



DenverDA

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May 31, 2016

Nicholas Metz
Chief of Police
Aurora Police Department
15001 E. Alameda Parkway
Aurora, CO 80012

RE: The officer-involved shooting by Aurora Police Lieutenant Stephen Redfearn (Badge 99034) on May 9, 2016, at the Sand & Sage Motel located at 8415 East Colfax Ave., Denver, Colorado, which resulted in bodily injury to Mr. Sidney Sylvester (d.o.b. 6/3/1988).

Dear Chief Metz:

I have reviewed the investigation of the officer-involved shooting at the Sand and Sage Motel on May 9, 2016, that resulted in bodily injury to Mr. Sidney Sylvester ("Sylvester"). I believe a jury would find from the evidence that Lt. Stephen Redfearn was justified under Colorado law in firing his weapon at Sylvester. Therefore, criminal charges against Lt. Redfearn will not be filed.¹ Two felony criminal charges have been filed against Sylvester for his actions with the handgun he wielded during this incident. He has been charged with felony menacing as well as felony possession of a weapon by a previous offender because he has prior felony convictions which disqualify him from lawfully possessing a handgun.

SUMMARY OF FACTS

On May 9, 2016, at about 1:39 p.m., Aurora Police received a 911 reporting that a shooting had occurred near the intersection of Akron Street and East 19th Avenue, in Aurora, Colorado. Officers responded and noted that multiple gunshots had been fired. Property was struck by bullets but no people were injured. Witnesses described the shooter as a black male about six feet tall with long hair in a dreadlocks hairstyle, wearing a white shirt. He was seen

¹ My decision, based on criminal law standards, does not limit administrative action by the Aurora Police Department or civil actions where non-criminal issues may be reviewed and where less stringent laws, rules and legal levels of proof apply. Any interested party may seek judicial review of this decision under C.R.S. 16-5-209.

getting into the back of a white SUV that left the area traveling southbound on Akron Street. The vehicle was noted to have duct tape covering a window on the rear passenger side.

Lt. Redfearn began driving nearby streets looking for the white SUV. He crossed into Denver. He was driving a fully marked Aurora Police vehicle (Ford Explorer) with an overhead emergency light bar. As he drove on Willow Street, a white Chevy Tahoe passed by him traveling the opposite direction. He noticed one of the occupants had long hair in dreadlocks. He then drove on Wabash Street where he passed by the Tahoe again and saw it park on the east side of the Sand and Sage Motel. The rear cargo window on the passenger side was covered with gray duct tape. Lt. Redfearn watched the Tahoe from a distance and notified Denver Police officers who arrived on Wabash Street. Lt. Redfearn saw a black male with dreadlocks get out of the Tahoe. This male, who matched the description of the shooter in Aurora, was later identified as Sidney Sylvester.

When Denver officers tried to make contact with Sylvester, he began running from them through the property of the Sand and Sage Motel. Lt. Redfearn pursued on foot. Lt. Redfearn ran westbound, in front of the motel office. Sylvester also ran westbound, but he ran behind the office. When Sylvester reached the western edge of the office, he turned left and ran toward the front of the building. This caused Sylvester to run directly into Lt. Redfearn's path. Lt. Redfearn suddenly saw Sylvester coming toward him and saw that Sylvester now held a handgun in his right hand. They were about five to seven feet apart. Fearing that Sylvester was about to shoot, Lt. Redfearn fired one shot at Sylvester. This gunshot struck Sylvester in his left upper arm or shoulder area. Sylvester immediately dropped the gun and ran to the east.

Surveillance Video

Surveillance video of the parking area along Wabash Street² on the east side of the Sand and Sage Motel shows the white Chevrolet Tahoe turn in and park. Sylvester gets out of the passenger side of the Tahoe and walks around to the driver's side. He is wearing a white short-sleeved t-shirt, long white pants, and a ball cap on his head. He has noticeably long hair in a dreadlocks style. He is holding a cell phone and appears to be speaking on it. He opens the driver's door, bends down and reaches into the vehicle and appears to retrieve something from inside. At the same time, two police SUVs can be seen driving southbound on Wabash approaching the area where the Tahoe is parked.

Sylvester emerges from the Tahoe and walks southbound. He immediately puts his entire right hand down the front of his pants below the waistband and keeps his hand there as he walks. He appears to be holding something concealed inside his pants. To his left on Wabash Street, the two fully marked police SUVs drive by him southbound as he is walking. He watches them as they pass by on his left.

When Sylvester gets to the south end of the parking lot, the Denver police SUV turns to the right to contact him. The overhead emergency lights are flashing on the police SUV.³ Sylvester runs to his right, westbound, and runs away from the police vehicle through the motel property. Lt. Redfearn runs from Wabash Street onto the motel property, westbound.

² Cameras 1 and 3.

³ Cameras 7 and 12.

Other surveillance cameras recorded Sylvester’s actions at different points as he ran through the motel property. The videos show Sylvester running away from the DPD vehicle that followed directly behind him,⁴ and he turns left and runs behind the office, westbound.⁵ The handgun Sylvester is carrying is not visible in the surveillance videos at these points. However, as he runs, Sylvester keeps his right hand inside his pants below the belt line.

As Sylvester runs west behind the office, Lt. Redfearn also runs west but along the front of the office.⁶ When Sylvester gets to the northwest corner of the building he turns left and runs south. His right hand is no longer tucked inside his pants. In his right hand he has a handgun.⁷ {See attached photo from surveillance camera}.

As Sylvester runs south, he is approaching the southwest corner of the building. Meanwhile, Lt. Redfearn is also approaching the southwest corner of the building from the west and has his gun out.⁸ He arrives near the southwest corner at about the same moment that Sylvester does. Sylvester is running directly toward Lt. Redfearn. {See photo attached}.

Videos from surveillance cameras record what happened very quickly in these moments:

Second⁹	SYLVESTER	LT. REDFEARN
11:14:56	<u>Camera 8</u> : Sylvester has the gun in his right hand and is running south toward Lt. Redfearn. {See attached photo from surveillance camera}	<u>Camera 7</u> : Lt. Redfearn is moving west and looks to his right towards Sylvester. Lt. Redfearn raises his handgun in Sylvester’s direction and begins to stop.
11:14:57	<u>Camera 8</u> : Sylvester is adjacent to camera 8 for a fraction of this second. (He passes from the view of the camera before 11:14:58). His gun is in his right hand. ----- <u>Camera 14</u> : Sylvester is holding his gun in his right hand as he is running south and beginning to turn to his left. As he is turning, he releases the gun, propelling it to the south.	<u>Camera 7</u> : Lt. Redfearn crouches to a firing stance.* He steps back and a spent cartridge casing can be seen in the air, having been ejected from his gun, and his gun is lowered. [*It appears from the video evidence that this is when Lt. Redfearn fired his weapon].
11:14:58	<u>Camera 14</u> : Sylvester has completed turning to his left and is running east. He loses his grip on the cell phone he was carrying in his left hand and the cell phone begins to fall.	<u>Camera 7</u> : Lt. Redfearn begins to move to the east to follow Sylvester.
11:14:59	<u>Camera 7</u> : Sylvester is running to the east.	<u>Camera 7</u> : Lt. Redfearn follows Sylvester.

⁴ Cameras 7 and 12.

⁵ Cameras 9 and 10.

⁶ Camera 7.

⁷ Camera 8.

⁸ Camera 7.

⁹ The numbers for the “seconds” are the times shown on the video recordings. However, the date and times on the recordings are inaccurate. They do not correspond to the actual time of these events. This shooting occurred at approximately 1:56:27 p.m.

The investigation confirmed that Lt. Redfearn fired one gunshot. The handgun he used was a Glock Model 21, .45 caliber semiautomatic pistol. The bullet count conducted after the shooting is consistent with one bullet having been fired. One spent .45 caliber cartridge casing was recovered near the spot where Lt. Redfearn stood when he fired. It was microscopically identified by the DPD Firearms Unit as having been fired in Lt. Redfearn's gun.

Sylvester's handgun was recovered where he tossed it. {See attached photo}. It is a Taurus, Model PT111, 9 millimeter semiautomatic pistol. It was not loaded when it was recovered. However, spent cartridge casings recovered at the shooting scene at Akron Street and 19th Avenue in Aurora were determined to have been fired in Sylvester's gun.

One bullet fragment was found (at marker 5) near the area where Sylvester stopped running to the east and fell to the ground after the shooting.

Sylvester sustained a gunshot wound that was described as being to his upper left arm or shoulder area.¹⁰ An Aurora police officer placed a tourniquet on his arm at the scene. He was also treated by paramedics who took him by ambulance to Denver General Hospital. When contacted later at the hospital by investigators, Sylvester refused to make a statement concerning the events leading to the shooting.

LEGAL ANALYSIS & CONCLUSION

Criminal liability is established only if it is proved beyond a reasonable doubt that all of the elements of an offense defined by a statute have been committed and it is proved that the offense was committed without legal justification as set forth in Colorado statutes. The justification of using physical force in self-defense is described in C.R.S. 18-1-704.¹¹ The justification for a peace officer's use of physical force while attempting to make an arrest is described in C.R.S. 18-1-707.¹² Both of these justifications are "affirmative defenses." This means that a person accused of a crime for using force does not need to prove that he or she was justified in using the force. Instead, the prosecution must prove the force was not justified. Accordingly, the question I must consider is: Would a jury find beyond a reasonable doubt, unanimously, that Lt. Redfearn acted without lawful justification?

I believe a jury would find that Lt. Redfearn had lawful justification to fire at Sylvester in self-defense. Sylvester had already shown his willingness to unlawfully fire his gun when he fired it multiple times only minutes earlier in Aurora. He had also shown his defiance of the law and his non-compliance with the police. By the time Lt. Redfearn confronted him at the corner of the building, Sylvester had moved the gun from inside his pants, where it was not in a firing position, to a position from which Sylvester could fire very easily and quickly. These actions by

¹⁰ Sylvester's medical records are protected by medical privilege. We do not have access to them.

¹¹ As pertinent to this case, **C.R.S. 18-1-704 (1)** states:

... a person is justified in using physical force upon another person in order to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by that other person, and he may use a degree of force which he reasonably believes to be necessary for that purpose.

¹² As pertinent to this case, **C.R.S. 18-1-707 (1)** states:

... 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 ... 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

Sylvester posed a direct threat to Lt. Redfearn's safety. When Lt. Redfearn saw Sylvester with the gun in his hand, it was reasonable for him to believe the gun was loaded and to fear that Sylvester would fire at him. Lt. Redfearn was not required to wait to see if Sylvester would fire first.

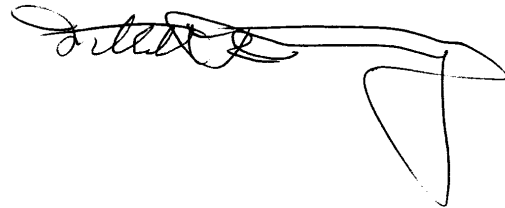
As the United States Supreme Court has instructed regarding assessing the reasonableness of an officer's beliefs when using physical force:

"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) at pp. 396-397.

Under these dangerous circumstances where Lt. Redfearn was forced to make a split-second judgment, his decision to shoot Sylvester was justified.

Attached to this letter is the officer-involved shooting protocol that was followed during this investigation.

Very truly yours,

A handwritten signature in black ink, appearing to read "Mitchell R. Morrissey", written over a horizontal line. The signature is stylized and cursive.

Mitchell R. Morrissey
Denver District Attorney

cc: Lt. Stephen Redfearn, Aurora Police Department; Zach Wagner, Attorney for Lt. Redfearn; 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; Ron Saunier, 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 Bruce Gibbs, Homicide DPD; Detective Adam Lucero, Homicide DPD; Lt. Scott Torpen, Aurora Police Department Major Investigations Section; Sgt. Matt Fyles, Aurora Police Department; Lamar Sims, Senior Denver Chief Deputy District Attorney; Doug Jackson, Senior Denver Chief Deputy District Attorney; Nicholas E. Mitchell, Denver Office of the Independent Monitor; Rev. William T. Golson, Jr.



Photo from surveillance camera 8 at the time marked 11:14:56. Sylvester is running south. His gun is in his right hand.



Sylvester's handgun

This photo was taken by investigators after the shooting. Camera 8 is on the upper corner of the building. At the time marked 11:14:57, Sylvester was running south approaching Lt. Redfearn who was positioned approximately where Sylvester's gun is seen on the ground in this picture. Sylvester held the gun in his right hand as he passed from the view of camera. As he turned left on the concrete walkway, he released the gun which fell and slid near Lt. Redfearn's feet.



Mitchell R. Morrissey
Denver District Attorney

OFFICER-INVOLVED SHOOTING PROTOCOL 2016

The Denver District Attorney is a State official and the Denver District Attorney's Office is a State agency. As such, although the funding for the operations of the Denver District Attorney's Office is provided by the City and County of Denver, the Office is independent of City government. The District Attorney is the chief law enforcement official of the Second Judicial District, the boundaries of which are the same as the City and County of Denver. By Colorado statutory mandate, the District Attorney is responsible for the prosecution of violations of Colorado criminal laws. Hence, the District Attorney has the authority and responsibility to make criminal charging decisions in peace officer involved shootings.

The Denver Police Department was created by the Charter of the City and County of Denver. Under the Charter, the police department is overseen by the Office of the Denver Manager of Safety, headed by the Executive Director of the Department of Safety. The Executive Director of the Department of Safety ("Executive Director") and the Chief of Police are appointed by and serve at the pleasure of the Mayor of Denver. The District Attorney has no administrative authority or control over the personnel of the Denver Police Department. That authority and control resides with City government.

When a peace officer shoots and wounds or kills a person in Denver, Colorado, a very specific protocol is followed to investigate and review the case. Officer-involved shootings are not just another case. Confrontations between the police and citizens where physical force or deadly physical force is used are among the most important events with which we deal. They deserve special attention and handling at all levels. They have potential criminal, administrative, and civil consequences. They can also have a significant impact on the relationship between law enforcement officers and the community they serve. It is important that a formal protocol

be in place in advance for handling these cases. The following will assist you in understanding the Denver protocol, the law, and other issues related to the investigation and review of officer-involved shootings.

For more than three decades, Denver has had the most open officer-involved shooting protocol in the country. The protocol is designed to insure that a professional, thorough, impartial, and verifiable investigation is conducted and that it can be independently confirmed by later review. The fact that the investigative file is open to the public for in-person review at the conclusion of the investigation assures transparency in these investigations. This serves to enhance public confidence in the process.

When an officer-involved shooting occurs, it is immediately reported to the Denver police dispatcher, who then notifies all persons on the call-out list. This includes the Major Crimes Commander, Senior Chief Deputy District Attorney, Division Chief of Patrol, Captain of Crimes Against Persons Bureau, Homicide Unit personnel, Director of the Crime Lab, Crime Lab Technicians, and others. These individuals respond first to the scene and then to DPD headquarters to take statements and conduct other follow-up investigation. The Denver District Attorney, Executive Director, and Chief of Police are notified of the shooting and may respond.

The criminal investigation is conducted under a specific investigative protocol with direct participation of Denver Police Department and Denver District Attorney personnel. Members of the Aurora Police Department also respond and participate in the investigation, evaluation and review as part of a multi-agency team, per C.R.S. 16-2.5-301 which became effective in 2016.

The primary investigative personnel are assigned to the Homicide Unit where the best resources reside for this type

of investigation. The scope of the investigation is broad and the focus is on all involved parties. This includes the conduct of the involved officer(s) and the conduct of the person who is shot. Standard investigative procedures are used at all stages of the investigation, and there are additional specific procedures in the Denver Police Department's Operations Manual for officer-involved shootings to further insure the integrity of the investigation. For example, the protocol requires the immediate separation and sequestration of all key witnesses and all involved officers. Involved officers are separated at the scene, transported separately by a supervisor to police headquarters, and sequestered with restricted visitation until a formal voluntary statement is taken. Generally the officers speak with their attorney prior to making their voluntary statement. A log is kept to document who has contact with the officer. This is done to insure totally independent statements and to avoid even the appearance of collusion.

In most cases, the bulk of the criminal phase of the investigation is concluded in the first twelve to twenty-four hours. Among other investigative activities, this includes a thorough processing of the crime scene; a neighborhood canvass to identify all possible witnesses; the taking of written statements from all witnesses, and video-recorded statements from all key witnesses and the involved officer(s). The involved officer(s), like any citizen, have a Constitutional Fifth Amendment right not to make a statement. In spite of this fact, Denver officers have given voluntary sworn statements in every case, without exception, since 1979. Since November of 1983, when the video interview room was first used, each of these statements has been video-recorded. *No other major city police department in the nation can make this statement.*

Officers are trained to properly secure their firearm after an officer-involved shooting. The protocol provides for the firearm to be taken from the officer by crime lab personnel for appropriate testing. The officer is provided a replacement weapon to use pending the completion of the testing. The protocol also allows for any officer to voluntarily submit to intoxicant testing if they chose. The most common circumstance under which an officer might elect to do so would be in a shooting while working at an establishment that serves alcohol beverages. Compelled intoxicant testing can be conducted if there are indications of possible intoxication and legal standards are met.

The Denver Chief of Police and Denver District Attorney commit significant resources to the investigation and review process in an effort to complete the investigation as quickly as practicable. There are certain aspects of the investigation that take more time to complete. For example, the testing of physical evidence by the crime lab -- firearm examination, gunshot residue or pattern testing, blood analyses, and other testing commonly associated with these cases -- is time consuming. In addition, where a death occurs, the autopsy and autopsy report take more time and this can be extended

substantially if it is necessary to send lab work out for very specialized toxicology or other testing. In addition to conducting the investigation, the entire investigation must be thoroughly and accurately documented.

Officer-involved shooting cases are handled by the District Attorney, and the Senior Chief Deputies District Attorney specifically trained for these cases. As a rule, two of these district attorneys respond to each officer-involved shooting. They are notified at the same time as others on the officer-involved shooting call-out list and respond to the scene of the shooting and then to police headquarters to participate in taking statements. They are directly involved in providing legal advice to the investigators and in taking video-recorded statements from citizens and officer witnesses, and from the involved officer(s). They continue to be involved throughout the follow-up investigation.

The Denver District Attorney is immediately informed when an officer-involved shooting occurs, and if he does not directly participate, his involved personnel advise him throughout the investigative process. It is not unusual for the District Attorney to personally respond and participate in the investigation. At the conclusion of the criminal investigation the District Attorney personally makes the filing decision.

If criminal charges are not filed, a decision letter describing the shooting and the legal conclusions is sent to the Chief of Police by the District Attorney, with copies to the involved officer(s), the Mayor, City Council members, the Executive Director of the Department of Safety, other appropriate persons, and the media. If the involved peace officer is from an agency other than DPD, the letter is directed to the head of that agency. A copy of the decision letter is also posted on the Denver DA website (www.denverda.org) so that members of the public may learn the facts of the incident and the reasons for the decision of the District Attorney.¹

At this time, the case file that is maintained by Denver District Attorney's Office is available and open to the public for review, unless a criminal case is pending concerning the facts of the shooting, and subject to the Colorado Criminal Justice Records Act. Allowing our file to be reviewed permits interested members of the public to learn more about the investigation; to verify that our description of the facts in the decision letter is accurate; to verify that our decision is supported by the facts; and to determine whether

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

they wish to challenge our decision under C.R.S. 16-5-209. Allowing access for review is important to the transparency of our decision making in these important cases, and serves to foster public trust and confidence in the investigative process and in the decisions that are made.²

If criminal charges are filed against the officer(s), the charges are filed in compliance with the same procedures as any other criminal filing. In that event, the file maintained by the Denver District Attorney's Office becomes available and open to the public for review at the conclusion of the criminal prosecution in the same manner as mentioned above.

THE DECISION

By operation of law, the Denver District Attorney is responsible for making the criminal filing decision in all officer-involved shootings in Denver.

The same standard that is used in all criminal cases in Denver is applied to the review of officer-involved shootings. The filing decision analysis involves reviewing the totality of the facts developed in the criminal investigation and applying the pertinent Colorado law to those facts. The facts and the law are then analyzed in relation to the criminal case filing standard. For criminal charges to be filed, the District Attorney must find that there is a reasonable likelihood that all of the elements of the crime charged can be proven beyond a reasonable doubt, unanimously, to twelve jurors, at trial, after considering reasonable defenses. If this standard is met, criminal charges will be filed.

One exception to the Denver District Attorney making the filing decision is if it is necessary to use the Denver Statutory Grand Jury. The District Attorney will consider it appropriate to refer the investigation to a grand jury when it is necessary for the successful completion of the investigation. It may be necessary in order to acquire access to essential witnesses or tangible evidence through the grand jury's subpoena power, or to take testimony from witnesses who will not voluntarily cooperate with investigators or who claim a privilege against self-incrimination, but whom the district attorney is willing to immunize from prosecution on

² However, the complete official file of the investigation remains in the custody of the Denver Police Department, which is the custodian of the case records. If we have made a decision not to file criminal charges, the Denver Police Department begins an *administrative* investigation and review of the incident. This may result in the gathering of additional information and the production of additional documents concerning the incident. The Denver District Attorney's Office is not involved in the administrative investigation and does not receive the additional information or investigative materials developed in that investigation. At the end of the administrative review, therefore, the files maintained by the Denver Police Department pertaining to the shooting will likely contain more information than the criminal investigation file.

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

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

THE COLORADO LAW

Criminal liability is established in Colorado only if it is proved beyond a reasonable doubt that someone has committed all of the elements of an offense defined by Colorado statute, and it is proved beyond a reasonable doubt that the offense was committed without any statutorily-recognized justification or excuse. While knowingly or intentionally shooting and causing injury or death to another human being is generally prohibited as assault or murder in Colorado, the Criminal Code specifies certain circumstances in which the use of physical force or deadly physical force is justified. As there is generally no dispute that the officer intended to shoot at the person who is wounded or killed, the determination of whether the conduct was criminal is primarily a question of legal justification.

Section 18-1-707 of the Colorado Revised Statutes provides that while effecting or attempting to effect an arrest, a peace officer is justified in using deadly physical force upon another person . . . when he reasonably believes that it is necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force. Therefore, the question presented in most officer-involved shooting cases is whether, at the instant the officer fired the shot that wounded or killed the person, the officer reasonably believed, and in fact believed, that he or another person, was in imminent danger of great bodily injury or death from the actions of the person who is shot. In order to establish criminal responsibility for

knowingly or intentionally shooting another, the state must prove beyond a reasonable doubt that the person doing the shooting either did not really believe he or another was in imminent danger, or, if he did hold such belief, that belief was, in light of the circumstances, unreasonable.

The statute also provides that a peace officer is justified in using deadly physical force upon another person . . . when he reasonably believes that it is necessary to effect an arrest . . . of a person whom he reasonably believes has committed or attempted to commit a felony involving the use or threatened use of a deadly weapon; or is attempting to escape by the use of a deadly weapon; or otherwise indicates, except through motor-vehicle violation, that he is likely to endanger human life or to inflict serious bodily injury to another unless apprehended without delay.

In Colorado, deadly physical force means force the intended, natural, or probable consequence of which is to produce death and which does in fact produce death. Therefore, if the person shot does not die, by definition, only physical force has been used under Colorado law.

GENERAL COMMENTS

The following statement concerns issues that are pertinent to all officer-involved shootings.

The great majority of officer-involved shootings in Denver, and throughout the country, ultimately result from what is commonly called the split-second decision to shoot. It is often the culmination of a string of decisions by the officer and the citizen that ultimately creates the need for a split-second decision to shoot. The split-second decision is generally made to stop a real or perceived threat or aggressive behavior by the citizen. It is this split-second time frame which typically defines the focus of the criminal-review decision, not the string of decisions along the way that placed the participants in the life-or-death final frame, although these certainly may be important in a case as well.

When a police-citizen encounter reaches this split-second window, and the citizen is armed with a deadly weapon, the circumstances generally make the shooting justified, or at the least, difficult to prove criminal responsibility under the criminal laws and required legal levels of proof that apply. The fact that no criminal charges are fileable in a given case is not necessarily synonymous with an affirmative finding of justification, or a belief that the matter was in all respects handled appropriately from an administrative viewpoint. It is simply a determination that there is not a reasonable likelihood of proving criminal charges beyond a reasonable doubt, unanimously, to a jury. This is the limit of the District Attorney's statutory authority in these matters. For these reasons, the fact that a shooting may be "controversial" does not mean it has a criminal remedy. The fact that the District Attorney may feel the shooting was avoidable or

"does not like" aspects of the shooting, does not make it criminal. In these circumstances, remedies, if any are appropriate, may be in the administrative or civil arenas. The District Attorney has no administrative or civil authority in these matters. Those remedies are primarily the purview of the City government, the Denver Police Department, and private civil attorneys.

Research related to officer-involved shootings indicates that criminal charges are filed in approximately one in five hundred (1-in-500) shootings. And, jury convictions are rare in the filed cases. In the context of officer-involved shootings in Denver (approximately 8 per year), this ratio (1-in-500) would result in one criminal filing in 60 years. With District Attorneys now limited to three 4-year terms, this statistic would mean there would be one criminal filing during the combined terms of 5 or more District Attorneys.

In Denver, there have been three criminal filings in officer-involved shootings in the past 40 years, spanning seven District Attorneys. Two of the Denver officer-involved shootings were the result of on-duty, work related shootings. One case was in the 1970s and the other in the 1990s. Both of these shootings were fatal. The cases resulted in grand jury indictments. The officers were tried and found not guilty by Denver juries. The third criminal filing involved an off-duty, not in uniform shooting in the early 1980s in which one person was wounded. The officer was intoxicated at the time of the shooting. The officer pled guilty to felony assault. This case is mentioned here, but it was not in the line of duty and had no relationship to police work. In 2004, an officer-involved shooting was presented by the District Attorney to the Denver Statutory Grand Jury. The Grand Jury did not indict. A brief report was issued by the Grand Jury.

Based on the officer-involved shooting national statistics, there is a very high likelihood that individual District Attorneys across the country will not file criminal charges in an officer-involved shooting during their entire tenure. It is not unusual for this to occur. In Denver, only two of the past seven District Attorneys have done so. This, in fact, is statistically more filings than would be expected. There are many factors that combine to cause criminal prosecutions to be rare in officer-involved shootings and convictions to be even rarer. Ultimately, each shooting must be judged based on its unique facts, the applicable law, and the case filing standard.

The American Bar Association's *Prosecution Standards* state in pertinent part: "A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction. In making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved or to a desire to enhance his or her record

of convictions. Among the factors the prosecutor may properly consider in exercising his or her discretion is the prosecutor's reasonable doubt that the accused is in fact guilty." The National District Attorneys Association's *National Prosecution Standards* states in pertinent part: "The prosecutor should file only those charges which he reasonably believes can be substantiated by admissible evidence at trial. The prosecutor should not attempt to utilize the charging decision only as a leverage device in obtaining guilty pleas to lesser charges." The standards also indicate that "factors which should **not** be considered in the charging decision include the prosecutor's rate of conviction; personal advantages which prosecution may bring to the prosecutor; political advantages which prosecution may bring to the prosecutor; factors of the accused legally recognized to be deemed invidious discrimination insofar as those factors are not pertinent to the elements of the crime."

Because of the difference between the criminal, administrative, and civil standards, the same facts can fairly and appropriately lead to a different analysis and different results in these three uniquely different arenas. While criminal charges may not be fileable in a case, administrative action may be very appropriate. The legal levels of proof and rules of evidence that apply in the criminal-law arena are imprecise tools for examining and responding to the broader range of issues presented by officer-involved shootings. Issues related to the tactical and strategic decisions made by the officer leading up to the split-second decision to shoot are most effectively addressed by the Denver Police Department through the Use of Force Review Board and the Tactics Review Board process and administrative review of the shooting.

The administrative-review process, which is controlled by less stringent legal levels of proof and rules than the criminal-review process, provides both positive remedial options and punitive sanctions. This process also provides significantly broader latitude in accessing and using information concerning the background, history, and job performance of the involved officer. This type of information may have limited or no applicability to the criminal review, but may be very important in making administrative decisions. This could include information concerning prior officer-involved shootings, firearm discharges, use of non-lethal force, and other conduct, both positive and negative.

The Denver Police Department's administrative review of officer-involved shootings improves police training and performance, helps protect citizens and officers, and builds public confidence in the department. Where better approaches are identified, administrative action may be the only way to effect remedial change. The administrative review process provides the greatest opportunity to bring officer conduct in compliance with the expectations of the

department and the community it serves. Clearly, the department and the community expect more of their officers than that they simply conduct themselves in a manner that avoids criminal prosecution.

There are a variety of actions that can be taken administratively in response to the department's review of the shooting. The review may reveal that no action is required. Frankly, this is the case in most officer-involved shootings. However, the department may determine that additional training is appropriate for all officers on the force, or only for the involved officer(s). The review may reveal the need for changes in departmental policies, procedures or rules. In some instances, the review may indicate the need for changing the assignment of the involved officer, temporarily or permanently. Depending on the circumstances, this could be done for the benefit of the officer, the community or both. And, where departmental rules are violated, formal discipline may be appropriate. The department's police training and standards expertise makes it best suited to make these decisions.

The Denver Police Department's Use of Force Review Board and the Tactics Review Board's after-incident, objective analysis of the tactical and strategic string of decisions made by the officer that lead to the necessity to make the split-second decision to shoot is an important review process. It is clearly not always possible to do so because of the conduct of the suspect, but to the extent through appropriate tactical and strategic decisions officers can de-escalate, rather than intensify these encounters, the need for split-second decisions will be reduced. Once the split-second decision time frame is reached, the risk of a shooting is high.

It is clear not every officer will handle similar situations in similar ways. This is to be expected. Some officers will be better than others at defusing potentially-violent encounters. This is also to be expected. To the degree officers possess skills that enhance their ability to protect themselves and our citizens, while averting unnecessary shootings, Denver will continue to have a minimal number of officer-involved shootings. Denver officers face life-threatening confrontations hundreds of times every year. Nevertheless, over the last 20 years officer-involved shootings have averaged less than eight annually in Denver. These numbers are sharply down from the 1970s and early 1980s when there were 12-to-14 shootings each year.

Skill in the use of tactics short of deadly force is an important ingredient in keeping officer-involved shootings to a minimum. Training Denver officers receive in guiding them in making judgments about the best tactics to use in various situations, beyond just possessing good firearms proficiency, is one of the key ingredients in minimizing unnecessary and preventable shootings. Denver police officers handle well over a million calls for service each year and unfortunately in responding to these calls they face

hundreds of life-threatening encounters in the process. In the overwhelming majority of these situations, they successfully resolve the matter without injury to anyone. Clearly, not all potentially-violent confrontations with citizens can be de-escalated, but officers do have the ability to impact the direction and outcome of many of the situations they handle, based on the critical decisions they make leading up to the deadly-force decision. It should be a part of the review of every officer-involved shooting, not just to look for what may have been done differently, but also to see what occurred that was appropriate, with the ultimate goal of improving police response.

RELEASE OF INFORMATION

Officer-involved shootings are matters of significant and legitimate public concern. Every effort must be made to complete the investigation and make the decision as quickly as practicable. The Denver Protocol has been designed to be as open as legal and ethical standards will permit. "Fair Trial -- Free Press" standards and "The Colorado Rules of Professional Conduct" limit the information that can be released prior to the conclusion of the investigation, and the "Colorado Criminal Justice Records Act" dictates that the public interest be considered before releasing criminal justice records.

Officer-involved shooting cases always present the difficult issue of balancing the rights of the involved parties and the integrity of the investigation with the public's right to know and the media's need to report the news. The criminal investigation and administrative investigation that follows can never keep pace with the speed of media reporting. This creates an inherent and unavoidable dilemma. Because we are severely restricted in releasing facts before the investigation is concluded, there is the risk that information will come from sources that may provide inaccurate accounts, speculative theories, misinformation or disinformation that is disseminated to the public while the investigation is progressing. This is an unfortunate byproduct of these conflicted responsibilities. This can cause irreparable damage to individual and agency reputations.

It is our desire to have the public know the full and true facts of these cases at the earliest opportunity, but we are 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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