



DenverDA

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February 12, 2014

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

RE: The investigation of the shooting of *Blas Bernardo Leroux* (D.O.B. 1/6/1979) by Denver Police **Technician Vincent Matthews**, Badge 95033, on January 13, 2014, outside the 7-Eleven Store located at 1490 Perry St., Denver, Colorado, which caused the death of Mr. Leroux on January 17, 2014.

Dear Chief White:

I have reviewed the investigation of the shooting of Blas Bernardo Leroux by Technician Vincent Matthews and my legal analysis of that incident has been completed. I conclude that under Colorado law Technician Matthews was justified in using deadly physical force directed at Mr. Leroux and that no criminal charges are appropriate.¹

SUMMARY OF FACTS

On the morning of January 17, 2014, Blas Leroux entered the 7-Eleven store at 1490 Perry Street. After several minutes inside the store, Leroux spoke to Elizabeth Quintero, the manager on duty, and said: "*Give me your keys*". When she refused, Leroux told her: "*I don't want to scare you, but I have a gun.*" This comment, along with other disturbing comments he made and the manner in which Leroux was holding his hand concealed in his pocket, made Ms. Quintero believe he had a gun. She told another worker, Mr. Krushal Grewal, to "*Stay away from this guy*" and she pressed the "emergency button" located behind the counter, hoping to summon police help. Mr. Grewal went into the back room and called 911.

A pastry vendor, Ms. Karen Kahmeyer, entered the store before police arrived. Ms.

¹ My decision, based on criminal law standards, does not limit administrative action by the Denver Police Department where non-criminal issues can be reviewed or civil actions where less stringent laws, rules and legal levels of proof apply.

Any interested party may seek judicial review of this decision under C.R.S. 16-5-209.

A description of the procedure used in the investigation of officer-involved shootings is attached to this letter.

Quintero warned Ms. Kahmeyer about Leroux and told her: *"I'm really scared because that guy says he has a gun"*.

Denver Police Officer Gregory Peoples arrived and entered the store. Leroux backed away from the officer and approached Ms. Kahmeyer who began to run away. Leroux chased after her and grabbed the back of her jacket. He began to hold her, forcibly controlling her with his left hand while concealing his right hand in his sweatshirt pocket, acting as if he were holding a handgun directed at her. Ms. Quintero and Mr. Grewal had also run away and were able to take refuge in the office and in the cooler of the store. At this point, Leroux was in an area of the store where shelving obstructed the view that Officer Peoples had of him. Concerned that Leroux may have a gun and that the hostage was in danger, Officer Peoples called for assistance. Other officers quickly arrived and entered the store. However, the officers decided to back out of the store to not force a confrontation with Leroux at that point.

Ms. Kahmeyer said that she struggled to get away from Leroux's grasp but he pressed something against her back and said: *"That's the gun in your back, so you better stop. You better stop or I will shoot."* Leroux forced her to move around the store for several minutes and also banged on the door to the office where Ms. Quintero had gone, and said: *"Open up or I'll shoot her."* Ms. Kahmeyer begged Leroux to let her go and not to hurt her. She believed he did have a gun held to her back. Leroux also said several times: *"Today, I am going to die."* Ms. Kahmeyer later told investigators that she feared for her life the whole time.

At one point, Leroux took Ms. Kahmeyer's keys and told her they were going to go outside together and she was going to drive them away in her van. As they walked to the front doors of the store he held her close in front of him and instructed her to: *"Stay in front of me."* He forced her to go out through the doors while he was directly behind her, holding her close and using her as a shield between himself and police officers who were outside in the parking lot.

Much of this episode was captured on surveillance camera at the 7-Eleven store. The video confirms the witness accounts of the behavior of Leroux. He can be seen inside the store forcibly holding Ms. Kahmeyer and controlling her movements. The video shows Leroux using Ms. Kahmeyer as a "human shield" while he kept his right hand in his pocket, simulating holding a handgun to Ms. Kahmeyer's back.

It is clear from the video that Leroux was in the act of kidnapping Ms. Kahmeyer as he moved her forcibly out of the store against her will. After going through the glass doors, Leroux turned Ms. Kahmeyer to the right. Police officers in the parking lot told him to put his hands up and to let her go. Ms. Kahmeyer put her hands up. She apparently struggled to get some distance from him but Leroux continued to hold her. It was at this point that one gunshot was fired, striking Leroux in the neck. Leroux immediately fell backward and Ms. Kahmeyer ran to an officer.

At the scene, it was determined that Leroux had not been carrying a weapon as he had pretended. Leroux received emergency treatment at Denver Health Medical Center but died on January 17, 2014, as a result of the gunshot wound. Toxicology tests on Leroux's blood indicated that he had amphetamine and methamphetamine in his system. Dawn B. Holmes,

M.D., Staff Pathologist at the Office of the Medical Examiner performed an autopsy on Leroux's body and determined that the cause of death was "due to a gunshot wound to the neck. The manner of death is homicide."

Leroux had been shot by Technician Vincent Matthews of the Denver Police Department Metro SWAT Unit. Technician Matthews was interviewed at DPD headquarters after the shooting. He indicated he was armed with an M4 .223 caliber rifle loaded with ammunition issued by the Denver Police Department. He had trained extensively with this rifle and was experienced and proficient with it. He had also received training in hostage rescue and tactics.

Technician Matthews took a position next to a white van that was parked just a few feet to the west and north of the entrance doors to the 7-Eleven. From this position he could use the van as cover and he could see clearly into the store. He saw the actions of Leroux holding Ms. Kahmeyer close to him as a human shield. He also observed that all hand movements Leroux made were with his left hand. Leroux kept his right hand concealed and held close against Ms. Kahmeyer as if he was holding a gun to her body. Technician Matthews said: *"That caused me to think ... that he does have a weapon. He's got it right on her."*

When Leroux came out of the store with the hostage in front of him, he looked at Technician Matthews and said: *"Get out of here."* Technician Matthews told him: *"I can't leave. Put your hands up. Let her go."* Leroux continued to tell the officers to: *"Clear out."* Ms. Kahmeyer told Leroux: *"They're not going to leave."*

Technician Matthews explained that his primary mission was to protect the hostage and to stop Leroux so that he could not harm her. SWAT members were not going to allow Leroux to leave with the hostage. Technician Matthews explained that he feared Leroux could pull the trigger at any instant and kill Ms. Kahmeyer.

After Leroux turned to his right with Ms. Kahmeyer in front of him, Technician Matthews had a clear shot and felt there were no other options. He fired one shot. He said in his interview later: *"At the point that I took the shot, I really believed that he was going to kill her."*

The video evidence of this episode is entirely consistent with the description given by Technician Matthews. According to the 7-Eleven surveillance camera clocks, Leroux entered the store at approximately 8:10 a.m. Officer Peoples entered the store at 8:38 a.m. Leroux grabbed Ms. Kahmeyer and held her hostage from this point until approximately 9:27 a.m. when the shot was fired by Technician Matthews.

LEGAL ANALYSIS

While intentionally shooting and causing the death of another person is generally prohibited as a crime of murder in Colorado, there are certain circumstances in which this behavior may be considered to be *justified* and not unlawful.²

² The reference in the Autopsy Report that "the manner of death is homicide" has no bearing on the issue of whether causing the death was legally justified or not.

C.R.S. 18-1-704 is a Colorado statute that describes the legal justification for using deadly physical force in defense of another person. As pertinent here, it provides:

- (1) Except as provided in subsections (2) and (3) of this section, a person is justified in using physical force upon another person in order to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by that other person, and he may use a degree of force which he reasonably believes to be necessary for that purpose.
- (2) **Deadly physical force** may be used only if a person reasonably believes a lesser degree of force is inadequate and:
 - (a) The actor has reasonable ground to believe, and does believe, that he or another person is in imminent danger of being killed or of receiving great bodily injury; or
 - (b) ...
 - (c) *The other person is committing or reasonably appears about to commit kidnapping as defined in section 18-3-301 or 18-3-302*

C.R.S. 18-1-707 describes the legal justification for a peace officer's use of deadly force while effecting an arrest or preventing an escape. As pertinent, it states:

- (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
 - (c) 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.

Regarding the issue of justification, the prosecution in a trial has the burden to prove that justification for the use of deadly physical force did not exist when the deadly force was used. Lack of justification, like other elements of a crime, must be proved beyond a reasonable doubt.

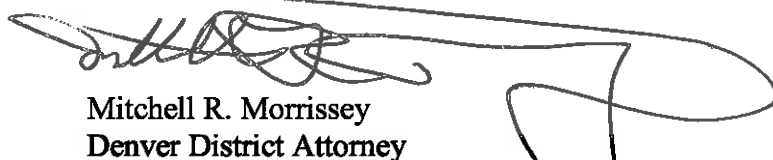
Accordingly, in making the decision whether to file criminal charges here, the essential question I must consider is: *Would a jury believe beyond a reasonable doubt that Technician Matthews lacked legal justification for using deadly physical force against Mr. Leroux?*

CONCLUSION

As to that question, I conclude the evidence clearly shows that Technician Matthews did have legal justification for using deadly physical force. I am certain a jury of Denver citizens would find, as I do, that Technician Matthews was justified in firing the shot that struck Mr. Leroux. Accordingly, no criminal charges will be filed as a result of this shooting.

As can be seen on the videos of this incident, Mr. Leroux was in the act of kidnapping Ms. Kahmeyer. For almost fifty minutes in the store and up to the point of the shooting, Mr. Leroux terrorized Ms. Kahmeyer and convinced her and others that he was armed with a handgun. While this was a senseless event brought on by Mr. Leroux which ended tragically for him and his family, it was responded to appropriately, skillfully and heroically by Technician Matthews and the Denver Police Department.

Very truly yours,



Mitchell R. Morrissey
Denver District Attorney

cc: Technician Vincent Matthews; Sean Olson, Attorney at Law; Michael Hancock, Mayor; All City Council Members; Scott Martinez, Denver City Attorney; Stephanie O'Malley, Executive Director; David Quinones, Deputy Chief of Police; Mary Beth Klee, Deputy Chief of Police; Ron Saunier, Commander of Major Crimes Division; Gerald Whitman, SWAT Commander; Paul Pazen, District 1 Commander; Gregory Laberge, Crime Lab Commander; Ron Thomas, Commander of Internal Affairs; Lieutenant Steve Addison, Major Crimes Division; Lieutenant James Haney, Major Crimes Division; Sgt. James Kukuris, Homicide; Sgt. Ed Leger, Homicide; Detective Randy Denison, Homicide; Detective Mark Crider, Homicide; Lamar Sims, Senior Chief Deputy District Attorney; Doug Jackson, Senior Chief Deputy District Attorney; Henry R. Reeve, General Counsel, Chief Deputy District Attorney; Nicholas E. Mitchell, Office of the Independent Monitor.



**Mitchell R.
Morrissey**

OFFICER-INVOLVED SHOOTING PROTOCOL 2014

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

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

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.

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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