



DenverDA

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February 23, 2016

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

RE: Investigation of the shooting and wounding of Jason Wood, DOB 8/23/79, DPD # 600796, in which Officer Antonio Lopez, 08027, fired shots on December 8, 2015, at 3700 N. Federal Blvd., Denver, Colorado.

Dear Chief White:

The investigation and legal analysis of the shooting and wounding of Jason Wood ("Wood") in which shots were fired by Officer (now Sergeant) Antonio Lopez, has been completed. I conclude that under applicable Colorado law no criminal charges are fileable against Officer Lopez. 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.

FACTS

At about 11:20 a.m., on December 8, 2015, Officer Antonio Lopez was on patrol in north Denver (Denver Police District 1). Officer Lopez, who was assigned to the District 1 narcotics team, was driving northbound on Federal Boulevard near the 4000 block. He was in full blue DPD uniform and driving an unmarked sedan which was equipped with a siren and emergency lights concealed in the grill, front and rear windshields and head and brake light housings. Officer Lopez saw a white Mercury Mountaineer (the "Mercury") traveling in the opposite direction. He noted that its front windshield was badly damaged. He made a U-turn, pulled in behind the Mercury and, when the driver changed lanes without signaling, activated his emergency lights. The Mercury pulled over and came to a stop in the parking lot of a liquor store at Federal Boulevard and Clyde Place. It stopped next to the passenger's side of a car driven by William Vicens who was accompanied by his wife, Carmen Cancancon, and their

three-year-old granddaughter, Sophia. Both Mr. Vicens and Ms. Cancancon later provided investigators with written and video-recorded statements. These statements provide a clear and chilling picture of the shooting incident.¹

Ms. Cancancon's written statement is as follows:

William was parking in the liquor store parking lot. I got out of the car to smoke. I saw a black car that was a police car. The man got out of the [Mercury] and said, "what." Then he started shooting [at] the police. He was a younger bald man with a light army jacket. I saw the gun but I could not tell you what it is. He ran in front of my car shooting at the police.

Mr. Vicens provided the following information in his written statement (both Ms. Cancancon and Mr. Vicens provided a great deal of additional detail in their video statements):

My wife and I and granddaughter just parked less than 2 [minutes] and I saw a white car park next to us and a man, Hispanic, light skin, came out of the car. At the same time I glanced and I noticed a black car with police lights and in a sec[ond] all this happened. The man pulled out a gun and started shooting on my wife's side and he kept shooting from the front of my vehicle. . . . The man looked straight as if too [sic] shoot us 'cause we looked straight at his face. He hid two or [three] times at us and he went to my right side to get into his car. I glance[ed] to my rear and saw the officer down and when the man went to get into his car I quickly took off but I ended crashing my car into a parked vehicle on the corner – a gray Nissan.

The man was wearing a white hoodie with some blue or green design. He has short hair about 6 ft. tall. The gun was silver in color. There was another person with him.²

Due to his injuries, Officer Lopez was unable to provide investigators with a statement until January 21, 2016. At that time, he stated that the first bullet to hit him struck him in the upper left chest. His ballistic vest stopped the projectile and his first thought was he had been punched in the chest. Wood's next bullets struck Officer Lopez in the left arm, rendering it useless. Officer Lopez now realized he was under fire and immediately began firing back. Wood continued firing, at one point walking slowly *toward* Officer Lopez. Officer Lopez was hit in the leg and these wounds forced him to fall to the ground. On the ground, Office Lopez realized that his gun had malfunctioned or he had emptied his magazine. Using only his right hand, Officer Lopez reloaded by seating the magazine and striking the butt of the gun "on the concrete." He then charged the pistol by holding the top of the pistol's slide against his body and moving the handgun. At some point, while he was so engaged, he was struck again. This bullet hit him in the left thigh "and, all of a sudden, that just starts bleeding really bad[ly]." He had moved to a position near or behind his car and from this position was looking underneath his

¹ Wood, the driver of the Mercury, survived his wound and has been charged with numerous crimes, the most serious of which is Criminal Attempt First Degree Murder of a Peace Officer (F-2)(Case # 15CR6802). As those charges are pending and in compliance with free-press/fair trial dictates, this factual recitation will be brief (*See*, Rules 3.6 and 3.8, Colorado Rules of Professional Conduct.) No reference will be made to possible statements made by Wood and laboratory reports will not be detailed.

² The other person referred to by Mr. Vicens was identified by investigators as Melinda Espinoza. Investigators determined that as Wood's car came to a stop, she got out, started walking away, turned and took a few steps back toward the car but when Wood starting shooting at Officer Lopez, she turned and fled north on Federal Blvd. She was later apprehended and provided a video statement to investigators.

police car. He saw Wood's lower legs, aimed and fired at them. He saw Wood stumble, which led him to conclude one of his rounds had hit Wood in the foot or lower leg. Wood got back into the Mercury and drove away.

Officer Lopez was able to radio that he had been shot. The Computer Aided Dispatch ("CAD") records reflect an "Officer Shot" call was aired at 11:21:41. Almost immediately, witnesses started calling 911 and reporting the event. For example, at 11:23:29, this call was logged:

MALE JUMPED OUT OF WHI FORD EXPLORER STARTED SHOOTING AT THE COP.

Another, logged at 11:34:22, provided these details:

PER CALLER JACOB- THE OFFICER PULLED UP BEHIND THE SUSP VEH IN THE [PARKING] LOT – THE FEMALE PASSENGER GOT OUT OF THE VEH – THE MALE THEN JUMPED OUT AND SHOT THE OFFICER THEN TOOK OFF.

Officer Lopez had been shot six times and the injuries he suffered to his left leg were life-threatening.³ Officers responding to his call for help arrived within moments and one officer placed a tourniquet on the leg while waiting for the ambulance. Denver paramedics arrived on scene at 11:25:29 and Officer Lopez was rushed to Denver Health Medical Center.

The evidence establishes that after shooting Officer Lopez, Wood returned to the Mercury, drove a short distance, and then abandoned the Mercury in the alley south of 3054 W. 39th Avenue. He then made his way, on foot, to the US Bank at 3400 W. 38th Avenue.

Ms. Sandra Lemus was sitting in her car, a black Toyota Corolla, in the drive-through lane at the bank. In her written statement, Ms. Lemus told investigators

I was taking a deposit slip, and at the same time I was on the phone talking to my sister, when I saw a man come in front of me with the intention of getting in my car. He was yelling at me to move but I didn't pay attention, so he grabbed the wheel and told me to hang up the phone and give it to him. He was struggling with me, so I let go of the wheel, but since I didn't agree, he pushed me [out] and jumped into my seat and took the car.

Immediately after Officer Lopez broadcast that he had been shot, officers began responding to the area. Some went to Officer Lopez's location but others began establishing a perimeter. Among this latter group were Officer Robert Greaser, 08034, and Officer Michael Clark, 04110, who were working car 181A. Officers Greaser and Clark were setting up in the area of W. 36th Avenue and Julian when, as Officer Clark later wrote, a

dark colored Toyota Corrolla [sic] drove straight towards us. The Toyota was traveling at a high rate of speed, southbound on Julian and it was occupied by only one white male, with short dark colored hair.

³ Physicians advised him one of the bullets shattered his femur and severed the femoral artery.

I then attempted to adjust our fully marked Denver Police vehicle, in an attempt to block the vehicle's path. After almost ramming into the driver's side of our patrol car, the driver of the Toyota, swerved around us and turned westbound on W. 39th Ave.

The officers activated their emergency equipment and gave chase. The Toyota led them in the direction of downtown and, in the area of 20th Street and Chestnut Street, Officer Clark successfully executed a precision intervention technique ("P.I.T.") maneuver. The Toyota came to a stop and Officers Greaser and Clark took the driver, later identified as Wood, into custody. The CAD reflects the call "one in custody" was aired at 11:35:52. Wood was found to have suffered a gunshot wound to his left ankle and was transported by ambulance to Denver Health Medical Center.

THE INVESTIGATION

West Clyde Place & Federal Boulevard

The liquor store parking lot is on the north side of West Clyde Place at Federal Boulevard. Across West Clyde Place is the parking lot for Nick's Diner and at the south end of the parking lot, the diner.⁴ In addition to Mr. Vicens and Ms. Concancon, officers and investigators identified at least 27 witnesses who were nearby and who witnessed portions of the event. Some of the witnesses saw the initial traffic stop; many others, alerted by the sound of gunshots, witnessed part of the shooting.⁵ Written statements were obtained from all those identified and video-statements were also obtained from those who saw key parts of the incident.

Near Officer Lopez's police car, crime scene investigators recovered 23 spent 9 mm shell casings and one empty 9mm firearm magazine with a 17 round capacity. In the area where witnesses stated Wood's car had been stopped and in the alley north of that location, investigators recovered 10 spent .45 caliber casings, three live .45 caliber rounds and an empty magazine capable of holding eight .45 caliber rounds.⁶ Numerous bullet strikes were documented to Officer Lopez's police car as well as to buildings in the area.

3100 Block West 39th Avenue

The Mercury, located in the alley south of 3054 W. 39th Avenue, was impounded by investigators who executed a search warrant on the vehicle on December 8, 2015. Numerous items were recovered including "suspected blood" on the "exterior lower running board by the front driver side door. . . .and on the front driver side floorboard," and a 7.62 caliber MAK-90

⁴ An overhead photo depicting the intersection and these businesses is found on page 9. This photo was not taken on the day of the incident and is provided for reference purposes only.

⁵ For example, witness Leon Limon provided both a written and video recorded statement. His written statement reads, in pertinent part.

I was inside Nick's Diner off Clyde & Federal for lunch, talking with my girlfriend & [my] sister Vanessa Limon when we saw an undercover cop pulling over a vehicle. We stopped and talked about it for a minute and went back to our conversation. About a minute later we heard gunfire & Vanessa told everyone to get down. While on the floor, I was peeking out the window and saw a cop on the ground[,] shot[,] and a man firing a gun at him. [The man] then jumped in a white SUV and fled. . . .

⁶ James Lepine witnessed the shooting from his office at a nearby church. He told investigators he heard gunshots, looked out his window and saw a man behind a white SUV "reloading his gun" and firing a "few more times."

semi-automatic rifle.⁷ Also found were 100 rounds of ammunition suitable for the rifle (either boxed or loaded in 30 round magazines); three .45 caliber pistol magazines (two containing seven rounds, the third, six rounds); a box containing 27 rounds of .45 caliber ammunition; and several other items of interest.

3400 West 38th Avenue

Several witnesses saw Wood on foot proceeding from the area where he dumped the Mercury to the US Bank at 3400 W. 38th Avenue. Samantha Ruiz, a drive-up teller at the bank, saw Wood walk to up to the passenger side of Ms. Lemus's Toyota and get in. She provided written and video recorded statements to the investigators. In her written statement she indicated that when Wood got in the car, Ms. Lemus gave him a "frightened look." She then saw Wood fighting with Ms. Lemus and grabbing at the steering wheel. Ms. Ruiz wrote that the car started to drive and "[Wood] forced himself over to the driver side pushing [Ms. Lemus] out. He then took off south on Julian St." Ms. Ruiz had the presence of mind to record the last moments of the encounter on her cell phone and she provided investigators with those video images.

20th and Chestnut Street

Officers Clark and Greaser were the primary pursuit officers who chased the Toyota when it drove through the perimeter and they brought the chase to an end by executing the P.I.T. maneuver.⁸ When the Toyota came to a stop, they got out of their patrol car and approached the suspect vehicle with their handguns drawn. Wood stepped out of the Toyota, hands raised, and the two officers took him into custody. Officer Greaser removed a handgun magazine from Wood's left front pocket. It was loaded with six live .45 caliber cartridges. Officer Greaser placed the magazine on the hood of the Toyota. Wood was bleeding from the foot. Officer Kyle Harmon noted that Wood "had a bullet protruding from his foot and his sock."

Written statements were obtained from all who responded to this scene. A neighborhood survey was also conducted in an attempt to locate any citizens who might have observed the termination of the pursuit. Officers cordoned off the area and crime scene investigators responded and documented this scene. The Toyota was towed to a secure lot and later searched by investigators. Among the items recovered from the Toyota was Ms. Lemus's purse. Wood's handgun was not recovered.⁹

⁷ This is a variant of the well-known AK-47.

⁸ Other officers covered and assisted in the pursuit. *See, e.g.*, the written statement of Officer Richard Fischer, 05023, who indicated that as he was responding to the officer shot call,

Officers called out a green Toyota vehicle fled the area of the scene. I was at 33rd and Pecos and observed on the patrol cars involved in the authorized chase and PIT heading south from my location. I got in behind the 2nd patrol vehicle as we approached 20th Street and Navajo [Street] and then headed east on 20th St with lights and siren activated. . . .

⁹ Investigators conducted an extensive search of the areas between North Federal Boulevard and W. Clyde Place and the US Bank at 3400 West 38th Avenue where Wood might have traveled but were unable to find the .45 caliber handgun he was using. Similarly, Officers Clark and Greaser reported they did not see Wood throw anything from the Toyota while they were following him. To this date, the handgun wielded by Wood has not been recovered.

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 Wood's injuries were caused by one of the shots fired by Officer Lopez the determination of whether his conduct was criminal is primarily a question of legal justification.

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

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

The Colorado law regarding self-defense which may be relied upon by any citizen, including a peace officer, is found at C.R.S. 18-1-704, which addresses the "use of physical force in defense of a person" and provides:

- (1) Except as provided in subsections (2) and (3) of this section, **a person is justified in using physical force upon another person in order to defend himself or a third**

person from what he reasonably believes to be the use or imminent use of unlawful physical force by that other person, and he may use a degree of force which he reasonably believes to be necessary for that purpose.

(2) Deadly physical force may be used only if a person reasonably believes a lesser degree of force is inadequate and:

(a) The actor has reasonable ground to believe, and does believe, that he or another person is in imminent danger of being killed or of receiving great bodily injury

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.

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

As Wood survived his wounds, the issue in this case revolves around the question whether the use of physical force by Officer Lopez was justified and whether the nature of the force used was appropriate. The test is whether the nature and degree of force used is objectively reasonable after considering the totality of the circumstances

In order to establish criminal responsibility when an officer knowingly or intentionally causes injury to another, the state must prove beyond a reasonable doubt that the officer who caused the injury either did not really believe the force used was necessary, or, if he did hold such belief, that belief was, in light of all available facts, objectively *unreasonable*.

CONCLUSION

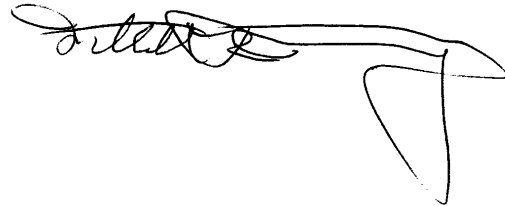
This incident highlights the inherent risks of police work. Officer Lopez was engaged in what is ordinarily a routine police action – effectuating a traffic stop. As Officer Lopez got out of his vehicle he was fired upon. There was no warning and nothing about the nature of the initial contact that would have led him, or any other reasonable officer, to believe the driver of the Mercury had lethal intent. Officer Lopez’s quick reaction to the fusillade of shots, first by returning fire in an attempt to keep Wood at bay and then, when he had an opportunity, to take aim and fire at the only target available, Wood’s legs, in all probability saved his life.¹⁰ Officer Lopez’s actions were courageous and commendable. His decision to use force to defend himself was clearly justified by C.R.S. §§ 18-1-704 and 18-1-707(1). Indeed, under the circumstances presented in this case, he had no other option.

¹⁰ The evidence is clear that Wood intended to kill Officer Lopez. But for the actions of Officer Lopez’s fellow officers in applying a tourniquet, the prompt response of the Denver paramedics and excellent medical care provided by the physicians and staff of Denver Health Medical Center, he would have achieved his goal.

February 23, 2016

As there is a pending prosecution against Wood, 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 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 includes a large, sweeping flourish that extends to the right and then loops back down.

Mitchell R. Morrissey
Denver District Attorney

cc: Sgt. Antonio Lopez; John Davis, 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; Matt Murray, Deputy Chief of Police; Ron Saunier, Commander of Major Crimes Division; Paul Pazen, Commander of District One; Gregory Laberge, Crime Lab Commander; Joseph Montoya, Commander of Internal Affairs Division; Lieutenant Matthew Clark, Major Crimes; Lieutenant Adam Hernandez, Major Crimes Division; Lt. Scott Torpen, Major Investigation Section, Aurora Police Department; Sgt. James Kukuris, Homicide; Sgt. Tom Rowe, Homicide; Detective Michael Martinez, Homicide; Detective Troy Bisgard, 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.





Mitchell R. Morrissey
Denver District Attorney

OFFICER-INVOLVED SHOOTING PROTOCOL 2015

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 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) 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.¹

¹ 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

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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