



DenverDA

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June 16, 2015

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

RE: Investigation of the shooting and wounding of John Thomas Clark, DOB 11/2/72, DPD #808911, in which Armando Cruz, 97038, fired a shot on March 20, 2015, at 7800 East Smith Road, Denver, Colorado.

Dear Chief White:

The investigation and legal analysis of the shooting and wounding of John Thomas Clark, in which Officer Armando Cruz discharged his weapon, has been completed. I conclude that under applicable Colorado law no criminal charges are fileable against Officer Cruz. 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. A description of the procedure used in the investigation of this officer-involved shooting and the applicable Colorado law is attached to this letter.

STATEMENT OF FACTS

On March 3, 2013, John Thomas Clark ("Clark") was charged in Arapahoe County District Court with numerous felonies, including Sexual Assault on a Child (Position of Trust), Sexual Assault on a Child (Pattern of Conduct), Incest, and being an Habitual Criminal (case # 13CR546). Clark was released on bond and the case was set for trial. Court records reflect that on January 16, 2015, Clark appeared in court and entered into a plea disposition in which he pleaded guilty to added counts of Sexual Exploitation of a Child, a class 3 felony, and Child Abuse, a class 4 felony. In return for Clark's plea to these charges, all other charges were dismissed. The sentencing hearing was scheduled for March 13, 2015, and the trial judge allowed Clark to remain free on bond until the sentencing date.¹ On March 13, 2015, Clark failed to appear for the sentencing hearing and a warrant was issued for his arrest.

Clark and his wife, Gloria Gamez DeClark (the mother of his victims), had separated in 2012, but remained in intermittent contact. Ms. DeClark provided a video-taped statement to Denver homicide Detective Eric Bueno, who is fluent in Spanish. Det. Bueno reported Ms. DeClark told him

¹ It appears the plea negotiation included a stipulated ten year sentence.

that Clark had been homeless for some time and that for several days before the shooting he had been living in her car, a green Jeep Liberty (the “Jeep”). During this time period, Ms. DeClark learned Clark had failed to appear in court and that a warrant had been issued for his arrest. The night before this incident, Clark called Ms. DeClark and they spoke for some time. During this conversation, he told her he was staying at the Wal-Mart parking lot at Quebec and I-70.

On the morning of March 20, 2015, Ms. DeClark went to the area of Quebec and I-70, looking for her car. She finally saw the Jeep on the north side of the Wal-Mart parking lot. As she did not wish to see or speak with Clark, she parked on the south side of the parking lot and called the police.

Denver Police Computer Aided Dispatch (“CAD”) records show Ms. DeClark’s call came in at 10:48 a.m. Ms. DeClark is a Spanish speaker and there was some confusion in the initial translation. CAD records show the call-taker was told Clark was in a 2002 green Jeep Liberty and was parked “on the [north side] where the park[ing] lot of Wal-Mart ends” and that Clark was possibly asleep inside the Jeep. A CAD print-out entry made at 10:52 reflects:

SUSP[ECT] TOLD COMP[LAINANT] IF THE [OFFICERS] TRIED TO CATCH HIM HE WOULD LET THE OFCS KILL HIM – SUSPECT IS CALLERS HUSBAND AND HE SEX ASLT’D THEIR DAUGHTER ** SMOKES MARIJUANA UNK WEAPONS – SHE WAS TOLD HE IS POSS BI-POLR.

Two police units were dispatched. Car 511B, driven by Officer Cruz was the first car dispatched and Car 512B, driven by Officer Rich Lavenhagen, 06023, was assigned to cover Officer Cruz.² Both officers were dressed in blue DPD uniforms. Officer Cruz was driving a fully marked Crown Victoria sedan; Officer Lavenhagen was driving a fully marked Ford Explorer. Both officers were receiving updated information from the dispatcher, over the air and on their on-board computers, as they drove to the Wal-Mart. This information included the following broadcast:

Dispatcher: Cars on that attempt pick-up at the Wal-Mart, just be aware that this party might try to attempt suicide by cop. Just so you’re aware.

Car on scene: We’re clear. Hold the air.

Dispatcher: Holding the air. Time’s 10:59

The officers were responding from separate locations. Officer Lavenhagen arrived on the scene first, spotted the Jeep and backed off while he awaited Officer Cruz. As he waited, additional information “was coming in.” He recalled the dispatcher advising that the suspect’s wife had stated “he wouldn’t go willingly – that he wanted to commit suicide by cop.” Officer Lavenhagen was unable to remember the specific words used, but he told investigators he advised Officer Cruz, by radio, that the suspect had made statements about “shooting it out with the cops and suicide by cops.”

Officer Lavanhagen estimated Officer Cruz arrived to cover him about 90 seconds after he arrived on scene. The two officers pulled in behind the Jeep. As Officer Cruz recalled it, as he pulled up he saw Officer Lavenhagen’s police car pull up and park behind the Jeep, “canted to the right” and he then pulled in behind the Jeep and parked, “canted on the left side” of the Jeep.

² While each officer was assigned a solo car, Officer Cruz had a civilian rider that morning – his father, Carl Swanson.

As Officer Lavenhagen explained their positioning,³

if [Clark] throws it in reverse and tries to escape – I’ve already thought this through, I’m like, I’m not sure if a sergeant is going to authorize a chase on a [unintelligible] sex assault on a child type thing – I do not want him leaving. If he leaves, he gonna have to go forward. Go over the curb, through a pretty good sized ditch, and then out on to Smith Road.

Both officers got out of their respective vehicles and approached the Jeep. Officer Lavenhagen walked to the passenger’s side and Officer Cruz the driver’s side.⁴ As Officer Cruz approached the driver’s side he was unable to see into the back or side windows because they appeared to be blocked by cardboard or some other material. Nothing was blocking the passenger’s side front window and Officer Lavenhagen was able to see inside. He told Officer Cruz that he was he was able to see into the Jeep from the passenger’s side front window and that the driver appeared to be asleep in the vehicle. Officer Cruz moved around the back of the car and took a position next to Officer Lavenhagen. Officer Cruz looked in the Jeep and saw “a person inside, sitting behind the driver’s wheel, well, not behind - sitting in the driver’s seat, behind the wheel, reclined.” Officer Cruz also formed the opinion that the party was asleep.⁵

Officer Lavenhagen started banging on the window while making statements to the effect of “Hey! Denver Police! Wake up.” Clark woke up and sat up. Officer Lavenhagen ordered him to unlock the door and he complied. The officer then ordered Clark to put his hands on the steering wheel and, again, he complied. Officer Lavenhagen holstered his handgun while Officer Cruz kept his handgun trained on Clark. Officer Lavenhagen then reached into the passenger compartment with his right hand to grab Clark’s hand which was on the steering wheel and

He immediately does that [demonstrating a quick movement, bringing the right hand to the waist.] and he buries his right hand in his crotch area, belt area. And, um, I believe I went back to “lethal” at that time -- drew my gun. And [Officer Cruz] and I were screaming at him, “Show us your hands! Show us your hands!” And I remember [Officer Cruz] screaming, “Give it up!” “Show us your hands!” Show us your hands!” And he’s doing this [demonstrating Clark reaching into the crotch/belt area and acting as if he was tugging or pulling at something.] And he’s looking at us.

Officer Lavenhagen recalled he told Officer Cruz to “stay lethal” and Officer Cruz responded, “TAZE him!” Officer Lavenhagen told investigators he was mindful that Clark was wearing a big down jacket and he replied, “I can’t TAZE him, he’s got the heavy jacket on.” Officer Lavenhagen then pulled out his “O.C.” spray⁶ and deployed it while Officer Cruz continued to hold Clark at gunpoint. As Officer Lavenhagen recalled it, “I gave the guy a big long burst of it. And he’s still doing this [mimicking reaching into the waist area] but he starts

³ Both Officer Cruz and Officer Lavenhagen provided video-recorded statements to investigators within hours of the incident. As is provided for in our protocol, Officer Cruz – as an officer who had fired his handgun - was sworn by a notary public before he gave his statement.

⁴ The officers’ description of their approach to the Jeep is corroborated by the uninvolved citizen witnesses and the Wal-Mart surveillance video as discussed below.

⁵ Both officers told investigators that they had each viewed a picture of Clark posted on their MDTs and each confirmed the person he saw in the Jeep was the wanted party.

⁶ Commonly referred to as “mace”, “O.C.” ([oleoresin capsicum](#)) or “pepper” spray is an aerosol irritant that causes the eyes to water and close, rendering a subject less likely (or willing) to resist. It is considered a less lethal force option.

doing this [showing how Clark leaned farther away from the officers] trying to get away from the spray.”

Other than leaning away from the O.C. spray, Clark gave no indication that the spray affected him.⁷ The officers continued to order him to show his hands and, after a few more commands, Officer Lavenhagen reached back into the passenger compartment and, in his words, “I just give the entire can. And the can gets to the point where it’s just sputtering.” Officer Lavenhagen was also pressing down on the “help” button on his police radio.

The officers continued issuing commands that Clark show his hands. Officer Cruz said Clark looked back at them and, at some point, made “a jerk” with his right hand – the hand inside his coat – which Officer Cruz believed was Clark grabbing a weapon. “I thought for sure that the way he was acting, he wouldn’t take his hand out of his coat, that he had a gun.” Officer Lavenhagen decided he might have success extricating Clark from the driver’s side. He told Officer Cruz to “cover him” and he moved around the back of the Jeep and approached the driver’s side window. Officer Cruz described Clark’s actions at this time:

And during the time that [Officer Lavenhagen] was over there, now the suspect turns and looks at me and, straight looking, just starts saying ‘Kill me! Kill me!’ And I’m yelling, “No! No! Show us your hands! Show us your hands!” And he just kept repeating, “Kill me now. Kill me now.”

When he got to the driver’s side window, Officer Lavenhagen took out his baton, shattered the window and, using the baton, removed the cardboard. He opened the driver’s door, reached into the car and grabbed Clark by the left arm and started to twist the arm while simultaneously grabbing the down jacket at the left shoulder area to

Pull him out of the car. And [Officer Cruz] screams, “Gun! Gun! He’s going for it!” And I can look down. And I can see down the front of this guy’s big heavy jacket. And I see a silver metal object coming out. And I dove. And if you’re gonna ask me if I hit the ground – I have no idea. I remember diving backwards, trying to get out of the way, and I hear the pop [of a gunshot] and my right ear starts ringing, it goes numb. Um, and I yelled something at [Officer Cruz] like, “does he still have the gun?” And [Officer Cruz] is like “he’s still got it! He’s still got it.”⁸

Officer Cruz heard the glass break when Officer Lavenhagen breached the driver’s side window and he then saw the door open and he could see his partner on the other side of the car through the passenger compartment. Officer Cruz saw Officer Lavenhagen grab Clark’s left hand in an attempt to pull him from the vehicle and take him into custody.

⁷ Officer Cruz told investigators the only impact the spray had was Clark “just turned his head, slow, away from the pepper spray, looking at, uh, outside the driver’s side window.”

⁸ The police radio traffic corroborates the statements of the officers. Shortly after they arrived on scene, one of the officers is heard over the air:

Car on scene: He won’t take his hand out of his pocket. He’s going for a gun.

A simulcast alert tone is broadcast

Dispatcher: Officers calling for help, 7800 Smith Road, north end of the parking lot. Party with a gun.

Other police cars advise the radio dispatcher they are responding, “Code 10.” Then, over the air,

Car on scene: Keep your hands! Keep your hands!

Another alert tone is broadcast:

Dispatcher: Additional cars 7800 Smith Road. North side of the Wal-Mart.

Car on scene: He’s not complying!

The suspect pulled back - went back into the position of reclining – laying down. And then the suspect came back up, and during this whole time he kept that, that right hand inside of his, uh, jacket. And then now, when he came up at me, then all of a sudden, out of nowhere, like he got his courage up, and he came, he came out [demonstrating] and there was a silver, what appeared to be a barrel of gun, that's when I yelled "Gun!" and then I fired one shot, striking the suspect.

In answer to a question from investigators, Officer Cruz stated that while the officers were ordering Clark to show his hands, he "kept hesitating and jerking, and every time he did that, I'm thinking 'this is it, this is it' . . ." When Clark made the final motion that Officer Cruz characterized as Clark mustering his courage, "I thought either [Officer Lavenhagen] was getting ready to get shot, or he was gonna shoot and kill me."

When Officer Lavenhagen opened the car door, he grabbed Clark with both hands and pulled him out of the Jeep and onto the ground, face down and jumped on top of him so he could hold him down and pin his right arm down so that he would be unable to wield his weapon. As Officer Lavenhagen held Clark, Officer Jay Rajala ran up and assisted him. Officer Lavenhagen was now able to use both of his hands on Clark's right arm so as to control it "because I'm worried about that gun." He told investigators he

Pull[ed] his arm out and this silver and blue pipe, I dunno know if it's a meth pipe or a crack pipe or a marijuana pipe, but it's probably 9, 10 inches long, comes flying out and goes shooting across the ground.

Three civilians saw at least part of the shooting, Carl Swanson and husband and wife Phillip and Maria Martinez. All three witnesses provided gave video recorded statements to investigators. In addition, investigators determined that one of Wal-Mart's security cameras was trained at the parking lot. It recorded the incident, however, the camera was at some distance and the video lacks clarity.

Mr. and Mrs. Martinez corroborated the officer's description of their initial approach. Ms. Martinez said when she saw one of the officers draw his pistol after getting out of the car, she turned and walked back toward the store. She stated that she did not see the actual shooting but was able to hear the officers yelling "put your hands where I can see 'em" and "don't do that! Put your hands where we can see them." As she recalled it, the officers stated, several times, "don't do that! Put your hands where we can see them." She thought she heard one of the officers say something along the lines of, "'We can shoot you,' or something, like trying to advise the person 'I don't want to shoot you,' or something."

And then I heard a, a bang. Like I thought, I thought maybe they might have hit the window of the vehicle [with some object], 'cause it was a pretty loud bang. And then, shortly after that, there was a gunfire, a gunshot – one gunshot.

Mr. Martinez told investigators when the officers first approached the Jeep he formed the opinion that the officers were trying to wake the occupant because "at first they were knocking on the windows." The officers' voices then got louder "and that's when I stepped back." He stated both officers had their guns out of their holsters and he heard them saying "get out! Get out!" And then he heard one of the officers say "don't do that or I'll shoot!" And then he says, "Get your hands out of your pockets!" As he described the incident, the situation escalated "pretty fast . . . and then one of them comes around to the driver's side and starts smashing the window to get him out." Mr. Martinez could not see what the officer was using to break the

window but he heard the window break “and then, after that, pretty much almost instantly, that’s when the gun went off.” Mr. Martinez heard, but did not see the shooting. He stated that the officer on the passenger side of the Jeep must have discharged his weapon because the Jeep blocked his view of that side. As he put it “I just heard the gunshot, I didn’t see [a] flash or anything.” Mr. Martinez told investigators that when he heard the gunshot, he turned and went back to the store.

Carl Swanson also gave a video-recorded statement to investigators. He recalled that “just as they arrived on the scene, the dispatcher ‘said that the person in the car might want to commit suicide by policeman.’” Mr. Swanson initially remained in the police car but stated that he was not able to see or hear much because the officers were on the passenger side of the Jeep. This changed shortly after they arrived -

all of a sudden [the officers] started shouting to, uh, “don’t do that! Don’t do that! Lay your hands – take your hands out of your pockets!” Or something of that sort, you know, but they kept repeating that, over and over again, “not to do that! Don’t move!” And, uh, you know, just kept repeating that.

Mr. Swanson told investigators he heard both officers shouting and then saw Officer Lavenhagen walk around the back of the Jeep, approach the driver’s door and “smash[ed] out the driver’s side window.” At this point, Mr. Swanson was able to see “there was, indeed, like cardboard or something stuck on that window.” Officer Lavenhagen then indicated to Mr. Swanson that he should move away from the area so Mr. Swanson started walking toward the Wal-Mart building. He stated he had not walked more than “20 or 30 feet” away from the police car when he “heard the shot.” He turned back and saw Officer Cruz “standing there, you know, pointing his gun, still.”⁹

Investigators contacted several other potential witnesses. One, Shirley Wilson, stated she saw the officers approach the Jeep and heard “the officers repeated [tell] the person in the vehicle to put hands up.” She stated the voices started to get louder and she backed away due to this escalation. She told investigators that she heard the gunshot but did not see what was happening at that moment. Investigators obtained written statements from Ms. Wilson and from other citizens, most of whom were Wal-Mart security officers and employees who arrived after the shot was fired.

The Wal-Mart surveillance video which captures the north parking lot was obtained by investigators. Clark’s vehicle is seen at the top right corner of the video but it is not clearly distinguishable. One can see the police cars arrive in the manner both officers and witnesses described. The camera is too far away to clearly record any specific actions taken by the officers at the car but the video corroborative of the sequence of events described by the witnesses and officers.

On March 23, 2017, Denver homicide detectives Michael Martinez and Eric Bueno met with Clark at the Denver Downtown Correctional Facility. Clark agreed to give a statement which was audio recorded. Clark corroborated the information provided by his wife and admitted that he had been asleep in the Jeep and was wakened by the police officers. He also told the detectives he “might have” told his wife he was considering suicide. More importantly

⁹ Mr. Swanson and Mr. and Ms. Martinez can all be seen on the surveillance video, moving much as they describe.

for purposes of this investigation, he admitted to placing his right hand inside his jacket when the officers opened the passenger side door. He stated that he made a “split second” decision when the officers contacted him.

Question: How were you going to get the officers to shoot you?
 Answer: Pro'lly exactly the way that I did.
 Question: And would you explain your actions to us. So we're clear about what you-
 Answer: He told me to put my hands up and I started to put my hands up. [He] told me to unlock the doors. I unlocked the doors and then, I dunno, I think they opened up the one door. And then they wanted me to open up the other door and instead of opening up the other door, I put my hand in my, my jacket.
 Question: And what was the reason for putting your hand in your jacket?
 Answer: Simulate having a weapon. I knew that's what they'd think.

In answer to a follow-up question, Clark indicated that he felt his actions would lead the officers to believe he had gun.¹⁰ He added later in the conversation that “actually, I think at one point in time I actually looked right at ‘em and told ‘em, ‘shoot me.’ ” Still later, Clark said he had told people in the ambulance, “[they] wasn’t supposed to shoot me in the arm -- they was supposed to shoot me in the head. That was that plan.”¹¹

Officer Cruz was armed with a 45 caliber Springfield Model XD. Officer Cruz carried his weapon with a live round in the chamber and each of his magazines with 12 rounds. His handgun, therefore, was loaded with 13 rounds of DPD issued ammunition. Firearms examiners confirmed Officer Cruz fired once. Although Clark’s medical records are not available to us due to his privacy protections, he told Det. Martinez the bullet fired by an officer entered and passed through his right arm and broke bones in both shoulders.

LEGAL ANALYSIS

Criminal liability is established in Colorado only if it is proved beyond a reasonable doubt that someone has committed all of the elements of an offense defined by Colorado statute, and it is proved beyond a reasonable doubt that the offense was committed without any statutorily-recognized justification or excuse. While knowingly or intentionally shooting another human being is generally prohibited as assault or homicide in Colorado, the Criminal Code specifies certain circumstances in which the use of physical force or deadly physical force by a peace officer is justified. As the evidence establishes that Clark’s injuries were caused by the shot fired by Officer Cruz, the determination of whether his conduct was criminal is primarily a question of legal justification.

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

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

¹⁰ Clark denied having anything which could have been mistaken for a weapon. The pipe shown in photos on page 12 belies this assertion.

¹¹ Officer Rajala rode in the ambulance with Clark and the paramedics. He told investigators that at one point Clark stated “I wanted the cops to shoot me in the head.”

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

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

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

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

or

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

1. Has committed or attempted to commit a felony involving the use or threatened use of a deadly weapon; or
2. Is attempting to escape by the use of a deadly weapon; or
3. Otherwise indicates, except through a motor vehicle violation, that he is likely to endanger human life or to inflict serious bodily injury to another unless apprehended without delay.

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

“**Deadly weapon**” means any of the following which in the manner it is used or intended to be used is capable of producing death or serious bodily injury: (I) A **firearm**, whether loaded or unloaded; (II) A knife; (III) A bludgeon; or (IV) Any other weapon, device, instrument, material, or substance, whether animate or inanimate.¹²

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

As Clark survived his wounds, the issue in this case revolves around the question whether Officer Cruz’s use of physical force was justifiable. The test is whether the nature and degree of force used is objectively reasonable after considering the totality of the circumstances

Officers are entitled to rely on the doctrine of “apparent necessity” so long as the conditions and circumstances are such that a person would reasonably believe, erroneously or not, that action was necessary. See, *People v. La Voie*, 155 Colo. 551, 395 P.2d 1001 (1964), *People v. Silva*, 987 P.2d 909 (Colo. App. 1999). It is immaterial whether the suspect was actually trying to injure the officers or another, so long as a reasonable person, under like conditions and circumstances, would believe the appearances were sufficient to require the action taken.

It is fundamental that the law of self-defense, which is emphatically a law of necessity, involves the question of one’s right to act upon appearances, even though such appearances may prove to have been deceptive; also the question of whether the danger is actual or only

apparent, and as well the fact that danger is not necessary, in order to justify one in acting in self-defense. Apparent necessity, if well-grounded and of such a character as to appeal to a reasonable person, under like conditions and circumstances, as being sufficient to require action, justifies the application of the doctrine of self-defense to the same extent as actual or real necessity. *Young v. People*, 107 P. 274, (Colo. 1910).

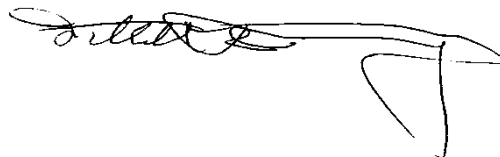
The question presented in this case is whether, at the instant Officer Cruz fired his pistol, he reasonably believed that level of force was necessary to arrest Clark or to defend himself from Clark. In order to establish criminal responsibility when an officer knowingly or intentionally causes injury to another, the state must prove beyond a reasonable doubt that the officer who caused the injury either did not really believe the force used was necessary, or, if he did hold such belief, that belief was, in light of all available facts, objectively *unreasonable*.

CONCLUSION

Officers Cruz and Lavenhagen were dispatched to pick-up a wanted party. They were aware that Clark was a convicted felon and that there was a valid warrant for his arrest. They were also advised that Clark was considering “suicide by cop.” However it was unclear whether he was armed. When they arrived on scene, they found Clark in a vehicle with many of the windows covered or obscured. Based upon these facts, the decision by both officers to draw their pistols was reasonable and appropriate. The officers were able to contact Clark and made reasonable efforts to get him out of his car. When he refused to comply and moved his hand in a way which led both officers to believe he was armed (and which he told investigators was designed to lead them to that conclusion), the officers considered different “less lethal” options and then deployed the option they felt would be most efficacious – O.C. spray. It was only after Clark pulled his hand from beneath his jacket, displaying a silver cylindrical object which simulated the barrel of a handgun, that Officer Cruz discharged his handgun. Officer Cruz did so because he believed Clark was about to shoot him. Officer Cruz’s belief that Clark was armed was, based upon the totality of the circumstances, objectively reasonable.¹³ His response of firing his weapon at Clark was also objectively reasonable, and the physical force used was appropriate. He fired one shot, effectively stopped the threat, and ceased firing. Officer Cruz acted to defend himself and Officer Lavenhagen from what he reasonably believed was an attempt by Clark to use deadly physical force against both officers. His use of force is, therefore, justified under C.R.S. § 18-1-707.

The Denver Police Department is the custodian of record related to this case. All matters concerning the release of records related to administrative or civil actions are controlled by the Civil Liability Division of the Denver Police Department. As in every case we handle, any interested party may seek judicial review of our decision under C.R.S. § 16-5-209.

Very truly yours,



Mitchell R. Morrissey
Denver District Attorney

¹³ Officer Lavenhagen also saw Clark pulling an object from beneath his jacket. The question he yelled to Officer Cruz, “does he still have the gun?”, indicates he, too, believed Clark was armed.

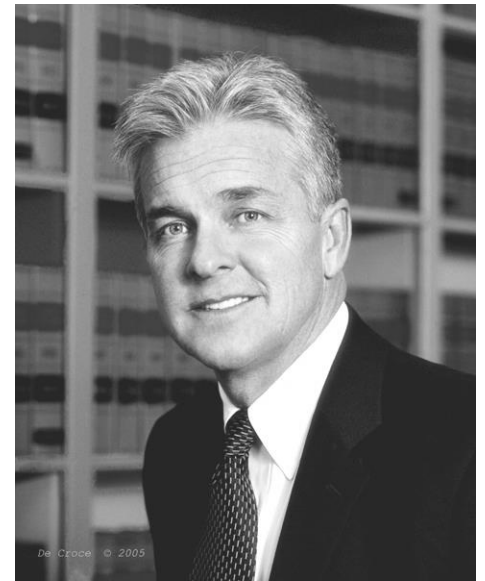
cc: Off. Armando Cruz; Steve Mandelaris, Attorney at Law; David Bruno, Attorney at law; Michael Hancock, Mayor; All City Council Members; Scott Martinez, Denver City Attorney; Stephanie O'Malley, Executive Director, Department of Safety; David Quinones, Deputy Chief of Police; Mary Beth Klee, Deputy Chief of Police; Ron Saunier, Commander of Major Crimes Division; Les Perry, Commander of District Five; Gregory Laberge, Crime Lab Commander; Lt. Ron Thomas, Commander of Internal Affairs; Division; Lieutenant Matthew Clark, Major Crimes; Lieutenant James Haney, Major Crimes Division; Sgt. James Kukuris, Homicide; Sgt. Ed Leger, Homicide; Detective Eric Bueno, Homicide; Detective Mike Martinez, Homicide; Lamar Sims, Senior Chief Deputy District Attorney; Doug Jackson, Senior Chief Deputy District Attorney; Nicholas E. Mitchell, Office of the Independent Monitor; Rev. William T. Golson, Jr.







OFFICER-INVOLVED SHOOTING PROTOCOL 2015



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

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.

reasonable defenses. If this standard is met, criminal charges will be filed.

One exception to the Denver District Attorney making the filing decision is if it is necessary to use the Denver Statutory Grand Jury. The District Attorney will consider it appropriate to refer the investigation to a grand jury when it is necessary for the successful completion of the investigation. It may be necessary in order to acquire access to essential witnesses or tangible evidence through the grand jury's subpoena power, or to take testimony from witnesses who will not voluntarily cooperate with investigators or who claim a privilege against self-incrimination, but whom the district attorney is willing to immunize from prosecution on the basis of their testimony. The grand jury could also be used if the investigation produced significant conflicts in the statements and evidence that could best be resolved by grand jurors. If the grand jury is used, the grand jury could issue an indictment charging the officer(s) criminally. To do so, at least nine of the twelve grand jurors must find probable cause that the defendant committed the charged crime. In order to return a "no true bill," at least nine grand jurors must vote that the probable cause proof standard has not been met. In Colorado, the grand jury can now issue a report of their findings when they return a no true bill or do not reach a decision—do not have nine votes either way. The report of the grand jury is a public document.

A second exception to the Denver District Attorney making the filing decision is when it is necessary to have a special prosecutor appointed. The most common situation is where a conflict of interest or the appearance of impropriety is present. As an example, if an officer involved in the shooting is related to an employee of the Denver District Attorney's Office, or an employee of the Denver District Attorney's Office is involved in the shooting. Under these circumstances, there would exist at a minimum an appearance of impropriety if the Denver District Attorney's Office handled the case.

THE COLORADO LAW

Criminal liability is established in Colorado only if it is proved beyond a reasonable doubt that someone has committed all of the elements of an offense defined by Colorado statute, and it is proved beyond a reasonable doubt that the offense was committed without any statutorily-recognized justification or excuse. While knowingly or intentionally shooting and causing injury or death to another human being is generally prohibited as assault or murder in Colorado, the Criminal Code specifies certain circumstances in which the use of physical force or deadly physical force is justified. As there is generally no dispute that the officer intended to shoot at the person who is wounded or killed, the determination of whether the conduct was criminal is primarily a question of legal justification.

Section 18-1-707 of the Colorado Revised Statutes provides that while effecting or attempting to effect an arrest, a peace officer is justified in using deadly physical force upon another person . . . when he reasonably believes that it is necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force. Therefore, the question presented in most officer-involved shooting cases is whether, at the instant the officer fired the shot that wounded or killed the person, the officer reasonably believed, and in fact believed, that he or another person, was in imminent danger of great bodily injury or death from the actions of the person who is shot. In order to establish criminal responsibility for knowingly or intentionally shooting another, the state must prove beyond a reasonable doubt that the person doing the shooting either did not really believe he or another was in imminent danger, or, if he did hold such belief, that belief was, in light of the circumstances, unreasonable.

The statute also provides that a peace officer is justified in using deadly physical force upon another person . . . when he reasonably believes that it is necessary to effect an arrest . . . of a person whom he reasonably believes has committed or attempted to commit a felony involving the use or threatened use of a deadly weapon; or is attempting to escape by the use of a deadly weapon; or otherwise indicates, except through motor-vehicle violation, that he is likely to endanger human life or to inflict serious bodily injury to another unless apprehended without delay.

In Colorado, deadly physical force means force the intended, natural, or probable consequence of which is to produce death and which does in fact produce death. Therefore, if the person shot does not die, by definition, only physical force has been used under Colorado law.

GENERAL COMMENTS

The following statement concerns issues that are pertinent to all officer-involved shootings.

The great majority of officer-involved shootings in Denver, and throughout the country, ultimately result from what is commonly called the split-second decision to shoot. It is often the culmination of a string of decisions by the officer and the citizen that ultimately creates the need for a split-second decision to shoot. The split-second decision is generally made to stop a real or perceived threat or aggressive behavior by the citizen. It is this split-second time frame which typically defines the focus of the criminal-review decision, not the string of decisions along the way that placed the participants in the life-or-death final frame.

When a police-citizen encounter reaches this split-second window, and the citizen is armed with a deadly weapon, the circumstances generally make the shooting justified, or at the least, difficult to prove criminal responsibility under the

criminal laws and required legal levels of proof that apply. The fact that no criminal charges are fileable in a given case is not necessarily synonymous with an affirmative finding of justification, or a belief that the matter was in all respects handled appropriately from an administrative viewpoint. It is simply a determination that there is not a reasonable likelihood of proving criminal charges beyond a reasonable doubt, unanimously, to a jury. This is the limit of the District Attorney's statutory authority in these matters. For these reasons, the fact that a shooting may be "controversial" does not mean it has a criminal remedy. The fact that the District Attorney may feel the shooting was avoidable or "does not like" aspects of the shooting, does not make it criminal. In these circumstances, remedies, if any are appropriate, may be in the administrative or civil arenas. The District Attorney has no administrative or civil authority in these matters. Those remedies are primarily the purview of the City government, the Denver Police Department, and private civil attorneys.

Research related to officer-involved shootings indicates that criminal charges are filed in approximately one in five hundred (1-in-500) shootings. And, jury convictions are rare in the filed cases. In the context of officer-involved shootings in Denver (approximately 8 per year), this ratio (1-in-500) would result in one criminal filing in 60 years. With District Attorneys now limited to three 4-year terms, this statistic would mean there would be one criminal filing during the combined terms of 5 or more District Attorneys.

In Denver, there have been three criminal filings in officer-involved shootings in the past 40 years, spanning seven District Attorneys. Two of the Denver officer-involved shootings were the result of on-duty, work related shootings. One case was in the 1970s and the other in the 1990s. Both of these shootings were fatal. The cases resulted in grand jury indictments. The officers were tried and found not guilty by Denver juries. The third criminal filing involved an off-duty, not in uniform shooting in the early 1980s in which one person was wounded. The officer was intoxicated at the time of the shooting. The officer pled guilty to felony assault. This case is mentioned here, but it was not in the line of duty and had no relationship to police work. In 2004, an officer-involved shooting was presented by the District Attorney to the Denver Statutory Grand Jury. The Grand Jury did not indict. A brief report was issued by the Grand Jury.

Based on the officer-involved shooting national statistics, there is a very high likelihood that individual District Attorneys across the country will not file criminal charges in an officer-involved shooting during their entire tenure. It is not unusual for this to occur. In Denver, only two of the past seven District Attorneys have done so. This, in fact, is statistically more filings than would be expected. There are many factors that combine to cause criminal prosecutions to be rare in officer-involved shootings and convictions to be

even rarer. Ultimately, each shooting must be judged based on its unique facts, the applicable law, and the case filing standard.

The American Bar Association's *Prosecution Standards* state in pertinent part: "A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction. In making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved or to a desire to enhance his or her record of convictions. Among the factors the prosecutor may properly consider in exercising his or her discretion is the prosecutor's reasonable doubt that the accused is in fact guilty." The National District Attorneys Association's *National Prosecution Standards* states in pertinent part: "The prosecutor should file only those charges which he reasonably believes can be substantiated by admissible evidence at trial. The prosecutor should not attempt to utilize the charging decision only as a leverage device in obtaining guilty pleas to lesser charges." The standards also indicate that "factors which should **not** be considered in the charging decision include the prosecutor's rate of conviction; personal advantages which prosecution may bring to the prosecutor; political advantages which prosecution may bring to the prosecutor; factors of the accused legally recognized to be deemed invidious discrimination insofar as those factors are not pertinent to the elements of the crime."

Because of the difference between the criminal, administrative, and civil standards, the same facts can fairly and appropriately lead to a different analysis and different results in these three uniquely different arenas. While criminal charges may not be fileable in a case, administrative action may be very appropriate. The legal levels of proof and rules of evidence that apply in the criminal-law arena are imprecise tools for examining and responding to the broader range of issues presented by officer-involved shootings. Issues related to the tactical and strategic decisions made by the officer leading up to the split-second decision to shoot are most effectively addressed by the Denver Police Department through the Use of Force Review Board and the Tactics Review Board process and administrative review of the shooting.

The administrative-review process, which is controlled by less stringent legal levels of proof and rules than the criminal-review process, provides both positive remedial options and punitive sanctions. This process also provides significantly broader latitude in accessing and using information concerning the background, history, and job performance of the involved officer. This type of information may have limited or no applicability to the

criminal review, but may be very important in making administrative decisions. This could include information concerning prior officer-involved shootings, firearm discharges, use of non-lethal force, and other conduct, both positive and negative.

The Denver Police Department's administrative review of officer-involved shootings improves police training and performance, helps protect citizens and officers, and builds public confidence in the department. Where better approaches are identified, administrative action may be the only way to effect remedial change. The administrative review process provides the greatest opportunity to bring officer conduct in compliance with the expectations of the department and the community it serves. Clearly, the department and the community expect more of their officers than that they simply conduct themselves in a manner that avoids criminal prosecution.

There are a variety of actions that can be taken administratively in response to the department's review of the shooting. The review may reveal that no action is required. Frankly, this is the case in most officer-involved shootings. However, the department may determine that additional training is appropriate for all officers on the force, or only for the involved officer(s). The review may reveal the need for changes in departmental policies, procedures or rules. In some instances, the review may indicate the need for changing the assignment of the involved officer, temporarily or permanently. Depending on the circumstances, this could be done for the benefit of the officer, the community or both. And, where departmental rules are violated, formal discipline may be appropriate. The department's police training and standards expertise makes it best suited to make these decisions.

The Denver Police Department's Use of Force Review Board and the Tactics Review Board's after-incident, objective analysis of the tactical and strategic string of decisions made by the officer that lead to the necessity to make the split-second decision to shoot is an important review process. It is clearly not always possible to do so because of the conduct of the suspect, but to the extent through appropriate tactical and strategic decisions officers can de-escalate, rather than intensify these encounters, the need for split-second decisions will be reduced. Once the split-second decision time frame is reached, the risk of a shooting is high.

It is clear not every officer will handle similar situations in similar ways. This is to be expected. Some officers will be better than others at defusing potentially-violent encounters. This is also to be expected. To the degree officers possess skills that enhance their ability to protect themselves and our citizens, while averting unnecessary shootings, Denver will continue to have a minimal number of officer-involved shootings. Denver officers face life-

threatening confrontations hundreds of times every year. Nevertheless, over the last 20 years officer-involved shootings have averaged less than eight annually in Denver. These numbers are sharply down from the 1970s and early 1980s when there were 12-to-14 shootings each year.

Skill in the use of tactics short of deadly force is an important ingredient in keeping officer-involved shootings to a minimum. Training Denver officers receive in guiding them in making judgments about the best tactics to use in various situations, beyond just possessing good firearms proficiency, is one of the key ingredients in minimizing unnecessary and preventable shootings. Denver police officers handle well over a million calls for service each year and unfortunately in responding to these calls they face hundreds of life-threatening encounters in the process. In the overwhelming majority of these situations, they successfully resolve the matter without injury to anyone. Clearly, not all potentially-violent confrontations with citizens can be de-escalated, but officers do have the ability to impact the direction and outcome of many of the situations they handle, based on the critical decisions they make leading up to the deadly-force decision. It should be a part of the review of every officer-involved shooting, not just to look for what may have been done differently, but also to see what occurred that was appropriate, with the ultimate goal of improving police response.

RELEASE OF INFORMATION

Officer-involved shootings are matters of significant and legitimate public concern. Every effort must be made to complete the investigation and make the decision as quickly as practicable. The Denver Protocol has been designed to be as open as legal and ethical standards will permit and to avoid negatively impacting the criminal, administrative, or civil procedures. "Fair Trial—Free Press" standards and "The Colorado Rules of Professional Conduct" limit the information that can be released prior to the conclusion of the investigation.

Officer-involved shooting cases always present the difficult issue of balancing the rights of the involved parties and the integrity of the investigation with the public's right to know and the media's need to report the news. The criminal investigation and administrative investigation that follows can never keep pace with the speed of media reporting. This creates an inherent and unavoidable dilemma. Because we are severely restricted in releasing facts before the investigation is concluded, there is the risk that information will come from sources that may provide inaccurate accounts, speculative theories, misinformation or disinformation that is disseminated to the public while the investigation is progressing. This is an unfortunate byproduct of these conflicted responsibilities. This can

cause irreparable damage to individual and agency reputations.

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

CONCLUSION

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

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