



DenverDA

Mitchell R. Morrissey, District Attorney - Second Judicial District

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March 5, 2015

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

RE: Investigation of the shooting and wounding of Sharod Kindell, DOB 3/10/91, DPD #730724, in which Jeffrey DiManna, 08002, fired shots on January 9, 2015, at 5081 Crown Boulevard, Denver, Colorado.

Dear Chief White:

The investigation and legal analysis of the shooting and wounding of Sharod Kindell, in which shots were fired by Officer Jeffrey DiManna, has been completed. I conclude that under applicable Colorado law no criminal charges are fileable against Officer DiManna. 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

WITNESS STATEMENTS

On the evening of January 9, 2015, Denver police officers Jeffrey DiManna, 08002, Jacob Robb, 04201, and Andrew Landon, 13077, were patrolling Denver Police District 5. The officers, assigned to the gang unit, were dressed in full blue DPD uniforms. They were in a “slick top” Crown Victoria patrol car, driven by Officer DiManna. Officer Robb was seated in the front passenger seat; Officer Landon in the back seat on the passenger’s side.¹

¹ The police car had neither an overhead light bar nor police markings or emblems on the doors and trunk. It did have emergency equipment – spot lights on both sides, red and blue lights positioned at the rear view mirror and in rear window and strobe lights in the headlight assemblies. It was also equipped with a “push bumper.” There were three officers in the car because there was an “odd number” of officers working the shift and Officers Robb and Landin were both trainee officers temporarily assigned to the Gang Bureau.

At about 7:40 p.m., the officers were in the area of the 5000 block of Crown Boulevard, driving northbound on Crown Blvd. near the 5000 block. As they approached 50th Avenue, they saw a Jeep Grand Cherokee (the “Jeep”) run the east-west stop sign at 50th Avenue and make a right turn heading south on Crown Blvd. Officer DiManna turned the police car around and started following the Jeep. The Jeep almost immediately pulled into a driveway at 4981 Crown Blvd. The police car drove past the stopped car and, as it passed, Officer Robb obtained and “ran” the license plate number of the Jeep. The computer check indicated the Jeep’s listed owner was a rental car company. Officer DiManna decided to stop a short distance down the block and wait to see whether the driver of the Jeep (later identified as Kindell) was, indeed, going to the house at which he had stopped.

Officer DiManna stopped the police car, turned off the car lights and waited. “Moments later,” the vehicle backed out of the driveway and headed back north on Crown Blvd. Officer DiManna made another U-turn and, again, got behind the Jeep. Almost immediately, Kindell pulled the Jeep into a driveway at 5081 Crown Blvd. and parked. The officers, based upon the stop sign violation and the unusual activity regarding the driveways, determined to conduct a traffic stop. Officer DiManna activated the emergency equipment and pulled in behind the Jeep.

The resident of the home at 5081 Crown Blvd., “S.G.,” witnessed the traffic stop. She provided investigators with a written statement and a video-taped interview. Her written statement provides this overview:

[I] saw a cop car outside of my house, saw a Jeep on my driveway. [I] thought it was my boyfriend but [it] wasn’t. I clearly saw a black man in the Jeep. [The] Officer asked for license or whatever because the [man] reach[ed] over to get something. Two officer[s] on each side of the car, one officer behind the car. One officer on the driver’s side tried to open the door. The driver quickly closed the door fast. I saw he locked the doors so the other officers wouldn’t try to open [them]. Driver started going backwards[,] crash[ed] one car then the cop car. That’s when the officers started shooting. [I was] [s]ure when he was backing up [he] hit the officer that was behind the car.

Officer Robb was the officer she saw positioned at the passenger side of the Jeep; Officer Landon was the officer she saw behind the vehicle and Officer DiManna was the officer she saw at the driver’s side.

When Officer DiManna pulled in behind the Jeep he placed the police car about ten feet back and parked at a slight angle. He got out and approached the driver’s door; Officer Robb went to the front passenger side and Officer Landon initially went to the back passenger side. Both Officers Robb and Landon were using their flashlights to see into the Jeep. Officer Robb confirmed there was only one occupant in the Jeep. As he looked in the side window, he heard Officer DiManna ask

the driver for his license, registration and insurance and then asked him “why did you pull in here?”, from what I can hear. And the guy says, “I live here.” And then Officer DiManna asks him, ‘what’s the address?’ And he asks him that a couple of times. And the guy never answers.

Officer Robb told investigators that Kindell was “kind of” reaching around in the car, apparently looking for something as he was reaching in his pockets and around the center console. To Officer Robb, Kindell “appeared very nervous.” Kindell never produced any identification and Officer Robb then heard Officer DiManna ask Kindell to exit the vehicle. He heard Kindell ask “why?” and then heard the Jeep’s engine start up.

Officer Landon confirmed that he followed Officer Robb to the passenger side of the vehicle. He first checked the rear right side of the passenger compartment and then moved to the back to make sure there was nothing of concern in the back of the SUV. He told investigators that when Officer DiManna contacted the driver, he was unable to hear the initial conversation. However, shortly after Officer DiManna started talking with Kindell, Officer Landon became aware that a “commotion” was developing and “Officer DiManna was ordering the driver out of the vehicle.” Officer Landon saw Officer DiManna open the driver’s door to remove Kindell and he moved around to a position near the driver’s side door so as to cover Officer DiManna. From this vantage point, he heard Kindell tell Officer DiManna he was not going to get out of the car. He saw Officer DiManna open the door. Kindell then

grabbed it and shut it. Officer DiManna opened it again. The driver was still holding it and shut it again. This happened, I’m not sure how many times, but a couple of times.

Officer Landon told investigators that the door was either locked or the driver was holding it shut but the windows on the driver’s side were at least partially open. He moved to the rear door, reached in and opened it so that he could access the driver’s door from behind. As he did this, the driver’s door reopened. He closed the back door and moved back to Officer DiManna’s side.

At this point Officer DiManna and I were, I believe, were both inside, uh, the interior of the door where it was open. Officer DiManna has the suspect at gunpoint. I grabbed, I attempted to grab him to remove him from the car but during this whole opening and closing the doors he had, uh, turned on the car – cuz he had initially turned it off. Um, as I was trying to remove him from the car he, ah, I saw him put the car into reverse. At this point I was just gonna try to attempt to get out of the way but he started to reverse.

In his video-taped statement, Officer DiManna stated that Kindell started to open the door as he approached the Jeep. Officer DiManna asked him to close the door and sit in the car and he complied. He then asked Kindell for his license, registration and proof of insurance. Kindell pulled out a wallet and started to look through it and, while he did so, Officer DiManna asked him why he had pulled into the driveway. Kindell responded that he lived at the location. Officer DiManna then asked him for the address. In Officer DiManna’s words,

. . . he ignored me. I asked him, again, ‘if you live here, what’s the address?’ and he ignored me, again. I asked him a third time and at this point he’s now starting to reach around in the vehicle. He’s reaching in the driver’s side door pocket, um, and kind of reaching back towards the center console. So after the third time I ask him, I mean he’s just acting very nervous the entire time.

When Kindell started to open the car door as Officer DiManna approached, Officer DiManna's first concern was that he was going to run. However, as Kindell started reaching around the passenger compartment as described by Officer Robb, Officer DiManna became concerned Kindell was looking for some type of weapon. (Officer DiManna had also taken note of the amount of trash and personal possessions in the Jeep and, in light of the fact the car was a rental car, concluded it might have been stolen.²) Based upon all of these factors, Officer DiManna asked Kindell to step out of the vehicle. He started to pull the door open and Kindell pulled it back and shut it. Officer DiManna again ordered Kindell out of the vehicle.

At this point he starts up the vehicle. I'm pulling on the door and I get it open. I then draw my handgun, 'cuz I don't know, exactly, what kind of weapons he has inside the vehicle in his immediate reach at this point. So I open the door. I've got my weapon drawn in my left hand, because I'm left handed, and I advise him to step out of the vehicle: "Sir, step out of the vehicle. You need to get out of the car. You need to get out of the car." And, he keeps refusing, saying "no!" I then go to grab his left sh, ah, left arm to try and control his arm 'cuz I can't see what his right hand is doing.

Officer Dimanna was standing inside the open driver's side door with the door to his left and trying to pull Kindell out of the car. He told investigators he saw Kindell look over his left shoulder toward the rear of the car and start the Jeep's engine.

[The engine] revs up, he, ah, gets it into reverse and, at a high rate of speed – without time to react the door catches me, and I'm kind of holding on to him and trying to sidestep as we're going in reverse. And he's traveling at a high rate of speed – I think he caught Officer Landon with me as well, in the door, uh, there was no way for me to, to roll out or spin out. If I woulda dropped to the ground he's angling out, I would have been caught by his tires, perhaps been killed by his actions.

The Jeep was moving back toward the police car, with Officer DiManna still trapped inside the door. Officer DiManna stated his immediate fear was that he was either going to be caught between the two cars or run over by the Jeep. It was at this time he fired at the driver.³ The Jeep continued backing up and hit the front of the police car. Officer DiManna told investigators he was forced into the push-bumper of the police car.⁴ He stated the Jeep's door was now "slamming" him in his back and he was pushed partially up on to the hood of the patrol car.

The [Jeep's] door then slams completely wide open as he continues through and hits our police car, pushing it back. He continues at a high speed in reverse – hits a parked vehicle that was, I believe, uh, I believe he hit the parked vehicle right in front of the house that was on the sidewalk – on the curb. Hits that. Uh, continues to a couple more feet.

² The Jeep had been stolen some months before. This fact and a description of some of the items recovered from the Jeep will be detailed below.

³ While Officer DiManna believed he fired twice at this point, the firearms evidence suggests he fired four times. He fired a fifth shot moments later.

⁴ It was Officer DiManna's belief he sustained his injuries at this point.

The Jeep then came to a stop. Officer DiManna stated that it appeared to him Kindell could have continued to back up and away but, instead, it appeared Kindell was trying to shift gears. Officer DiManna was now standing directly in front of the Jeep and he believed Kindell was about to drive forward and strike him.⁵ He fired another shot at Kindell through the front windshield. Kindell got out of the vehicle and started to run leaving the Jeep's motor running. The Jeep was in drive and it started moving forward slowly. Officer DiManna moved out of the way and the Jeep came to rest against a tree in the front yard of the residence. The time was about 7:46 p.m.

Kindell led Officers Robb and Landon on a brief foot chase.⁶ Kindell ran through the park, across 51st Avenue, runs across a ravine and then down the 5100 block of Carson Street with Officer Robb the closest pursuing officer. Kindell ran to an SUV which was stopped in the middle of the street. It appeared to Officer Robb that he tried to get into the SUV but the occupants of the vehicle would not let him in. Kindell then ran to the front door of a house at 5120 Carson Street and "tries to go in there and someone in [that house] won't let him in and pushes, kind of pushes him out." Kindell then ducked around the house and Officer Robb lost sight of him. Officer Robb held his position and as officers began setting up a perimeter he saw signs someone was hiding in the area he had last seen Kindell. He and other officers began yelling words to the effect of "is somebody there? Is somebody there? Show me your hands! Show me your hands!", and identifying themselves as Denver police officers. Shortly after they began issuing those commands, Kindell called out that he could not move. The officers moved in and found Kindell hiding and injured. Kindell was taken into custody and an ambulance was called in "as quickly as possible."

The SUV Officer Robb saw Kindell approach was occupied by witness "T.L." He told investigators he was sitting in his truck which was parked in front of his house and talking with his brothers when he heard a gunshot. His brothers went inside the home and he remained in the truck. He was in this position when he saw a male party run up to his truck and attempt to open the back passenger door. T.L. stated the party then

tapped on the window. I tried to scare him and yelled "POLICE!" and he jumped and and said, "Oh shit!" Then he ran to my front porch and jumped over the [*unclear*] (along the front porch) and tried to open the front door. I saw the police running after this guy soon after he turned the corner from 51st.

Among the people in the house Kindell tried to enter was T. L-M. He confirmed he had been talking with T.L. at the car when he heard "six" gunshots. He and his brother went into their home and a "dude attempted to enter our house [but] we did not let that happen."

THE SUBSEQUENT INVESTIGATION

⁵ Officer Landon was standing just behind Officer DiManna at this point. He had also drawn his weapon but did not fire because Officer DiManna was in his field of fire.

⁶ Officer DiManna started to join the foot pursuit but after he ran a short distance, pain in his knee made it impossible for him to run. He returned to the Jeep to see whether there was anything in the vehicle that would assist officers in identifying the driver and to secure the scene. He did not take part in Kindell's ultimate apprehension.

Kindell had sustained several gunshots. One of the officers who assisted in taking him into custody placed a tourniquet on his left leg. That officer noted Kindell was wearing an ankle monitor.⁷ An ambulance was called and he was transported to Denver Health Medical Center where he was treated for gunshot wounds to the upper left leg/scrotum and right arm. He was later released to the custody of the Denver sheriff.

Investigators at the scene documented extensive damage to the front end of the Crown Victoria and driver's side fender. The push bumper was broken off and lying on the ground. The car was running; the gear selector in the parked position. The Jeep Grand Cherokee had major damage to the interior and exterior driver door with the inside door panel broken off and found in the driveway. The rear bumper was damaged. The driver's door was open; the engine running with the gear selector in the drive position. A bullet defect was found in Jeep's front windshield and a spent bullet recovered from the dashboard. A Chevrolet Impala parked on the street had damage to the passenger front quarter panel. A traffic investigator examined the scene and observed skid marks

under the rear tires of the police vehicle. These marks are consistent with the police vehicle being pushed backwards from impact with the Jeep. These skid marks were created by the rear-tires only, which is consistent with the police vehicle being "[in] park" at the time of the collision.

The Jeep was owned by the Hertz rental company. Investigators contacted the Hertz agency at DIA and learned that car had been placed on a recall safety hold and was supposed to have been stored on one of their lots. The hold was placed on October 28, 2014, and no Hertz representative had any dealings with the Jeep after that date. No one had been authorized to rent or remove the vehicle from the lot. A stolen vehicle report was made by Hertz representatives who valued the Jeep at \$45,000.00.

On January 13, 2015, investigators processed the Jeep. During the search investigators documented one bullet strike to the front window. They also detailed damage to the left rear corner of the vehicle and the driver's door. The damage to the door was so extensive that the door could not be closed.⁸ In the center console investigators recovered \$3,498.00 in U.S. currency. Also found in the center console was a weighing scale. Another weighing scale was found on the rear passenger seat. In the back passenger area, detectives located a child's car seat and articles of paperwork, some of which appeared to be "medical paperwork for what appeared to be a child with the last name of Kindell." On the child seat, investigators recovered a bag of marijuana. Other bags of marijuana were on the floorboard behind the front passenger seat, in a sealed white bucket in the cargo area of the Jeep and in the center console. The total weight of the marijuana recovered was just over 150 grams. In the cargo area investigators located a photo of Kindell in the company of three other men and Arapahoe County court papers bearing Kindell's name.⁹ Numerous other items were recovered, most

⁷ We are unclear which of Kindell's pending or past cases required the ankle monitor.

⁸ Photos showing the damage to the Jeep and the other involved vehicles are found on pages 11 and 12.

⁹ Kindell was and is facing charges in Arapahoe County for an incident occurring November 20, 2013, in which, *inter alia*, he is alleged to have led a motorcycle officer on a high speed chase on a busy roadway in Aurora Colorado. Case # 13CR2625. In that case, charges include Criminal Attempt 1st Degree Assault, Vehicular Eluding and Child Abuse. Kindell also stands convicted of Vehicular Eluding (F-5) in a 2013 case in Weld County (13CR536) after an incident occurring on March 25, 2013, wherein he led officers in that jurisdiction on a high speed chase (in that case he was also in possession of a large quantity of marijuana, \$3427.25 in U.S. currency, and a stolen Glock semi-automatic handgun.

notably, a .40 caliber Sig-Sauer semi-automatic pistol, which was found “tucked on the right side of the driver’s seat, between the seat and the center console.” The firearm’s magazine was loaded with 10 cartridges but there was no live round in the chamber. An additional magazine, loaded with 12 cartridges, was recovered from a backpack in the rear cargo area. Also in the backpack was an “artificial penis attached to a jock strap with a pouch attached to it that contained a yellow liquid substance.” Elsewhere in the Jeep was found “a small box labeled One Quick Fix Synthetic Urine Kit” and “paperwork with what appeared to be urinalysis results for UA testing with the name Sharod Kindell, with results showing NEG.”

Detectives researched the serial number of the Sig-Sauer semi-automatic pistol and determined it had been reported stolen from an address in the 2200 block of Marion Street, Denver, Colorado, on or about November 23, 2014.

Officer DiManna was armed with a 9mm Glock 17 semi-automatic pistol. This firearm has a 17 round magazine capacity and may be carried with an additional round in the chamber. Officer DiManna had it loaded in this fashion with DPD issued ammunition. Five spent shell casing were recovered at the scene. This fact, coupled with the unloading sheet, confirmed Officer DiManna fired five rounds.

Both Officer DiManna and Officer Landon suffered abrasions and contusions to their legs. Both were treated at Denver Heath Medical Center and released either later that night or early the next morning.

On January 16, 2015, Kindell was charged with one count of First Degree Assault, two counts of Second Degree Assault, two counts of Aggravated Motor Vehicle theft and various other charges relating either to his status as a convicted felon or some of the items found in the car. Those charges are pending in the Denver Courts.

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 Kindell’s injuries were caused by the shot fired by Officer DiManna, 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:

Kindell is also facing charges in Denver for Possession of a Weapon by a Previous Offender (Case # 14CR3400). On April 12, 2012, the Colorado Department of Motor Vehicles issued an Order of Denial of Kindell’s driving privileges for a three year period.

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

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

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

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

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

or

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

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

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

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

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

“**Deadly weapon**” means any of the following which in the manner it is used or intended to be used is capable of producing death or serious bodily injury: (I) **A firearm**, whether loaded or unloaded; (II) A knife; (III) A bludgeon; or (IV) Any other weapon, device, instrument, material, or substance, whether animate or inanimate.¹⁰

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

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

¹⁰ Colorado case law establishes a motor vehicle may, in certain circumstances, be used or deployed as a deadly weapon. See, *People v. Stewart*, 55 P.3d 107 (Colo. 2002).

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 test in determining whether an officer's use of physical force to take a suspect into custody is appropriate is whether the nature and degree of force used is objectively reasonable after considering the totality of the circumstances. As Kindell survived his wounds, the issue in this case revolves around the question whether Officer DiManna's use of **physical force** was justifiable.

Last year the United States Supreme Court reaffirmed that a

claim that law enforcement officers used excessive force to effect a seizure is governed by the Fourth Amendment's "reasonableness" standard. See *Graham v. Connor*, 490 U.S. 386 (1989); *Tennessee v. Garner* 471 U.S. 1 (1985). . . . The inquiry requires analyzing the totality of the circumstances. See *ibid*.

We analyze this question from the perspective "of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Ibid*. We thus "allo[w] for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in particularly situation." *Id.*, at 396-397
Plumhoff v. Rickard, 134 S.Ct. 2012, ____ (2014)¹¹

The question presented in this case is whether, at the instant Officer DiManna fired his pistol, he reasonably believed that level of force was necessary to take Kindell into custody or that Kindell was directing or was about to direct unlawful physical force against either him *or* another officer. In order to establish criminal responsibility for an officer knowingly or intentionally causing injury to another, the state must prove beyond a reasonable doubt that the officer doing the shooting either did not really believe in the existence of these requisite circumstances, or, if he did hold such belief, that belief was, in light of all available facts, objectively *unreasonable*.

CONCLUSION

The cases noted previously in footnote 9 clearly establish Kindell's propensity for driving aggressively and with a wanton disregard for the safety of others when seeking to avoid apprehension by the police. This case turns on Kindell's decision to disregard Officer DiManna's order to exit the vehicle and then to restart the engine and back up while Officer DiManna was standing in the open door. Kindell's chosen course of action presented a great risk of serious injury to Officers DiManna

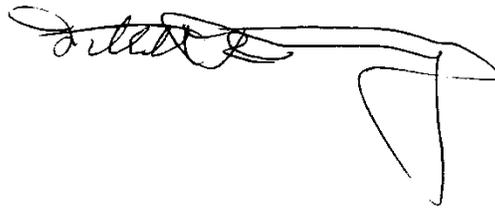
¹¹ This decision is worth reading in the context of this investigation as it deals with an officer's use of force to "terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders." *Plumhoff v. Richard*, 134 S. Ct at _____. Although the case here does not involve a high-speed car chase, the driving conduct clearly presented a threat to the lives of the two officers struck by the car Kindell was driving.

March 6, 2015

and Landon. Any reasonable officer would have quickly determined that some use of force may necessary to prevent that injury. In view of the circumstances of this case, and the options Officer DiManna had, we cannot say his decision to discharge his firearm was objectively unreasonable. As such his actions were both legally justified and, in the context of the risk presented by Kindell, appropriate.

As there is a pending prosecution against Kindell, we will open our file related to this Officer-Involved Shooting for in-person review at our office following the conclusion of that criminal proceeding. 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,

A handwritten signature in black ink, appearing to read "Mitchell R. Morrissey", written over a horizontal line. The signature is stylized and cursive.

Mitchell R. Morrissey
Denver District Attorney

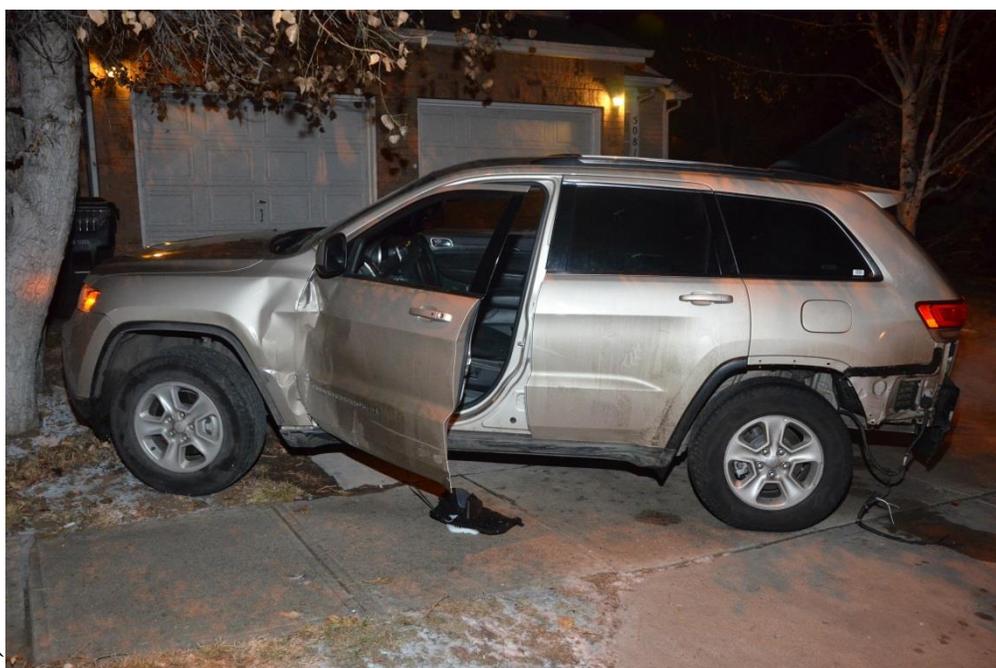
cc: Off. Jeffrey DiManna; Sean Olson, Attorney at Law; David Bruno, Attorney at law; Michael Hancock, Mayor; All City Council Members; Scott Martinez, Denver City Attorney; Stephanie O'Malley, Executive Director, Department of Safety; David Quinones, Deputy Chief of Police; Mary Beth Klee, Deputy Chief of Police; Ron Saunier, Commander of Major Crimes Division; Gregory Laberge, Crime Lab Commander; Lt. Ron Thomas, Commander of Internal Affairs; Mark Fleecs, Commander of Investigator Support Division; Capt. Kris Kronke, Gang Bureau; Lieutenant Matthew Clark, Major Crimes Division; 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.



The Jeep and the police car are shown in the center of the photograph. To the right is the Chevrolet Impala the Jeep also struck.



This photo shows the damaged push bumper of the police car and the collision damage to the Impala.



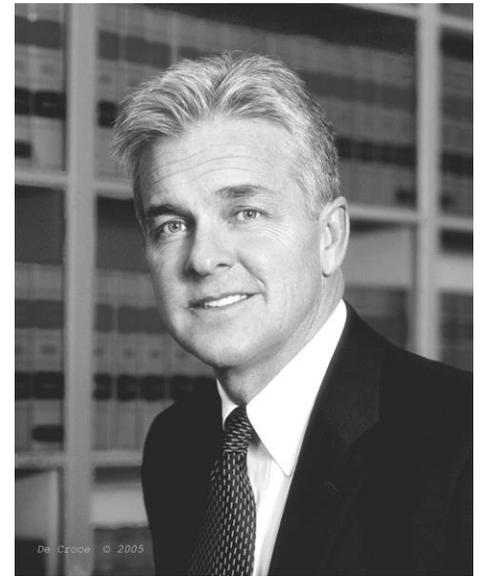
The damage to the driver's door is displayed in this photo.



The damage to the back of the Jeep as well as items torn from the Jeep and the police car are displayed in this photo.



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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