



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

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

RE: Investigation of the February 22, 2016, shooting death of Gerardino Cayetano-Gonzalez, 8/8/92, in which Officers Rachel Eid, 14001 and Michael Clark, 04110, fired shots at Lowell Boulevard and West Moncrieff Place, and Officers Kevin Burke, 13030, and Michelle Cooper, 04115, fired shots in the 3500 block of Lowell Boulevard, Denver, CO.

Dear Chief White:

The investigation and legal analysis of the shooting death of Gerardino Cayetano-Gonzalez, aka Gerardino Cayetano-Gonzales, in which shots were fired by Denver police officers Kevin Burke, Michael Clark, Michelle Cooper and Rachel Eid has been completed. I conclude that under applicable Colorado law no criminal charges are fileable against any of the four officers involved in this shooting. 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.

STATEMENT OF FACTS

At about 1:26 p.m. on February 22, 2016, Denver police officers responded to a burglary in progress call at 3056 W. 37th Avenue. The residents at that location reported that two Hispanic males had attempted to force their way into the home through a basement window but fled on foot when they realized the residents had detected them. Because of the nature of the call, several police cars responded to the area and began searching for possible suspects.

Officer Juan Pacheco, 92018, was one of the officers who engaged in the search for the suspects. At about 1:35 p.m., Officer Pacheco, driving a fully marked patrol car and wearing a blue DPD uniform, was in the area of 34th and Irving Street when he observed a black SUV stopped in the

alley between Irving and Julian Streets. He stopped to investigate and saw an Hispanic male coming out of the rear of a residence at 3339 W. 34th Avenue, carrying a large flat screen TV. In a written statement, Officer Pacheco told investigators that he drew his handgun and ordered the suspect to “halt.” The man, instead, dropped the TV, ran back into the house and out the front door. Officer Pacheco advised the dispatcher of the incident. Officer Pacheco remained with the SUV (a Dodge Durango bearing Colorado Temporary License Plate 230549-P)¹ and, when a second police car arrived, checked the house to make sure no other suspects were present.

Among the officers responding to the first burglary-in-progress call were District 1 SCAT team officers Kevin Burke, 13030, and Rachel Eid, 14001. Officers Burke and Eid were driving an unmarked sedan which had covert emergency lights in the windshield and grill and was equipped with a siren. Both officers were wearing full blue DPD uniform. The two officers were driving in the alleys around 3056 W. 37th Street when they met with the victim of the burglary of that residence who told them the suspects had run westbound through the alley and then “southbound on Grove.” CAD dispatch records show the officers aired this information at 13:34:42 hours. The officers made sure the complainant was safe and then continued their search for suspects. They were so engaged when they heard Officer Pacheco

[call] out another, he said, I have another burglary in progress . . . Hispanic male just ran out the front door. And he said, what I believe was, 3400 block Julian-Irving Alley (which I didn’t think existed because all the alleyways in that little neighborhood run east-west, not north-south). But we were driving westbound on 34th [Avenue] right towards that location so we were right there looking for somebody running.²

Officers Burke and Eid had turned south on Julian Street and, almost immediately, saw two Hispanic males west of their location in the alley between 33rd and 34th Avenue. The men were both dressed in dark clothing and Officer Burke noted that one of the men “kept looking back real suspiciously.”³ The officers pulled into the alley to further investigate. Just as Officers Burke and Eid pulled in the alley, Officers Robert Greaser, 08034, and Michael Clark, 04110, who were in a fully marked patrol car and driving northbound on Julian Street, arrived at the location. Officers Greaser and Clark pulled into the alley directly behind Officers Burke and Eid.

As Officers Burke and Eid pulled into the alley, Officer Burke told Officer Eid that he thought the party who had been acting suspiciously was going to run. In his video-recorded statement, Officer Burke recalled,

So, I drove up to him and I hit the lights and the siren and the male on the left [later identified as Cayetano-Gonzalez] runs. . . . The guy on the right [later identified as Padilla] never even looked

¹ Investigators later determined the Dodge Durango was owned by Esther Martinez. Ms. Martinez provided investigators with a statement in which she confirmed that she owned the Durango. She also stated that Cayetano-Gonzalez was her boyfriend and that, while she was aware he was driving the Durango, she was unaware he was engaged in burglarious conduct. She also told investigators that Cayetano-Gonzales was close friends with Alfonso Padilla and that both men were members of the “GKI” street gang. Investigators later searched the car and located a number of items which were identified by the residents of 3339 W. 34th Avenue as having been taken from their home without their permission.

² An overhead photograph showing the streets, alleys and locations of the three primary incidents involved in this investigation is attached on page 14.

³ A comparison between the physical and clothing descriptions of the suspects provided by the victim of the first burglary and the physical and clothing descriptions of Padilla and Cayetano-Gonzalez, and the fact that the first suspects fled on foot while Padilla and Cayetano-Gonzalez driving the Durango suggests that the police were dealing with two different burglary teams.

back, but never stopped walking – he just kept walking like we weren't even there. So I jumped out of the car and I get the one guy in custody who's standing there. He just puts his arms out to the side when I tell him. I get him into custody and Officer Eid runs after the male that ran southbound through the house and that's the last time I saw her.

Officer Eid followed Cayetano-Gonzalez, on foot, through the houses and across 33rd Avenue. Officer Clark jumped out of the patrol car driven by Officer Greaser and joined the foot pursuit. (CAD records show this entry at 13:39:41 hours: “*Julian alley – H/M ran sb 3300 just east of Lowell.*”) Cayetano-Gonzalez ran across 33rd Avenue and through the side yard of one house. At the back yard of that house, he went through a gate or door to a fence and then somehow barricaded it behind him. When Officer Eid got to that gate she found she could not force the door, so she went out to 33rd Avenue, ran west to Lowell and then proceeded south on Lowell Boulevard to the intersection of Moncrief Place and Lowell Boulevard. Officer Clark turned when he reached 33rd Avenue and ran east to Julian Street and then south on Julian Street to West Moncrief Place.⁴

When Officer Eid reached West Moncrief Place, she looked to her left and saw the same party she had been chasing on the south side of the street walking westbound in her direction. She started walking toward him and, due to the nature of the call and what Officer Eid described as a “*pretty significant difference in [their] size and stature,*” she started to draw her service pistol. Cayetano-Gonzalez appeared to take note of Officer Eid because he started angling toward her, moving slightly faster than he had been when Officer Eid first saw him. He closed to a distance that Officer Eid estimated to be no more than twenty feet and

Non-verbally sort of puffed up, squared up at me, looked me right in the eye and came at me in what I'm certain was an, an attack mode. At that point I looked down and I saw a black object in, for sure, in his right hand. I don't know, I identified this black object as a gun. I saw the barrel of the gun very clearly. It was pointed directly at me. I know he had it in his right hand, I cannot be sure if he was holding it in both hands or not. At that point I began to raise my gun. There was no doubt in my mind that he was pointing a firearm at me and he's trying to kill me. I heard a, a real loud noise, uh, which I think, I'm sure, was a gunshot. He fired first. We were in the middle of the street – there's [sic] parked cars on both sides of the street. He fired at me first. I began to fire back at him.⁵

Officer Eid realized that she had no cover and turned and began running back to the north side of the street where she saw a vehicle which would provide cover. As she ran, she felt a blow to her left ankle and realized she had been shot. She made it to the vehicle, crouched behind it for cover and advised the radio dispatcher that she had been shot. (CAD records reflect “*shots fired Moncrief/Lowell*” at 13:43.55)⁶

⁴ The approximate paths taken by Cayetano-Gonzalez and Officer Eid are indicated on the diagram attached on page 14.

⁵ Mr. Bill Lund, an eye-witness, confirmed that Cayetano-Gonzalez fired first. In his written statement he wrote that he “*saw a police officer come out of the alley & run towards this guy on Moncrief and he started shooting at her and she shot back & he ran across the parking lot & jumped into a lady's car & took off. He pointed a gun at me before he carjacked this lady's car.*” In answer to a clarifying question, he wrote “*the bad guy started shooting first.*”

⁶ The transcript of the transmission reads:

Officer Eid:	Okay, I got him right here, Moncrieff and Lowell
Dispatcher:	Moncrieff and Lowell, [cars] cover in
Officer Eid:	Shots fired!
Dispatcher:	Cars, let me know when you are [code] six with her
Officer Eid:	Okay, 82 Adam. I've been shot. There's a foot pursuit southbound on Lowell. Shots fired!

Officer Clark had run south on Julian Street. When he reached Moncrief Place, he crossed to the south side of the street and took a few steps up the block. He told investigators that he had walked “maybe two houses” west from Julian Street when he saw Guyetano-Gonzalez come out of a house or yard mid-block on the north side of the street and start walking west. He then saw Officer Eid “*running down Lowell and she saw [Cayetano-Gonzalez], she slowed down. She got on the radio and said, ‘that’s our suspect!’*” Officer Clark realized that Officer Eid was going to confront Cayetano-Gonzalez by herself so he started running up to the street.

When he first started running, Officer Clark was only able to see

their heads because the, the yards were raised and the fence – and I’m looking down on em, running. And I hear the shots come out. I round the corner where the fence is. I can see Officer Eid, uh, it looked like she went back for cover. The suspect still had his gun, his hand up with a gun. I drew, and I probably say, this is all estimate, a couple of steps from where that fence started to where I drew and, um, I started firing.

These events took place on an early Monday afternoon in a busy area of north Denver. A number of citizens witnessed parts of this first gunfight. Jose Romero was working at a construction site at the corner of Moncrief Place and Lowell Boulevard.⁷ He provided investigators with both written and video-recorded statements in which he states that he heard a gunshot and then “*saw a guy with a gun running and shooting at the police.*” Mr. Romero then heard Officer Eid yell that she had been shot and he went to her aid.⁸

Officer Clark told investigators that when he first shot at Cayetano-Gonzalez, the subject “*brought his weapon down, looked at [the officer] and started walking south, uh to that parking lot.*” The parking lot which Officer Clark was referring to was on the southeast corner of Moncrief Place and Lowell Boulevard. Officer Clark was still on Moncrief Place and the construction site fence blocked his view of the parking lot and the 3200 block of Lowell Boulevard. When he arrived at the end of the fence, he cautiously looked around the corner and saw the subject at the south end of the parking lot. Officer Clark fired additional rounds at Cayetano-Gonzalez. He stopped firing when some cars drove into his field of fire. He then saw Cayetano-Gonzalez stop a vehicle which was northbound on Lowell Boulevard, just south of 32nd Avenue, by pointing his handgun at the driver. The driver got out of the car and Cayetano-Gonzalez took her place. Officer Clark moved quickly toward that vehicle, found a position of cover behind a parked vehicle, took aim and fired “*one shot in the windshield of the car. It hadn’t started moving yet.*” The vehicle then started driving toward Officer Clark. As it passed him, Officer Clark attempted to shoot at the suspect through the side window of the car but found that he had exhausted all of the cartridges in his pistol.

⁷ The construction site on the southeast corner of the intersection was fenced. These fences are those Officer Clark is referring to in his statement. See the photos of Moncrief Place and Lowell Boulevard attached on page 18.

⁸ Mr. Romero’s selfless courage is to be commended. Another citizen who sought to provide aid to Officer Eid was Dillon Hansen who resided near the intersection of Moncrieff Place and Lowell Boulevard. Mr. Hanson was home and told investigators he heard several loud bangs. In a video-recorded statement he indicated that “*he looked out the front door window [and] saw a uniformed police officer walking across the street, his gun is raised and he’s shooting at the individual that’s running away.*” Mr. Hansen then saw another police officer “*limping away. You could tell that she was hit.*” Mr. Hansen opened his door and asked the officer whether she needed help. He went outside to assist her but as he arrived another officer came to her aid and Officer Eid told Mr. Hansen to go back inside. Mr. Hansen told investigators he was struck by the suspect’s demeanor – despite the fact he was being shot at “*he was walking. . . .when the cop was saying something, he turned around [and] looked at him and then kept walking away, I don’t know if it was a walk or a jog but it wasn’t this quick movement.*”

The driver of the vehicle who Cayetano-Gonzalez forced out of her car at gunpoint was Ms. Suzanne Houck. Ms. Houck provided investigators with written and video recorded statements in which she stated that she was driving her Acura sedan (the “Acura”) and had just turned right on Lowell Boulevard from 32nd Avenue when an armed man approached her vehicle and ordered her out of her car at gunpoint. She stated she got out and ran to the wine store on the corner with “*bullets flying all around [her].*” Several witnesses saw Cayetano-Gonzalez rob Ms. Houck of her vehicle and their statements make it clear that Cayetano-Gonzalez took the Acura at gunpoint *and* that he was firing his handgun. One of these witnesses was Mr. Tim Hall. In his written statement he reported that he was eating at a pizza restaurant located at the northeast corner of 32nd and Lowell when he

noticed man/w gun walking south on Lowell. Points at woman in beige car. She gets out & runs he gets in. As he does so he aims & fires toward north – 5/6 rounds. Gets in car leave northbound. Police SUV rams him. Bumper falls off – 20 sec later [the suspect] leaves.⁹

The police SUV which Mr. Hall saw ram the Acura was driven by Officer Greaser. As noted above, he and Officer Clark had pulled into the alley to cover Officers Eid and Burke as they went to contact Padilla and Cayetano-Gonzalez. After Officer Clark jumped out of the patrol car to join the foot pursuit, Officer Greaser backed his police car onto to Julian Street and attempted to get in front of the pursuit and assist in apprehending Cayetano-Gonzalez. Officer Greaser was driving on Julian Street when he heard Officer Eid make a radio call that she had made visual contact with the suspect in the area of Moncrief Place and Lowell Boulevard. He turned west on Moncrief Place from Julian Street and heard gunshots and then heard Officer Eid air that she had been shot. He told investigators that as he drove up the street, he saw Officer Clark,

Maybe one hundred feet from the corner of Lowell and he’s, it looks like he’s exchanging gunfire with somebody. But there’s, like, an open lot there, so I, all I can see is him. I can’t see what he’s shooting at. So I drove around [Officer Clark] to the intersection.

Officer Greaser stated that he arrived at the intersection, looked to his left and saw Cayetano-Gonzalez force Ms. Houck out of her car and climb into the driver’s seat. Officer Greaser started driving

towards him. As I was driving towards him his attention turned to me – he started, he was like leaning out of the window firing toward my car. So, I drove as he was just starting to take off. I drove and then I slammed my car into the, tried to hit the driver’s side door basically. I tried to hit him with my car to stop him.

The collision resulted in debris being knocked off one of the cars but did not have the desired effect – Cayetano-Gonzalez continued to drive north on Lowell Boulevard. The impact did, however, disable Officer Greaser’s car. He drove a short distance and realized he would be unable to continue pursuing the Acura so he left his car and went to aid Officer Eid.

As Officers Eid and Clark began started the foot chase in the alley, Officer Burke placed Padilla in custody and began questioning him in an effort to determine who he was, who his associate

⁹ See, also, statements of Mr. Johnathan Marsh and Ms. Veronica Martinez, owners of a cheese store at 3211 Lowell Boulevard, Mr. Bill Lund (quoted in note 5, above) and Mr. Kyle Turner.

was, whether they had gang affiliation¹⁰ and why his associate ran. As he was speaking with Padilla he heard gunshots *“coming from the south and west and then, immediately, Officer Eid gets on the air and airs shots fired.”* Officer Burke placed Padilla in the front seat of his police car and started driving west in the alley. He drove up to King Street, made a left turn, drove to 33rd Avenue and then turned west toward Lowell Boulevard. As he approached Lowell Boulevard, he heard a dispatch that there was *“an officer down.”* He then heard an officer air that the suspect was in a silver car driving north on Lowell. In his video-statement, Officer Burke recalled

so, I know he’s coming from the south and, right as I reach the stop sign at Lowell, he drives right by me. I could look right into the driver’s seat. He’s the only one in the vehicle, and it’s the guy that ran. He’s still got his hat on. He’s looking back at me, all nervous. As he drives by me, I get behind the car.

Officer Burke activated the lights and siren of his unmarked police car. He was now in a vehicle pursuit of a burglary suspect whom he believed had just shot a police officer. As he followed the Acura driven by Cayetano-Gonzalez, he saw a marked patrol car, which was operated by Officer Michelle cooper, driving north on Lowell, a couple of blocks ahead of the Acura. He then heard other officers advising Officer Cooper that the suspect was coming up behind her. Officer Burke saw Officer Cooper make a U-turn and attempt to block the Acura’s path. Cayetano-Gonzalez, however, was able to *“maneuver around her car and continue northbound on Lowell”* with Officer Burke in pursuit. Officer Cooper completed her turn and pulled in behind Officer Burke with the lights and siren on her marked patrol car fully activated.

With the two police cars in pursuit, Cayetano-Gonzalez drove north to 38th Avenue where he turned right. As the pursuit proceeded east on 38th Avenue, Officer Burke gave way to Officer Cooper as she was in a fully marked police car. Officer Cooper took over the primary chase car responsibility and Officer Burke assumed the responsibility for *“calling out the chase.”* When Cayetano-Gonzalez reached Federal Boulevard he turned right, again. He was now driving south on Federal Boulevard. He then turned right, again, on 36th Avenue and began to accelerate. As Officer Burke told investigators *“I call it out - 50 miles per hour, we’re westbound! And the [Acura’s] blowing all the stop signs. I don’t know which streets have stop signs, but he’s blowing all of them.”*

Officer Cooper had been on a lunch break at the District One Police Station when she heard the first burglary call on the radio and then heard Officer Pacheco call out the burglary in progress. She told investigators that she believed only two cars were addressing that call so she decided to proceed in the direction of Officer Pacheco’s location.¹¹ Officer Cooper was in the area of 35th Avenue and Lowell Boulevard when she monitored the call that shots had been fired and an officer was down. She told investigators that when she reached Lowell Boulevard at 34th Avenue, she looked to her right, and saw a silver car. However, the car was stationary and it did not seem to be the

¹⁰ Officer Burke noted that Padilla had a large “G” tattoo displayed on the side of his neck and he asked whether he was a GKI member. Padilla responded in the affirmative.

¹¹ Radio call transcriptions reflect this series of transmissions:

Officer Pacheco: 112 Baker

Dispatch: 12 Baker?

Officer Pacheco: Yeah, possible burglary in progress – 3400 block alley Irving-Julian

Dispatch: 3400 Irving-Julian. Clear. Cars to cover in

Officer Steen: 15 Adam, I’ll go.

Officer Cooper: 22 Baker, heading up.

“right” vehicle (it was, in fact, uninvolved in these events). She told investigators she then heard an officer air,

he’s coming straight at you. So I try to turn around in the block and then he goes around me. So I joined the pursuit. I hear “chase authorized!” “PIT authorized” and then we, we do the chase from there.¹²

Officer Cooper corroborated Officer Burke’s description of the course of the chase. As she described the final moments, Cayetano-Gonzalez was

going west on 36th [Avenue]. I don’t lose him, but he gets really far ahead of me at, um, Irving [Street] because he just blows through the intersection. It’s a stop sign. So I clear it and I go, and I almost reach him. He gets to Lowell and he makes a left turn, southbound. And when I come around the corner, I see the car’s kind of mangled. It’s, um, it’s like facing east from there and he’s kind of up on the sidewalk. So I, I rammed the side of his car ‘cuz it looked like it was still trying to move and I had to stop him. So, after I ram it, I can’t see him. All the airbags on the side of the car had gone off.

The Acura came to rest on the east side of the street, facing the curb. Officer Cooper got out of her car and drew her pistol.¹³ As she came around the front of her car, she saw Cayetano-Gonzalez get out of the passenger side of the Acura and start running south, away from Officer Cooper. Officer Cooper told investigators that as Cayetano-Gonzalez ran,

He reached back with a gun and starts firing shots. I fired two or three rounds. The other officer, I do believe it was Burke, Officer Burke. I think that’s what his name – I’m not totally sure, I don’t really know him. He was in the [undercover] car. He comes around to the other side of the [Acura] and he also fired shots. The guy went straight down. [Officer] Burke goes over to secure [Cayetano-Gonzalez’s] weapon. He tells me he has somebody in the car – to go over [to that car].

When Officer Burke came around the corner at 35th Avenue and Lowell Boulevard he saw the Acura up on the east curb line, facing east, with Officer Cooper’s patrol car pushed up against the driver’s side of the patrol car. He pulled his car behind the Acura and placed his front bumper against the rear bumper of the Acura so as to prevent Cayetano-Gonzalez from backing away. Officer Burke told investigators he saw Officer Cooper standing outside of her police car with her gun drawn. He got out of the patrol car, moved around to the passenger side of his car and drew his pistol in preparation for making a felony arrest. As Officer Burke came around the back of his patrol car, he saw Cayetano-Gonzalez exit the Acura from the passenger side. He described the next critical moments,

I see the male get out of the vehicle. I see the gun in his hand. I’m only about 15 feet away [and] he’s got like, it almost looks like those old World War II German Luger, Ruger things that [allied soldiers]

¹² The chase and pursuit intervention tactic [“Pit” maneuver] was authorized by Lt. James Williams, radio call sign “Command 100.”

Dispatch:	Cars in pursuit, where are you now?
Lieutenant Williams:	[Command] 100, pursuit is authorized. PIT at your first opportunity
Dispatch:	Pursuit authorized. PIT when you can. Get me a speed, traffic conditions, And where ya at. [P.I.T. stands for “precision intervention technique” – a maneuver where a pursuing vehicle pushes into the rear quarter of the vehicle being chased with the goal of forcing that car to spin out and stop.]

¹³ A diagram showing the relative position of the Acura, Officer Cooper’s patrol car and Officer Burke’s unmarked police car is attached on page 17 Photos of the cars in the positions diagramed are found on page 19.

used to take off [German] officers. I'm not a gun nut so I'm not sure what the modern day equivalent to that is. He's got it in his right hand. I immediately, um, and he's, he's got it in his right hand pointing it down and, as he's running to the south, he points it back towards Officer Cooper and he starts firing. So I'm to the side of him, about 15 feet, and I'm walking or jogging the same direction he's going and I just yell, Police!" And just start firing.

Officer Burke told investigators he continued firing until Cayetano-Gonzalez went to the ground. He estimated he fired "*about*" ten times. Cayetano-Gonzalez fell on his back and released the grip on his pistol. Officer Burke approached him, kicked the pistol a short distance away, and did a quick check to make sure he did not have any additional weapons. Another officer approached and maintained a position over Cayetano-Gonzalez until the paramedics arrived and he was pronounced dead at the scene.

At least two witnesses, Ms. Anna Kramer and Mr. Robert Ward, saw some part of the fatal shooting. Ms. Kramer provided investigators with written and video-recorded statements; Mr. Ward provided a video-recorded statement. In her written statement, Ms. Kramer reported she was standing inside a residence at 36th Avenue and Lowell Boulevard when she heard sirens and the sound of a collision. She looked out a window and saw a police car crash into a silver sedan at which point a "*man from the passenger side of the sedan exited the vehicle & started running away. He pulled out a gun aimed at the female officer & shots were fired. I don't know who fired first.*"

Mr. Ward reported he was walking south on Lowell Boulevard on the west side of the street somewhere between 37th and 35th Avenue when he heard sirens and saw police cars chasing a light grey sedan north on Lowell Boulevard. Mr. Ward noticed that the sedan had damage to the driver's side and it appeared to him the driver's side airbag had deployed. Mr. Ward estimated that he was between 33rd Avenue and 35th Avenue when he "*heard a bunch of commotion. Heard the sirens coming back.*" He told investigators that he looked back and saw the same damaged vehicle come around the corner of what he believed was 34th Avenue, and lose control. He told investigators the car then "*jumped the curb [and] hit a tree*" on the west side of the street. Mr. Ward stated that the car then came across Lowell Boulevard and it appeared to Mr. Ward that the vehicle was "*totally out of commission at that point in time.*" Mr. Ward then saw a marked police SUV and an unmarked police cruiser pull up – the unmarked car was behind and to the right of the sedan, the marked car stopped with its grill up against the driver's side of the sedan.

Two officers got out: A male out of the [unmarked police car] and a female out of the SUV. They seemed to be approaching cautiously, there didn't seem to be anything going on. And then someone got out of the passenger door, started running south on Lowell, had a handgun and was pointing it behind him, shooting, and at that point I hit the deck. [Mr. Ward demonstrated the gunman's actions by leaning forward and holding his right hand behind him.] When I kinda looked up, it was all over. The guy was on the ground, bleeding profusely. And then all the other police cars got there.

In answers to follow-up questions, Mr. Ward made it clear that Cayetano-Gonzalez did not turn and fire at the officers but, rather, simply reached back and fired as he ran, adding that it appeared Cayetano-Gonzalez was "*shooting blindly behind him.*" He described the handgun as a semi-automatic pistol which the gunman held in his right hand and stated he thought the gunman fired two to three shots.

Cayetano-Gonzalez was armed with a .22 caliber Ruger MKII semi-automatic pistol.¹⁴ Investigators determined that this pistol had been stolen in a burglary which occurred at an address in the 1600 block of Ulster Street, Denver, CO on February 19, 2016.¹⁵ In the Durango belonging to Cayetano-Gonzalez's girlfriend, investigators found items taken in three separate burglaries, including the burglary at 3339 West 34th Avenue. They also found a Colorado identification card belonging to Padilla and a Colorado Department of Corrections I.D. card belonging to Padilla.¹⁶

Officer Clark was armed with a 9mm Springfield XDM-9 semi-automatic pistol. This pistol has a 19 round magazine and may be carried with an additional round in the chamber. Officer Clark told investigators he loads his magazines with 18 rounds and that when he charges his pistol, he does not replace the cartridge – when he engaged Cayetano-Gonzalez he thus had 17 rounds in the magazine and an additional round in the chamber of his firearm.¹⁷

Officer Eid was armed with a 9mm Smith & Wesson M&P semi-automatic pistol. The magazine capacity for this firearm is 17 rounds and it may be carried with an additional round in the chamber. Officer Eid's practice was to load it in this fashion.

Officer Burke was armed with a 9mm Glock 34 semi-automatic handgun. This pistol also has a 17 round magazine capacity and may be loaded with an additional round in the chamber. Officer Burke's practice was to load it in this fashion.

Officer Cooper was armed with a 9mm Glock 17 semi-automatic pistol. Although this pistol has a 17 round magazine capacity and may be carried with an additional round in the chamber, it was Officer Cooper's practice to load her pistol with one round in the chamber and 16 rounds in the magazine.

Numerous shell casing and bullet fragments were recovered at the Moncrief Place scene. Four of the shell casings were .22 caliber "Super X" cartridge casings. Firearms examiners identified these shell casings as having been fired from the Ruger wielded by Cayetano-Gonzalez. Ten 9mm shell casings were found in this area. Firearms examiners identified three of those as having been fired from Officer Eid's pistol. The other seven were identified as having been fired from Officer Clark's pistol.

Additional shell casings and bullet fragments were found on Lowell Boulevard between 32nd Avenue and Moncrieff Place. A .22 caliber "Super X" shell casing, which was determined to have been fired from the Ruger, was found near 32nd Avenue. Eight spent shell casings, which were determined to have been fired from Officer Clark's pistol, were located north of the location at which this .22 caliber casing was found.

¹⁴ A photo of the Ruger is attached on page 20.

¹⁵ Padilla was on ISP Parole and was required to wear an ankle bracelet with GPS monitoring. GPS records establish he was at the location of this burglary on February 19, 2016.

¹⁶ Cayetano-Gonzalez, also a GKI member, was a convicted felon with a lengthy criminal history. A Colorado Department of Parole report, included in the case file, notes that he had been placed on ISP-Parole on August, 20, 2015, and thereafter "managed to commit numerous violations." The report further notes Cayetano-Gonzalez was "sanctioned with Sure and Swift on three separate occasions . . . the most recent Sure and Swift was completed on February 12, 2016." We must, once again, voice our concern for the inadequacy of these programs.

¹⁷ Officer Clark stated that he keeps his spare magazines fully loaded with 18 rounds apiece, but he did not reload and fire his pistol in this event.

In the 3500 block of Lowell Boulevard, crime scene investigators recovered 15 shell casings. Firearms examiners found that one of those casings was .22 caliber “Super X” casing fired from the Ruger. The other recovered shell casings were all 9mm casings. Firearms examiners determined that four of the recovered casings were fired from Officer Cooper’s Glock model 17. The remaining ten shell casings were identified to Officer Burke’s Glock model 34.¹⁸

On February 23, 2016, Dr. Meredith Frank, Assistant Medical Examiner with the Office of the Medical Examiner for the City and County of Denver, performed an autopsy on the body of Cayetano-Gonzalez. Dr. Frank documented gunshot wounds to the head, upper right abdomen, right forearm, right buttock, right thigh, left thigh, left knee and two wounds to the left arm. She also documented a “probable graze wound” to the back of the right arm and “apparent pseudo-stippling injuries on the left face/neck, anterior left arm/forearm, and dorsal left hand.” (These wounds are significant in that they are consistent with Cayetano-Gonzalez being in the car when glass and metal fragments were flying.) Toxicological testing reviewed the presence of THC and Cannabinoids. The cause of death was multiple gunshot wounds. Dr. Frank recovered two of the bullets that struck Cayetano-Gonzalez from his body and a third from his clothing. The other wounds were “through and through” and not recovered at autopsy.

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 Officers Burke and Cooper caused Cayetano-Gonzalez death.¹⁹ The determination of whether the officers’ actions were criminal is primarily a question of legal justification.

C.R.S. 18-1-707 is the Colorado statute which 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.

¹⁸ Diagrams of the two locations, including markers indicating the approximate positions of the recovered shell casings are found on pages 15 and 16.

¹⁹ It is unclear whether any of the rounds fired by Officers Eid and Clark struck Cayetano-Gonzalez. If any of those rounds did hit him it does not appear they would have caused fatal injuries.

(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 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 questions presented in this case are whether, at the instant Officers Clark and Eid discharged their firearms, the legal justifications for using physical force as set forth in C.R.S. § 18-1-707(I) were applicable and, at the instant Officers Burke and Cooper discharged their weapons, whether 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 in each instance.

Officer Eid was attempting to arrest a burglary subject. When he realized she was intending to do so, he started walking toward her, pulled a gun and began firing at her from a relatively close distance. Her decision to return fire may have saved her life and her actions were clearly justified pursuant to both C.R.S. 18-1-707 (2)(a) and (2)(b)(1). Officer Clark heard gunshots, saw Cayetano-Gonzalez armed with a handgun which he was aiming at Officer Eid and saw Officer Eid seeking cover. His conclusion that Officer Eid was under fire was objectively reasonable; his decision to shoot to protect Officer Eid and the numerous citizens in the area, reasonable and commendable.

Officers Burke and Cooper engaged in a vehicle pursuit of the suspect with the knowledge that he was armed, had shot a police officer and robbed a victim of her car at gunpoint. Cayetano-Gonzalez's obvious disregard for life, or anyone, officer or civilian, in his path was displayed in the way he drove through the neighborhood. He crashed and, as the officers arrived at the crash site, got out of his car and fled, firing in Officer Cooper's direction as he ran from her. Officer Cooper returned fire. Officer Burke fired to protect himself and Officer Cooper. Both officers acted decisively, reasonably, appropriately and courageously.

On February 22, 2017, Cayetano-Gonzalez embarked on a crime spree. He burglarized a home. He opened fire on a uniformed police officer in broad daylight on a busy street. He walked down the middle of a street, stopped a woman driving up that street, forced her out of her car at gunpoint, and drove off. As he drove off he fired at least one round at Officer Clark. He led police on a wild car chase, crashed his car and got out, firing his pistol as he ran. The risk he posed to the officers involved and the community at large cannot be overstated. It appears that Cayetano-Gonzalez was determined to escape or die trying as he had a number of opportunities to surrender to authorities but at each point chose not to. His actions led to his death. We are fortunate Officer Eid was not more badly injured and that no others were hurt.

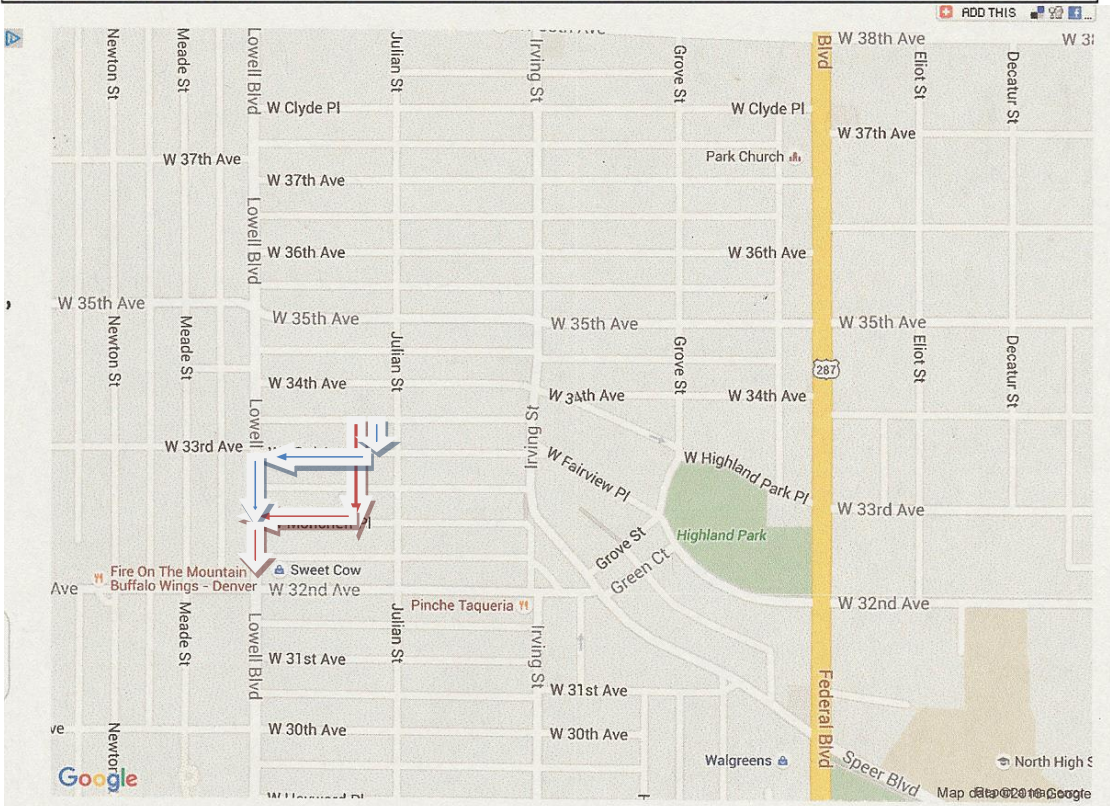
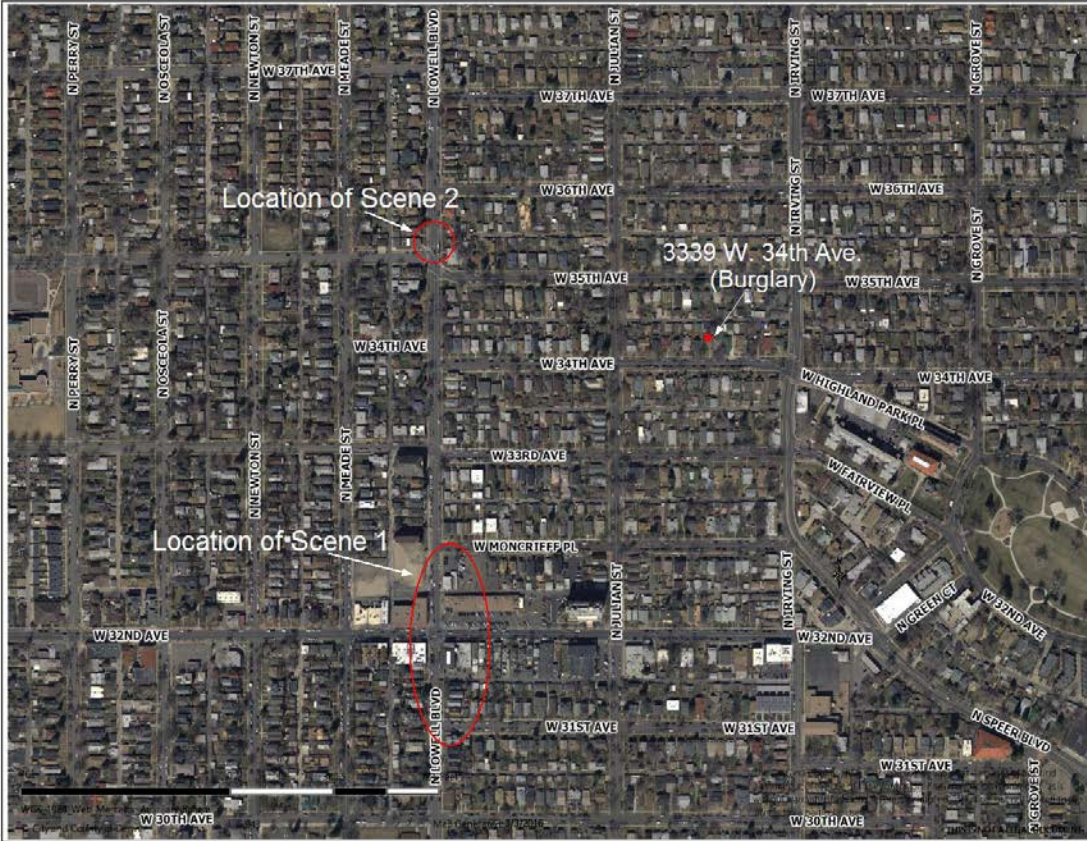
The attached document entitled Officer-Involved Shooting Protocol 2016 explains the protocol followed in this investigation. Our file may be open for in-person review in accordance with the provisions of that protocol. The Denver Police Department is the custodian of records related to this case. All 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,

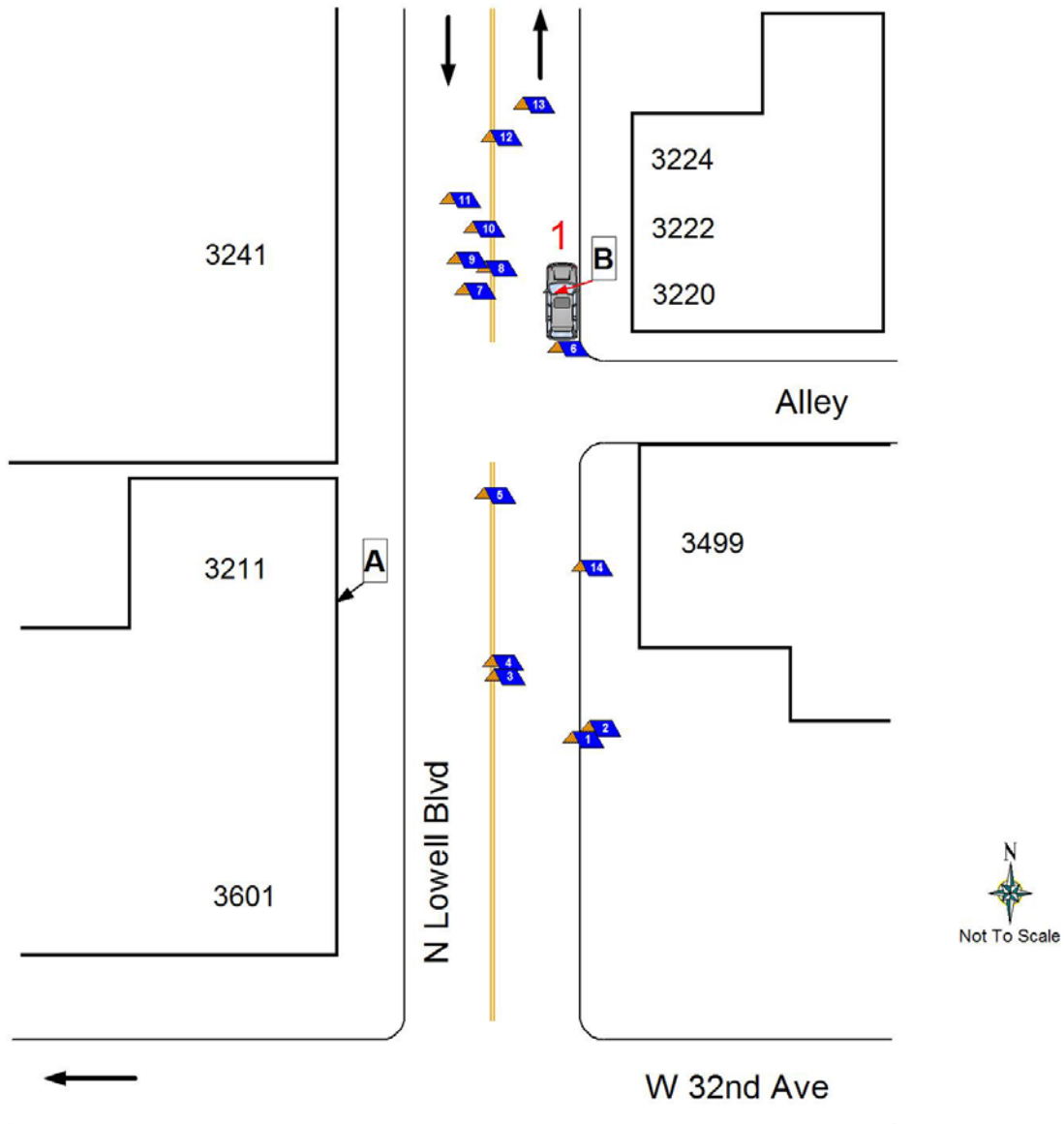


Mitchell R. Morrissey
Denver District Attorney

cc: Officer Rachel Eid, Officer Michael Clark, Officer Kevin Burke, Officer Michelle Cooper, Sean Olson, Attorney at Law; Steve Mandelaris, 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; Paul Pazen, Commander of District 1; Gregory Laberge, Crime Lab Commander; Ron Thomas, Commander of Internal Affairs; Lieutenant Matthew Clark, Major Crimes Division; Lt. Scott Torpen, Aurora Police Department Major Investigations Section; Sgt. James Kukuris, Homicide; Sgt. Tom Rowe, Homicide; Sgt. Joe Englebort, Homicide, Sgt. Matthew Fyles, Aurora Police Department Major Investigations Section; Detective Mark Crider, Homicide; Detective Jamie Castro, Homicide; Lamar Sims, Senior Chief Deputy District Attorney; Doug Jackson, Senior Chief Deputy District Attorney; Nicholas E. Mitchell, Office of the Independent Monitor; Steve Castro, OME, and Rev. William T. Golson, Jr.

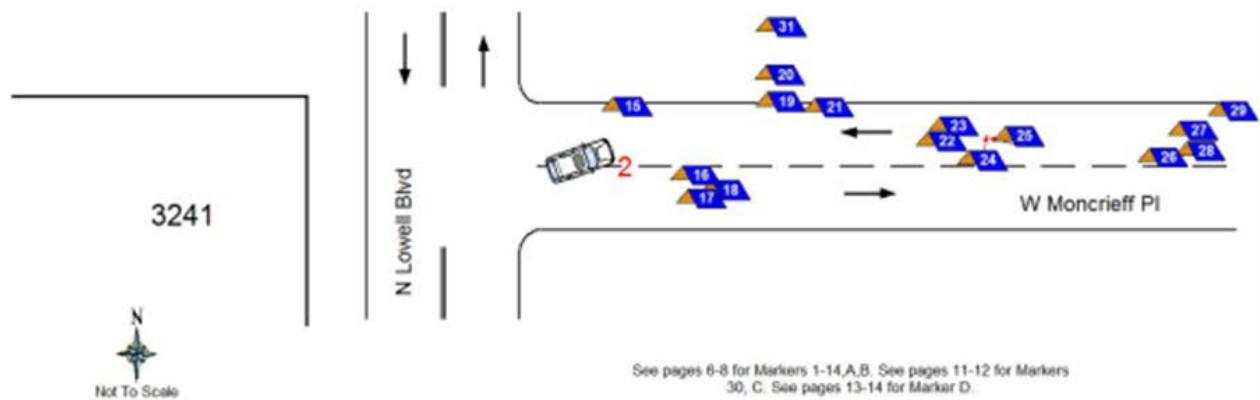


The red arrows show the approximate path taken by Cayetano Gonzalez when he fled on foot from the alley. The blue arrows show Officer Eid's approximate path as she ran in pursuit.

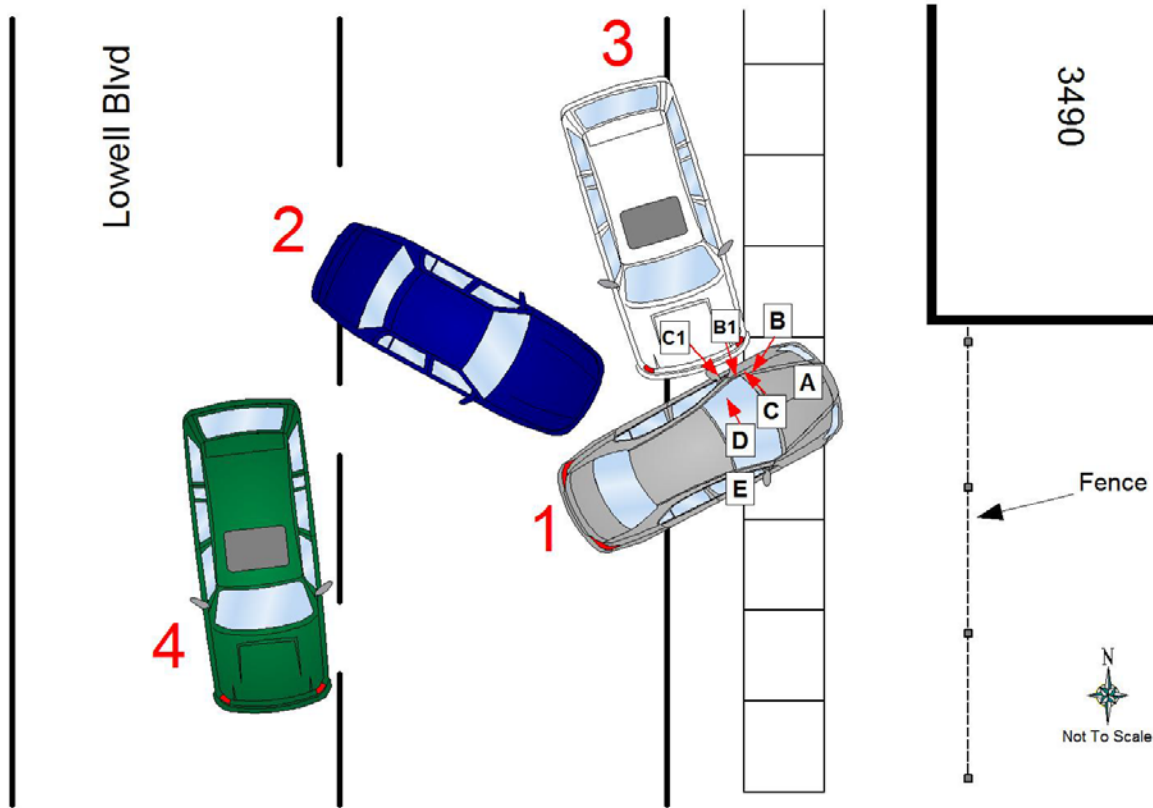


Some arrows are red for visibility. See pages 9-10 for Markers 15-29, 31. See pages 11-12 for Markers 30, C. See pages 13-14 for Marker D.

This diagram shows the approximate location of various items of evidence recovered in the 3200 block of Lowell Boulevard. Marker # 1 is positioned at a spent .22 caliber Super X cartridge. Markers # 2, 7-13 are positioned at 9mm cartridges identified to Officer Clark's pistol. Markers 3, 4 & 5 and 14 are positioned at bullet fragments. Marker # 6 is positioned at part of a car bumper.



This diagram depicts the approximate location of items of evidence recovered on W. Moncrieff Place at Lowell Boulevard. Marker 15 indicates the approximate location of a shoestring removed from Officer Eid’s shoe. Markers 16, 17, 18, 26, 27, 28 and 29 indicate the approximate location of shell casings ejected from Officer Clark’s pistol. Markers 19, 21 and 31 indicate the approximate location of shell casing ejected from Officer Eid’s pistol. Markers 22, 23, 24 and 25 indicate the approximate location of shell casings ejected from the Ruger wielded by Cayetano-Gonzalez. (Marker 20 indicates the approximate location



Markers A through E not measured on scene.

This diagram depicts the approximate position of the vehicles as they appeared in the 3500 block of Lowell Boulevard at the end of the chase. Vehicle # 1 is the Acura, Vehicle # 2 is Officer Burke's police car, Vehicle # 3 is Officer Cooper's police car. Vehicle # 4 is a police unit driven by a Metro-SWAT officer that arrived shortly after the shooting. The markers A through E indicate bullet strikes to the Acura. The evidence suggests that those bullet strikes occurred when Officer Clark was engaging the Acura in the 3200 block of Lowell Boulevard.



Looking west on Moncrief Place – the construction fence is seen on the right side of the photo



Looking south-west on Moncrief Place.. The parking lot at the corner of Moncrief Place and Lowell Boulevard is seen in the center-right of the photo.



Midblock in the 3200 block Lowell Boulevard looking to the north-east. The parking lot at the corner of Moncrief Place and Lowell Boulevard is in the center of the photo.



Looking south in the 3500 block Lowell Boulevard. The tree which the Acura struck when it lost control may be seen on the right side of the photograph. (The tent in the background was set up by investigators during the processing of the scene.)



This photo shows positions the three cars involved in the chase at the conclusion of the chase.



This photo shows bullet strikes to the Acura's windshield and car body.



The stolen Ruger with which Cayetano-Gonzalez was armed.



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 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. 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

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.

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.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

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.

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

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