



DenverDA

Mitchell R. Morrissey, District Attorney - Second Judicial District

201 W. Colfax Avenue, Dept. 801, Denver, CO 80202

Bus. Phone: 720-913-9000
Fax: 720-913-9035

February 12, 2016

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

RE: Investigation of the shooting death of Miguel Martinez, DOB 2/20/87, DPD # 588136, in which Technician Frederick Jones, 08021, and Technician Jesse Rembert, 05026, fired shots on November 22, 2015, at 305 S. Alcott Street, Denver, Colorado.

Dear Chief White:

The investigation and legal analysis of the shooting death of Miguel Martinez, in which shots were fired by Technicians Frederick Jones and Jesse Rembert, has been completed. I conclude that under applicable Colorado law no criminal charges are fileable against either Technician Jones or Technician Rembert. My decision, based on criminal-law standards, does not limit administrative action by the Denver Police Department where tactical issues may 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.

SYNOPSIS

At approximately 5:29 p.m. on Sunday, November 22, 2015, the Denver Combined Communications Center ("the call center") received a call from residents at 305 S. Alcott Street, stating that Miguel Martinez ("Martinez"), a member of the family who sometimes lived with his brothers in a detached garage at the rear of the main house (the "garage"), was armed, suicidal and had been threatening members of the family. Police officers arrived and determined that Martinez had barricaded himself in the garage. Officers were also told that Martinez had pointed a handgun at members of the family and that at some point he had shot himself in the leg. Upon their arrival, the patrol officers began attempts to communicate with Martinez and convince him to come out of the building. Sometime before 8:00 p.m., DPD hostage negotiators and Metro-SWAT officers arrived at the location. Hostage negotiators established phone contact with Martinez and continued efforts to persuade him to surrender. Metro-SWAT officers relieved the patrol officers on the inner-perimeter, holding positions from which they could monitor all sides of the garage.

Hostage negotiators worked diligently in an ultimately fruitless effort to get Martinez to surrender without incident. At about 10:30 p.m., Metro-SWAT commanders, concerned that Martinez was becoming more volatile and worried about the self-inflicted gunshot wound they were informed he had suffered, decided to introduce tear gas into the garage and force Martinez out. Using a 40 mm launcher, tear gas canisters were fired into windows on the north and south side of the garage, to no avail. Commanders then decided to try again, using a “burn box” which releases a much greater amount of gas. The decision was made to use a ram attached to a DPD armored vehicle to make a hole in the garage door on the west side of the building and throw the “burn box” through the hole.

A team of officers, either in the armored vehicle or using it as cover, approached the garage and the driver punched the ram through the insulated garage door. Through the hole, officers were able to see Martinez and immediately began ordering him to drop the handgun. Instead, he started pointing it in the direction of the garage door and fired it at least once. Technicians Jones and Rembert each saw Martinez’s actions. Both officers were armed with M-4 rifles. Each fired several rounds. Martinez was struck multiple times and died at the scene.

STATEMENT OF FACTS

At 5:28:34 p.m., the Denver 911 call center received a call requesting aid at 305 S. Alcott Street. The caller, later identified as Margaret Martinez, became frustrated when the call-taker sought to determine whether the address was a house or an apartment and hung up on the call-taker. The call-taker returned the call immediately:

Call taker: Hello, ma’am. Please tell me exactly what happened?
Mrs. Martinez: I said my grandson is around here with a gun!
Call taker: Okay. And who is he threatening?
Mrs. Martinez: I didn’t hear you.
Call taker: Who is he threatening with a gun, ma’am?
Mrs. Martinez: My other grandson. I don’t think he’ll shoot him.
He’s just acting smart. I’m 80 years old. Just forget about it.

The call-taker continued to attempt to get information but Mrs. Martinez, again frustrated, said “I can’t do it. I just got out of the hospital.” Mrs. Martinez hung up a second time. The call-taker called Mrs. Martinez back, again. This time Mrs. Martinez provided the call-taker with the information that her grandson was named “Miguel Martinez” and that he was 25 years old. As the call-taker attempted to get additional information, Mrs. Martinez was heard talking to another person. She then said words to the effect of “she’s here. Thank you.”, and, again, terminated the call.¹

In a written statement provided to investigators, Martinez’s mother, Gema Martinez, who resided in the 3100 block of West Gill Place, Denver, CO, advised that her son, Richard Martinez (hereinafter “Richard”), telephoned her and told her that Martinez had been consuming controlled substances for a couple of days and on the day of the incident Martinez had been fighting with him. Mrs. Martinez went to the Alcott address and, when she arrived,

¹ The “she” that Mrs. Martinez was referring to may have been Martinez’s mother whom, she believed, would calm him down.

[Martinez] came outside to tell me he was very mad at his brothers. [Martinez] said he was shot in the leg and was bleeding. I asked if he wanted medical attention. He said [“] No – to leave him alone[,] that he wanted to bleed to death and just die.[”]

Ms. Martinez went on to explain that Martinez suffered from schizophrenia, was bi-polar and had not been taking his medications. She also acknowledged she knew Martinez was an escapee from the Colorado Department of Corrections.²

Joseph Martinez [hereinafter “Joseph”] lived with his brother, Richard, in the garage. He provided investigators with a video-taped statement in which he confirmed the information provided by Gema Martinez. Joseph also told investigators that one or two days before the incident some unknown individuals - as he described it, “someone who wasn’t too happy with [Martinez]” - had fired shots at the garage with at least one round going through the garage door.³ Joseph stated that on November 21, 2015, Martinez had arrived at the garage armed with a semi-automatic pistol which he “waved” at both Joseph and Richard, and told both of his brothers that “someone sent him to take care of [Joseph and his] brother,” which Joseph understood as meaning that Martinez was going to hurt him. Martinez also told Joseph that “the voices in his head were telling him he needs to spend some time with his natural brothers because he knew he was going to die soon. And, that he wasn’t coming back for life [sic] and he was going to take his own life if necessary.” Joseph told investigators that at some point, Martinez said something to the effect that “if law enforcement was called, he was taking a lot of people with him” and that he also said “he’s not going out without a bang.” Joseph told investigators he and Richard were so concerned for their safety that they left their residence.

When asked about the day of the incident, Joseph told investigators that he was not at home at the beginning of the incident but that he was in the area and heard gunshots so he returned to the area to find police had cordoned off the area and established a command post. He remained near the command post and at one point police investigators allowed him to speak to Martinez on the telephone. During the conversation, Martinez apologized for threatening his brothers, stated that he had shot himself by accident and that he was in much pain, adding that he had ingested heroin and “meth speedballs” to deal with the pain and that he was “going to solder the [bullet] hole shut because he was losing a lot of blood. That one of his best friends taught him how to solder the hole shut.”

Officer Michael Traudt, 13073, was one of the first officers to respond to 305 S. Alcott. As he drove to the location, the dispatcher advised responding officers that a caller had reported hearing 6 gunshots in the area.⁴ In his written statement, Officer Traudt stated he was familiar with the address and aware that “a wanted male” sometimes stayed at the garage. As he approached he confirmed, via his MDT, that there was still an active warrant for Martinez’s arrest. Officer Traudt stated he and other officers arrived at the address, went to the garage and, when they knocked on the door, a male voice yelled, “fuck you! Go away!”

The officers spoke first with Margaret Martinez and, upon her arrival, Gema Martinez. Both witnesses provided the information recounted above. Gema Martinez advised the officers that

² A felony warrant for “Escape” and “Dangerous Drugs” had been issued on August 11, 2015, by the Colorado Department of Corrections. The warrant included a caution for “*violent tendencies*.”

³ Investigators located and documented bullet strikes to the garage that were consistent with this statement.

⁴ Attached as Appendix 1 is a chronology of some relevant radio transmissions aired during the first two hours of this incident.

Martinez was alone in the garage and still armed with a handgun. Based upon these facts, the officers on scene established a perimeter and began efforts to communicate with Martinez.

While the officers were establishing the perimeter, one of the family members who was speaking with Martinez by cell phone in an effort to convince him to surrender, handed the phone to Officer John Akins, 01046. In his written report, Officer Akins stated that he tried to persuade Martinez to come out of the garage but he refused and stated

“I would rather bleed out in here or make you kill me than go back to prison.” [Martinez] then went on to say that he had used a lot of heroin and methamphetamine and was not afraid to die. [Martinez] then repeated his threat to make the police shoot him. I was able to get [Martinez] to talk about his wound in an effort to determine the seriousness of the injury and the potential danger he was in. [Martinez] described his wound but stated that it was not pulsing and was just a steady flow from his leg. I offered [Martinez] medical assistance if he would peacefully come out of the residence. [Martinez] refused to come out and stated, “I’m gonna die in here. I have and [sic] AK47 pointed at the door and if you come in I will shoot you.” [Martinez] then hung the phone up on me.

The patrol officers on the scene continued to attempt to communicate with Martinez, both by telephone and public address system. They also requested that hostage negotiators and Metro-SWAT officers respond.

Detective Heather Hohnholz, 99078, the on-call negotiator for the Crisis Negotiations team, arrived at about 7:55 p.m. When she arrived she was directed to an officer standing in the intersection of W. Dakota Avenue and Alcott Street in the company of three female parties, one of whom was talking on a cell phone. Det. Hohnholz learned that this party was talking with Martinez and she requested and was given the phone. As she began attempting to establish rapport with Martinez, other officers provided her with the information that the suspect was “schizophrenic.”

Martinez first told Det. Hohnholz he had suffered a leg injury which was bleeding and that he was in a lot of pain. He refused to provide any more information about the injury, instead yelling that police officers were too near the windows and he believed they were trying to make entrance. As the conversation proceeded,

[Martinez] then told me he was holding a loaded SKS [a high powered rifle] and that he had another gun nearby which he had disassembled to make it safe. He stated that he had pushed the refrigerator in front of the door. [Martinez] stated he was willing to come out, but he was afraid that the cops were going to kill him. I assured [him] that his safety was my priority, and that if he did what he was directed to do, he would not be injured.

Thus began a conversation that was to last for more than two hours during the course of which Martinez repeatedly indicated he was going to “come out” but that he needed time to “catch his breath, or smoke a blunt, or calm down first.” Det. Hohnholz stated,

During the course of the negotiation, on several occasions I was provided with recordings made with the [Martinez’s] mother, his cousin Marco, and Gabby, the mother of his child. [Martinez] was receptive to listening to the recordings, and would begin to seem like he would come out. Then he would suddenly get agitated and talk about cops pointing lasers at him, cops drilling the walls to shoot him, etc., and the cycle would begin again.

At about 10:00 p.m., leaders of the Crisis Negotiation team decided that the approach they had been pursuing was not fruitful and Det. Hohnholz was “directed to become more forceful with [Martinez], and start pushing to him come out of the home. [Martinez] again grew agitated, and [she] had to work to calm him down.” These redoubled efforts continued for about 30 minutes. At about 10:30, Det. Hohnholz was advised that tactical units were going to be deploying chemical agents and that she should continue attempting to work with Martinez. In her words,

At approximately 2234 hrs [10:34 p.m.], I heard a sound over the phone that sounded like it was possibly the deployment of chemical agents. I immediately began giving [Martinez] clear instructions to come out of the house with hands up, and to come to the door. Although there was little response from [Martinez], I continued to give him these directions until the phone disconnected for unknown reasons at approximately 2248 hrs [10:48 p.m.]

The decision to introduce gas was made by Metro-SWAT commanders who had assumed operational control upon arriving at the scene. In his written statement, Special Operations Commander Patrick Phelan ⁵reported that upon his arrival:

My immediate concerns were the physical condition of the suspect, due to the self-inflicted gunshot wound[,] and the suspect’s lethal capabilities with the reported handgun and AK-47. I conferred with paramedics on the scene who stated that the [sic] depending on the location of the gunshot wound, the suspect’s life could be in jeopardy. Unfortunately, approaching the armed suspect had considerable and obvious risks.

As negotiators continued in their efforts to resolve the stand-off, other investigators sought and obtained a search warrant for the garage. After he had monitored the on-going negotiations for some time, Commander Phelan ordered SWAT team leaders to prepare a “chemical agent deployment” plan. His reasons for doing so were “based on the duration and failure to make progress through negotiations and the growing concern for [Martinez’s] physical condition; at a point in the negotiations the negotiators believed [Martinez] was fading,”

The plan was to introduce gas through windows on the north and south side of the garage simultaneously by firing 40 mm gas munitions through those windows, with the hope that Martinez would come out of the garage rather than being overcome. Just after 10:30 p.m., Commander Phelan confirmed that a judge had issued the search warrant and ordered the Metro-SWAT officers on the inner-perimeter to deploy the chemical agents. Officers launched several canisters into the garage through the windows. As they did so, Det. Hohnholz, who was still on the phone with Martinez, began giving him “direct” orders to come out of the house. Other officers gave similar commands on a public address system. The gas appeared to have no effect - Martinez did not comply with the orders to vacate.

Metro-SWAT commanders had assigned teams of officers to posts where they could watch all four sides of the garage. One team, consisting of Cpl. Rob Broden, 90026, K-9 Officer Kenneth Brown, 98039, Technician Jacob Stevenson, 01016, and Technicians Rembert and Jones, was assigned to the armored vehicle known as the “Bearcat” and posted in the alley where they could

⁵ The Metro-SWAT unit is contained with the Special Operations Division of the Denver Police Department.

watch the west and south sides of the garage.⁶ (Joining this team was Metro K-9 officer Michael Gallegos, 96047, and his police dog. They followed the Bearcat into the alley in Technician Gallegos's police car.) Members of this team had introduced the gas through the window on the south side of the garage.

When the first attempts to force Martinez out by using the 40 mm gas canisters failed, Cpl. Broden's team was tasked with using the ram attached to the Bearcat and making a hole in the garage door on the west side of the garage. Through that opening, they would then insert a "burn box" which would emit substantially more gas than the 40 mm canisters.⁷ At about 10:48 p.m., Commander Phelan ordered the Bearcat team to breach the garage door and introduce the "burn box."

The Bearcat was being driven by Cpl. Broden. Technician Jones was in the turret, Technician Stevenson on foot on the driver's side of the vehicle and Technician Rembert on foot on the passenger's side. Both Technicians Jones and Rembert were carrying 5.56 caliber Colt M4 carbines. The M4 has a 30 round magazine and both officers carried their rifles with the magazines fully loaded.⁸

The garage door had been modified by the addition of drywall, insulation, and wooden supports. Using the ram, Cpl. Broden was able to create a hole large enough to allow Technician Jones to see into the garage. Technician Jones advised him that he could see Martinez and Cpl. Broden enlarged the hole so as to enable the team to shine a light inside for better visibility.⁹

In his video statement, Cpl. Broden informed investigators that once the room was lit he was able to see that a refrigerator had been placed as a barrier in front of the main door. He also saw Martinez lying on his side in the north-east corner of the garage holding a black semi-automatic handgun. He told investigators he heard members of the SWAT team yelling "gun" and then heard them ordering Martinez to drop the gun. Cpl. Broden told investigators he saw Martinez's gun move to the west and he believed he heard a "pop." He then heard Technician Rembert fire several rounds.

Technician Jones was positioned in the turret when Cpl. Broden made the hole in the garage door. He told investigators that once the hole was enlarged he was able to see Martinez's legs and lower torso. Martinez was lying on the floor in the north-east corner of the room. When Cpl. Broden enlarged the opening Technician Jones was able to see most of Martinez's body "except his hands. His hands are behind something – I don't know what – if it's a trash can or like a TV monitor or a computer monitor or whatever." Technician Jones and other officers yelled that they were police officers and commanded Martinez to surrender. Technician Jones told investigators,

⁶ The Bearcat or "Blackcat" is a wheeled vehicle with armor designed to withstand small-arms fire. It has a hatch-covered opening in the roof, referred to as the "turret," which allows an officer to take a position of "high cover." Pictures of this vehicle are found on page 15.

⁷ In his video statement, Technician Rembert described this tool as "essentially a metal box that you put a higher quantity of gas in to try and induce someone to come out – the amount of gas that it produces is significant and that typically induces people to leave the residence."

⁸ Each officer was also carrying a 9mm semi-automatic pistol. Neither officer fired his handgun.

⁹ There was little or no interior lighting in the room. Officers were reliant upon the Bearcats headlights and spotlights and their own flashlights for illumination

Then all of a sudden he starts moving. He's just moving his legs. His body's moving a little bit but his hands remain where they're at. So his body keeps moving for a little bit and he pulls one hand out and it is clear as day that it's a pistol. As I'm looking at this gun, I yell out, "Gun!" So now we're like, we're telling him to drop the gun. We're telling him who we are. We're "Denver Police! Drop the gun! Drop the gun!" I'm watching him. He has his finger on the trigger. So he's kinda of – his belly – I mean his torso is facing me and I don't remember which hand that pistol's in but he has it up and it's pointing at the ceiling towards the south. So as we're giving him more commands, I hear a pop and then I kind of see his hand go [demonstrating] and it's kind of faint but I'm pretty sure it was a gunshot.

Technician Jones told investigators it was his belief that Martinez's first round traveled into the ceiling. However, after the first round was fired, Martinez began pointing the muzzle in the direction of Technician Rembert who was, at that point, standing near the garage wall at the passenger's side of the Bearcat. As the muzzle traveled in Technician Rembert's direction, Technician Jones began firing his M4. He told investigators "I don't know how many shots I discharged. But as soon as I see him no longer a threat and he kind of rolls over - the gun falls - and he rolls over to his side and he ends up on his arms, laying [sic] on top of his arms, I disengage him."

Technician Rembert told investigators when Cpl. Broden first breached the garage door, he was in a rear position providing cover to Technician Gallegos (the K-9 team was present as a less-lethal option.) He heard Technician Jones announce that he was able to see Martinez's legs so he moved up to the driver's side of the Bearcat. However, from that position, he was unable to see Martinez so he then moved around to the passenger side of the Bearcat and then forward to a point where he "was actually able to see [Martinez's] legs and a good portion of his torso from about the mid, mid-forearm down to his legs." Technician Rembert joined the other officers issuing commands that Martinez show his hands and surrender.

Technician Rembert stated he was about to suggest that they send in the police dog when Martinez started to move a little bit. As he described events,

At that point he's laying [sic] on what would be his right side, you know, in this position on his right side. At that point, I heard somebody yelling, "Gun!" And up from [Martinez's] hand – I believe it was his left hand – it might have been his right, but I'm pretty sure it was his left – goes up in the air and in his hand is a black semi-automatic pistol.

Technician Rembert told investigators he continued yelling "Denver Police! Drop the Gun!" while Martinez was pointing the gun in the air. Martinez kept the gun pointing in the air for several seconds and then he started "slowly lowering it towards the sound of [Technician Rembert's] voice." Technician Rembert stated

And when the gun is facing me – as the barrel is dropping lower to me, pointing at me, moving it around to the sound of my voice as I'm yelling at him – as the barrel gets – as it's coming down towards my body, right – I could see where the barrel is at – it's kind of off my shoulder – that's when I fire the first round.

If, as Technician Jones recounted the facts, Martinez fired a round into the ceiling, but Technician Rembert did not hear that shot. However, Technician Rembert told investigators that after he fired his first round, Martinez fired a shot in his direction. Technician Rembert then returned fire,

firing multiple rounds. In his words “I shot the one and then he shot. Then I shot a long stream of rounds.” As he fired, Technician Rembert heard another officer, to his left, also firing.

The officers stopped firing when it became apparent that the threat presented by Martinez had been neutralized. They and other officers carefully entered the garage and, once it was determined that Martinez no longer presented a threat, paramedics also entered the garage to attend to Martinez. The paramedics, in communicating with doctors at Denver Health Medical Center, assessed Martinez’s condition and he was pronounced dead at the scene at 11:09 p.m. The scene was secured for the follow-up investigation by CSI and homicide investigators.

Next to Martinez’s body at the scene, investigators recovered a .40 caliber Springfield XD-40 semi-automatic pistol.¹⁰ Investigators also located six spent .40 caliber cartridge casings. One of those (recovered at evidence marker #27) was “microscopically identified as having been fired in the submitted Springfield firearm.” Another (recovered at evidence marker 41) was compared to test-fired cartridge casings from the Springfield pistol but “due to damage, the result of the microscopic comparisons were inconclusive.”¹¹ The other four casings were found to have been fired from the same “unknown 40 S&W firearm. These cartridge cases can be eliminated from the Springfield firearm [recovered next to Martinez’s body].”¹²

Investigators also recovered two “fired” bullets which had been discharged from the Springfield pistol. One was recovered from the ceiling. The other was recovered from the garage wall near the garage door. Investigators determined it had been fired in the direction of Technician Rembert’s position.¹³ The locations at which these bullets were recovered corroborates the statements made by Technicians Jones and Rembert.

Investigators recovered numerous Remington .223 caliber shell casings outside the garage and in or on top of the bearcat.¹⁴ These shell casing and the unloading sheets prepared by Denver Crime Lab firearms examiners allowed investigators to determine that Technician Jones fired 16 rounds and Technician Rembert fired 17 rounds.

On November 23, 2015, forensic pathologists with the Office of the Medical Examiner for the City and County of Denver performed an autopsy on Martinez’s body.¹⁵ Martinez was found to have sustained 34 gunshot type “defects” to his upper body.¹⁶ Some wounds were to Martinez’s right side, others to his left side and Martinez’s position at the time he was first shot cannot be determined by the location of the wounds. Toxicological testing was “positive for methamphetamine (with metabolite)

¹⁰ See the photos on pages 15 & 16.

¹¹ Photos showing the cartridge casings at markers 27 and 41 are found at page 17.

¹² There is no evidence establishing when those four cartridge casing were ejected and by whose pistol. We can say only that they were not identified to Martinez’s Springfield XD-40. We are informed that the Denver Police Department does not authorize officers to carry .40 caliber pistols.

¹³ This bullet was documented at “marker 6”. Photos showing the trajectory and the recovered bullet are found at page 17. A diagram prepared by the Crime Lab showing the estimated trajectory is attached at page 18.

¹⁴ The 5.56 caliber M4 carbine may be loaded with .223 Remington cartridges.

¹⁵ This report was not completed, signed and dated until February 2, 2016. We received it on February 3, 2016.

¹⁶ We are aware that this number exceeds the number of rounds fired by the officers. This results from the fact that some of the wounds to the extremities entered and exited an arm and then re-entered the body.

and cannabinoids in the blood and cannabinoids, amphetamines and fentanyl/metabolite in urine.”
The cause of death was “multiple gunshot wounds.”¹⁷

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. The evidence establishes that the shots fired by the involved officers caused Martinez’s death. The determination of whether the officers’ actions were criminal is primarily a question of legal justification.

C.R.S. 18-1-707 is a Colorado statute which describes the circumstances under which a peace officer may 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.

In order to establish criminal responsibility for an officer knowingly or intentionally causing death to another, the state must prove beyond a reasonable doubt that the officer either did not really

¹⁷ Of interest is the fact that no gunshot wound was found in either of Martinez’s legs. It appears his statement to family and friends that he had shot himself was, in fact, false. Why he chose to make such a statement is a mystery.

believe in the existence of the circumstances required by the statute, or, if he did hold such a belief, that belief was, in light of all available facts, unreasonable.

Section 18-1-901(2)I 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.

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

It is fundamental that the law of self-defense, which is emphatically a law of necessity, involves the question of one’s right to act upon appearances, even though such appearances may prove to have been deceptive; also the question of whether the danger is actual or only apparent, and as well the fact that danger is not necessary, in order to justify one in acting in self-defense. Apparent necessity, if well grounded and of such a character as to appeal to a reasonable person, under like conditions and circumstances, as being sufficient to require action, justifies the application of the doctrine of self-defense to the same extent as actual or real necessity. *Young v. People*, 107 P. 274, (Colo. 1910).

CONCLUSION

The question presented in this case is whether, at the instant Technicians Jones and Rambert discharged their firearms, the legal justifications for using deadly physical force as set forth in C.R.S. § 18-1-707(2) were applicable. I conclude they were.

Martinez barricaded himself in a building after telling family and friends he was suicidal. He had threatened his brothers with a handgun and had told his ex-girlfriend and members of his family that he had shot himself in the leg, that “he would either bleed to death or shoot it out with police before going back to jail.”¹⁸ He made it clear to Officer Akins during a phone conversation early in the stand-off that he “would rather bleed out in here or make you kill me than go back to prison.” These were the facts with which Denver police officers were confronted.

Police first secured the scene by establishing a perimeter so as to assure that Martinez would not pose a threat to any citizens and residents in the neighborhood. They then spent several hours

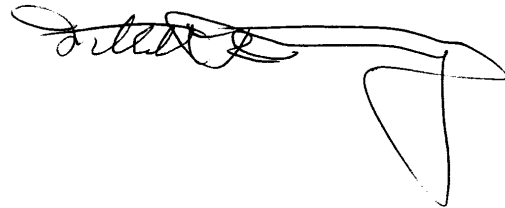
¹⁸ See, written statement of Officer Michael Traudt recounting his interview with Gema Martinez.

attempting to negotiate his peaceful surrender. Ultimately, a decision was made by senior commanders to use “tear gas” in an effort to force Martinez out of the garage. The nature of the structure in which Martinez had barricaded himself demanded that officers attempt to introduce a large quantity of gas and that they would have to break out a hole in the wall in order to do so. Once the hole was made, Technicians Jones and Rembert were able to see Martinez and see he was armed with a handgun. They gave him several orders to drop his handgun. Rather than comply, he fired one round in the ceiling and one round in Technician Rembert’s direction. Both officers returned fire. Officer Rembert fired to defend himself; Technician Jones fired to protect Technician Rembert. Each of their actions were objectively reasonable and, as such, justifiable under Colorado law.

This case, yet again, points out the tragic impacts of drug abuse and mental illness on the criminal justice system as officers were called to confront a subject who was under the influence of illegal controlled substances, and, in this instance, appears to have suffered from some psychosis. These conditions apparently led Martinez to confront highly trained police officers in a situation he must have known he could not win. His actions and statements may cause some to conclude this case was “suicide by cop.” We know only that Martinez could have prevented his death by complying with the repeated requests and demands that he surrender peacefully.

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: Officer Frederick Jones; Officer Jesse Rembert; Sean Olson, 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; Patrick Phelan, Commander of Special Operations; Gregory Laberge, Crime Lab Commander; Joseph Montoya, Commander of Internal Affairs; Lieutenant Matthew Clark, Major Crimes Division; Lt. Scott Torpen, Aurora Police Department Major Investigations Section; Sergeant James Kukuris, Homicide; Sergeant Tom Rowe, Homicide; Detective Randall Denison, 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; and Rev. William T. Golson, Jr.

APPENDIX 1

The following is a chronology of radio transmissions from the first calls to the arrival of the negotiators

5:34 p.m.

Dispatcher: [I] need a cruiser to advise on a weapons call just dropped. Getting a call at 305 S. Alcott. Three Zero Five South Alcott. Started as a 9-1-1 hang-up. We called back and had an uncooperative female saying she just had a heart attack and the grandson's there – refusing to cooperate with us and then she said she needed some kind of help and her grandson has a gun. Then she hung up and she won't answer the phone.

5:35p.m.

The dispatcher assigned the call to one car noting that due to the nature at least two cars would be needed. As she did so, car 431H came on the air and advised the dispatcher and the responding cars:

431H: The address is known to have CODE 5 parties who are armed. [Unintelligible] may need more than two cars. I can head that way from the station.

Responding cars decided to “stage” at Dakota Street and Alcott Street so they would not be visible from the house.

5:40 p.m.,

The dispatcher advised cars responding to the Alcott call that the call center had just received a “shots heard – six to seven gunshots, 381 South Alcott - three to five minutes ago, possibly north of the location.” One of the patrol cars acknowledged that broadcast and requested that additional cars be directed to the area.

5:44 p.m.

Responding cars began advising the dispatcher that they had arrived at the location.

5:59 p.m.

Car 431F advised the dispatcher that officers were going to attempt to “make contact” and requested that she “hold the air.”¹⁹ At 6:08 p.m., one of the officers on scene advised the dispatcher that they had “information from the grandmother that the male had shot himself; he does have a gun” and officers were holding the perimeter. Two sergeants and at least seven patrol cars were either on scene or *en route*.

By 6:15 p.m.

Fire department and EMS vehicles had been positioned at or near the intersection of Alameda and Alcott Streets (those vehicles were relocated to Zuni and Dakota Streets shortly thereafter.)

¹⁹ This is, in essence, a request that no radio traffic other than that concerned with the specific incident or location be broadcast.

6:32 p.m.

A supervisor on scene asked the dispatcher to reach out to other DPD patrol districts and have them send additional cars to the location to assist in securing the perimeter and stopping traffic from coming in to the area.

6:45 p.m.

A supervisor began the process of calling the Metro-SWAT unit to the scene. Two minutes later, officers began attempts to get Martinez to leave the house by making announcements every three minutes.

6:55 p.m.

Car 430 aired that he “had [Martinez] on the phone for a minute. He just hung up on me. From talking to him, sounds - he’s claiming that he has an AK47 in there, so, beware of that.”²⁰

7:01 p.m., another supervisor (car 440 B) advised the dispatcher of the following:

Ma’am. I just got off the phone with the party inside this residence. He confirmed that he is in there, confirmed that he is shot and confirmed that he is armed. At this point in time he is refusing to come out. This will be a barricade. Um, can you go ahead and get ahold of [Criminal Investigations Division] and get a negotiator started this way, please?

²⁰ Officers at the scene were unable to determine whether Martinez did, in fact, have such weaponry. The information they received from Martinez’s mother was that she had not seen an AK47, “only a small black handgun.” However, car 432D broadcast the information that “we were there about a month, month and a half ago and, um, there were AK47s in this back house. There were two laying [sic] on the bed. We didn’t have reason to go into the house – we weren’t able to take them but he may have one. “









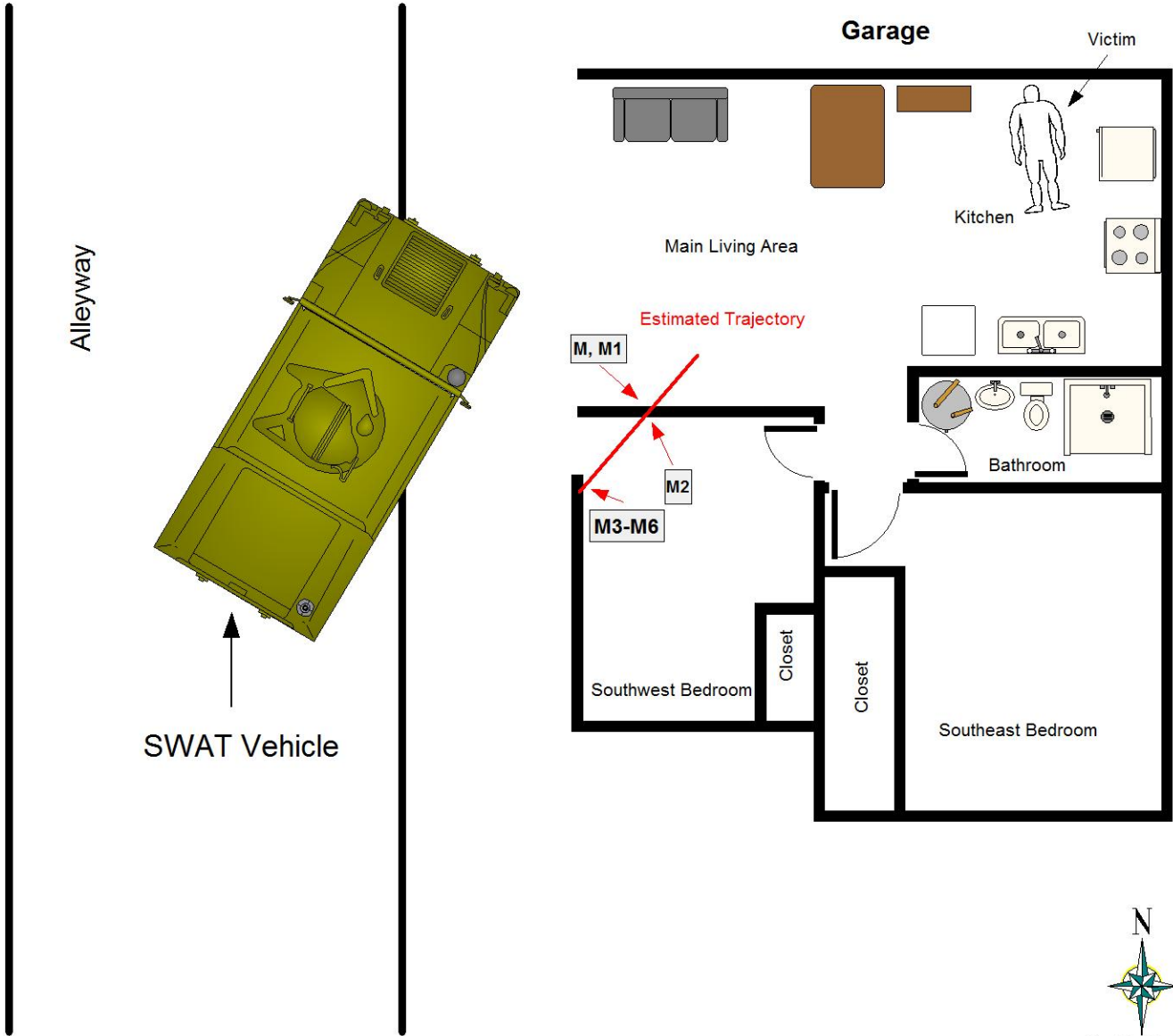


Case Number: 2015-683593

Date: 11/23/2015

Location: 305 South Alcott Street: Diagram Author Benik (B13051): Approved by Greene (B14008) on 02/10/2016

Description:
Markers M-M6 Trajectory





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.

Mitchell R. Morrissey

Denver District Attorney

CONTACT FOR INFORMATION

S. Lamar Sims, Senior Chief Deputy District Attorney,
Denver District Attorney's Office, 201 West Colfax
Avenue, Dept. 801, Denver, CO 80202 720-913-9000

Doug Jackson, Senior Chief Deputy District Attorney,
Denver District Attorney's Office, 201 West Colfax
Avenue, Dept. 801, Denver, CO 80202 720-913-9000