



# DenverDA

Mitchell R. Morrissey, District Attorney - Second Judicial District

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March 23, 2016

Nicholas Metz  
Chief of Police  
Aurora Police Department  
15001 E. Alameda Pkwy  
Aurora, CO 80012

RE: Investigation of the shooting and wounding of Christopher Padilla, 11/6/95, DPD # 840612, in which Officer David Musgrave, 23297, fired shots on December 17, 2015, in the 4700 block North Ivy Street, Denver, Colorado.

Dear Chief Metz:

The investigation and legal analysis of the shooting and injuring of Christopher Padilla, by a shot that was fired by Officer David Musgrave, has been completed. I conclude that under applicable Colorado law no criminal charges are fileable against Officer Musgrave. My decision, based on criminal-law standards, does not limit administrative action by the Aurora Police Department where tactical issues can be reviewed, or civil actions where less-stringent laws, rules and legal levels of proof apply. A description of the procedure used in the investigation of this officer-involved shooting and the applicable Colorado law is attached to this letter.

## STATEMENT OF FACTS

The Colorado Auto Theft Prevention Authority/Metropolitan Auto Theft Task Force ("CMATT") is a multi-jurisdictional investigative team that investigates auto-theft in the Denver metropolitan area. Among the agencies represented on CMATT are the Englewood and Aurora Police Departments, the Arapahoe County Sheriff Department and the Colorado State Patrol. CMATT investigators routinely work in plain clothes, drive unmarked cars and regularly rely on the support of uniformed police officers from the jurisdiction that is the locus of the criminal activity.

On Thursday, December 17, 2015, CMATT received a request from investigators with the Commerce City Police Department ("CCPD") to assist in the investigation of a residence at 4201 E. 69<sup>th</sup> Place, Commerce City, CO, and the surrounding area, as investigators had

recently located and recovered more than 50 stolen vehicles from that area. Five CMATT investigators were assigned to join the operation: Detective Sergeant Barry Cape, Aurora Police Department, Investigator Dave Musgrave, Aurora Police Department, Investigator Jonathan Smith, Colorado State Patrol, Investigator Ed Smith, Arapahoe County Sheriff Department, and Investigator Brian Taylor, Englewood Police Department.<sup>1</sup>

At about 5:00 p.m. on the afternoon of December 17, 2015, a briefing conducted by CCPD Det. R. Aragon was held at the CCPD headquarters.<sup>2</sup> The briefing sheet, disseminated at the briefing, included the following information:

From September 2015 to December 10<sup>th</sup>, 2015, CCPD has recovered 55 stolen vehicles in the area surrounding **4201 E. 69<sup>th</sup> Place, 6600 Oneida St and 5400 Krameria St.** Of those recovered stolen vehicles, only four (4) were stolen out of Commerce City. 43 were 199 -1999 models, the majority being Hondas. Also recovered were Acura's [sic], VW, Subaru's [sic], Jeeps, Saab, Durango as well as, [sic] Ford and GMC trucks.

The homeowner allows numerous people to stay at this location. Many are known drug users and have been involved in a variety of crimes, including auto theft.

We have received information that the persons involved used the stolen vehicles to transport drugs and like to entice [sic] officers into a vehicular pursuit. . . .

We have received two (2) reports of sexual assault at his location. At least one victim said that she was drugged then sexually assaulted.

*[Bold in the original.]*

The team was equipped with mobile license plate readers ("LDRs") and GPS tracking devices which could be affixed to a vehicle and then tracked on a laptop monitored by one of the investigators from a surveillance vehicle. After the briefing, the members of the team set up in the target area. Shortly after they set up, ACSD Investigator Smith located a white Honda (the "Honda") parked in the 7100 block of Birch Street. He noted that there was damage to the steering column and verified the car had been reported stolen. He deduced that "the stolen car was still being used as it was cold and snowy outside but there was no snow on the top of the car," and he placed a tracker on the Honda. At 6:59, the Honda went "mobile" and the team began a loose surveillance, following or tracking it to a residential complex known as the "Holly Park Apartments."

At the Holly Park Apartments, the surveillance team watched as the driver and sole occupant of the Honda met with a white Cadillac. The two vehicles then drove to a McDonald's at E. 60<sup>th</sup> Avenue and Parkway Drive. ASCD Investigator Smith was in a position where he could watch the vehicles and he

saw the stolen white Honda parked on the southwest side next to a red Honda Civic. On the driver's side of the red Honda Civic, the Caddy was parked. I observed the driver of the stolen white Honda remove a large duffel bag and what appeared to be a car stereo from the red

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<sup>1</sup> To avoid confusion Investigator Ed Smith will be referred to as "ACSD Investigator Smith" and Investigator Jonathan Smith will be referred to as "CSP Investigator Smith."

<sup>2</sup> The briefing sheet indicates that, in addition to the five CMATT officers working on this operation, seven CCPD officers, four in uniform and three in plainclothes, and three plainclothes investigators with the Colorado State Patrol "BATTLE" unit were involved. (BATTLE is an acronym for "Beat Auto Theft Through Law Enforcement.")

Honda and place them into the Caddy. There were two occupants from the Caddy that also entered the red Honda. The driver of the stolen white Honda exited the McDonald's parking lot onto Parkway Dr. and then eastbound on 60<sup>th</sup> Ave. The Caddy went the opposite direction, but both vehicles ended back at the Holly Park Apartments.

The two vehicles again separated and, because they had the tracking device on the Honda, the CMATT team continued following that vehicle to a United Parcel Service ("UPS") facility at 5190 Ivy Street where investigators lost sight of the Honda as it drove into the parking lot.<sup>3</sup>

In his video-recorded statement, CSP Investigator Smith described the following events.<sup>4</sup> He had been monitoring the GPS tracker on his laptop and when the Honda went into the parking lot, which was fairly full, he realized it was a good place to dump a stolen car. Accordingly, he drove through the lot looking for the Honda. While he was driving down one of the lanes he saw a Hispanic male walking down a different lane. This man was the only pedestrian walking "through the aisle" so CSP Investigator Smith aired the man's description to the other team members. CSP Investigator Smith then located the Honda. It was now unoccupied and, as he later told investigators, the only person he had seen in the area "was this dude walking this direction." CSP Investigator Smith recalled that, about that time, another officer aired, "that's the guy we saw at McDonald's. . . . That is the guy who was driving the Honda Civic." CSP Investigator Smith drove down a lane and swung around "trying to relocate the guy." He did not see him on foot and then he heard ACSD Investigator Smith air that the suspect was "driving away in an Acura. Ed [Smith] aired out the plate."<sup>5</sup>

As he monitored this transmission, CSP Investigator Smith was driving south and he saw the Acura driving in a northbound direction. He then saw Investigator Musgrave driving northbound on Ivy and he advised Investigator Musgrave by radio that "that's the car," letting him know that the suspect was now in the Acura. CSP Investigator Smith executed a U-turn and pulled in behind Det. Musgrave. As he later told investigators, it was his thought that, as they did not have a tracker on the Acura, he and Investigator Musgrave would follow the car but would not attempt to contact the driver unless and until additional officers were with them.

The roads were snow-packed and the side streets were, in CSP Investigator Smith's words, "awful." The suspect continued driving around, in a seemingly aimless manner, with the two officers following him from a short distance and CSP Investigator Smith advising the other members of the team of their route by police radio. Ultimately, the suspect turned eastbound on 48<sup>th</sup> Avenue with Investigator Musgrave and CSP Investigator Smith about three blocks behind him. He then made a right turn on to Ivy

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<sup>3</sup> A marked Commerce City Police car stopped the Cadillac elsewhere and the occupants of that vehicle were arrested. That investigation is not relevant here.

<sup>4</sup> CSP Investigator Smith was the only witness to the shooting other than Investigator Musgrave and, of course, Padilla.

<sup>5</sup> The registered owner of the Acura, Ms. Alejandar Flores-Guevara, told investigators that her niece, Ms. Katherine Flores, was the only person allowed to drive the car. Ms. Katherine Flores, who worked at UPS, told investigators she had the only key to the Acura and she had not given Padilla authorization to take the Acura.

Street and proceeded southbound on Ivy Street. The cars were now in Denver, CO. As CSP Investigator Smith recounted the facts, Investigator Musgrave “airs out there’s, like uh, I think he airs out either that there’s a train or there’s a back-up ahead.” The traffic was stopped ahead of the suspect who

approaches the stopped traffic at Ivy and, for whatever reason, the Acura made this abrupt U-turn . . . to go back northbound. The [Acura] makes a U-turn. . . . So [Officer Musgrave] comes in and swoops across, uh, basically in front of [the Acura]. At this point in time [Officer Musgrave] is essentially right on the car. Again, we want to mention, the road conditions are atrocious. We have this combination of snow-packed ice as well as uneven plow, like, snow – with, like, ruts. So it’s pretty slick. The Acura made a U-turn –obviously he isn’t going very fast. He’s just made this U-turn and he’s having trouble with traction himself. And I see [Officer Musgrave] cross the street and, you know, what I’m perceiving is he’s either going to, he’s attempting, basically, to contact the car right here and cut off the northbound escape route for this particular vehicle and perhaps do a vertical pin.

As CSP Investigator Smith watched, the Acura “avoids contact” with Investigator Musgrave’s vehicle by driving over the sidewalk, which was covered with snow, and on to a “raised, grassy knoll.” The vehicle stalled out or got stuck at the top of the ridge. The two undercover police cars also came to a stop.<sup>6</sup> As CSP Investigator Smith came to a stop, he saw the door to the Acura open and concluded that the suspect was going to run. He told investigators,

[Officer Musgrave] is out of his car. [The suspect] is out of his car. I’m exiting and this is where, I hear a “pop.” And I was like, “oh! [Officer Musgrave] TASED him.” My first thought – [Officer Musgrave] just TASED him. As I see the party go down, the party’s yelling [and] I hear [Officer Musgrave] say, “It was an accident! It was an accident! It was an accident! It was an accident!”

CSP Investigator Smith stated he was still under the impression that the suspect had been TASED and he started to go to the suspect to place him in handcuffs. He told investigators he did not take his handgun out of his holster because, as he was getting out of the car he heard the “pop,” saw the suspect go down to the ground and concluded that any threat had been negated by the TASER. CSP Investigator Smith handcuffed the suspect, later identified as Padilla, and, as he did so, heard Investigator Musgrave air “shots fired” and “accidental [shooting]” and request an ambulance. CSP Investigator Smith checked Padilla and saw he had sustained a wound to the left abdomen. He verified that there was no exit wound, went to get his trauma kit from his police vehicle and applied first aid. As other officers arrived, he and those officers continued to administer aid while they awaited the ambulance. CSP Investigator Smith told investigators that Padilla was not armed when he placed him in handcuffs and he neither saw any weapons in the area nor did he ever see the suspect wield a weapon.

Investigator Musgrave provided investigators with a voluntary statement. This statement was given under oath and video and audio recorded. In this statement, he

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<sup>6</sup> Pictures showing the positions of the three cars after they came to rest are found on pages 11 and 12.

confirmed that he was in plain clothes and driving an unmarked black Chevrolet Tahoe.<sup>7</sup> He also indicated that he and the other team members were monitoring the radio broadcasts made by CSP Investigator Smith as he called out the Honda's movements.

Investigator Musgrave told investigators that after the Cadillac and the Honda drove away from the red Honda at the McDonald's parking lot, he went back to look in the red Honda. He saw that the "windows were frosted over and the stereo was gone out of the dashboard." In answer to a follow-up question, he stated it was his belief that the individuals with the Cadillac and white Honda had just perpetrated a theft from a motor vehicle.

As noted above, the CMATT team stayed with the Honda as it drove around the area and eventually into the UPS parking lot. Investigator Musgrave did not follow the Honda into the UPS parking lot but was monitoring the radio traffic:

Question: Do you see [the suspect] switch into the Acura at all?  
 Musgrave: No, I didn't personally see that. [ACSD] Ed Smith is the one that actually says, "our guy's in that Acura and he's pulling out now."  
 Question: When he pulls out, did you see the vehicle?  
 Musgrave: Yeah. So, I'm on the main road by the parking lot and as I'm coming up the road I see the Acura pulling out of the lot and going north. I'm right behind him and they go, "Dave! That's the car."  
 Question: Is that Ivy Street?  
 Musgrave: I believe it is. He made a big square and then he went south instead of going back north.  
 Question: And then do you see the driver and make visual contact with him at all?  
 Musgrave: No. I'm behind him now, so I'm just behind the car for this entire duration.

When the Acura came to the stopped traffic on Ivy Street and started to make its U-turn, Investigator Musgrave told investigators he

looked to the right and I see a lot of deep slush so I figured it's just a little hectic and I'd probably get stuck in the snow so I started to pretend like I was turning around too and I thought it would slow him and he'd get stuck. But he saw me doing that, too, and he guns it. As he's coming in front of me we collide and I just push him up onto the grass.<sup>8</sup>

The Acura appeared to be stuck. Investigator Musgrave stated that he saw the driver's side door open and he opened his door and began to get out. As he did so, he started yelling "police!" He also drew his handgun from his holster and activated the "tactical" flashlight that was affixed to the barrel of the gun so that he could better see suspect. He told investigators that as he moved away from his car, he slipped and stumbled on the ice. As he did so, he heard his pistol go off. Investigator Musgrave described the events thusly:

Question: When you stumble, where are you in relation to your car?  
 Musgrave: I had just cleared the door because I remember coming around the door

<sup>7</sup> The Tahoe did have red and blue emergency lights hidden in the grill, on the visor, and in the back window, but these were not activated during this incident.

<sup>8</sup> The picture on page 12 shows some front end damage to Investigator Musgrave's Tahoe that is consistent with this contact. A photo on page 13 shows damage to the rear of the Acura.

and I see [Padilla] as he's starting to move out. I'm going forward and in the worst possible footing you could have. There's about a foot of slush, there's a curb and then there's a grassy hill covered in snow. So I don't know specifically where I was between that transition, between my door and the curb area, but that's where the shot went off. I remember thinking he's running so I'm gonna have to get my TASER out and that's when the shot went off. I was surprised by it. I see a hand fall to the ground and didn't realize he initially got hit until I asked him.

Investigator Musgrave stated that he had turned on his flashlight before the pistol discharged. This colloquy ensued:

- Question: Um, you keep demonstrating how you were holding your hand and you describe like a pressure switch activated under your trigger guard where you activate your light. That was activated, correct?
- Musgrave: Correct.
- Question: Where was your trigger finger, if you recall?
- Musgrave: I can't say that I specifically remember. Clearly it was on the trigger at some point, but I've been doing this for ten years and probably done a thousand takedowns or close to it and I always have my finger on the side, so I don't know if it was a gripping thing, a thing as I'm falling down.

In response to additional questions, Investigator Musgrave estimated he was "maybe five feet, six feet" away from Padilla when the shot was fired. He stated that his muzzle would have been pointed in Padilla's direction because he was using the flashlight. In his words, "So I was using [the flashlight], I yell 'Police!' and I got my gun pointed at him with the light turned on as he's moving to my left."

As soon as he realized Padilla had been shot Investigator Musgrave got on his police radio, advised the dispatcher that he had an "accidental discharge," that the suspect had been injured and that an ambulance was needed right away. Denver police computer-aided dispatch records reflect the following entry at 7:44:27 p.m.: ADCOM REQ FIRE AND SUPERVISOR 4570 IVY STR.- ACCIDENTAL DISCHARGE. REQ EMERGENT ON PARTY IS HIT.

Investigator Musgrave was armed with a .40 caliber Glock 23. This pistol has a 13 round magazine. The magazine was fully loaded and there was an additional cartridge in the chamber. One round was fired during this incident. The pistol-mounted flashlight was a Streamlight TLR-1 which may be illuminated by activating an on-off toggle switch set in front of the trigger guard or holding a pressure switch set underneath the trigger guard.<sup>9</sup> A photo showing Investigator's Musgrave pistol with the flashlight in place is attached on page 11.

Padilla was rushed to Denver Health Medical Center and was treated for what an attending physician described in the Serious Bodily Injury report as a "gunshot wound to the abdomen with concern for bowel/organ injury." HIPPA protections preclude us from

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<sup>9</sup> When using the pressure switch, the operator must maintain pressure in order for the light to stay on. Investigator Musgrave stated he was using the pressure switch rather than the of-on toggle switch during the incident.

obtaining or releasing any additional facts concerning his medical condition. We are aware that Padilla was successfully treated for his wounds and released to the custody of the Jefferson County Sheriff.

Padilla's release to the Jefferson County Sheriff was occasioned by the fact that, on the date of this incident there were two outstanding warrants for his arrest, one issued on December 3, 2015, for "FTA" on charges of 2<sup>nd</sup> Degree Aggravated Motor Vehicle Theft and Possession of Burglary Tools (Jefferson County District Court case # 15CR3470), and the other, also issued on December 3, 2015, for Vehicular Eluding, Possession of Burglary Tools and several other charges (Jefferson County District Court Case # 15CR3533). Additionally, on October 16, 2016, Padilla was charged in the Adams County District Court with charges of Possession of Burglary Tools and Aggravated Motor Vehicle Theft (Case # 15CR3268). Court records indicated Padilla had pleaded guilty to a Class 1 Misdemeanor Motor Vehicle Theft charge in the Adams County case on November 10, 2015. He was on bond and awaiting sentencing when he was involved in this shooting incident.

On December 18, 2015, Denver Police Detective Mark Crider conducted a brief interview with Padilla at Denver Health Medical Center. In his supplementary report, Det. Crider reported that "Padilla admitted to being a participant in stealing the white Honda and dropping the Honda off at the UPS facility. He admitted to stealing the Acura from the UPS facility. As charges arising from the theft of the Honda and Acura may be filed in Adams County, we will not discuss the details of Padilla's statement.

Investigators at the scene determined that a nearby business at 4570 Ivy Street had surveillance video that captured the incident. The camera captures a parking lot outside of the business, the snow covered raised area between the parking lot and the street where the cars came to rest and part of the street. There is no audio – the video is relatively clear but the scene is very dimly lit. Tree trunks block much of the view of the street. The video shows cars driving north and south on Ivy Street. At about 7:38 on the video time stamp, Padilla's car can be seen attempting to complete the U-turn. The video-display of the three involved vehicles corroborates the statements of CSP Investigator Smith and Investigator Musgrave. When the vehicles come to a stop, the video captures the driver's door of the Acura open and a party start to exit. It is helpful to watch the next seconds in a "frame by frame" manner. The image is, as noted, very dim and the headlights of CSP Investigator Smith's vehicle shine in the direction of the camera. The video shows the door to Investigator Musgrave's vehicle open and a small light, consistent with a flashlight, held in a steady fashion in Padilla's direction. This continues for two or three frames as Padilla moves one or two steps. The "flashlight" then appears to dip down and in the next frame Padilla begins to fall. The video thus suggests Padilla was shot at the time the flashlight beam moves from its steady, level position.

### **LEGAL ANALYSIS AND CONCLUSION**

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. In the instant case, the nature of the inquiry differs from that pursued in most officer involved shooting investigations in that this shooting involves an unintended discharge.<sup>10</sup> As such, this inquiry involves issues of recklessness and criminal negligence rather than the issue of lawful justification involved in most officer involved shootings

C.R.S. § 18-1-707 defines the circumstances under which a peace officer may justifiably use physical force in Colorado when making an arrest.<sup>11</sup> Under the circumstance of this case, that statute does not provide justification for Investigator Musgrave's actions as the evidence suggests that he did not intend to shoot Padilla. Indeed, he stated that Padilla was starting to flee on foot and he was considering transitioning to his TASER when he stumbled and his handgun discharged unintentionally. This is not a situation where Investigator Musgrave was attempting to take Padilla into custody by firing his weapon. Therefore, the issue to be determined is not whether the shooting was legally justified but whether Investigator Musgrave may be held criminally liable as a result of the unintended discharge of his firearm.

In Colorado, to be held criminally liable for any of the crimes pertinent to the facts of this case, there must be proof that Investigator Musgrave acted with a "culpable mental state." The culpable mental states are "Intentionally," "Knowingly," "Recklessly" or "With Criminal Negligence," which terms are defined by law as follows:

**"Intentionally" or "with intent"** A person acts "intentionally" or "with intent" when his conscious objective is to cause the specific result proscribed by the statute defining the offense

**"Knowingly" or "willfully"** A person acts "knowingly" or "willfully" with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists. A person acts "knowingly" or "willfully," with respect to a result of his conduct, when he is aware that his conduct is practically certain to cause the result.

**"Recklessly"** A person acts recklessly when he consciously disregards a substantial and unjustifiable risk that a result will occur or that a circumstance exists.

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<sup>10</sup> Observers often use the term "accidental discharge." However, many with handgun expertise make a useful distinction between an "accidental discharge" and an "unintentional discharge." An "accidental discharge" occurs when something within the firearm is operating incorrectly or when the firearm trigger gets caught or pushed by something other than a finger (e.g., a holster strap.) An "unintended discharge" results when the firearm is operating correctly but the person operating the firearm takes actions that result in the firearm's discharge – in unintended discharge situations, the operator pulls the trigger without intending to do so. See, Krell, B. "Discharge Analysis of the Struggle over a Firearm", *Investigative Sciences Journal*, Vol. 7, No. 1, January 2015.

<sup>11</sup> A discussion of that provision of law is found at page 3 of the Officer Involved Shooting Protocol which is attached to this letter.



**"Criminal Negligence"** A person acts with criminal negligence when, through a gross deviation from the standard of care that a reasonable person would exercise, he fails to perceive a substantial and unjustifiable risk that a result will occur or that a circumstance exists.  
*See*, C.R.S. §18-1-501.

As there is no question that Padilla suffered bodily injury or that the instrument that caused that injury was a deadly weapon<sup>12</sup>, and there is insufficient evidence to prove the trigger was pulled intentionally or knowingly, the question is whether we would be able to prove, beyond a reasonable doubt, that Investigator Musgrave acted recklessly or with criminal negligence when the firearm discharged.

We do not believe there is a reasonable likelihood of proving, beyond a reasonable doubt, that in the circumstances involved here Investigator Musgrave was reckless in arming himself as he got out of his police car. First, he told investigators that the members of his team were trained to exit in that fashion when approaching vehicles driven by auto thieves and that, he had, in this assignment, taken weapons off of a number of individuals who he contacted in similar investigations. Second, the information provided Investigator Musgrave and the other members of his team at the briefing conducted earlier that day was that many of the individuals who were the target of the saturation operation should be considered armed and dangerous. It is worth noting that within the two weeks prior to this incident a Denver police officer was shot and critically injured when he made a traffic stop and the subject stepped out of the car and immediately began firing at the officer. On a different day within that same two week period, a Mountain View police officer attempted to make a traffic stop in Denver and encountered a subject who stepped out of the vehicle and pointed a shotgun at the officer. An attempt to stop a car thief in a stolen car must be considered a "high risk" or "felony stop." A police officer's decision to draw his weapon in this situation would not be sufficient to convince a jury beyond a reasonable doubt that the officer was reckless nor negligent.

The next question is whether Investigator Musgrave was reckless or criminally negligent by the fact that he apparently allowed his finger to rest or stop on the trigger rather than keeping it outside of the trigger guard. The investigation here must focus on issues of biomechanics and what studies show about unintended discharges.

A basic rule of firearm safety is to keep the finger off the trigger until such time as a target is acquired and the operator is prepared to fire. Many argue that any time a firearm is discharged in violation of that rule the operator must be considered negligent. However, recent research establishes a number of factors that can result in a discharge caused by an unintended trigger response. Among the factors identified by researchers are "sympathetic contractions, startle reactions and loss of balance." *See*, Enoka R. "Involuntary Muscle Contractions and the Unintentional Discharge of a Firearm." Law Enforcement Executive Forum, 3(2), 27-39 (2003). *See also*, Hiem C., Niebergal E., and Schmidtbleicher D., "Involuntary Firearms Discharge – Does the Finger Obey the Brain," Polizeitrainer Magazin

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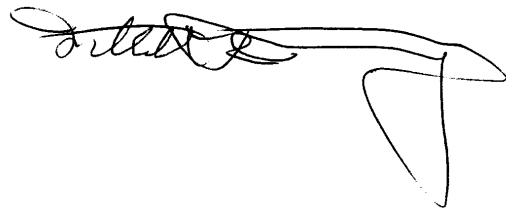
<sup>12</sup> Under Colorado law, C.R.S. 18-1-901 (e), a "Deadly weapon" means: (I) A firearm, whether loaded or unloaded; ..."

#10 (Ger. 200\_). In the instant case, Investigator Musgrave stated he slipped as he was moving toward Padilla. He was candid with investigators in stating that he did not recall whether his finger was on the trigger before he slipped but that his training was to keep his finger off the trigger until such time as he was prepared to fire. There is no contradictory evidence. A complicating factor is the placement of the flashlight activation switches on and below the trigger guard requires an operator to have his hand engaged in various motions around the trigger. Finally, the surveillance video does not provide evidence which would call Investigator Musgrave's statements into question.

My determination is that a jury, confronted with the facts and circumstances involved in this investigation, would not conclude unanimously that Investigator Musgrave's actions constituted criminal negligence.<sup>13</sup> Even in criminal law, some events are truly accidental. It is a sad reality in our community that a law enforcement officer contacting an individual in a stolen vehicle, as Investigator Musgrave did here, must exit his vehicle with his firearm out. When that occurs, the risk of an accidental discharge increases. As there is no reasonable likelihood that a jury would find that Investigator Musgrave acted with a culpable mental state of recklessness or with criminal negligence, no charges will be filed against Investigator Musgrave.

The attached document entitled Officer-Involved Shooting Protocol 2015 explains the protocol followed in this investigation. Our file may be open for in person review in accordance with the provisions of that protocol. The Denver Police Department is the custodian of records 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: Det. David Musgrave; David Goddard, 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; Matthew Murray, Deputy Chief of Police; Ron Saunier, Commander of Major Crimes Division; Mark Fleecs, District IV Commander; Gregory Laberge, Crime Lab Commander; Joseph Montoya, Commander of Internal Affairs; Gerald; Lieutenant Matthew Clark, Major Crimes Division; Sgt. James Kukuris, Homicide; Sgt. Tom Rowe, Homicide; Detective Mark Crider, Homicide; Detective Aaron Lopez, Homicide; Lamar Sims, Senior Chief Deputy District Attorney; Doug Jackson,

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<sup>13</sup> The applicable criminal statute which would be applicable to criminally negligent behavior in the context of this investigation is Assault in the Third Degree, a Class 1 Misdemeanor. *See*, C.R.S. § 18-3-204. This crime may be established where "with criminal negligence the person causes bodily injury to another person by means of a deadly weapon."

Senior Chief Deputy District Attorney; Nicholas E. Mitchell, Office of the Independent Monitor; and Rev. William T. Golson, Jr.



This photo shows Investigator Musgrave’s handgun with the flashlight mounted beneath the barrel. The light may be operated by a “toggle” switch mounted in front of the trigger guard or a pressure switch set at the base of the trigger guard.



CSP Investigator Smith’s vehicle is the pick-up truck in the center-left of the picture. Investigator Musgrave’s SUV is on the right side. The back of the Acura is seen between the two police vehicles.



A view of the three involved vehicles from the parking lot showing where the Acura “high-centered” on the snow bank.



The front of Investigator Musgrave’s vehicle with damage to the front end.



Damage to the left back of the Acura



*Mitchell R. Morrissey*  
*Denver District Attorney*

## **OFFICER-INVOLVED SHOOTING PROTOCOL 2015**

**T**he Denver District Attorney is a State official and the Denver District Attorney's Office is a State agency. As such, although the funding for the operations of the Denver District Attorney's Office is provided by the City and County of Denver, the Office is independent of City government. The District Attorney is the chief law enforcement official of the Second Judicial District, the boundaries of which are the same as the City and County of Denver. By Colorado statutory mandate, the District Attorney is responsible for the prosecution of violations of Colorado criminal laws. Hence, the District Attorney has the authority and responsibility to make criminal charging decisions in peace officer involved shootings.

The Denver Police Department was created by the Charter of the City and County of Denver. Under the Charter, the police department is overseen by the Office of the Denver Manager of Safety, headed by the Executive Director of the Department of Safety. The Executive Director of the Department of Safety ("Executive Director") and the Chief of Police are appointed by and serve at the pleasure of the Mayor of Denver. The District Attorney has no administrative authority or control over the personnel of the Denver Police Department. That authority and control resides with City government.

When a peace officer shoots and wounds or kills a person in Denver, Colorado, a very specific protocol is followed to investigate and review the case. Officer-involved shootings are not just another case. Confrontations between the police and citizens where physical force or deadly physical force is used are among the most important events with which we deal. They deserve special attention and handling at all levels. They have potential criminal, administrative, and civil consequences. They can also have a significant impact on the relationship between law enforcement officers and the community they serve. It is important that a formal protocol

be in place in advance for handling these cases. The following will assist you in understanding the Denver protocol, the law, and other issues related to the investigation and review of officer-involved shootings.

For more than three decades, 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 assures transparency in these investigations. This serves to enhance public confidence in the process.

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-recorded 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 video interview room was first used, each of these statements has been video-recorded. *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 -- is time consuming. 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. As a rule, 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-recorded 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 decision letter describing the shooting and the legal conclusions is sent to the Chief of Police by the District Attorney, with copies to the involved officer(s), the Mayor, City Council members, the Executive Director of the Department of Safety, other appropriate persons, and the media. If the involved peace officer is from an agency other than DPD, the letter is directed to the head of that agency.

A copy of the decision letter is also posted on the Denver DA website ([www.denverda.org](http://www.denverda.org)) so that members of the public may learn the facts of the incident and the reasons for the decision of the District Attorney. At this time, the case file that is maintained by Denver District Attorney's Office is available and open to the public for review, unless a criminal case is pending concerning the facts of the shooting, and subject to the Colorado Criminal Justice Records Act. Allowing our file to be reviewed permits interested members of the public to learn more about the investigation; to verify that our description of the facts in the decision letter is accurate; to verify that our decision is supported by the facts; and to determine whether they wish to challenge our decision under C.R.S. 16-5-209. Allowing access for review is important to the transparency of our decision making in these important cases, and serves to foster public trust and confidence in the investigative process and in the decisions that are made.<sup>1</sup>

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<sup>1</sup> However, the complete official file of the investigation remains in the custody of the Denver Police Department, which is the custodian of the case records. If we have made a decision not to file criminal charges, the Denver Police Department begins an *administrative* investigation and review of the incident. This may result in the gathering of additional information and the production of additional documents concerning the incident. The Denver District Attorney's Office is not involved in the administrative investigation and does not receive the additional information or investigative materials



If criminal charges are filed against the officer(s), the charges are filed in compliance with the same procedures as any other criminal filing. In that event, the file maintained by the Denver District Attorney's Office becomes available and open to the public for review at the conclusion of the criminal prosecution in the same manner as mentioned above.

## 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.

The same standard that is used in all criminal cases in Denver is applied to the review of officer-involved shootings. The filing decision analysis involves reviewing the totality of the facts developed in the criminal investigation and applying the pertinent Colorado law to those facts. The facts and the law are then analyzed in relation to the criminal case filing standard. For criminal charges to be filed, the District Attorney must find that there is a reasonable likelihood that all of the elements of the crime charged can be proven beyond a reasonable doubt, unanimously, to twelve jurors, at trial, after considering reasonable defenses. If this standard is met, criminal charges will be filed.

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

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developed in that investigation. At the end of the administrative review, therefore, the files maintained by the Denver Police Department pertaining to the shooting will likely contain more information than the criminal investigation file.

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, an appearance of impropriety may exist if the Denver District Attorney's Office handled the case. This may cause our office to seek a special prosecutor.

## 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, although these certainly may be important in a case as well.

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. "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, and the "Colorado Criminal Justice Records Act" dictates that the public interest be considered before releasing criminal justice records.

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.

We encourage any interested person to read the decision letter in these cases, and if desired, to review the investigative case file at our office to learn the facts. We

find that when the actual facts are known a more productive discussion is possible.

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