



COPY FILE

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District Attorney

OFFICE OF THE DISTRICT ATTORNEY
TENTH JUDICIAL DISTRICT, COLORADO

May 13, 2011

VIA HAND DELIVERY

Interim Chief Luis Velez
Pueblo Police Department
Pueblo Municipal Justice Center
200 S. Main Street
Pueblo, CO 81003

Re: Decision Letter
Officer-Involved Incident Concerning
Officer Phillip Trujillo

Dear Interim Chief Velez:

The investigation and legal analysis regarding the above matter have been completed. My decision, based on criminal law standards, does not limit administrative action by the Pueblo Police Department where non-criminal issues can be reviewed, or a civil action where less stringent laws, rules, and legal levels of proof apply.

Background

Effective January 1, 2006,¹ several law enforcement agencies in Pueblo County entered into a revised "Officer-Involved Incident Protocol of the Tenth Judicial District" (CIT agreement). Among those who are signatories to the CIT agreement include the Pueblo Police Department, the Pueblo County Sheriff's Office, and the Colorado Bureau of Investigation (CBI). The CIT agreement establishes a team approach to the investigation of

¹ Prior to its effective date of January 1, 2006, the original CIT agreement was revised on December 21, 2005. The revisions are not material or relevant to this inquiry.



Interim Chief Luis Velez
May 13, 2011

certain critical incidents involving peace officers. Such a team provides any participating law enforcement agency requesting assistance proficient investigators to assist in the investigation of a critical incident to enable a “thorough, unbiased investigation of any critical incident involving a law enforcement officer.” Notably, the protocol adopted in the CIT agreement recognizes that “[A]long with an open investigation for public evaluation, the incident investigators and agency managers must understand the legal rights, obligations and authority of the agencies and individuals involved.” *Officer-Involved Incident Protocol of the Tenth Judicial District, Statement of Pueblo County Law Enforcement Agencies.*

Statement of Investigation and Facts

Triggering the CIT Agreement

The Pueblo Police Department invoked the CIT agreement’s investigative protocols for this incident. The investigation was conducted by investigators from the Pueblo Police Department, the Pueblo County Sheriff’s Office, the CBI and the District Attorney’s Office.² Reports, and photographs and diagrams of the scene attached to this decision letter, were received from agencies involved in the investigation as well as an autopsy report prepared by a forensic pathologist.

Facts

The Call

At 10:59 p.m. February 24, 2011, Pueblo Police Department dispatch received a call from an unknown female reporting a noise disturbance at 2309 Longhorn Drive in Pueblo, the home of Robert and Michole Elmore (residence).

Police Officers Dispatched

Pueblo Police Officers Phillip Trujillo and Steven Perez were dispatched at 11:00 p.m. to investigate “loud music” emanating from the residence.

Officer Trujillo was the first to arrive at the residence at about 11:07 p.m. (a 23:07:50 arrival). Notably, he was in full uniform and in a marked police vehicle, and did not know who resided at the residence nor had he ever been called to that location prior to this dispatch. He parked his police vehicle on the street east of the residence, and approached the front door of the residence alone.

According to Officer Trujillo, he observed items lying around the exterior of the residence that seemed out of place and an open car door (driver’s side) of a vehicle parked in the

² This was the eighth investigation involving the CIT agreement.

Interim Chief Luis Velez
May 13, 2011

driveway of the residence. He used his flashlight to look around. Officer Trujillo heard what he described as arguing from the interior of the residence — a male voice shouting and yelling profanity. In fact, he heard “muffled gunshots” sounds as he approached the front door. He thought someone was hitting something with a bat or blunt object. Because of what he saw and heard, his approach to the front door was cautious (he kept telling himself to “be ready, be ready” for something).

Standing next to the front door, he rang the doorbell once and knocked on the door twice. Officer Trujillo believed that the person approaching the door was “pissed” and that he had a bat or weapon. Officer Trujillo had his hand seated deep on the butt of his firearm, holster unsnapped (presumably with his left hand as he is left handed). Notably he was off to the side of the front door, one foot on one of the steps and one foot on the ground, when suddenly the front door swung open (the door opens to the inside, from the right to the left of the resident – there is no screen door). The person opening the door said: “you want to fuck with me?” Officer Trujillo saw human fingers and an arm come out of the door holding a firearm — a gray or silver and black semi-automatic pistol — which was pointing at his face (Mr. Elmore was right handed). At that moment, fearing for his life, he moved his head to the side, stepped toward the person, drew his firearm in self-defense, pointed it at the person and fired two shots. Clearly, Officer Trujillo was focused on the firearm that was raised to meet him.

After the shooting Officer Trujillo immediately took cover on the side of the residence and called police dispatch, telling dispatch that he had fired shots and that he needed more cover, officers and medical assistance (23:09:38 “shots fired” call). At that point a black male emerged from the residence. Officer Trujillo ordered the male, Lydell Potter, to the ground and handcuffed him for the safety of all concerned.

Lydell Potter stated to Officer Trujillo: “Dude they just shot my friend, they shot my friend and he needs help, help him ... He thought you were his girlfriend. He was going to kill her.” Thereafter, Officer Trujillo scanned the inside of the residence where he saw Robert Elmore slumped over. At that point a white Cadillac Escalade pulled up at the scene.

Officer Trujillo was removed from the immediate area of the shooting scene and was transported to the Pueblo Municipal Justice Center (PMJC) at 23:25:39, where his duty belt, holster and firearm — a Glock Model 17 SN:HRF207 Cal: 9mm — were retrieved.

Officer Perez arrived on scene at 23:12:29. After conducting a security search of the main and basement levels of the residence with Pueblo Police Detective Mark Cannon and Pueblo Police Officer Nathan Pruce, he observed two bullet shell casings. One was just off the front of the porch lying on the driveway of the residence; the other next to some hosing and a child’s bicycle near the left side of the garage. He protected the casings and their location as

Interim Chief Luis Velez
May 13, 2011

medical response teams arrived and transported Mr. Elmore to Parkview Medical Center (PMC).

Additional Police Officers Arrive at Scene

Detective Cannon was familiar with those who resided at the residence. There was an ongoing narcotics investigation involving Robert Elmore. When he heard the "loud music" dispatch, he was a short distance from the residence. Cannon arrived at the residence after the shooting (23:11:47), and was the second officer at the scene. He drives an undercover vehicle described as a white Cadillac Escalade.

Upon arrival, Detective Cannon observed Officer Trujillo near the front porch of the residence, Lydell Potter restrained in handcuffs, and Robert Elmore was lying in the doorway of the residence in a pool of blood. Officer Trujillo responded to Cannon's question of what happened: "The guy opened the door and pointed a gun at me and I shot him," answered Officer Trujillo.

As noted, a security search of the residence was conducted by Cannon to determine if any one else was inside. He searched the upper level of the residence, then was assisted by Officers Perez and Pruce in conducting a search of the main and lower levels of the residence. Not finding any other suspects or victims inside the residence, all officers exited the residence.

Photographs

Photographs of the scene were taken by Pueblo Police Officer Greg Bowen who arrived at the scene at 23:15. He was able to photograph Mr. Elmore prior to his departure with the medical team.

A black firearm (pistol) — a S&W Model SW9VE SN:PBR5842 — was photographed as it was observed lying on the floor just inside the front door of the residence. The barrel of the pistol was pointed towards the direction of the front door. The two 9mm shell casings found in the driveway also were photographed.

Transport of Mr. Elmore

Officer Bowen rode in the ambulance with the medical team and Mr. Elmore as the wounded Mr. Elmore was transported to PMC.

At PMC, Officer Bowen remained with Robert Elmore until other detectives arrived. Thomas Greidanus, M.D. pronounced Mr. Elmore dead at 23:45.

Interim Chief Luis Velez
May 13, 2011

Arguments between Mr. and Mrs. Elmore

After the Critical Incident Team was debriefed at 1:00 a.m. on February 25, 2011, Lydell Potter was interviewed by Pueblo Police Detective Glen Fillmore and Sergeant Tom Proud of the Pueblo County Sheriff's Office at the PMJC. Previously, Mr. Potter had given a written statement to Pueblo Police Officer Gary Wyberg.

In both his written statement and interview Mr. Potter stated that he lives at 2310 Longhorn Drive and had been an acquaintance of Robert "Danny" Elmore for three or four years. He went to the residence at about 9:30 p.m. on February 24, 2011. He related that Mr. Elmore was fighting with his wife, Michole Elmore, because Mrs. Elmore had told Mr. Elmore that she was with another man. Mr. Potter also helped Robert Elmore pick up items that had been thrown around the inside of the residence.

While assisting an intoxicated Mr. Elmore, Potter overheard Mr. Elmore have at least two phone conversations. Mr. Potter believed that Michole Elmore was on the other end of the conversations. During the first conversation, Mr. Elmore told his wife to not come home because he was with another woman (Mr. Potter knew that Mr. Elmore was not with another woman at that time, but thought that Mr. Elmore said that to make his wife mad). The second conversation occurred about 25-30 minutes later. Mr. Potter related that Mrs. Elmore called her husband and Mr. Potter overheard Robert Elmore say to her: "go ahead and send the guy over" and then hung up the phone. Apparently, according to Mr. Potter, Mr. Elmore was reacting to a statement that his wife made during that conversation that she was going to send a guy over "to shoot it up or to do a drive by shooting." Seconds later Mr. Potter and Robert Elmore heard a knock at the front door. Mr. Potter stated: "[we] thought it was the guy Danny's wife sent over."

Mr. Potter explained that Mr. Elmore went to the door and said "I don't know who this is." Mr. Elmore grabbed his pistol (which he had been waiving around in an unsafe manner during the evening in the residence in front of Mr. Potter, without the magazine in the pistol) from a coffee table, put the magazine in it (apparently Mr. Elmore did not put a round in the chamber of his pistol), telling Mr. Potter: "That's probably those fowls (cq) right there." Mr. Elmore was "paranoid, excited, agitated and jumpy." He then "threw" open the front door with a quick jerk. Potter heard a single shot and then saw smoke. Robert Elmore dropped the pistol that he had in his hand (Mr. Elmore was right handed) and fell to his knees. Mr. Potter kicked the pistol away and saw a police vehicle outside. Being relieved to see the police instead of someone who had come over to shoot Mr. Elmore, he stepped out from the inside of the residence, was commanded by a police officer to lie down, and then was handcuffed and put into the back of a marked police vehicle.

Interim Chief Luis Velez
May 13, 2011

Phone Activity Prior to Arrival of Police

Notably, Pueblo Police Detective Cody Wager reviewed the telephone activity of Mr. and Mrs. Elmore for February 24, 2011. The couple argued back and forth via text messages throughout the day. For example, at 5:30 p.m. Mr. Elmore tells his wife "I never cheater on u now u and everybody will die n ready." Two minutes later he sends her this message: "Now u die."

At 7:22 p.m. he sends her another message: "you tell homie to b waiting I am going over ther now so now will b in prison so kiss your kids good buy." Then, at 7:44 p.m. he sends, "U need to let me go home or u will never c your kids agean we will bouth die to night in front of r kids."

The last call made between Mr. and Mrs. Elmore was at 10:46 p.m.; a call from Michole to her husband.

Witnesses

Three other eye witnesses to the shooting were interviewed: Mr. Lane Potter who is Lydell Potter's brother; Mr. Brian Stuart who is the boyfriend of Lane and Lydell Potters' mother; and Daniel and Renee Casillas who observed the incident from their home.

All of the witnesses gave similar accounts: they observed Officer Trujillo approach the residence and knock on the front door, observed Mr. Elmore opening the door swiftly, and then heard shots being fired.

Lane Potter:

Lane Potter lives at 2310 Longhorn Drive which is directly across the street and south of the residence. He observed a marked police vehicle parked near the driveway of the residence. A uniformed police officer was standing in the driveway of the residence with a flashlight. According to Lane Potter, he observed the police officer knock on the front door of the residence with his right hand; saw Mr. Elmore swing open the front door with his left hand; and observed a "handgun" in Mr. Elmore's right hand slightly raised in the air. At that moment, Lane Potter saw the police officer draw his "gun" (presumably with his left hand) and fire three shots at Elmore. Mr. Elmore fell to the ground in the doorway. The police officer scrambled around the corner, yelled for those in the residence to get on the ground and show their hands. Lydell Potter obeyed the commands.

Interim Chief Luis Velez
May 13, 2011

Daniel and Rene Casillas:

Mr. Casillas observed the events from the back of his home (4219 Widener Street) which faces the scene. He saw a marked police vehicle parked by the driveway of the residence. A uniformed police officer was standing on the first step of the porch of the residence with a flashlight in his left hand looking around. The officer then stepped up onto the second step of the porch. The front door swung wide open, very quickly. Mr. Casillas stated that he saw a man wearing a white shirt open the door with his left hand, and it appeared that he was in an "aggressive stance." Then three shots were heard and the man fell. The police officer went around the side of the garage.

Rene Casillas recounted similar events as that of Daniel Casillas. She emphasized, as Mr. Casillas had stated, that observing the property clearly was possible because the lights inside the residence were on and dim street lights were on.

Brian Stuart:

Mr. Stuart was on the front porch of his home. He also lives across the street at 2310 Longhorn Drive. He watched the police officer approach the residence, observed the officer look at the car parked in the driveway, and saw the officer approach the front door of the residence. According to Mr. Stuart, the police officer rang the doorbell and then waited several seconds before he knocked on the door several times. The police officer stood on the front porch for about 35-45 seconds before the front door flew open and Mr. Elmore immediately raised a silver and black "handgun" up to the face of the police officer. Three shots were heard; the officer backed away from the front door and took cover behind the front corner of the garage.

Interview of Michole Elmore

After the incident, it took several hours to locate and contact Michole Elmore. Thereafter, she was interviewed at the PMJC.

At 4:20 a.m. on February 25, 2011, she explained to Detective Cody Wager and Pueblo Police Detective Shelly Taylor key events which led up to the incident that occurred the night before.

Earlier in the day of February 24, Michole registered at the Motel 6 located at 4103 N. Elizabeth Street. She was at the motel with her children and a friend named Stacy. She admitted that she made the "loud music" call to the police. She made another call at about

Interim Chief Luis Velez
May 13, 2011

12:05 a.m. on February 25 to report neighbors removing items out of the residence (she did not know that her husband had died just before she made the call). Her explanation for making the second call was to check on the welfare of her husband because he had been drinking and he normally did not drink. Notably, she denied that any threats were made between her and her husband the previous evening. In fact, she asserted that the last time she spoke with Robert was around 7:00 p.m. on the evening of February 24, 2011. Her cellular phone was retrieved.

Search of Residence

A search of the residence was conducted by the CBI, Pueblo Police Department, and the Pueblo County Sheriff's Office. Blood samples, several guns, broken glass, liquor bottles, bullets, oxycodone, cocaine, and marijuana plant samples were seized.

Autopsy

Robert Elmore suffered two bullet holes — one in his upper chest above his right nipple and the other on his right side below his right armpit.

Kelly Lear-Kaul, M.D., a forensic pathologist, opined that the condition directly leading to the death of Mr. Elmore was gunshot wounds to the trunk at an intermediate range. One bullet entered at right upper chest perforating the right lung and thoracic spinal cord at T8 coming to rest in the back. The path of travel was from front to back and right to left. The other bullet's entrance was at right lower chest perforating the liver, right kidney and coming to rest in the lower back; the path of the bullet was from front to back, right to left, and downward.

Mr. Elmore had numerous scratches to his face and forehead that were in various stages of healing, which may have been scratches consistent with fingernail marks and defensive wounds during physical altercations.

Procedural Considerations

Administrative Actions

An administrative review is controlled by less stringent legal levels of proof and rules than a *criminal review* and can provide both positive remedial options and punitive sanctions. This process can be said to result from an agency's "internal affairs" investigation and provides significantly broader latitude in accessing and using information concerning the background, history and job performance (prior conduct) of the involved officer. Issues related to the strategical decisions made by the involved officer leading up to the critical incident are most effectively addressed by the department's administrative review. This type

Interim Chief Luis Velez
May 13, 2011

of information may have limited or no applicability to *criminal reviews*, but is very important in making administrative decisions.

There are a variety of actions that can be taken administratively by the department in response to its review. On the one hand, the department's review may reveal that no action is required. On the other hand, the department may determine that rules were violated and that formal discipline may be appropriate. Or, the department may make findings that support additional training for all officers on the force, or the need for changes in departmental policies, procedures and rules. In summary, departmental action can be taken for the benefit of the community, department, its' officers or the involved officer.

Civil Law versus Criminal Law

The civil law provides remedies for essentially private wrongs — actions in which the state may not have an interest. Monetary damages can be sought under a civil suit for a wrongful act that violates a legal right of an injured party. Plaintiffs in civil litigation are required to prove their case by a preponderance of the evidence or some lesser standard of proof; although some cases have indicated that “clear and convincing evidence” may be the required standard of proof.

A crime normally involves a wrongful act specifically prohibited by the criminal law. In most cases the law requires the wrongful act be accompanied by criminal intent. In other words, a person intentionally commits a prohibited act. Of course, a criminal action requires that the prosecution prove its case “beyond a reasonable doubt” — the highest standard of proof. Notably, the criminal law and civil law can overlap. Conduct by a person that constitutes a crime can also involve a tort (a wrongful act that violates a legal right of an injured party). For example, a person who kills another person can be guilty of a crime and have a verdict of guilty rendered against him or her in a civil suit for damages.

It is the general responsibility of a district attorney to review cases prior to placing them into the judicial branch's court system. Put simply, a district attorney has a criminal “charging” responsibility. Charging may be through the complaint/information process or the grand jury presentment process. The charging “discretion” reposed in a district attorney is an awesome power to be used judiciously. If ever justice is to be established in a community, it will first come from a local district attorney's charging practices. This is the area of discretionary power that best defines a prosecutor's personal criminal justice philosophy. Accordingly, if there is reasonable likelihood or probability of conviction, a district attorney may conclude that one has committed a chargeable offense. Among other things, this standard takes into account the quantity, quality, admissibility and credibility of available evidence.

Interim Chief Luis Velez
May 13, 2011

Legal Analysis – Criminal Law

Criminal Liability in General

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 law, and it is proved beyond a reasonable doubt that the offense was committed without any statutorily-recognized justification or excuse. *See* Sections 18-1-407, 18-1-502, 18-1-701 and 18-1-710, C.R.S.

Use of Deadly Force by a Peace Officer

Legal Justification: Colorado's Use-of-Force Statutes

Subject to the provisions of section 18-1-707, C.R.S., a peace officer who uses excessive force in pursuance of such officer's law enforcement duties is subject to the criminal laws of Colorado, including the laws relating to homicide, to the same degree as any other citizen. Section 18-8-803, C.R.S.³

While knowingly or intentionally shooting and causing the death of another person is generally prohibited as homicide in Colorado, section 18-3-101(1), C.R.S., the Colorado Criminal Code specifies certain circumstances in which the use of deadly physical force is justified. *See* Sections 18-1-701 and 18-1-707, C.R.S.

A peace officer is justified in using deadly physical force upon another person to effectuate an arrest, or when attempting to effectuate an arrest, only 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. Section 18-1-707(2)(a), C.R.S.

Additionally, a peace officer is justified in using deadly physical force upon another person to effect an arrest, or when attempting to effectuate an arrest, when he reasonably believes that it is necessary to effect an arrest, or to attempt to effectuate an arrest, of a person whom he reasonably believes "[O]therwise indicates ... that he is likely to endanger human life or to inflict serious bodily injury to another unless apprehended without delay." Section 18-1-707(1) and (2)(b)(III), C.R.S.

³ Section 18-8-803 C.R.S. "is consistent with national norms of acceptable force. Colorado officers may be charged with: (1) manslaughter, where they recklessly cause the death of another;" (18-3-104) "and (2) criminally negligent homicide, where they cause death by conduct constituting criminal negligence" (18-3-105). McGuinness, *Constitutional Issues in the Criminal Prosecution of Law Enforcement Officers*, 33 Colo. Law. 55 (2004).

Interim Chief Luis Velez
May 13, 2011

In summary, these “use-of-force” statutes establish Colorado standards that provide that officers are “justified in using reasonable and appropriate physical force upon another person when and to the extent that the officer reasonably believes it necessary ...” *Boykin v. People*, 45 P. 419 (Colo. 1896) [A police officer who did not provoke an assault and was engaged in making an arrest is not obligated to retreat before defending himself].

Legal Justification: Colorado’s Use-of-Force Statutes – Apparent Necessity v. Actual Necessity

Section 18-1-704(1), C.R.S. provides that “... 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.” Notably, deadly force may be used if the officer reasonably believes a lesser degree of force is inadequate and the officer has reasonable grounds to believe, and does believe, that he or another person is in imminent danger of being killed. Section 18-1-704 (2)(a), C.R.S. and *See Campbell v. People*, 133 P. 1043 (Colo. 1913).

Public Entities: Policies Required under Colorado Law

Section 18-8-804, C.R.S. provides that each public entity that employs police officers shall adopt policies or guidelines concerning the use of force by officers within that jurisdiction which must be complied with by the officers in carrying out their duties within that jurisdiction.

Effectuating an Arrest

A peace officer may arrest a person when he has a warrant commanding that a person be arrested or when he has probable cause to believe that an offense was committed and has probable cause to believe that the offense was committed by the person to be arrested. Section 16-3-102(1)(a) and (c), C.R.S. All necessary and reasonable force may be used in making an arrest. Section 16-3-101(2), C.R.S. Moreover, an officer can rely upon and accept information provided by another officer when formulating probable cause. *People v. Nanes*, 483 P.2d 958 (Colo. 1971).

The Split-Second Decision

Officer-involved shootings ultimately result from what is commonly called the “split-second decision to shoot.” “In a split second, law enforcement officers must recognize a threat, evaluate its seriousness, and instantaneously employ potentially deadly force against criminal suspects to combat apparent dangers to citizens, bystanders, fellow officers, and themselves.” McGuinness and Tucker, *Police Use of Force Standards under Colorado and Federal Law*, 36 Colo. Law. 47 (2007).

Interim Chief Luis Velez
May 13, 2011

Put simply, the split-second decision is generally made to stop a real or perceived threat or aggressive behavior by the citizen. 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.” It is this split-second time frame which typically defines the focus of the criminal filing decision, not the string of decisions along the way that placed them in the “life or death” final frame.

Typically, when a police-citizen encounter reaches this split-second window, and the citizen is armed with a firearm, 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.

Reactive Deadly Force Response

Often the threatening suspect may end up being shot and hit in side or rear angles as a result of an officer’s reactive deadly force response. When an officer shoots a suspect and a bullet hits the subject in side or rear angles, this is a very different angle of entry than the average, uninformed civilian, law enforcement officer or officer of the court would expect.

In deadly force confrontations which are fully justified, “... [T]here is a ‘lag time’ between the recognition of the apparent threat and the actual use of force. In the time it takes to unholster, prepare, and fire a weapon, the position of the suspect often has changed.”⁴ For example, when a suspect is moving, his position will be different when a bullet strikes him than it was when the officer’s decision was made to shoot.

Research by Bill Lewinski, Ph.D. “... proves that in the street, action really does beat reaction ... [and] will provide a clear explanation for ... why so many suspects get shot in the back.”⁵ Dr. Lewinski notes:

“In an actual street encounter, an officer will never know whether he is facing the fastest, slowest or just the average person. The only way an officer can ensure his survival is to prepare for, and react as if he’s facing the fastest person out there. All of the motions studied ... have come from actual officer-involved shootings, and reflect the real-life threats or circumstances.”⁶

⁴ McGuinness and Tucker, *Police Use of Force Standards under Colorado and Federal Law*, 36 Colo. Law. 47 (2007).

⁵ Lewinski, “Why is the Suspect Shot in the Back? Finally, Hard Data on How Fast the Suspect Can Be — in 11 Different Shooting Scenarios,” *The Police Marksman*, (Nov./Dec.2000), pp. 20-28.

⁶ *Id.*

Interim Chief Luis Velez
May 13, 2011

Notably, Lewinski's research finds that when "an officer gets the signal that his life is in danger, his concentration becomes exclusively focused on the threat, specifically the movement of the gun in his direction." According to Dr. Lewinski, "once the brain decides it's time to shoot, it is virtually impossible to interrupt the completion of that action."⁷

A Prosecutor Must Act Within the Bounds of Professional Ethics

A district attorney is not an ordinary litigant. He represents the People of the State of Colorado. Section 20-1-102, C.R.S. "In representing citizens, the prosecutor is vested with broad discretionary authority to investigate and charge criminal conduct." *See People in Interest of J.A.L.*, 761 P.2d 1137 (Colo. 1988). Put simply, the role of a prosecutor is to seek the truth and for justice to be done, not merely to convict. ABA Standards for Prosecution and Defense Standards, 3-1.2(c) (1993).

A prosecutor's duty is to "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause." Rule 3.8(a), Colo. RPC [Colorado Rules of Professional Conduct].

Question Presented

As there is no dispute that Officer Trujillo intended to shoot at the person he said pointed a firearm at him, the determination of whether the conduct of Officer Trujillo was criminal is primarily a question of legal justification. That is, the question presented in this case is whether, at the instant Officer Trujillo fired the shots that mortally wounded Robert Elmore, he reasonably believed, and in fact believed, that he was in imminent danger of great bodily injury or death from the actions of Mr. Elmore.

Standard of Review

"The evolving body of use-of-force law mandates a complete factual assessment of the unique facts and circumstances 'at the moment' of the particular use of force." McGuinness and Tucker, footnote 8, *supra*. As previously stated, it is the split-second time frame which typically defines the focus of the criminal filing decision, not the string of decisions along the way that placed Officer Trujillo and Robert Elmore in the "life or death" final frame.

"The examination of a duty-related law enforcement incident with possible criminal implications necessitates a contextual analysis of instantaneous decision-making."⁸

⁷ Lewinski, "The Suspect is Shot in the Back. Is your Shooting Clean?," *The Police Marksman*, (Sept./Oct.1999), p. 23.

⁸ McGuinness, *Constitutional Issues in the Criminal Prosecution of Law Enforcement Officers*, 33 Colo. Law. 55 (2004).

Interim Chief Luis Velez
May 13, 2011

According to *Smith v. Freland*, 954 F.2d 343 (6th Cir., 1992):

“... [W]e must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes ‘reasonable’ action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.” *Smith v. Freland*, at 347.

Conclusions

The events described by Officer Trujillo and witnesses in this case are in pertinent part internally consistent, are consistent with one another, and are consistent with the physical evidence developed in the investigation. There is no direct evidence or physical evidence that materially contradicts or differs from the basic account given by Officer Trujillo.

The inspection of the firearms by investigators confirms that Officer Trujillo fired the shots that mortally wounded Elmore. The shell casings recovered at the scene, which were identified as being fired from Officer Trujillo’s firearm, add further confirmation of this fact. The description of the action taken by Officer Trujillo during the final frames of his split-second decision to shoot is consistent with causing the type of fatal wound sustained by Mr. Elmore.

Events During the Critical Time Frame Immediately Preceding Officer Trujillo’s Shots:

Clearly, timing was everything when Officer Trujillo arrived at the residence. Unknown to him, he came upon a scene where an intoxicated Mr. Elmore had been fighting with his wife, Michole Elmore, for some time, including minutes before Officer Trujillo’s arrival; Mr. Elmore had a state of mind where he believed his wife when they spoke during one of the phone conversations that evening wherein she was going to send a guy over “to shoot it up or to do a drive by shooting;” and Mr. Elmore thought that the knock at the front door was the guy his wife sent over to shoot him. Without a doubt, Mr. Elmore was “paranoid, excited, agitated and jumpy,” as Lydell Potter stated, as he swung open the front door with firearm in hand.

An unsuspecting Officer Trujillo heard what he described as arguing from the interior of the residence — a male voice shouting and yelling profanity. In fact, he heard “muffled gunshots” sounds as he approached the front door. He thought someone was hitting something with a bat or blunt object. Because of what he saw and heard, his approach to the front door was cautious (he kept telling himself to “be ready, be ready” for something).

Interim Chief Luis Velez
May 13, 2011

Standing next to the front door, he rang the doorbell once and knocked on the door twice. Officer Trujillo believed that the person approaching the door was “pissed” and had a bat or weapon. Officer Trujillo had his hand seated deep on the butt of his firearm, holster unsnapped (presumably with his left hand as he is left handed).

Description of the Action During the Final Frames of Officer Trujillo’s Split-Second Decision: Notably Officer Trujillo was off to the side of the front door, one foot on one of the steps and one foot on the ground, when suddenly the front door swung open (the door opens to the inside, from the right to the left of the resident – there is no screen door). The person opening the door said: “you want to fuck with me?” Officer Trujillo saw human fingers and an arm come out of the door holding a firearm — a gray or silver and black semi-automatic firearm — which was pointing at his face (Mr. Elmore was right handed). At that moment, fearing for his life, he moved his head to the side, stepped toward the person, drew his firearm in self-defense, pointed it at the person and fired two shots. Clearly, Officer Trujillo was focused on the firearm that was raised to meet him.

Mr. Elmore’s actions with vigorous intensity and speed were a precursor to the shooting decision made by Officer Trujillo. These actions by Elmore understandably could be perceived by Officer Trujillo as life threatening. Obviously, Elmore’s body language tended to be associated with Officer Trujillo’s decision to shoot. Officer Trujillo saw a firearm pointed at his face.⁹ Officer Trujillo was mentally processing the general shape of the object in Mr. Elmore’s hand faster than the fine details. Officer Trujillo believed that Elmore was going to shoot him and Trujillo was in fear for his life. Officer Trujillo drew his duty firearm and then fired at Mr. Elmore two times. In that split-second time frame, Officer Trujillo chose to shoot to live.

Officer Trujillo was justified in using physical force upon Mr. Elmore in order to defend himself from what he reasonably believed to be the use or imminent use of unlawful physical force by Mr. Elmore. Officer Trujillo justifiably used a degree of force which he reasonably believed to be necessary for that purpose. His use of deadly force was justified as he reasonably believed a lesser degree of force was inadequate and he had reasonable grounds to believe, and did believe, that he was in imminent danger of being killed. Section 18-1-704(1) and (2)(a), C.R.S. See *Campbell v. People*, 133 P. 1043 (Colo. 1913).

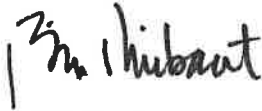
⁹ A firearm is a deadly weapon. Section 18-1-901 (3)(e)(I), C.R.S.

Interim Chief Luis Velez
May 13, 2011

Decision¹⁰

Taking into consideration the quantity, quality, admissibility and credibility of available evidence I conclude that at the instant Officer Trujillo fired the shots that mortally wounded Robert Elmore, he reasonably believed, and in fact did believe, that he was in imminent danger of death from the actions of Mr. Elmore. Put simply, the action taken by Officer Trujillo is statutorily-recognized justification. Therefore, there is not a reasonable likelihood or probability that Officer Trujillo committed a chargeable offense that can be proven beyond a reasonable doubt, unanimously, to a jury. Accordingly, no charges will be filed against him.

Sincerely,



Bill Thiebaut
District Attorney

BT:rd

cc: Sheriff Kirk Taylor, Pueblo County Sheriff's Office
Agent-in-charge Marc Micciche, Colorado Bureau of Investigation
Enclosures

¹⁰ According to the CIT agreement, as soon as practical after the critical incident and receipt of the investigative report, the District Attorney "... shall determine whether anyone committed a crime. The District Attorney shall communicate his findings, conclusions of law and decision via a decision letter to the chief law enforcement officer of the venue and employer agencies involved." *Officer-Involved Incident Protocol of the Tenth Judicial District, District Attorney Responsibilities*, at page 37.

