



DenverDA

Mitchell R. Morrissey, District Attorney - Second Judicial District

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December 12, 2016

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

RE: The officer-involved shooting by Denver Police Officer Antony Gutierrez-McKain (Badge 13068) on August 27, 2016, at 8 N. Fox Street, Denver, Colorado, which resulted in the death of Mr. Terry Lee Salazar (D.O.B. 1/04/1967)

Dear Chief White:

I have reviewed the investigation of the officer-involved shooting that occurred on August 27, 2016, for the purpose of determining whether charges should be brought against Denver Police Officer Antony Gutierrez-McKain for causing the death of Mr. Terry Lee Salazar. My review of the evidence shows that Officer Gutierrez-McKain was legally justified in using deadly physical force because of the imminent deadly threat Salazar posed to the officer. Therefore, criminal charges are not warranted.¹

SUMMARY OF FACTS

Terry Salazar was living at 8 Fox Street in August 2016. He was 49 years old and had a history of drug abuse and felony convictions. He was wanted on four arrest warrants involving cases that occurred in 2016.² At about 9:30 p.m. on Friday evening, August 26, 2016, Salazar spoke to his sister, Michelle Perez, on the telephone. She told Salazar he should turn himself in to police. He told her: *"This time they're not taking me alive. They will have to kill me."*

A few hours later, early Saturday morning, August 27, 2016, Salazar was at the house at 8 Fox Street. He was angry and was disturbing and threatening others at the house. One of the other people living there, Danny Martinez, confronted Salazar about his behavior. Salazar punched Martinez in the mouth and then stabbed Martinez in the chest and cut his arm with a

¹ This investigation was conducted by the Denver Police Department and the Aurora Police Department pursuant to the officer-involved shooting protocol that is attached. My decision in this case is based on criminal law standards and does not limit administrative action by the Denver Police Department or other civil actions where non-criminal issues may be reviewed and where different rules and lower levels of proof apply. Judicial review of my decision may be sought under the provisions of C.R.S. 16-5-209.

² Two warrants were for felony drug cases. One warrant was for a domestic violence assault case. One warrant was for failing to appear in court concerning a traffic offense.

large knife. As a result of the stabbing, Martinez sustained a collapsed lung which required the insertion of a chest tube at the hospital.

Subsequent to the stabbing of Martinez, at approximately 2:40 a.m., one of the female occupants of the house called 911 seeking police help and asking the police to arrest Salazar. She indicated that Salazar was wanted on arrest warrants. She said she was going to kick him out of the house and she wanted the police to arrest him when he came outside. She asked to remain anonymous because she was fearful that Salazar would trap her in the house and kill her if he knew she had called the police.

Officers Antony Gutierrez-McKain and Sean Kelly were working together that morning, assigned to patrol in District 3. After confirming that Salazar was wanted on active arrest warrants, they drove near the address. They arrived at 2:57 a.m. and got out of their vehicle to wait outside. After a few minutes, Salazar came out of the house. When he saw the officers, however, he quickly ran back inside the house. He went up the stairs to the second level of the house and went down a short hallway to a small bedroom. The officers entered the house, climbed the stairs and approached the bedroom. Officer Gutierrez-McKain had his handgun out. Officer Kelly had his Taser out, not his handgun.

Later, at DPD headquarters after the shooting, both officers described the events that occurred. Officer Gutierrez-McKain told investigators that as they approached the bedroom he heard a female voice from the bedroom say: “*Terry, don’t do this.*” The female sounded as if she was crying. When he heard her scream, Gutierrez-McKain opened the door to the bedroom, fearing that she was being attacked. He saw Salazar with a large black knife in his hand. Salazar raised it and began swinging it at the officers. Gutierrez-McKain pointed his handgun at Salazar and shouted commands to put the knife down. A prolonged confrontation with Salazar began. Gutierrez-McKain did not fire his weapon during the confrontation in the bedroom because another male was in the room directly behind Salazar. Gutierrez-McKain described Salazar’s behavior and comments:

He’s swinging [the knife] and he’s now picking stuff up in the room and throwing it at us officers and telling us he’s not going back... he’s never going to see his kid again, he’s not going back. And we’re shouting at him: “Terry, don’t make us do this. Put the knife down. I don’t want to shoot you, put the knife down....”

Officer Kelly also described the confrontation with Salazar in the bedroom. Salazar was able to close the door a couple of times but the officers pushed it open again. At one point, Salazar charged toward the officers with the knife, prompting Officer Kelly to fire his Taser. The Taser stopped Salazar momentarily, but he was able to pull the probes out and continue his aggression, still wielding the knife.

The officers’ descriptions of Salazar’s aggressive behavior were corroborated by the two other adults who were in the bedroom when Salazar entered. Ms. Krystle Muniz told investigators that she heard the commotion from Salazar and that he was carrying a knife when he entered the room. Salazar said to her: “*I won’t go without a fight. They are going to have to shoot me.*” Ms. Muniz said that after the officers opened the door, Salazar was swinging his knife at them to prevent them from coming in. The officers yelled from the doorway for Salazar to put the knife down. Salazar began throwing things at the officers. The adult male in the

room, Antonio Ruiz, ultimately climbed out the window onto the roof in order to escape the confrontation.

Officer Gutierrez-McKain heard Salazar say: “*Get my fucking gun. Get the gun.*” Officer Kelly heard him say: “*Where’s my fucking gun? I’m going to kill her.*” When Salazar pushed the door closed again, the officers decided to retreat down the hallway for better cover in case Salazar was able to get a gun from the bedroom and start shooting. Ms. Muniz told Salazar: “*Don’t do this Terry, just stop. Just go with the police, it’s going to be alright.*” And Salazar shouted: “*I’m not going back. I’m not going to prison.*”

Both officers retreated from the bedroom doorway down the short hallway (eastward) back to the stairs. The hallway was difficult to navigate because it was extremely cluttered and messy with many items strewn about on the floor and piled up along the walls. Officer Kelly dropped the Taser at the east end of the hallway as he stumbled into the stairway. He then took a position on the stairs just below the landing that was midway up the stairway. He pulled out his handgun but did not fire it.

Officer Gutierrez-McKain got to the end of the hallway and went down the five steps to the landing where the stairway turns. He stopped on the landing. By this time, Salazar had come out of the bedroom and was advancing east in the hallway with the knife toward Gutierrez-McKain. He was shouting: “*Kill me. Just do it. Just kill me, shoot me.*” Officer Gutierrez-McKain was shouting at Salazar: “*Put the knife down. I don’t want to shoot you.*”

Gutierrez-McKain described being backed up to the east wall on the landing. He described the moments just before his decision to fire:

I’m backing up. I’m thinking: this guy is going to slash me, or he’s going to stab me. I can’t go any further back, so this is it, you know. Either he stops and puts the knife down, or I have to shoot him.”

Salazar did not drop the knife. He advanced closer, still threatening. Gutierrez-McKain estimated that Salazar got about two arms lengths from him when he fired his weapon. He fired five times. Salazar turned around and took a few steps to the west in the hallway toward the bedroom. He then collapsed with the knife underneath him.

The officers announced on the police radio that a police shooting had occurred and requested an ambulance for Salazar, code 10. The time was 3:18 a.m.

Salazar was pronounced dead at 3:41 a.m. at DHMC. An autopsy was performed by Assistant Medical Examiner, Krista Timm, M.D., who indicated in the Autopsy Report that Salazar died as a result of gunshot wounds of the trunk and upper extremities. The manner of death was homicide. Toxicology tests revealed that Salazar’s blood was positive for amphetamine and methamphetamine. Salazar was struck by five bullets. The entrance wounds were to his paramedian chest, left lower chest, left upper arm, right forearm, and left upper back.

Five shell casings were recovered on the stairway. They were microscopically identified by the DPD Crime Lab Firearms Unit as having been fired in Gutierrez-McKain’s handgun. His weapon was a Glock model 17 semi-automatic 9mm. The Taser, wires, and probe were observed at the scene and collected by DPD Crime Scene Analysts. Also recovered was the large black

knife used by Salazar. Bullet fragments were collected, and a blue shirt that was worn by Martinez when he was stabbed by Salazar was observed on the first floor. The shirt had a large amount of fresh blood on the chest area and a cut in the material consistent with a knife puncture.

LEGAL ANALYSIS & CONCLUSION

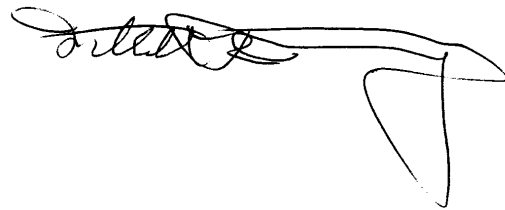
In factual circumstances such as these, criminal liability for a homicide is established only if it is proved beyond a reasonable doubt that legal justification for using deadly force, such as in self-defense, does not apply.

Colorado's statutory justification for the use of deadly physical force in self-defense is described in C.R.S. 18-1-704. That statute allows for the use of deadly physical force in self-defense if a person "reasonably believes a lesser degree of force is inadequate" and the person has "reasonable ground to believe, and does believe, that he or another person is in imminent danger of being killed or of receiving great bodily injury."

The statutory justification for a peace officer's use of deadly physical force while attempting to make an arrest is described in C.R.S. 18-1-707. In that situation, deadly physical force is justified if the officer "reasonably believes 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."

In this case, the evidence shows that Officer Gutierrez-McKain was clearly acting in self-defense and both of these statutory justifications would shield him from criminal liability. No witness or evidence contradicts or disputes this. Therefore, criminal charges are not legally or ethically appropriate and will not be filed.

Very truly yours,

A handwritten signature in black ink, appearing to read "Mitchell R. Morrissey", with a long horizontal flourish extending to the right and a large, stylized loop at the end.

Mitchell R. Morrissey
Denver District Attorney

cc: Officer Antony Gutierrez-McKain; Sean Lane, attorney for Officer Gutierrez-McKain; Michael Hancock, Denver Mayor; All Denver City Council Members; Stephanie O'Malley, Executive Director; David Quinones, Deputy Chief of Police DPD; Matthew Murray, Deputy Chief of Police DPD; Magen Dodge, Commander, District 3 DPD; Barb Archer, Commander of Major Crimes Division DPD; Gregory Laberge, Denver Crime Lab Commander; Joseph Montoya, Commander of Internal Affairs DPD; Lieutenant Matthew Clark, Major Crimes Division DPD; Sgt. James Kukuris, Homicide DPD; Sgt. Tom Rowe, Homicide DPD; Detective Aaron Lopez, Homicide DPD; Detective Martin Smith, Homicide DPD; Lt. Scott Torpen, Aurora Police Department Major Investigations Section; Sgt. Matt Fyles, Aurora Police Dept; 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.

The Hallway (facing west).

The bedroom is behind this wall.



The Hallway (facing east).

The stairway.

The Bedroom.





The Blue X indicates the wall behind Officer Gutierrez-McKain when he fired.
The red markings indicated Salazar's path from the bedroom toward Gutierrez-McKain and then back toward the bedroom door where he collapsed to the floor.



The blue X marks where Officer Gutierrez-McKain stood on the landing when he fired.



The knife used by Salazar.



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.

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