



# DenverDA

Mitchell R. Morrissey, District Attorney - Second Judicial District

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August 11, 2016

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

RE: The officer-involved shooting by Denver Police Technician Jeffrey Motz (Badge 93014) which resulted in the death of Mr. Dion Damon (d.o.b. 12/16/1975) on April 12, 2016, in the 1300 block of Bannock Street, Denver, Colorado.

Dear Chief White:

I have reviewed the investigation of the officer-involved shooting on April 12, 2016, for the purpose of determining whether criminal charges should be brought against Denver Police Department Technician Jeffrey Motz ("Motz") for causing the death of Mr. Dion Ray Damon ("Damon"). This investigation was conducted by the Denver Police Department and the Aurora Police Department pursuant to the officer-involved shooting protocol that is attached. A thorough review of the evidence gathered in this investigation shows that Technician Motz was legally justified in using deadly physical force under the facts and circumstances he faced. I believe a jury would agree. Therefore, criminal charges are not warranted.<sup>1</sup>

## SUMMARY OF FACTS

On March 17, 2016, Dion Damon armed himself with a semi-automatic pistol and entered The Bank of Denver on South Holly Street to commit an aggravated robbery. He used the pistol to threaten three female bank tellers, forcing them to empty their cash drawers and put the money in a bag. He then ordered them to lie on the floor as he fled with over thirty thousand dollars of cash in the bag.

Denver detectives developed information that led to the positive identification of Damon as the bank robber. They also learned that he drove a silver colored Dodge Charger to make his getaway. Damon was a convicted felon with multiple arrests, including arrests for offenses involving the use of weapons, and he was a known GKI gang member in Denver. Detectives

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<sup>1</sup> This decision is based on criminal law standards and does not limit administrative action by the Denver Police Department or other civil actions where non-criminal issues may be reviewed and where different rules and lower levels of proof apply. Judicial review of my decision may be sought under the provisions of C.R.S. 16-5-209.

sought a warrant for Damon's arrest, which was issued by The Honorable Judge Doris Burd at 4:20 p.m. on Monday, April 11, 2016.

The Rocky Mountain Safe Streets Task Force Fugitive Unit issued a "wanted" bulletin with Damon's photo. This bulletin informed officers that Damon was "Wanted for Agg Bank Robbery with a Gun" and that he had prior criminal history involving weapons.

On Tuesday, April 12, 2016, officers assigned to the Fugitive Unit located Damon. He was seen getting into the silver Dodge Charger with two passengers. Because of the danger in arresting a suspect who was likely to be armed, they requested that the Denver Police Metro/Swat Unit conduct the arrest. Officers did not want to make the arrest with the passengers present, however, so they maintained surveillance on the vehicle as Damon drove and they kept the Metro/Swat officers apprised of the vehicle's location.

Damon ultimately drove to the 1300 block of Bannock Street where he parked on the east side of the street, facing north. Both passengers got out of the car and walked north on the sidewalk towards 14<sup>th</sup> Avenue, leaving Damon alone in the car. Members of Metro/Swat, who were nearby in vehicles, were notified that Damon was alone in the car. The Metro/Swat members then converged on the Dodge Charger to arrest Damon.

A video recording from a camera on the west side of Bannock Street shows that the first police vehicle, driven by Technician Motz, approached the Charger at 12:36:13 p.m. on the video clock. Motz fired gunshots at approximately 12:37:07 p.m. Police dispatchers were immediately notified by police radio that there had been an officer-involved shooting and this investigation began.

Statements obtained from witnesses, confirmed by video evidence, revealed that only Motz and Technician Rick Eberharter were in positions to see through the front windshield of the Charger during the moments before the shooting. Because of the dark tint on the car windows other witnesses were not able to see Damon inside the Charger.

#### Technician Jeffrey Motz

After the shooting, Motz voluntarily agreed to be interviewed by investigators at DPD Headquarters. This interview was video recorded. Motz explained that he was driving a dark green police Ford Expedition ("SUV") and that he initiated the first police contact with the silver Dodge Charger on Bannock Street. Technician Rick Eberharter was the front seat passenger in the SUV. Technician Craig Moen was the back seat passenger.

As Motz drove the police SUV south on Bannock Street, he saw the Dodge Charger facing north in a parking space on the east side of the street. He turned the SUV to cross the northbound traffic lane and drove at a 45 degree angle to the front of the Charger, at very low speed. The reinforced bumper of the SUV made contact with the front left corner of the Charger. Damon reversed the Charger a few feet but Motz maintained pressure against it as a tactical measure to "pin" the vehicle to prevent Damon from driving away. Motz saw another police SUV pull up to his right, close to the driver's door of the Charger.

Motz immediately got out of the SUV, drew his weapon, and faced the Charger. He stood next to the driver's seat with the driver's door open in front of him for protection. He

could see Damon in the driver's seat of the Charger. He pointed his handgun at Damon and held it extended in the high ready position. He estimated that he was about ten feet from Damon. Motz was positioned almost directly in front of Damon and was looking at him through the front windshield of the Charger. When asked about his ability to see through the windshield, and about possible sun glare off the windshield, Motz indicated that his view of Damon was not obstructed by glare or by shadows. He said he could see Damon clearly. Motz was wearing polarized sunglasses.

Motz said he purposefully had not activated a police siren on the SUV because he wanted Damon to be able to hear his commands. Flashing police emergency lights on the SUV were activated, however. From his position facing the Charger, Motz repeatedly ordered Damon to "show me your hands." Damon did not comply with any of these commands.

Motz said he watched Damon intently and did not turn his attention away even though he could hear activity happening behind him. Similarly, Damon looked at Motz during the encounter except for the initial moments when Damon looked around and at times when he would occasionally look downward toward his hands.

Motz said he could see Damon from his sternum up and recognized him from the photograph he had seen earlier on the "wanted" bulletin from the Fugitive Unit. Although Motz could not see Damon's hands, he could tell by Damon's shoulder movements that his hands were moving. It appeared that Damon was doing something with his hands below the level of the dashboard. He noted that Damon looked down occasionally. These actions caused Motz to think Damon might be reaching for a gun. *"I'm thinking he's reaching for a gun, trying to arm himself."*

Motz described that instead of complying with repeated commands to show his hands, Damon looked at Motz and shook his head from side to side. Motz interpreted that gesture as Damon saying, *"No. I am not going to do that."* Before the shooting, and after more commands to show his hands, Damon again shook his head from side to side, looking at Motz. Suddenly, Damon quickly brought both of his hands up together above the steering wheel in a gesture toward Motz. *"His hands popped up quickly."* Motz clarified that it was not the type of motion one would make to allow officers to see his hands or to surrender. Damon did not show his palms, for example. Motz said he saw a handgun in Damon's right hand and it was being directed toward him. Motz said at this point he fired his gun at Damon.

Motz described these moments:

*While I'm telling him to show me his hands, he's doing something with his hands down -- and I don't know if it was his waistband, the seat, the seat pocket -- but it was the front driver's passenger compartment. I knew his hands were moving because I could see his shoulders moving. He would occasionally glance down into the driver's side thing, but he was looking right at me when I was telling him: "Show me your hands."*

*At this point, after several "show me your hands" he starts shaking his head. And it wasn't like: "I'm scared. I don't understand you." It was more like: "I'm not gonna do it." So, I give him another order: "Show me your hands." And he goes back down. He's doing something down there that I can't see.*

*And, then, his hands pop up quickly. And it wasn't like, you know, raising my hands.*

*It was like this. [Motz demonstrates that Damon's hands were together, raised quickly in front of his face]. And I see a black and silver colored semi-auto in his right hand. And, it's starting to come toward me.*

*At that time, I fired at him. I'm gonna call it approximately three shots very quickly. I kind of paused there, for just a split second, because I lost sight of him.<sup>2</sup> But what I saw was him rolling over this way. So, what I thought he was doing was ducking underneath the dashboard to be able to shoot through the windshield right at me. So, I continued firing and fired several more shots. He stopped moving altogether and I stopped shooting.*

### Technician Rick Eberharter

Technician Rick Eberharter (Badge 92063) was the front seat passenger in the SUV driven by Motz. In his interview at DPD headquarters, he confirmed that Damon was visible through the front windshield of the Charger even though the side windows were too darkly tinted to see into the car. He said as Motz drove the SUV to pin the Charger in the parking space he saw Damon looking at them. Eberharter got out of the passenger side of the SUV and circled around the back to the driver side and stood near Motz. He drew his weapon. Through the windshield of the Charger he could see Damon, who was holding his hands down out of view. Both he and Motz gave commands for Damon to show his hands. At one point Damon looked directly at him and shook his head, indicating "no". Eberharter yelled again and made a hand motion to Damon with his hand open to communicate that the officers wanted to see his hands. Damon again shook his head, indicating "no."

Eberharter then went to the rear of the SUV to get some flash bang diversionary devices. He determined, however, that it was not safe to use the flash bang devices because the windows of the Charger were so darkly tinted that officers could not see into the car. As he began to seek another method to break the windows of the Charger so officers could see in, he heard the gunshots fired by Motz.

### Video Evidence

There was no body-worn camera evidence to review. Metro/Swat officers are not equipped with body cameras. However, two surveillance cameras recorded the shooting from different angles.

A camera belonging to the Denver Art Museum was located on the east side of Bannock Street. This camera was directed toward the northwest. It recorded a view from behind the Charger on its passenger side. It recorded the police SUV pinning the Charger into the parking space and Motz getting out of the SUV and confronting Damon from behind the open driver's door of the SUV. The camera was facing Motz. Damon is not visible inside the Charger in this recording.

A second camera was located on the west side of Bannock Street and was directed toward the northeast. It recorded a view of the Charger from the driver side but because of the tinted side windows of the Charger, Damon cannot be seen. When the police SUVs arrived, the camera's view of the Charger was blocked. The video shows Motz's SUV from the passenger side and rear. Since Motz stood on the driver side, he cannot be fully seen. However, since the

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<sup>2</sup> Motz explained during the interview that the spray of windshield glass during the first three shots caused him to momentarily lose sight of Damon.

SUV front doors are left open, Motz's right arm can be seen as he extends it toward the Charger. A close frame-by-frame watching of the video shows what appear to be spent cartridge casings that have been ejected from Motz's handgun as they rise in the air above the SUV. The video also shows what appear to be bursts of glass debris from the windshield of the Charger when it was struck by bullets.

The video shows that Motz extended his arm and gun toward the Charger at 12:36:20 on the camera clock. Forty seven seconds later, the first video evidence of a shot being fired is seen at 12:37:07. Motz withdraws his arm from the firing position at 12:37:13.

### Physical Evidence

The investigation confirmed that Motz was the only person who fired a weapon at the scene. The weapon he used was an H&K model USP, .45 caliber semi-automatic pistol. He fired seven gunshots. Seven spent .45 caliber cartridge casings were recovered at the scene. All seven casings were microscopically identified by the DPD Firearms Unit as having been fired in the handgun used by Motz.

All seven gunshots penetrated the windshield directly in front of the steering wheel of the Charger. Three bullets and four fragments of a bullet were recovered from the interior of the car. Three more bullets were recovered during the autopsy performed on Damon's body.

The vehicle was searched. No gun was found inside the vehicle or in the possession of Damon. However, a cell phone with blood on it was found inside the car. It was found in the space between the driver seat cushion and the center console. The location of the cell phone suggests the possibility that it had been dropped after the shooting. Blood patterns on the cell phone coupled with linear blood patterns and a void on Damon's right hand suggest to investigators that Damon may have been holding the cell phone in his right hand at the moment he was shot, although this is not known conclusively.

### Autopsy Report

An autopsy was performed on Damon's body on April 13, 2016. The Autopsy Report documents that three bullets penetrated or perforated Damon's body. Three bullets were recovered during the examination, two from inside the body and one from Damon's clothing.

One bullet struck Damon in the left forehead and passed through his brain. The bullet that caused this wound was recovered in the right subdural space.

Another bullet struck Damon in his upper left chest, fractured his left clavicle and passed through his body until the bullet came to rest in the posterior aspect of his left 2<sup>nd</sup> rib, where it was recovered. The course and direction of this wound path was left to right, front to back.

Another bullet passed fully through Damon's left forearm. This bullet struck and entered the posterior side (outside) of Damon's left forearm, 19 ½-inches below the top of his left shoulder. The bullet passed through his forearm and exited the anterior side (inside) of his left forearm, 15 ¾-inches below the top of his left shoulder. (The entrance wound was 3 ¾ inches closer to Damon's hand than the exit wound).

Also notable were “punctate abrasions.”<sup>3</sup> Punctate red abrasions were noted on the left side of Damon’s face (forehead, periorbital, nose, cheek, and chin). Punctate purple abrasions were noted in areas on the dorsal aspects (the back) of the thumb and index finger of each hand. There were no punctate abrasions on the palms of Damon’s hands.

Toxicological analysis of Damon’s blood was positive for heroin.

Because Damon’s death was caused by actions of another person, the “manner of death” is considered by the Medical Examiner to be homicide. This should not be mistaken as an opinion pertaining to the legal issues of criminal culpability, or lack of culpability.

### LEGAL ANALYSIS & CONCLUSION

Criminal liability for a homicide is established only if it is proved beyond a reasonable doubt that the elements of a crime, such as murder, manslaughter, or criminally negligent homicide, have been committed and it is proved beyond a reasonable doubt that legal justification for the homicide does not apply.

Colorado’s statutory justification for the use of deadly physical force in self-defense is described in C.R.S. 18-1-704.<sup>4</sup> The justification for a peace officer’s use of deadly physical force while attempting to make an arrest in Colorado is described in C.R.S. 18-1-707.<sup>5</sup> Both of these justifications for using force 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 beyond a reasonable doubt that the force was not justified.

In this case, considering the burden of proof in a criminal case and the law regarding justifiable use of force, the question I must consider is: Does the totality of the evidence prove beyond a reasonable doubt that Technician Motz was acting without lawful justification when he used deadly physical force? My view of the evidence is that the answer to that questions is no. Therefore, filing criminal charges is not legally or ethically appropriate.

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<sup>3</sup> These were caused by the impact of broken glass particles.

<sup>4</sup> As pertinent to this case, **C.R.S. 18-1-704** states:

(1) Except as provided in subsections (2) and (3) of this section, a person is justified in using physical force upon another person in order to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by that other person, and he may use a degree of force which he reasonably believes to be necessary for that purpose.

(2) Deadly physical force may be used only if a person reasonably believes a lesser degree of force is inadequate and:

(a) The actor has reasonable ground to believe, and does believe, that he or another person is in imminent danger of being killed or of receiving great bodily injury; ....

<sup>5</sup> As pertinent to this case, **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 ... 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 ....

(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 the 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; ....

Motz said he could see Damon through the front windshield of the Charger. Eberharter corroborates this. Their descriptions of Damon's actions before the shooting were similar. At the moment of the shooting, the video shows that Eberharter had moved away from the front of the Charger and there was no witness, other than Motz, who was in a position to see Damon. Thus, Motz was the only witness to see the gesture when Damon's hands "popped up quickly" as Motz described.

However, there is physical evidence that supports Motz's description and demonstration of Damon's gesture. The punctate abrasions noted by the pathologist on the backs of both of Damon's thumbs and forefingers suggest that his hands were above the dashboard, and the outside of his forefingers were directed toward the windshield when gunshots shattered the windshield glass. If his hands had been below the dashboard, it is unlikely that the windshield glass would have caused these abrasions. Note that the only other punctate abrasions were on Damon's face, which was above the dashboard.

Also, the path of the bullet through Damon's left forearm is very significant. The location of the entrance wound shows that the outside of Damon's forearm was facing Motz when it was struck. In other words, Damon's palms were not facing Motz when he was shot. The entrance wound is also closer to the hand than is the exit wound. This shows that Damon's left hand was closer to Motz than was Damon's elbow. The significance of the wound path is this: It is exactly the wound path one would expect if Damon was shot in the forearm while making the gesture with his hands that Motz described. This evidence strongly supports Motz's credibility and the accuracy of his description of Damon's gesture.

However, Motz was not accurate in describing that Damon had a gun in his hand when he made the gesture. Under these circumstances, I must assess whether it was reasonable for Motz to fire in self-defense.

Regarding assessing reasonableness 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) at pp. 396-397.

Additionally, my "calculus of reasonableness" in this case includes the following conclusions that I draw from the facts. I believe a jury would draw the same conclusions.

(i) Motz knew that Damon had recently shown his willingness to use a gun criminally when he used a gun during the bank robbery. He also knew that Damon had a criminal history of using weapons unlawfully. Therefore, it was reasonable for Motz to anticipate or expect that Damon may be armed during this encounter. It is apparent that the Fugitive Unit considered this a risk as well, because they requested that Metro/Swat perform the arrest.

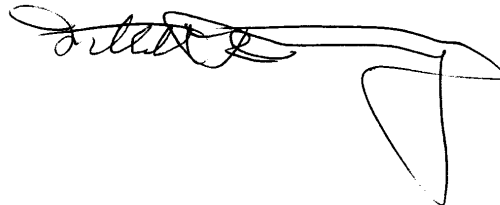
(ii) Damon's defiance escalated the risk of a lethal outcome. If Damon had simply complied by showing his hands, this shooting would not have occurred.

(iii) Damon was the cause of the lethal outcome because he made the sudden threatening gesture pretending to point a gun at Motz. Why he did this cannot be known.<sup>6</sup> But considering the tense circumstances facing Motz it is clearly understandable and reasonable that he believed Damon was making a move to shoot him and was armed with a gun.

In this dangerous factual context it makes no difference legally that Damon was not holding a gun. An officer is not required by law to wait to be fired upon before firing in self-defense. Colorado law recognizes that self-defense applies in situations where the need for self-defense is apparent, even though later it is learned that the danger perceived was not actual. So long as it reasonably appears that the threat to the officer's life is real, the officer may lawfully act in self-defense if he reasonably believes it is necessary. It has long been the settled law of this jurisdiction that "reasonable belief rather than absolute certainty is the touchstone of self-defense." *Beckett v. People*, 800 P2d.74, 78 (Colo 1990); *People v. Jones*, 675 Pd. 9, 13 (Colo 1975).

In this case, I believe it was reasonable for Motz to believe that Damon was about to fire upon him with deadly force and his decision to shoot Damon was reasonable and legally justified self-defense under Colorado law.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Mitchell R. Morrissey', followed by a long horizontal line and a large, stylized flourish.

Mitchell R. Morrissey  
Denver District Attorney

cc: Technician Jeffrey Motz; Sean Olson, Attorney for Tech. Motz; 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, District 6 DPD; Marcus Fountain, 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 Troy Bisgard, Homicide DPD; Detective Aaron Lopez, Homicide DPD; Lt. Scott Torpen, Aurora Police Department Major Investigations Section; Sgt. Matt Fyles, Aurora Police Department; Lamar Sims, Senior Chief Deputy District Attorney; Doug Jackson, Senior Chief Deputy District Attorney; Nicholas E. Mitchell, Denver Office of the Independent Monitor; Rev. William T. Golson, Jr.

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<sup>6</sup> Perhaps Damon was acting on a wish for "suicide by cop". This theory was advanced by a witness who said he knew Damon and who said Damon had previously stated that "he would rather die than go back to prison", and that if the police swarmed his house he would "off himself" or have a shootout. He suggested that if Damon was unarmed, he would point his cell phone like it was a gun.





**ROCKY MOUNTAIN SAFE STREETS TASK FORCE  
FUGITIVE UNIT**

4701 MARION STREET, SUITE 400 • DENVER, COLORADO 80216 • (303) 313-8800

**WANTED**

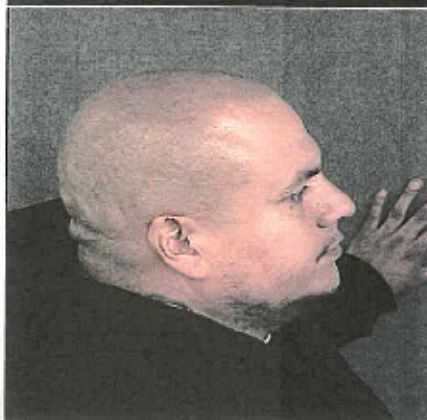
**For AGG BANK ROBBERY WITH GUN**

**NAME:** Dion Ray Damon  
**RACE/SEX:** H/M  
**DOB:** 12/16/1975  
**HEIGHT:** 5'9-6'0  
**WEIGHT:** 205-240  
**HAIR:** BLK  
**EYES:** BRO  
**S/M/T:** tat L/arm, r/arm, stomach, back  
  
**LKA:** 1016 S Elliot St #C  
**VEHICLES:** Silver Dodge Charger QDT-841

**WARRANT INFORMATION: AGGRAVATED BANK  
ROBBERY WITH GUN**

**CRIMINAL HISTORY:** Robbery, Weapons,  
Obstruction, Drugs, Extortion

**ADDITIONAL:** SUPPOSED TO BE STAYING WITH  
G/F DAWN SERENA AGUIRRE 01/01/1981



**LAW ENFORCEMENT USE ONLY**













*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](http://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.<sup>1</sup>

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

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<sup>1</sup> 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.<sup>2</sup>

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

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<sup>2</sup> 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.

*Mitchell R. Morrissey*

*Denver District Attorney*

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