holding a handgun and attempting to use it while resisting arrest.

Sgt. Matthew Beaudin: Sgt. Matthew Beaudin is a fifteen year veteran of the Colorado State Patrol, currently in the Investigative Service Section, with the rank of Sergeant. His assignment on August 8, 2014, was with the Auto Theft Unit of the State Patrol. He indicated that it was common for members of the Auto Theft Unit to patrol hotel parking lots looking for stolen cars and that was his reason for being in the parking lot of the Ramada Inn at 4849 Bannock Street in

¹ My decision is based on criminal law standards. It does not limit administrative actions by the Colorado State Patrol where non-criminal issues can be reviewed or civil actions where less stringent laws, rules and legal levels of proof apply. Judicial review of this decision may be sought under the provisions of C.R.S. 16-5-209.

Denver where the events of this shooting unfolded.²

His vehicle was an unmarked black sport utility vehicle equipped with cameras on its roof that photographed license plates to aid in searching for stolen cars. Sgt. Beaudin was wearing “plain clothes” (jeans and a gray polo shirt) but he wore a badge outside of his clothing, hanging on a chain around his neck. The badge was easily visible, displayed at chest level. Sgt. Beaudin was armed with a black Smith and Wesson .40 caliber semi-automatic pistol, model M & P 40. He also carried a bright yellow and black conducted electrical weapon manufactured by Taser, Inc.

In one of the parking spaces in the parking lot of the Ramada Inn, he saw a motorcycle displaying a temporary license plate. He said that at approximately 1:06 p.m. he “ran” the temporary license plate on his computer and learned that the motorcycle had been reported stolen. He checked the VIN number stamped on the motorcycle and confirmed that this motorcycle was the same motorcycle that was reported stolen. He also noticed that the ignition switch of the motorcycle was damaged.

Sgt. Beaudin called his dispatcher to report he had found this stolen motorcycle and to request that a tow truck be sent to tow it. Shortly thereafter, a police officer from the Longmont Police Department with information about the theft of the motorcycle called Sgt. Beaudin on his cell phone. That officer asked Sgt. Beaudin to swab the motorcycle before towing it in an effort to obtain DNA. Sgt. Beaudin agreed to do so and went to his vehicle to get the materials he needed for the swabbing. He intended to swab the handle grips of the motorcycle.

As Sgt. Beaudin returned his attention to the motorcycle, he saw a white male on the motorcycle, trying to start it. This person was later identified as Austin David Uncles. He was wearing a backpack. Sgt. Beaudin yelled at Uncles that he was a police officer and commanded Uncles to get off the motorcycle or he would “taze him”. Sgt. Beaudin described that Uncles first acted as if he would comply but then abruptly pushed the motorcycle down and began running away. Sgt. Beaudin again yelled at him: “Police” - “Stop” and that he would “taze him”. Despite this command, Uncles did not stop. Sgt. Beaudin deployed his Taser. Sgt. Beaudin believed the Taser prongs struck Uncle’s shoulder and the backpack. Uncles did not slow down, however, and continued running away.

Sgt. Beaudin chased Uncles through the parking lot eastbound toward Bannock Street. Uncles removed and dropped the backpack as he was running. At Bannock Street, Sgt. Beaudin caught Uncles and tackled him. After being taken to the ground, Uncles struggled with Sgt. Beaudin, who again identified himself as a police officer and commanded Uncles to stop resisting.

As they struggled, Sgt. Beaudin was positioned behind Uncles’ back with his arms wrapped

² While we rarely comment on tactical issues, Sgt. Beaudin’s failure to notify the Denver Police Department (DPD) that he was in Denver conducting an investigation and his further failure to inform the DPD that he had recovered the stolen vehicle – does give me cause for concern. His decision to proceed without backup, while dressed in plain clothes, presented a danger to himself and the civilians that later became involved in this incident. Had Sgt. Beaudin notified the DPD of his actions prior to his contact with Uncles, DPD could have provided backup and the subsequent events may well have been avoided. It is my understanding that the command of the Denver Police Department has addressed Sgt. Beaudin’s failure with the command of the Colorado State Patrol.

around Uncles' body, trying to prevent Uncles from using his arms and hands. Sgt. Beaudin noted that Uncles was reaching for something, or pulling at something, in his waistline. Uncles was also forcefully pushing his body weight back against Sgt. Beaudin, trying to overpower him to get free. Sgt. Beaudin described Uncles as fit and strong. He was not easy to contain and never relented.

A red Ford Mustang stopped close to where the struggle was occurring on Bannock Street. Sgt. Beaudin tried to summon help from the driver by showing his badge to indicate that he needed help. The driver of this car (later identified as Mr. Kelly Hummel) came to Sgt. Beaudin's aid.

Sgt. Beaudin told investigators that when Mr. Hummel approached, Uncles freed his arm and pulled a handgun that had been concealed in a holster in his waistband. Uncles rotated so that the muzzle pointed at Sgt. Beaudin but then Uncles directed the muzzle at Mr. Hummel.

Sgt. Beaudin said he believed Uncles was going to shoot him, Mr. Hummel, or both of them, so he disengaged from wrestling with Uncles in order to draw his own weapon. He described using his right hand to push down on Uncles and using his left hand to draw his weapon from its holster. He fired one shot into Uncles' back, directing his shot toward center mass.

Despite having been shot, Uncles continued to struggle. Sgt. Beaudin kept him on the ground and controlled his movements. When Uncles finally stopped struggling, Sgt. Beaudin directed someone to call 911. Sgt. Beaudin then began administering chest compressions in an effort to save Uncles' life. He continued these efforts until an ambulance arrived.

Frank Garza: On August 8, 2014, Mr. Frank Garza was working for Connolly's Towing. He had been directed to the parking lot of the Ramada Inn to provide towing services at the request of the Colorado State Patrol. He was wearing clothing with reflective yellow safety strips. He spoke to Sgt. Beaudin who told him to wait to tow the motorcycle until after Sgt. Beaudin swabbed it for DNA. Mr. Garza went to get tow straps from his truck. Moments later he noticed Sgt. Beaudin confronting a man who had gotten on the motorcycle and was trying to take it. Sgt. Beaudin announced that he was a police officer, told the man to get off the motorcycle, and pointed a yellow Taser at him. Mr. Garza said there was "no way" the man would not know that Sgt. Beaudin was a police officer since Sgt. Beaudin had announced this several times. The man, however, threw the bike down at the officer's feet and ran. Sgt. Beaudin fired the Taser but the prongs hit the man's backpack. Mr. Garza saw the officer chase the man through the parking lot and finally overtake him on Bannock Street. He confirmed the man was struggling with Sgt. Beaudin and "totally resisting." *"I believed he [Sgt. Beaudin] needed some help holding the guy down because the guy was just fighting."*

Since he believed Sgt. Beaudin needed help, Mr. Garza approached to help. He also saw that the man was tugging at something in his waist area. Mr. Garza described the moments just before the shooting:

"The guy is on his knees and still trying to pick the officer up while the officer is on his back. And he's trying to get up. And he's getting up I ran up to him and I get the guy and

*I push him.... The next thing, the officer pulled out his gun.
Next thing I know, the officer shot him right there... one shot.
Then I see the gun fall on the floor."*

Mr. Garza said the gun fell from Uncle's hand. He said the officer did nothing wrong.

Mr. Kelly Hummel: Mr. Kelly Hummel was driving a red Ford Mustang northbound on Bannock Street when he saw one man tackle another man near the southbound lane of traffic. He made a U-turn to see what was going on and to see who needed help. He stopped his car near them, facing them. One man was on the ground; the other man was on top of him. He said the man on the ground was strong and he could tell the man on top was losing the battle for control. The man on top looked at him and said: *"I'm a cop. I need help."* Mr. Hummel got out of his car and approached to help. He saw a badge hanging from the neck of the man on top.

Mr. Hummel went to the left side of the man on the ground [Uncles] and grabbed his left arm. While holding Uncles' left arm and trying to lean on him, he saw Uncles reach his right hand into his belt area and pull out a gun. Uncles then extended his right hand with the gun up to his left hand and cocked the gun with his left hand. Mr. Hummel said he did not know what the officer was doing at that moment. He described Uncles' next movement of the gun:

*"At that point, the gun went like this [demonstrating on video].
It was heading for my face. I heard a shot."*

Mr. Hummel said he immediately got up to his feet, not knowing if the shot had gone by his head or if he had perhaps been shot. *"The first thing I think is: do I feel burning?"* He saw the officer in a firing stance and then knew that the officer had fired. In his interview he expressed what he realized had just occurred: *"If that officer would've not shot, I would not be here."*

Surveillance video: Ramada Inn surveillance cameras directed toward the east show the struggle and shooting from a long distance. The video shows that Sgt. Beaudin chased Uncles for approximately 16 seconds before tackling him. They struggled on the ground for approximately 32 seconds before Sgt. Beaudin fired his weapon. The video confirms that Mr. Hummel came to the aid of Sgt. Beaudin after stopping his red Mustang. He was involved in the struggle on the ground with Uncles for approximately ten seconds before Sgt. Beaudin fired. Sgt. Beaudin fired just moments after Frank Garza stepped in to help.

Physical evidence. Physical evidence found on the pavement at the scene by crime scene investigators corroborates what Sgt. Beaudin described:

- Near the motorcycle where the chase began, evidence was found indicating a Taser had been discharged (wires, confetti and cartridge doors)
- The Taser was found on Bannock Street near the point of the struggle.
- Also on Bannock street, a black Sig Sauer 9 mm semi-automatic pistol, model P938, (Uncles' handgun) was found. This gun was loaded with 1 bullet in the chamber and 5 bullets in the magazine. The hammer was in the cocked/back position and the safety was on.
- Uncles' black holster was also found on Bannock Street.
- Only one fired .40 caliber cartridge case was recovered on Bannock Street. This is

consistent with Sgt. Beaudin having fired one time. This cartridge case was microscopically identified by the DPD crime lab as having been fired from Sgt. Beaudin's handgun.

A bullet was recovered from Uncles while he was being attended to in the ambulance. It was examined by the DPD crime lab and microscopically identified as having been fired by Sgt. Beaudin's handgun. No other bullets involved in this shooting were found.³

Cause of death: Dawn B. Holmes, M.D., performed an autopsy on Uncles and noted that the cause of his death was a gunshot wound to the back. The entrance wound was in the middle of Uncles' back to the right of his spine. The exit wound was in the middle of Uncles' chest. It was noted that the "manner of death is homicide."

911 was called at approximately 1:43 p.m.

LEGAL ANALYSIS

C.R.S. 18-1-707 specifies when the use of physical force and deadly physical force by a peace officer is legally justified. Subsections (1) and (2) provide:

- (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 effect 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 for a purpose specified in subsection (1) of this section 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 an arrest, or to prevent the escape from custody, of a person whom he reasonably believes:
 - (I) Has committed or attempted to commit a felony involving the use or threatened use of a deadly weapon; or
 - (II) Is attempting to escape by the use of a deadly weapon; or
 - (III) 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 Colorado, this statutory justification is an "affirmative defense" to a criminal charge. This means to obtain a conviction based on use of physical force, the prosecution must prove to a jury -- by proof beyond a reasonable doubt -- that the particular force was not justified.

³ Another spent bullet was recovered on the pavement on Bannock Street. However, because of the dirty and worn condition of this bullet, investigators suspected that it was unrelated to this shooting. The DPD crime lab examined this bullet and confirmed that it was unrelated to this shooting. The crime lab determined that this bullet is a .45 caliber bullet, which is not the size of ammunition used by the handguns of either Uncles (9 mm) or Sgt. Beaudin (.40 caliber).

Additionally, Colorado case law instructs that when examining the necessity for acting in self-defense or defense of others, a person is entitled to rely on “apparent necessity” so long as the conditions and circumstances are such that a person would reasonably believe that defensive action was necessary. See, *People v. La Voie*, 395 P.2d 1001 (1964); *Riley v. People*, 266 P.3d 1089 (Colo. 2011).

With these statutes and case law guiding my analysis, the question for me is whether the facts support or refute a claim that Sgt. Beaudin’s use of force was justified.

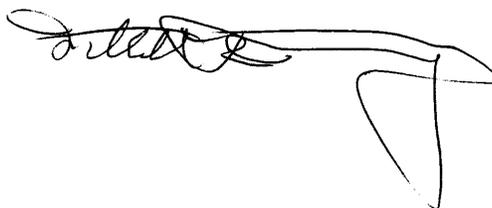
CONCLUSION

I conclude that this investigation clearly shows that Sgt. Beaudin had legal justification for using deadly physical force.

Mr. Hummel acted selflessly and courageously by helping Sgt. Beaudin struggle with Uncles. When Uncles was able to free his right hand and grab his handgun, Mr. Hummel was in jeopardy of being killed. Also, perhaps, were Sgt. Beaudin and Mr. Garza. During his interview, Mr. Hummel precisely and succinctly described the urgency and the justification for Sgt. Beaudin to fire his weapon: *“If he would’ve hesitated, I wouldn’t have been here.”*

Accordingly, criminal charges will not be filed against anyone involved in this matter.

Very truly yours,

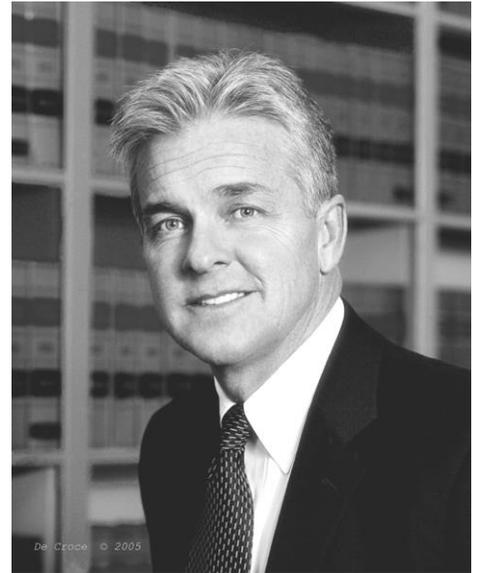
A handwritten signature in black ink, appearing to read "Mitchell R. Morrissey". The signature is written in a cursive style with a long horizontal stroke extending to the right, ending in a large, stylized loop.

Mitchell R. Morrissey
Denver District Attorney

cc: Sgt. Matthew Beaudin, Colorado State Patrol; Jamie Wynn, Counsel for Sgt. Beaudin; David Goddard, Counsel for Sgt. Beaudin; Michael Hancock, Denver Mayor; All Denver City Council Members; Scott Martinez, Denver City Attorney; Stephanie O’Malley, Executive Director; Robert White, Chief of Police DPD; David Quinones, Deputy Chief of Police DPD; Mary Beth Klee, Deputy Chief of Police DPD; Ron Saunier, Commander of Major Crimes Division DPD; Gregory Laberge, Denver Crime Lab Commander; Lieutenant Steve Addison, Major Crimes Division DPD; Sgt. James Kukuris, Homicide DPD; Sgt. Ed Leger, Homicide DPD; Detective Aaron Lopez, Homicide DPD; Detective Mark Crider, Homicide DPD; Lamar Sims, Senior Chief Deputy District Attorney; Doug Jackson, Senior Chief Deputy District Attorney; Nicholas E. Mitchell, Office of the Denver Independent Monitor, Stan Hilkey, Executive Director, Colorado Department of Public Safety.



OFFICER-INVOLVED SHOOTING PROTOCOL 2014



Mitchell R. Morrissey
Denver District Attorney

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

The Denver Police Department was created by the Charter of the City and County of Denver. Under the Charter, the police department is overseen by the Office of the Denver Manager of Safety, 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.¹ 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

¹ 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.

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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