



DenverDA

Mitchell R. Morrissey, District Attorney - Second Judicial District

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November 22, 2016

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

RE: The officer-involved shooting on August 16, 2016, by Denver Police Corporal Jeffrey Heinis (Badge 06014) which caused injuries to Mr. LAJ, a juvenile (D.O.B. 10/6/1998).

Dear Chief White:

I have reviewed the investigation of the officer-involved shooting in which Denver Police Corporal Jeffrey Heinis fired shots that resulted in injuries to a seventeen year old juvenile male (LAJ). The Denver Police Department and the Aurora Police Department conducted this investigation pursuant to the officer-involved shooting protocol that is attached.

This shooting occurred in the parking lot and alley west of 1095 Federal Boulevard, Denver, Colorado, on August 16, 2016. Corporal Heinis fired shots at LAJ who was brandishing a loaded handgun and attempting to escape arrest. LAJ was wounded in the leg by one of the gunshots. For his use of the handgun during this incident, LAJ was charged with felony charges of menacing and possession of a weapon by a previous offender. He was also charged with felony motor vehicle theft. On November 21, 2016, LAJ pled guilty to the charge of menacing, a class 5 felony. He was adjudicated a juvenile delinquent for the 6th time and was committed to the Division of Youth Corrections for a minimum period of one year up to a maximum of two years.

My purpose in reviewing this shooting was to determine whether criminal charges should also be brought against Corporal Heinis for injuring LAJ. My review convinces me that a jury following the law governing the use of force by a police officer would not find beyond a reasonable doubt that Corporal Heinis used unlawful force. Therefore, criminal charges against Corporal Heinis are not warranted.

My decision is based on criminal law standards which require consideration of the statutory provisions justifying the use of force by a peace officer and which require proof beyond a reasonable doubt that the force used was unjustified. My decision 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.

SUMMARY OF FACTS

On August 14, 2016, at approximately 1:47 a.m., Arapahoe County Sheriff Deputies responded to the scene of an aggravated robbery “carjacking.” The victim of the robbery reported that he was sitting alone in his friend’s car, a tan or beige colored 2005 Volvo, when four Hispanic males got out of a Jeep Liberty that was parked in front of the Volvo. Two of the Hispanic males approached him, pointed handguns at him, and ordered him to get out of the Volvo. The victim was afraid for his life. He indicated that both of the males racked the slides of the semi-automatic handguns they carried. After the victim got out of the Volvo, the two males with the guns got in and drove it away. The other two Hispanic males drove away in the Jeep Liberty. The victim could only describe the robbers as being Hispanic males and one was wearing a red shirt. The Volvo had a temporary license affixed to the rear.

Two days later, on August 16, 2016, at approximately 4:15 p.m., the Volvo was being driven northbound on Federal Blvd. in Denver. Coincidentally at that time, Denver Police Department Sergeant Rich Seeley was also driving northbound on Federal Blvd. in the same area. Sgt. Seeley was aware of the carjacking of the Volvo on August 14. He had reviewed the case report of the carjacking because he had been investigating recent thefts of Jeep Liberty vehicles in Denver and he had spoken to an Arapahoe County investigator about the Volvo carjacking.

As Sgt. Seeley drove northbound on Federal Blvd. at about 7th Avenue, he noticed a beige Volvo ahead of him with a temporary license. Sgt. Seeley radioed that this may be the car they were looking for, and asked for additional police officer support. When the temporary license plate number assigned to the stolen Volvo was radioed to him, Sgt. Seeley confirmed that the Volvo on Federal was the car taken in the carjacking. Sgt. Seeley aired this on the radio to other officers. He aired that the driver was a Hispanic male with a black ball cap and black shirt, and that there was at least one other occupant in the car. The Volvo turned left onto 12th Avenue but Sgt. Seeley was unable to maneuver his car across traffic to follow. He radioed that the Volvo had turned west on 12th Avenue. Another officer radioed: “*It was carjacked with guns. Be careful.*”

Denver Police Department Corporal Jeff Heinis was near Federal Blvd. and 29th Avenue when he heard the first radio transmissions regarding the Volvo. He drove southbound on Federal Blvd. and turned west on 12th Avenue. He then turned south into the parking lot of the Denver Community Credit Union at 1095 Federal Blvd. This address, although numbered 1095, is located at the southwest corner of 12th Avenue and Federal Boulevard.

Heinis was wearing a body worn camera. He activated his body worn camera just before turning into the credit union parking lot. Audio began recording at that time. Corporal Heinis saw the Volvo in the parking lot of the Credit Union.¹ The Volvo had been reversed into a parking space. The front of the car was facing east toward the entrance to the Credit Union. Its engine was running. Immediately behind the car was a chain link fence. The fence paralleled the north-south alley that was on the other side of the fence.

Heinis pulled his police SUV in front of the Volvo, facing it. He was driving a white Ford Interceptor with full police markings and overhead light bar. He could see through the front windshield of the Volvo. There were three people in the Volvo, one in the driver seat and two in the rear seats. Heinis immediately got out of his police vehicle on the driver side and

¹ This was less than three minutes after Sgt. Seeley saw the Volvo turn west onto 12th Avenue.

began yelling loud commands to the occupants of the Volvo to show their hands as he pointed his service weapon at them.

The driver of the Volvo was LAJ. The male in the back passenger side was wearing a red shirt. The other person in the back seat was a juvenile female. All three of them got out of the Volvo through separate doors, ran to the fence behind the car and turned left to run south along the chain link fence.

As LAJ got out of the driver's seat, Corporal Heinis saw that he was holding a semi-automatic handgun.² Corporal Heinis described his thoughts when he saw LAJ with the gun:

The driver who gets out -- I can see he's holding a black semi-auto handgun in his hand.... So I just decided to focus on the driver who had the gun. And I was fairly close to him, so I became pretty concerned that he was going to take a position behind one of the other vehicles and start shooting at me or just... start firing... behind. I became very fearful that he was going to shoot me with the gun. He didn't leave the gun in the car. He didn't try to conceal it. He had already used it in the commission of a violent felony. So, I thought, okay, he's bringing it for a reason. He's not just wanting to hang on to it. There's no reason for him to get out of the car with that gun.

As the three juveniles ran south along the chain link fence, Heinis ran south in the parking lot. LAJ turned away from the fence and ran east, momentarily running in front of Corporal Heinis³, but LAJ turned back to the west and ran directly to the fence.⁴ In his interview, Corporal Heinis described his thoughts before he fired his weapon as LAJ was about to escape:⁵

I know this area pretty well and I could see the other two are going up over the fence. And, I know that if he goes up over the fence, there's going to be a big alley there. At the end of the alley is Tenth Avenue which is kind of a busy street. There's an RTD bus stop there that's always got people at it. There's a body shop there that the garage door is usually -- or the door is usually open -- and there's people hanging out, out there, and there's usually people walking back and forth, you know, across that alley. So I didn't want that to be my backdrop in case I had to get involved in anything with him. So, I decided at that point I didn't want him to be able to get into that alley or car jack another vehicle or run into a house. There's also a neighborhood right back there. I decided to fire shots at him to stop him from doing that. I considered him a very imminent threat to everybody in the area, including myself. ... I was probably thirty, thirty feet away from him when I started firing shots at him and he was running south and I was kind of moving south a little bit too. As he started going up over the fence, I think I hit him in, in the leg. I don't know how many times I hit him. He went up over the fence and he immediately started yelling that I had shot him in the leg. I immediately advised the dispatcher that shots were fired and I requested an ambulance code ten to stand by. He still had the gun right near him. It was laying on the ground maybe five feet away from him.

² This .45 caliber handgun was recovered near LAJ after he was shot. It was loaded but a bullet was not in the chamber.

³ See three photos on page 9.

⁴ By this point, the juvenile female from the rear of the Volvo had already climbed over the fence and entered the alley; the juvenile male passenger from the rear passenger seat was climbing the fence.

⁵ The first shot was fired approximately 14 seconds after Heinis got out of his police vehicle yelling at LAJ to show his hands.

Twelve shots were fired by Heinis. His handgun was a Glock 9 mm, model 17, semi-automatic. Twelve spent cartridge casings ejected from his handgun were recovered in the parking lot.

LAJ received a gunshot wound to his right ankle area, which resulted in a broken bone. He was treated at the Denver Health Medical Center. Medical information is very limited since LAJ's medical record is privileged information that he chose not to divulge to investigators. When Det. Aaron Lopez met LAJ at the hospital, LAJ vehemently refused to speak with him.

The two juveniles who fled from the rear seat of the Volvo were apprehended in the neighborhood nearby. Both of them had warrants for their arrest based on events unrelated to this case. Video surveillance from the credit union revealed that there had been a fourth occupant in the Volvo, in the front passenger seat, when LAJ backed it into the parking space. This male juvenile, however, got out of the Volvo and entered the credit union before Corporal Heinis arrived. At the time of the shooting, this male juvenile was in the credit union. Video surveillance shows him walk out of the credit union and hurriedly leaving the area on foot after the shooting, obviously not wanting to be contacted by police officers. This juvenile did not provide information to the investigators.

The gun that LAJ brandished as he got out of the Volvo and ran was recovered in the alley a few feet from where LAJ lay on the ground after being shot. It was a .45 caliber Springfield Armory handgun. The magazine was loaded with seven live .45 caliber rounds. The safety was off. There was no bullet in the firing chamber.

Another semi-automatic handgun was visible on the rear passenger seat where the juvenile male in the red shirt had been sitting. It was a CZ P-09, 9 mm caliber handgun. This gun was a stolen gun. It was loaded with seventeen live 9 mm rounds in the magazine. Because this gun was possessed by the juvenile passenger (JJGP), he was charged with unlawful possession of a handgun by a juvenile. He pled guilty to this charge on November 21, 2016.

When the car was searched, a third semi-automatic handgun was found in the center console between the front seats. It was a .45 caliber Colt Government handgun. This gun also was a stolen gun. It was loaded with six live .45 caliber rounds in the magazine. Also found in the car were marijuana cigarettes and other marijuana products, hash oil, syringes containing possible hash oil, and drug paraphernalia such as pipes, bongs, and weight scales.

There were several customers of the credit union and others nearby who heard the sound of gunfire but did not see the shooting or the events leading up to the shooting. Most were inside the credit union. One was in a pickup truck in the parking lot. None, however, could describe the details of the approximately 14 seconds immediately before the shooting. No witnesses refuted or contradicted the information provided by Corporal Heinis. The video and audio evidence from the body camera worn by Heinis supports the description of these events that he gave during his interview at DPD headquarters.

LEGAL ANALYSIS & CONCLUSION

C.R.S. 18-1-707 provides legal justification when a peace officer uses reasonable and appropriate force necessary to make an arrest or to prevent an escape from custody. C.R.S. 18-1-707 states:

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

(a) *To effect an arrest or to prevent the escape from custody of an arrested person unless he knows that the arrest is unauthorized; or*

(b) *To defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force while effecting or attempting to effect such an arrest or while preventing or attempting to prevent such an escape.*

(2) *A peace officer is justified in using deadly physical force upon another person for a purpose specified in subsection (1) of this section 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 an arrest, or to prevent the escape from custody, of a person whom he reasonably believes:*

(I) *Has committed or attempted to commit a felony involving the use or threatened use of a deadly weapon; or*

(II) *Is attempting to escape by the use of a deadly weapon; or*

(III) *Otherwise indicates, except through a motor vehicle violation, that he is likely to endanger human life or to inflict serious bodily injury to another unless apprehended without delay.*

This statute is an affirmative defense in Colorado. Therefore, in order for Corporal Heinis to be held criminally liable for this shooting, the prosecution must prove beyond a reasonable doubt to a unanimous jury that either (1) it was unreasonable for Heinis to believe force was necessary to arrest LAJ, or, (2) the force used by Heinis was unreasonable or inappropriate.

Regarding what is reasonable when an officer uses physical force, the United States Supreme Court has instructed:

“The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”

“The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation.” [Graham v. Connor, 490 U.S. 386 (1989),396-397]

As to the first issue regarding use of force, a jury would conclude it was reasonable for Officer Heinis to believe force was necessary to arrest LAJ. The arrest of LAJ was clearly authorized, yet LAJ was defying police commands, brandishing a deadly weapon and fleeing into a residential neighborhood. These actions created the need for physical force to arrest him.

As to the second issue, a jury considering the facts of this case would not be unanimously convinced beyond a reasonable doubt that either the degree of force or the type of force used by Corporal Heinis was unreasonable or inappropriate.

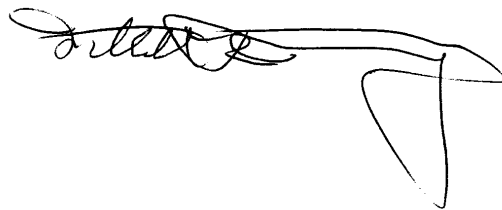
(a) Degree of force. By definition, deadly physical force was not used. The term “deadly physical force” is defined in Colorado as force that actually causes death. Force that does not cause death is “physical force”. In this case, deadly physical force was not used. However, Heinis believed that circumstances were present that would justify the use of deadly physical force under C.R.S. 18-1-707(2)(b). He believed that the circumstances listed in 2(b) of the statute were present, namely, that LAJ had committed a felony with a gun during the carjacking; that LAJ was attempting to escape by use of a gun, as evidenced by LAJ’s decisions to arm himself and to display the gun; and that LAJ was likely to endanger others if he escaped with the gun into the neighborhood unless apprehended without delay.

If it was reasonable for Corporal Heinis to believe at least one of the circumstances listed in 2(b) were present, the statute would justify the highest degree of force, i.e., deadly physical force, if reasonably necessary. Because the facts show that it was indeed reasonable to believe these 2(b) circumstances were present, but Heinis did not use deadly physical force, the lesser degree of force he used did not contravene the statute.

(b) Type of force. Some may wonder if it was appropriate to shoot LAJ while he was fleeing. However, in this factual setting there was no other option available for Corporal Heinis to successfully prevent LAJ’s escape and to arrest him. The only other option was for Heinis to use no physical force, to let LAJ escape, and to hope he would be apprehended later without having caused harm to anyone. Given the facts of this case, I believe a Denver jury that follows the law as written in C.R.S. 18-7-707 would not find beyond a reasonable doubt that the decision by Heinis to fire his weapon was unreasonable or inappropriate.

For these reasons, filing of criminal charges against Corporal Heinis is not ethically supportable under criminal law standards. Therefore, charges will not be filed. Any other issues pertaining to Heinis’ actions or decision making do not implicate criminal liability and are most appropriately left to be addressed by the Denver Police Department in their internal review.

Very truly yours,

A handwritten signature in black ink, appearing to read "Mitchell R. Morrissey". The signature is written in a cursive style with a long horizontal stroke extending to the right, ending in a vertical line that curves downwards.

Mitchell R. Morrissey
Denver District Attorney

cc: Corporal Jeffrey Heinis; John Davis, Attorney for Corporal Heinis; 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; Paul Pazen, Commander, District 1 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.









Yellow markers indicate location of spent cartridge casings (12).



Area where LAJ climbed the fence.



Loaded .45 caliber semi-automatic handgun, which LAJ dropped in the alley after the shooting.



The loaded 9mm semi-automatic handgun on the rear passenger seat where the juvenile male in the red shirt sat before he ran from Corporal Heinis.



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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Denver District Attorney

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