



DenverDA

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September 19, 2016

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

RE: Investigation of the shooting and wounding of Kevin Lee Jones, 3/17/76, DPD # 482873, and Robert Jones, 9/27/80, DPD# 507453, in which Detective Randall Wagner, 00121, fired shots on July 10, 2016, at 14th Street and Curtis Street, Denver, Colorado.

Dear Chief White:

The investigation and legal analysis of the shooting and wounding of Kevin Lee Jones and Robert Jones, in which shots were fired by Denver Police Officer Randall Wagner, has been completed.¹ I conclude that under applicable Colorado law no criminal charges are fileable against Detective Wagner. My decision, based on criminal-law standards, does not limit administrative action by the Denver Police Department, where non-criminal issues can be reviewed or civil actions where less-stringent laws, rules and legal levels of proof apply. A description of the procedure used in the investigation of this officer-involved shooting and the applicable Colorado law is attached to this letter.

STATEMENT OF FACTS

This incident occurred just after 1:00 a.m. on Sunday, July 10, 2016, at 14th Street and Curtis Street in downtown Denver.² At about 1:05 a.m., Ms. Emily Waddell and Ms. Fiona McAliney were walking to the Auraria Student Lofts, 1051 14th Street (the "Auraria Lofts"), to join up with some friends. In a written statement, Ms. Waddell indicated that as they neared

¹ Shots were also fired by Edwin Montoya, a private security guard in the employ of Mile High Protection Services. As will be discussed in the body of this letter, Mr. Montoya fired to protect the lives of others and we would be unable to prove, beyond a reasonable doubt, that his actions were not justified pursuant to C.R.S. § 18-1-704. Accordingly, no charges will be filed against Mr. Montoya.

² The overhead photo attached on page 12 shows the area of interest. Shown as well are the businesses which are referred to by witnesses as points of reference – the Denver Center for the Performing Arts (the "DCPA"), the Epernay Lounge, the Backstage Coffee Shop, the Corner Office restaurant, the Century Link Building and the Auraria Student Lofts.

their destination they walked past a group of people, in the middle of which were two African-American men engaged in what she described as a “*heated argument*.” Ms. Waddell stated that, when she and Ms. McAliney were a few feet past the group, she looked back and saw that “*the [two] men were in a physical fight that moved from the sidewalk into the street*.” Ms. Waddell indicated that she then saw a man in a uniform attempt to break up the fight. She stated that she saw the “*officer spray the men with what appeared to be pepper spray or mace*.” Ms. Waddell and Ms. McAliney turned and continued walking toward their destination when they heard gunshots coming from behind them. Ms. Waddell said that when the shots rang out, “[*they*] were helped to safety by a security guard on duty at the student lofts.”³ In her audio-recorded interview, Ms. Waddell estimated that approximately two minutes elapsed between the time she turned away from the fight and the point at which she heard gunshots.

Jacob Kaplan, a resident at the Auraria Lofts, was one of the people with whom Ms. Waddell and Ms. McAliney were meeting.⁴ He provided investigators with a video-recorded statement, in which he stated that he and a couple of other friends were walking up 14th Street from Arapahoe Street to meet Ms. Waddell and Ms. McAliney, who were already in front of the Auraria Lofts. He indicated that just as they met up, he heard

A little bit of an argument – it wasn’t loud. It wasn’t real loud. And then, all of a sudden, we hear a ‘zip.’ Like a shot and a ‘zip.’ And, uh, at first I thought it was a bottle rocket or a firework or something and that’s when, um, we hear, like, eight shots. Like a full clip, like shoot right in our direction. And we hear, uh, the bullets hitting cars and hitting the ground right next to us.

Mr. Kaplan added that he and the others started to take cover when one of the security guards ushered them into the building.

Several other individuals witnessed the crowd milling at the intersection of 14th and Curtis Street. Mr. Matt Haddadi, the owner of the Back Stage Coffee Shop, provided investigators with both written and video-taped statements. He told investigators he was inside his business when he saw a large group of people near the Curtis Street intersection and a fight in which “*several people were involved*.” He then saw a security guard attempt to separate the disputants and saw him deploy pepper spray. Another witness, Mr. Marc Kurtz, provided investigators with a brief written statement in which he indicated he

saw a fight/skirmish. A couple of cops were around a group of guys. One dark-skinned office[r] started macing some guys and then they separated. A few seconds later we heard gun shots (about six to eight shots) and then everyone ran. I saw a black man in white pants who was involved in the shooting but I didn’t see who shot the gun.⁵

³ Both Ms. Waddell and Ms. McAliney provided investigators with audio-recorded telephone interviews (Ms. McAliney also completed a written statement.) Ms. McAliney’s observations mirrored Ms. Waddell’s. She explained that at about the time the fight moved into street and the security guard began deploying “*pepper spray*” their friends arrived and they ceased watching the fight. Ms. McAliney stated that “*as we turned around to say ‘hi’ to our friends, we heard gunshots go off and a second security guard came out of the student lofts and told us to take cover inside*.”

⁴ Another witness, Mr. Eric Gonzales, was walking with Mr. Kaplan. He provided investigators with an audio-recorded telephone interview which was corroborative of the statement provided by Mr. Kaplan.

⁵ Other witnesses included Ms. Megan Harvey and Ms. Ashley Ruiz, both of whom provided investigators with video-recorded statements. Ms. Harvey and Ms. Ruiz were in Ms. Harvey’s car and were stopped at the light at 14th and Curtis Street. They saw a group of people at the intersection. Ms. Harvey stated that she then heard gunshots. She looked to her right and saw a person in uniform shooting but could not determine who his target was. Ms. Ruiz told investigators she saw a “*guy who was kind of*

Two other witnesses, Mr. Frank Moore, Jr., and Reginald Madison, jumped into a black Chevrolet Impala convertible and drove away immediately after the shooting. Witness Ashley Ruiz described this action and the vehicle to officers at the scene. Those officers, concerned that this vehicle might have been involved, aired the description.⁶ The Impala was stopped by other officers at 17th and California. Both Mr. Moore Jr. and Mr. Madison were taken to DPD headquarters where they provided video-recorded statements. Mr. Moore also permitted officers to search his vehicle and no weapons were found. While officers were engaged in contacting Mr. Moore, Jr., and Mr. Madison, three more men, Mr. Joshua Moore, Mr. Herbert Ray, and Mr. Frank Moore (father of Frank Moore, Jr.) arrived at the 17th Street and California Street location and told officers that they had been with Mr. Moore Jr. and Mr. Madison at 14th Street and Curtis Street and had also witnessed the shooting.

Mr. Joshua Moore, Mr. Frank Moore and Mr. Ray provided investigators with written and video-recorded statements. Their statements, and those provided by Mr. Moore, Jr., and Mr. Madison, are consistent with and corroborative of the statements of other witnesses and the video surveillance. *See, e.g., Mr. Ray's written statement:*

[I] witnessed two men fighting on the sidewalk. It went into the street. Police broke it up with spray. When the guy in a black shirt [and] a pair of dark pants came running west firing a gun, I turned around before he reached the corner and [where he] was shot from the south side of the street. Police officers and security were on the south side of the street. [There] was a lot of gunfire when I saw the guy in the black shirt and dark pants fall to the ground.⁷

The individual Ms. Waddell described as a uniformed officer and Mr. Kurtz described as a "dark-skinned officer" was not a police officer. He was Mr. Edwin Montoya, 4/11/90, a uniformed and armed security guard employed by "Mile High Protection Services" which provided security for the Auraria Lofts.

On July 12, 2016, Mr. Montoya, in the company of his attorneys, met with investigators and provided a video-recorded statement. Mr. Montoya confirmed that he was working as a uniformed security guard and stated that his uniform consisted of black pants, a blue and black shirt with patches on the shoulder, and a duty belt on which he carried a TASER, a baton, OC spray, flashlight, a handgun and three additional magazines.⁸ He told investigators that he was outside in front of the Auraria Lofts when he noticed two groups of men in front of the yellow bench at the northwest corner of 14th Street and Curtis Street⁹ "having a verbal altercation." He described one of the groups as consisting of eight-to-ten black men; the other group consisted of

looking down the street as if something was about to happen." She saw police officers to her right and then heard the sound of gunfire at which time she ducked down in the vehicle.

⁶ Before Kevin Jones was transported to the hospital, one of the responding officers, Matthew Peltier, 13045, asked him who shot him. In his written statement, Officer Peltier indicated that K. Jones "did not know. The only information Kevin was able to give to me was that the suspects were in a black convertible." Despite K. Jones statement, there is no evidence that anyone other than he, Officer Wagner and Security Guard Montoya discharged weapons. There is no credible evidence suggesting anyone in Frank Moore, Jr.'s, party had or fired a gun.

⁷ See, also, Joshua Moore's statement indicating he saw a man wearing a black shirt "walk down the sidewalk and come back down the sidewalk with the gun in his right hand. Then I seen [sic] him lift his hand up and start shooting. . . ."

⁸ Mr. Montoya possessed a "Denver Merchant Guard Card" and an "Armed Merchant Guard Card" which provided authorization for him to carry a firearm while in uniform and engaged in the security business. It appears both cards had expired some weeks before July 10, 2016. That issue is not before us.

⁹ A photo showing this bench is attached on page 12.

three or four black males. He then saw two black men, one wearing a light shirt and red pants, the other attired in dark colored jeans and a blue and white long-sleeved checkered shirt, start to fight. Mr. Montoya stated that he “*gave verbal commands to break it up*” and began flashing his flashlight in an effort to distract the men. The combatants paid him no heed. The fight moved from the sidewalk into the street and Mr. Montoya began deploying OC spray in an attempt to stop the fight and disperse the crowd.

Mr. Montoya stated that he was aware that two off-duty Denver police officers were working at the Epernay Lounge. As he had been unable to stop the brawl, he began attempting to gain the attention of the officers by flashing his light in the direction of the Epernay Lounge. He saw an officer “*come up the sidewalk*” and he crossed the street to meet with that officer. The two met near the “T-intersection” where Curtis Street meets 14th Street in front of the Backstage Coffee Shop. Mr. Montoya told investigators he was telling the police officer what had occurred when he saw two men who were fighting go to the ground and then the male wearing the red pants get up and take off “*in a sprinting manner, running down Curtis Street*” toward 15th Street and away from the fight. Mr. Montoya stated that “*a second later, from my right direction, I heard three shots.*” He looked across the street and saw

a black male with a bald head, black shirt, black jeans, right arm fully extended, with a black handgun in his hand, shooting at the crowd that was fighting with them in front of the yellow benches on 14th and Curtis. There was [*sic*] innocent bystanders walking by. There was [*sic*] students from the Auraria Student Lofts sitting outside, smoking. He was just shooting in that direction.”

Mr. Montoya told investigators that he drew his handgun. As he did so, he heard the Denver officer fire his handgun. Mr. Montoya began firing at the gunman. As he began firing, Mr. Montoya saw the “*second aggressor,*” the black male wearing the blue and white checkered shirt, come into his field of vision. Mr. Montoya stated that “*his body language showed like he might have had something in his hand cuz he was kinda angled the same way [demonstrating by holding his right arm outstretched], and he just walked into the line of fire.*”

Mr. Montoya told investigators that the man he saw firing the pistol appeared to have been struck, either by his rounds or by the rounds fired by the Denver officer, because he fell to the ground. The second party also appeared to have been shot as he took several steps back toward Champa Street before falling to the ground.

Mr. Montoya told investigators that after both men went to the ground, the Denver officer moved to take the gunman into custody and he “*advanced on the second suspect [and] held the second suspect at gunpoint – gave him verbal commands to show his hands [with] which he complied.*” Mr. Montoya indicated that other officers were arriving as he and the Denver officer approached the two suspects and he assisted Denver officers in taking the second suspect into custody. In answer to questions posed by investigators, Mr. Montoya made it clear that the “*second suspect*” was the man wearing the blue and white checkered shirt. Mr. Montoya also stated that although he thought the “*second suspect*” might have had a gun, he was never aiming at that party. Instead, the “*second suspect*” walked directly into the line of fire while Mr. Montoya was shooting at the gunman.

Mr. Montoya stated that he believed the gunman fired three rounds before he started firing and that he believed he fired “*four to six*” rounds. In answer to a specific question about his reason for firing his gun, he answered,

In fear for people’s lives. In fear for students who were outside smoking. In fear for bystanders that were walking by. Uh, in fear for the people that he was fighting with - I mean, they’re selfless, they’re defenseless. They had no idea – they thought the fight was done and over with and guy comes walking down, shooting into a crowd. . . . I was scared someone was gonna die.

Detective Randall Wagner was the officer Mr. Montoya met in front of the Back Stage Coffee Shop. Det. Wagner, who is assigned to the Narcotics Bureau in District 5, was working an authorized off-duty assignment as a uniformed officer at the Epernay Lounge and was dressed in a full blue DPD uniform.¹⁰ He provided investigators with a sworn and video-recorded statement shortly after the incident. Det. Wagner stated that he was standing near the front doors of the Epernay Lounge which opened out onto 14th Street. He indicated he was talking with some patrons and one of the bar’s security guards when he turned and noticed the flash of a flashlight coming from 14th and Curtis Street. He then noticed what he believed to be a cloud of pepper spray and saw a “*security guard [Mr. Montoya] kind of bouncing around, um, backwards and kind of hopping, like, moving out of the way. And then he would spray and then he’d move.*” Det. Wagner stated that it appeared that Mr. Montoya was trying to break up a fight so he started walking towards the conflict. As he approached Curtis Street, Det. Wagner met Mr. Montoya who pointed out two men and told him that “*these guys are fighting.*” Det. Wagner told investigators that he saw a guy wearing either red shorts and a white shirt or white shorts and a red shirt

come running across Curtis [Street]. As he, kind of come out of my peripheral, I saw the other two guys, up on 14th [Street] there. They were running back down the sidewalk and, as I go to, the uh, well, I got to a, a sign there [on the corner of 14th and Curtis]. As I got to the sign, I saw [one of the latter two] raise a handgun, a black handgun, and start firing towards the crowd on the east side of, of 14th [Street].

Question by interviewer: O.k. What happened then?

Answer: Uh, he fired it, at least one round, he may have fired a, a second round, I’m not sure. I challen – I, I didn’t realize that I had my gun out but I challenged him at gunpoint and I was yelling at him to put the gun down, put the gun down. I was actually screaming, “get on the ground!” whi-- which didn’t make sense to me now but I was screaming at him to get on the ground.

Det. Wagner told investigators that, instead of complying with his commands, the gunman, later identified as Kevin Jones (“K. Jones”), fired another round at which point Det. Wagner began shooting at the gunman, stating that “*I fired at him several times, I don’t know how many times. And, all the while, I was screaming at him to, uh, get down on the ground.*” Det. Wagner indicated that he did see “*the second guy*” (later identified as “R. Jones”) as the two ran forward toward Curtis Street but his attention was focused on K. Jones. He stated that as shots were fired he saw K. Jones fall to the ground and then saw R. Jones, who was slightly

¹⁰ There were two Denver police officers working at the Epernay Lounge. The other officer, Det. Chris Parker, 06058, was also working in uniform. He was stationed at the back door to the lounge, on the Arapahoe Street side, and did not witness the shooting. He heard the gunshots, ran to the scene, and assisted in taking Kevin Jones into custody. (Det. Parker had previous encounters with Kevin Jones and knew him by name.) Det. Parker provided investigators with a video-recorded statement.

ahead of K. Jones, run back to his brother and then run a short distance toward Champa Street and “*into a, a little cut out, there, between the buildings.*”

In follow-up questioning, Det. Wagner made it clear that the Jones brothers were across 14th Street from his position. He stated that R. Jones was aiming at

the crowd of people by these cars cuz, when I had walked up, everybody that had been pepper sprayed and [unintelligible] were going back towards the cars. So, it appeared that he was shooting at this group of guys in the cars.

Question by interviewer: O.K. And how many rounds do you believed he fired?

Answer: He fired? I don't know, for sure. I, I think four or five. It's, it's kind of hard to say cuz the security guard was somewhere beside me and he was firing also, so there was [sic] rounds going off pretty much everywhere. So I think he w-I think this is four or five.

When asked why he discharged his firearm, Det. Wagner stated that K. Jones was shooting into a crowd of people and “*he was not gonna stop unless I stopped him.*” Det. Wagner told investigators that he stopped firing when K. Jones “*stopped firing and, and went to the ground.*” Det. Wagner stated that he approached the gunman and, as he did so, he was joined by Det. Parker. Det. Wagner held K. Jones at gunpoint as he was taken into custody. Det. Wagner then looked around the area and observed K. Jones's pistol in a ground level planter between the street and the sidewalk.¹¹

VIDEO EVIDENCE

Det. Wagner was not equipped with a body worn camera. Mr. Montoya did have a body worn camera, which he told investigators he had purchased himself, however it had not been activated. Investigators did locate surveillance cameras from three sources: Denver Police High Activity Location Observation (“HALO”) cameras, Century Link building surveillance cameras and Auraria Lofts surveillance cameras.

Auraria Lofts video

Starting on July 12, 2016, investigators made repeated efforts to either obtain or review the video evidence from representatives of the Auraria Lofts. Detectives were first advised that the footage would be stored for 30 days and that they would need to make a formal request for the videos. Such a request was made on July 22, 2016. On August 1, 2016, investigators were informed that the video had not been saved and could not be recovered.

HALO Video

HALO cameras were located on 14th Street at both Curtis and Champa Streets. The HALO camera at 14th and Curtis Street shows several men gathering on the sidewalk on the east side of 14th Street near the entrance to the Auraria Lofts. The fistfight described by the witnesses is seen on the video at 1:07 a.m. as are Mr. Montoya's actions in attempting to break up the fight. This camera does not show activity on the west side of the street nor does it show activity on the

¹¹ Photos of the pistol in this location are located on page 14.

other side of Curtis Street (the camera does shift to the area in front of the Century Link Building after the shooting and the viewer can see a male in black clothing down on the sidewalk.)

At 1:07 a.m., the HALO camera positioned at 14th Street and Champa Street records a male party in dark clothing run toward that camera from the area of Curtis Street. The party runs, in the street, to a car that is parked on the east curb near Champa Street. He can be seen opening the trunk of the vehicle and then closing the trunk and heading back towards Curtis Street on the sidewalk. The video does not clearly show the make or model of this car. Among the cars investigators found parked on the east side of the street between Curtis Street and Champa Street was a Blue Dodge which listed to Kevin Jones and a Ms. Bridgett Arnold.

Century Link Building Video

The Century Link building is located at 931 14th Street. Two of the surveillance cameras operated from that building, cameras # 18 and #19, are positioned to record activity on the sidewalk that runs along the 14th Street side of the building. Camera 18, positioned near mid-block, is directed toward Curtis Street; Camera #19 is positioned at or near the corner of the building at 14th Street and Curtis Street and is directed toward Champa Street.

At 1:07:35, a party, dressed in dark clothes, runs up 14th Street towards Champa Street and passes Camera #18. At 1:08:01, another male can be seen at the corner of 14th and Curtis Street, walking toward Champa Street. Four seconds later, a man wearing dark clothing passes underneath Camera 18, jogging toward Curtis Street with a handgun visible in his right hand. At 1:08:09, this party approaches the male who was walking toward Champa Street and that individual turns and starts jogging alongside the gunman. At 1:08:16, the two men abruptly stop near the intersection of 14th and Curtis, turn and begin moving back towards Champa Street. Two seconds later, the gunman falls to the ground. The other party continues moving toward the camera and then, at 1:08:29, he stops, takes several steps toward Curtis Street, then turns, takes a few steps toward Champa Street and then he, too, goes to the ground.

On Camera 19, at 1:07:59, a black male wearing a light shirt comes into the picture. The man is looking back toward the intersection of Curtis Street and Champa Street. He is carrying a shoe in his right hand. About two seconds later, he stops to put on the shoe, all the while looking back at the intersection. He then continues walking toward Champa Street, still looking back. At 1:08:07, the man in dark clothing comes into view at the top of the frame. About a second later, that man draws abreast of the man wearing the light shirt who turns and starts jogging alongside and to the left of the man in dark clothing. As the two move toward Curtis Street, the man in the dark clothing raises his right hand and a handgun can be seen. The video shows him aiming his handgun directly down 14th Street. At 1:08:14, both parties jog past the camera position and out of view. Three seconds later, the gunman comes back into view, moving toward Champa Street. He takes three or four steps and falls to the ground. He attempts to get up and, as he does so, his handgun may still be seen in his right hand. He then falls into the planter and rolls off the planter and onto the sidewalk.¹² At 1:09:43, the man, now lying on his back, raises his hands. Three seconds later an officer approaches from the area of 14th Street, holding the man at gunpoint.¹³

¹² A picture of Kevin Jones' gun seen in the planter is found on page 14.

¹³ Still photos captured from Camera 19 are found on pages 13 & 14.

FIREARM EVIDENCE

Det. Wagner was armed with a 9mm Glock model 19. At the time of the incident, Det. Wagner's pistol was loaded with a 15-round magazine and an additional round in the chamber (he carried two additional 17-round magazines, neither one of which was used in the incident). Firearms examiners and crime scene investigators determined that Det. Wagner fired ten rounds.

Mr. Montoya was armed with a 40 caliber Glock model 23. This firearm has a 13 round magazine. Mr. Montoya indicated that it was not his practice to carry it with an additional round loaded in the chamber. Firearms examiners and crime scene investigators determined that Mr. Montoya fired eight rounds.

Kevin Jones was armed with a 9mm Ruger model P89DC semi-automatic pistol. The weapon was recovered at the scene and submitted to the DPD crime lab for examination. The firearm was found to contain two live cartridges in the magazine and a spent cartridge casing in the chamber. This is evidence that the firearm had malfunctioned while it was being fired. Seven 9mm spent shell casings were recovered in the area where witness and video evidence establish that Jones was firing the weapon. Firearms examiners determined that those shell casings were ejected from Jones's Ruger. The evidence establishes that Kevin Jones fired eight times.

Both Kevin Jones and Robert Jones were taken by separate ambulances to Denver Health Medical Center. Robert Jones was treated for gunshot wounds to the left shoulder and right thigh. Kevin Jones was treated for gunshot wounds to the upper left and upper right chest and both legs.¹⁴

On July 19, 2016, charges of Criminal Attempt First Degree Murder—extreme indifference, Criminal Attempt First Degree Assault and Possession of a Weapon by a Previous Offender were filed against Kevin Lee Jones. Those charges are pending in the Denver Courts.

LEGAL ANALYSIS

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

¹⁴ This information is gleaned from statements of officers and paramedics on the scene and the SBI reports prepared by emergency room physicians. Medical privacy provisions preclude us from obtaining detailed wound or treatment information.

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

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

(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 effect 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.

This section provides the law which we apply to the facts of in this case to determine whether Detective Wagner's actions are justified or, alternatively put, whether we would be able to prove beyond a reasonable doubt that his actions did not fall within the protections set forth in this statute.

Mr. Montoya is not a peace officer and, as such, his actions must be considered in light of those statutes which apply to citizens who seek to use force with justification. Section 18-1-704 of the Colorado Revised Statutes sets forth the law which allows a citizen to use force to defend himself *or another citizen*.¹⁵ It provides, in pertinent part,

(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**

¹⁵ A peace officer does not, by virtue of his office, lose the protections guaranteed citizens by C.R.S. § 18-1-704, and these protections would also be available to Detective Wagner.

physical force by that other person, and he may use a degree of force which he reasonably believes to be necessary for that purpose.

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 both brothers Jones survived their wounds, deadly physical force was not used. The issue in this case thus centers on the question whether the use of *physical force* by Det. Wagner and Mr. Montoya 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

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).

As relates to Det. Wagner’s actions, the question is whether, at the time Det. Wagner fired his pistol, he reasonably believed that he was attempting to take into custody a person who was wielding or about to wield unlawful physical force against one or more other individuals, and furthermore, his actions in were objectively reasonable. As concerns Mr. Montoya’s actions, the question is whether, when Mr. Montoya discharged his pistol, he believed that Kevin Jones was about to use unlawful physical force against citizens in the area, that belief was objectively reasonable, and that he reasonable believed it was necessary to use the manner of force he employed.

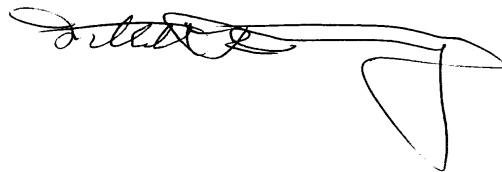
CONCLUSION

One need only review the video evidence to conclude that Kevin Jones' actions were malicious, malevolent and taken with extreme indifference toward the value of human life. The video evidence and witness statements make it clear that he was firing a handgun, indiscriminately, down a crowded street. The evidence suggests that, despite Det. Wagner's shouted warnings, Kevin Jones was not aware that Det. Wagner and Mr. Montoya were attempting to intercede. The actions taken by Det. Wagner and Mr. Montoya in all probability prevented other people, none of whom were involved in the actual fist fight, from being shot and injured or killed.

Under the facts of this case, Detective Wagner's conduct is justified under C.R.S. 18-1-707(1)(b) and 18-1-704 (1) and Mr. Montoya's actions are justified under C.R.S. 18-1-704(1). The fact that the evidence suggests Kevin Jones' brother, Robert Jones, was not armed does not render either Det. Wagner or Mr. Montoya criminally culpable for the injuries he suffered. The evidence, first, suggests that he was one of the two men involved in the fist fight. But more importantly, he was leaving the area and turned to join Kevin Jones as Kevin Jones moved forward toward the crowd firing a handgun repeatedly. Robert Jones was not an innocent bystander. Finally, although we cannot say conclusively whose pistol's rounds struck Kevin Jones and whose struck Robert Jones, in light of the circumstances of this case, the answer to that question is immaterial.

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

Very truly yours,



Mitchell R. Morrissey
Denver District Attorney

cc: Det. Randall Wagner, Sean Lane, Attorney at law; Mr. Edwin Montoya, Ms. Maureen O'Brien, Attorney at Law, Michael Hancock, Mayor; All City Council Members; P. Shaun Sullivan, Acting Denver City Attorney; Stephanie O'Malley, Executive Director, Department of Safety; David Quinones, Deputy Chief of Police; Matt Murray, Deputy Chief of Police; Marcus Fountain, Commander of Major Crimes Division; Ron Thomas, Commander of District Five; Gregory Laberge, Crime Lab Commander; Joe Montoya, Commander of Internal Affairs Division; Lieutenant Matthew Clark, Major Crimes; Lt. Scott Torpen, Aurora Police Department Major Investigations Section; Lieutenant Adam Hernandez, Major Crimes Division; Sgt. James Kukuris, Homicide; Sgt. Tom Rowe, Homicide; Sgt. Joe Englebert, Homicide; Sgt. Matthew Fyles, APD Major Crime/Homicide Unit; Detective John Saulton, 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.



- Epernay Lounge
- Auraria Lofts
- The Corner Office
- Backstage coffee shop
- The CenturyLink Building



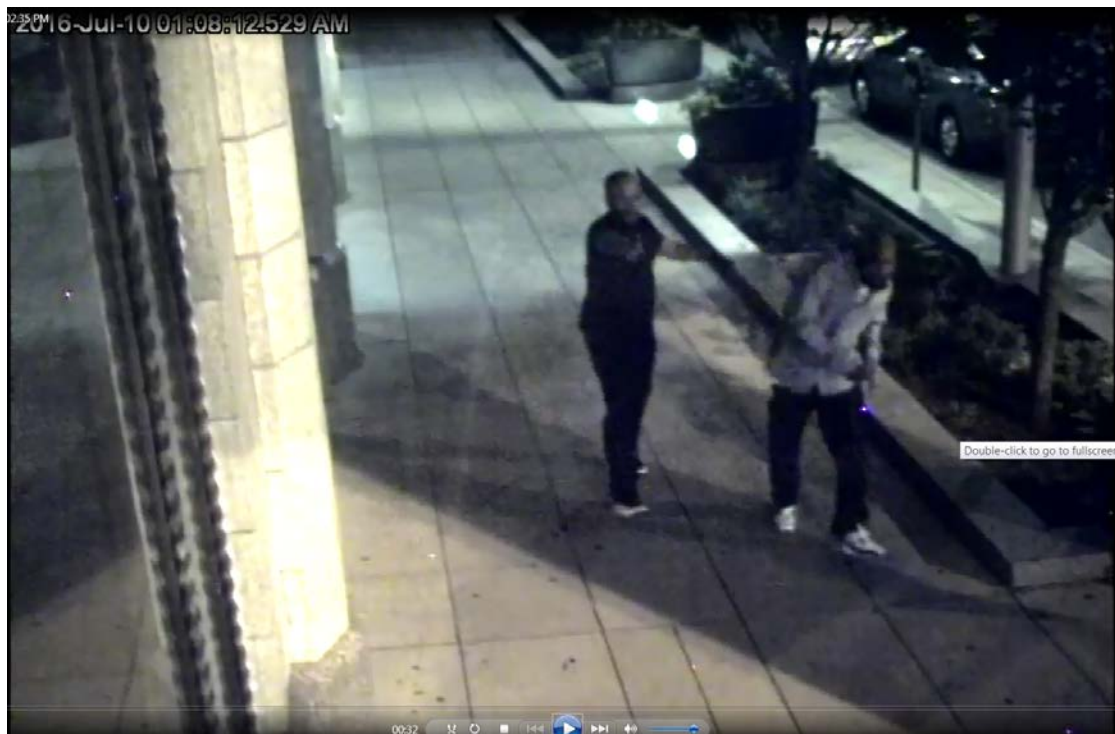
The "yellow bench"

14th Street

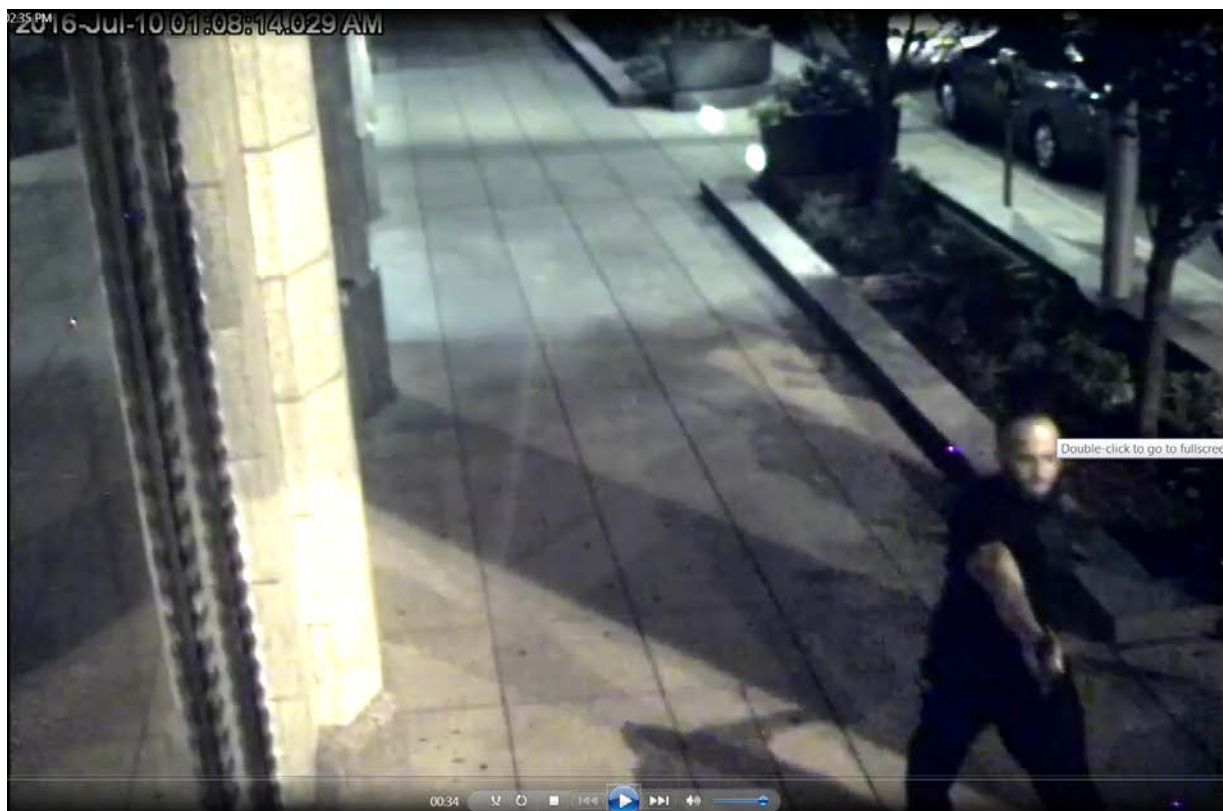
Curtis Street.



Kevin Jones is on the left and Robert Jones is on the right as they approach the intersection of 14th and Curtis Streets.



The two have moved closer to Curtis Street. Kevin Jones has raised and is firing his gun. The planter into which he fell and where his gun was recovered is on the right side of the photo.



Kevin Jones underneath the camera position. His handgun is clearly seen in his right hand.



Kevin Jones's handgun recovered in the planter.



Mitchell R. Morrissey
Denver District Attorney

OFFICER-INVOLVED SHOOTING PROTOCOL 2016

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 Deputy Chief of Police Operations, Major Crimes Commander, Senior Chief Deputy District Attorney, 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. Members of the Aurora Police Department also respond and participate in the investigation, evaluation and review as part of a multi-agency team, per C.R.S. 16-2.5-301 which became effective in 2016.

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.¹

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.

¹ C.R.S. 20-1-114, enacted in 2015, requires Colorado District Attorneys to publicly release a report when they have decided not to file criminal charges against an officer in an officer-involved shooting. In Denver, this has been our protocol for decades before the legislation was enacted. Indeed, as is explained herein, we provide even greater "transparency" than the new legislation provides because, in addition to distributing the decision letter publicly, we make our files of the underlying factual investigation available for inspection by members of the public, including the media.

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.²

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

² 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 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.

used if the investigation produced significant conflicts in the statements and evidence that could best be resolved by grand jurors. If the grand jury is used, the grand jury could issue an indictment charging the officer(s) criminally. To do so, at least nine of the twelve grand jurors must find probable cause that the defendant committed the charged crime. In order to return a "no true bill," at least nine grand jurors must vote that the probable cause proof standard has not been met. In Colorado, the grand jury can now issue a report of their findings when they return a no true bill or do not reach a decision -- do not have nine votes either way. The report of the grand jury is a public document.

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

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