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Decision Statement

January 21, 2016

Re: The death of **Michael Marshall**

By: Mitchell R. Morrissey, Denver District Attorney

I have reviewed the investigation of the death of Michael Marshall (D.O.B. 05/10/1965) who passed away on November 20, 2015. Mr. Marshall's death followed a psychotic episode while in custody at the Van Cise-Simonet Detention Center on November 11, 2015, during which Mr. Marshall was physically restrained by Denver Sheriff's Deputies. I have thoroughly reviewed the video recordings of the incident, the statements of the deputy sheriffs, the nurses involved and the Autopsy Report. In addition, follow-up discussions have been conducted with Dr. Meredith Frank who performed the autopsy.

I sympathize with Mr. Marshall's family and express my condolences for their loss. Sadly, this situation is an example of how difficult it is for society as a whole, including deputies in a jail, to handle the complex issues presented by those suffering from severe mental illness.

The purpose of this Decision Statement is to inform the public of the facts of the incident and to explain why a remedy does not lie within the bounds of ethical criminal prosecution in this case. To those calling for criminal charges in order to effect a change regarding use of force tactics or policies, I want to emphasize that criminal charges are appropriately used only to respond to criminal acts that can be proven beyond a reasonable doubt. Absent that certainty of proof, criminal charges are not appropriate and are not justice.

SUMMARY OF THE FACTS

Mr. Marshall was an inmate afflicted with severe mental health issues who was being held in the Denver Detention Center. Mr. Marshall was arrested for trespassing on November 7, 2015.[1] His jail cell was in the 4D pod, a special management unit on the fourth floor of the detention center. He had refused to take medicine prescribed for his mental illness (schizophrenia) for at least two days. On November 11, 2015, while on free time out of his cell,

[1] His arrest was the sixth police contact with him at the same location (a hotel) during 48 hours. Mr. Marshall was described as "rambling" or "ranting" in calls he placed to 911 on November 5, 2015. On the second police response that night he was taken to DHMC for a mental health evaluation. He was contacted twice on November 6 after similar calls. On November 7, the hotel manager called 911 twice because of his behavior. On the second police contact that day, he was arrested for trespassing.

he was observed behaving in a strange and erratic manner.[2] When sheriff deputies saw him approach another inmate aggressively, they intervened. It appeared to the deputies that Mr. Marshall was disoriented, so he was taken into the sally port area attached to the 4D pod in order to keep him away from other inmates. A nurse was called to obtain help for him.

The sally port is a separated area that can be entered from the 4D pod on one side and from a hallway on the other side. The video from inside the sally port showed Mr. Marshall, shirtless, pacing back and forth, dragging a blanket for about 2 ½ minutes before he sat down on a bench. About 30 seconds later, Deputy Sheriff Garegnani entered the sally port through the hallway door that was to the left of Mr. Marshall. Deputy Garegnani stood to the left of Mr. Marshall, blocking the door. Two other deputy sheriffs, Deputy Civic and Deputy Phuvapaisalkij, were in the hallway outside the door behind Deputy Garegnani. Deputy Hernandez was in the sally port a few steps to Mr. Marshall's right. Ashlee Allison, the nurse who was called about Mr. Marshall's behavior, was down the hall on the telephone, on hold, waiting to speak to a doctor at Denver Health to get authorization to provide medicine for Mr. Marshall.

About a minute and a half after Deputy Garegnani entered the sally port, Mr. Marshall, who appeared to be upset, abruptly got up from the bench and tried to push past Deputy Garegnani to go through the door into the hallway. The deputy placed his left hand on Mr. Marshall's chest to stop him and pointed with his right hand to direct Mr. Marshall back to the bench. Mr. Marshall resisted this and tried to get past the deputy again. The video showed Mr. Marshall sliding his back along the wall toward the door and he appeared to be losing his balance. Deputy Garegnani took Mr. Marshall's upper right arm, turned him around counter-clockwise, and placed him back on the bench in a sitting position. As this was happening, Deputy Civic and Deputy Phuvapaisalkij came through the door to assist. Mr. Marshall immediately resisted and pushed himself forward to move off the bench in the direction of the door. The deputies took hold of Mr. Marshall and moved him to the floor onto his stomach.[3]

The maneuvers placing Mr. Marshall on the bench and on the floor were not aggressive or violent. It is important to note that there were no punches, kicks, strikes of any kind, or any impact force used to control Mr. Marshall throughout this incident. No choke holds or carotid restraints were used. Tasers were not used. The physical force used by the deputy sheriffs during this incident was applied by holding Mr. Marshall and by preventing him from getting up. One deputy said he pressed his knee on the back of Mr. Marshall's thigh. Another said that at one point he placed his knee just above Marshall's buttocks to control him. Pressure was applied by deputies' hands to the back of Mr. Marshall's shoulders or scapula areas. One deputy controlled his head movements but Mr. Marshall was still able to move his head from side to side. OPN devices (nunchucks) were used on Mr. Marshall's ankles. To minimize the risk of injury to everyone, including the nurses and Mr. Marshall, five deputies were involved in

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[2] Several inmates described Mr. Marshall acting bizarrely. One inmate said Mr. Marshall was "not right" and was "amped up." He saw Mr. Marshall carrying blankets and food trays and stacking them outside of a cell and then eating with his bare hands from food trays, making a mess that he seemed incapable of cleaning up. Another inmate described his eating as "shoveling food into his mouth as if he had never eaten before." Mr. Marshall approached that inmate aggressively on two occasions. After the second time, the deputy sheriffs escorted Mr. Marshall out of the pod. A third inmate had similar observations.

[3] The time displayed on the *sally port video* is approximately 18:33:00.
The time references are approximate. Unless otherwise noted, time references are to the *sally port video*.

applying some degree of physical force to control Mr. Marshall.[4] Each deputy's task was to control a body part such as a left leg, right arm, etc. One of the deputies described that the strategy behind this control tactic is that it minimizes the level of force needed to safely control a combative inmate and also minimizes the risk of anyone sustaining an injury.

Mr. Marshall first struggled to prevent the deputies from handcuffing him. However, even after his hands were successfully handcuffed behind his back, he continued to struggle. The deputies described that he raised his buttocks and "used his core" in an effort to rise up and he pressed his forehead against the floor in an effort to raise his shoulders.[5] Mr. Marshall was making growling noises, showing his teeth. One deputy tried to control his head to prevent him from banging his head on the floor and to ensure that he did not bite. The deputies described Mr. Marshall as surprisingly strong. He was instructed numerous times to calm down and to stop resisting. He was told that the more he struggled, the more force the deputies would need to use to control him. Because he was moving his legs and kicking his feet, a leg chain was placed on his lower legs. OPNs were used on his ankles in an effort to cause Mr. Marshall to stop struggling.

Mr. Marshall struggled on the floor for over 2 minutes before he "went limp." The deputies stood up. They rolled Mr. Marshall over to sit him up and to check on him.[6] The deputies were not certain if he had lost consciousness or if he was faking. Deputy Garegnani did a "chest rub" on Mr. Marshall but got no response. The deputies called a "medical emergency" requesting immediate nurse assistance.[7] Several nurses throughout the detention center heard the call of a medical emergency and went to the 4D sally port area.

Nurse Allison, a Licensed Practical Nurse, arrived in less than one minute to attend to Mr. Marshall.[8] She kneeled down near his head to assess him.[9] She said she noticed that Mr. Marshall had vomited before she arrived.[10] She saw that he was breathing and that he had airflow. She noticed his nostrils were flaring and she could hear breath coming out of him. She used a blood pressure cuff and a stethoscope to check Mr. Marshall's blood pressure.[11] His vital signs, including his blood pressure, were stable. When she used the stethoscope she could hear Mr. Marshall's heart beating.

The deputies stated that Mr. Marshall resumed struggling after the nurses arrived. Nurse Allison confirms seeing Mr. Marshall "wiggling" or "squirming" against the deputies. He also made "grunting" sounds, like he was catching his breath after struggling.

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[4] The Deputy Sheriffs who had physical contact with Mr. Marshall in the sally port are: Bret Garegnani (Badge 08048); Carlos Hernandez (Badge 12060); Smajo Civic (Badge 12057); Sarah Bautista (Badge 11069); Thanarat Phuvapaisalkij (Badge 14021).

[5] Most of Mr. Marshall's body is not visible in the majority of the video footage after he is taken to the floor because the deputies bodies' block the view of the camera. His head is not visible from 18:33:00 until 18:46:15. Because of this, some statements describing Mr. Marshall's efforts cannot be confirmed or refuted by the video. All of the deputies mention that Mr. Marshall continued a prolonged struggle. The nurses also state that Mr. Marshall was moving (i.e., resisting, squirming, turning his head) when they were present.
No sound is recorded by the cameras.

[6] 18:35:28

[7] 18:36:05 Deputy Arellano is seen on the video using his radio at this time.

[8] 18:36:45 on the hallway video.

[9] 18:37:04

[10] The deputies, however, indicated that Mr. Marshall first vomited after the nurses arrived.

[11] 18:39:25 -- 18:40:10

Helen Ajao, a Registered Nurse, arrived about a minute after Nurse Allison. She said that she wondered why a medical emergency was called because she saw that Mr. Marshall was "agitated" and "still resisting" when she arrived. He was moving his head and his "upper body part." She tried to calm him down by speaking to him. She said he was breathing and his blood pressure raised no concerns. She could not take his pulse from his neck because he was agitated and was moving his neck and his head "from side to side."

After taking Mr. Marshall's blood pressure, Nurse Allison got up and went to the hallway for about a minute. Nurse Ajao then took over the position kneeling at Mr. Marshall's head.[12] She said that she observed that a deputy was controlling Mr. Marshall's head but Mr. Marshall was still able to move it. When asked if he ever stopped moving his head, she said he would "stop and start again." She asked the deputy controlling his head to release his neck a little bit but he told her that they have to restrain him.[13] Seconds later, Mr. Marshall vomited. She said the deputies then turned Mr. Marshall on his side as far as they could, but because he was being restrained it was a "challenging situation."[14] Nurse Ajao noticed the vomit was coming from Mr. Marshall's mouth and nose, which concerned her because of the risk of aspiration. She used the blanket to wipe the vomitus off his face. She stated, however, that she never sensed him having difficulty breathing before he was placed into the restraint chair.

Nurse Allison was seen on the video providing latex gloves to Deputy Garegnani who put them on.[15] Nurse Allison returned to the spot near Mr. Marshall's head. She said that because Mr. Marshall had vomited, she used the stethoscope again to listen to his lungs by placing the stethoscope at points on his back.[16] Through the stethoscope, she confirmed that he was breathing. However, because she detected sounds of "bronchospasms" in his lungs, she advised the deputies to keep pressure off of his back. She said the deputies listened to her and nobody had hands on his back. She also advised that Mr. Marshall needed to be put into a chair so she could listen to his lungs better and so he could breathe easier. She ordered someone to obtain a restraint chair from the third floor of the detention facility.[17] A few seconds later, both Nurse Allison and Nurse Ajao left the sally port and went into the hallway.[18] Both nurses indicated that Mr. Marshall was breathing at that time.[19]

About two and a half minutes after Nurse Allison called for the restraint chair, it was delivered to the doorway.[20] In their interviews, the deputy sheriffs who could see Mr. Marshall's head said that he was breathing while they were awaiting the restraint chair. When the restraint

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[12] 18:40:15

[13] Deputy Phuvapaisalkij states that he was controlling Mr. Marshall's head because of concerns that Mr. Marshall might bang his head and that he might try to bite.

[14] Deputies also described putting Mr. Marshall on his side with his head to the side to ensure that the vomitus drained out.

[15] 18:41:29

[16] 18:42:46 -- 18:43:06

[17] Nurse Allison removes the stethoscope at 18:43:06. From 18:43:06 to 18:43:14 she can be seen speaking to the deputies and then speaking toward someone in the hallway. This appears to be when she ordered the restraint chair.

[18] 18:43:23

[19] Monica Bisgard, a Registered Nurse, observed from the doorway part of time as Nurse Allison and Nurse Ajao checked on Mr. Marshall. She recorded the vitals as they were called out. Nothing about the vital signs was alarming. She observed that Mr. Marshall had vomited, but she saw that Mr. Marshall was breathing and that there seemed to be no complications with his airway or his ability to breathe. She left at approximately 18:42:30 to go to the third floor to get medicine for Mr. Marshall and did not return until CPR was being performed.

[20] This is seen on the *hallway video* at 18:45:50.

chair arrived, the deputies placed a breathable "spit hood" on Mr. Marshall because of the health risk presented if he were to voluntarily or involuntarily spit when transferred to the chair.[21] Six seconds later, the deputies rolled Mr. Marshall onto his back, lifted him, and placed him into the chair, sitting upright.[22] The deputies then began securing Mr. Marshall to the restraint chair. Approximately thirteen minutes and twenty seconds (18:33:00 -- 18:46:20) had elapsed from the time Mr. Marshall began struggling on the floor until he was placed upright in the restraint chair.

After the deputies secured Mr. Marshall to the restraint chair, it was pulled into the hallway for the nurses to check on him.[23] Nurse Allison placed a pulse oximeter device on Mr. Marshall's finger. It was noticed that his chest and stomach did not appear to be rising and falling with inhalations and exhalations. It was suspected that he was no longer breathing, or perhaps he was holding his breath.[24] One nurse described hearing the exhale sound of his "last breath." Nurse Allison used the stethoscope to listen to Mr. Marshall's heart.[25] She described hearing the sound of two and a half heart beats, and then it stopped. The spit hood was removed[26] and ammonia packets were placed to his nostrils. Mr. Marshall did not react. Mr. Marshall's pupils did not react when a light was shined into his eyes.[27] Nurse Allison gave orders to get him out of the chair and to begin emergency CPR efforts to revive him.

Mr. Marshall was placed on the hallway floor where Deputy Sheriff Garegnani immediately began performing CPR compressions as others assisted.[28] The video recorded the extraordinary efforts to revive and save Mr. Marshall. During CPR, Mr. Marshall's airway was repeatedly blocked by vomitus, so he was rotated onto his side multiple times. Suctioning was also attempted. "Bagging," by forcing air into his lungs, was attempted. Automated external defibrillator (AED) pads were placed on Mr. Marshall's chest during CPR.[29] However, the AED never detected a heart rhythm suitable for a shock to be delivered.

The deputies and nurses continued to perform CPR even after Denver Health Paramedics arrived.[30] One paramedic tried to place a breathing tube into Mr. Marshall's throat, without success.[31] Finally, after CPR had been performed on Mr. Marshall for twenty minutes, one of the paramedics indicated that he detected a pulse. Mr. Marshall was lifted and put onto a gurney.[32] Paramedics attended to him and took him to the Denver Health Medical Center.

Mr. Marshall was in the hospital in a comatose state for nine days. On November 20, 2015, he died. A forensic autopsy was performed on November 21, 2015, and the Autopsy Report was completed and signed by Assistant Medical Examiner, Dr. Meredith A. Frank on January 7, 2016.

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[21] 18:45:51 -- 18:46:04
[22] 18:46:10 -- 18:46:20
[23] 18:49:10 on the *hallway video.*
[24] Nurse Allison said that it was not uncommon for some patients to hold their breath.
[25] 18:49:53 -- 18:50:37 on the *hallway video*.
[26] 18:50:52 on the *hallway video.*
[27] 18:51:05 on the *hallway video.*
[28] 18:51:52 on the *hallway video.*
[29] 18:54:55 on the *hallway video*.
[30] 19:03:10 on the *hallway video*.
[31] 19:07:00 on the *hallway video*.
[32] 19:11:54 on the *hallway video*.

Dr. Frank was interviewed by a senior member of my staff in order to gain a complete understanding of the Autopsy Report and medical opinions about issues in this case. Dr. Frank's testimony would be pivotal evidence to a jury if criminal charges were to be filed in this case. Thus, her opinions greatly affect my decision regarding whether criminal charges are appropriate. [33]

As revealed by the Autopsy Report, Dr. Frank's opinion is that several factors and conditions, in confluence, contributed to cause Mr. Marshall to suffer asphyxia and cardiopulmonary arrest while at the detention center. These factors were cited in the Autopsy Report:

1. Chronic heart disease (Hypertensive and atherosclerotic cardiovascular disease).
2. Chronic lung disease (Chronic obstructive pulmonary disease/emphysema).
3. Agitation during acute psychotic episode.
4. Being restrained in a prone position making it more difficult to breathe.
5. Aspiration causing Mr. Marshall's airway to be compromised.[34]

In discussing the Autopsy Report, Dr. Frank indicated that the degree to which each of these factors contributed to causing Mr. Marshall's death varies; not all factors contributed equally. Also, the certainty of her opinion regarding each factor varies. In addition, Dr. Frank emphasized that physical exertion by Mr. Marshall played a major role in causing his heart failure during this incident.

Aspiration: Dr. Frank indicated that she cannot state with certainty when Mr. Marshall aspirated. Her opinion is that it is probable that Mr. Marshall aspirated while he was being restrained on the floor by the deputies.[35] However, she cannot rule out other reasonable possibilities.[36] Because of these uncertainties, Dr. Frank would testify in court that in her opinion it is probable, but not certain, that aspiration contributed to Mr. Marshall's collapse at the detention center.

Likewise, Dr. Frank would testify that she cannot specify with a reasonable degree of medical certainty what caused the aspiration to occur. When asked if the physical restraint by the deputies could have caused Mr. Marshall to aspirate, Dr. Frank said it was possible. Similarly, when asked if Mr. Marshall's own physical exertion against the deputies could have caused him to aspirate, Dr. Frank said it was possible.

Restraint in a prone position: Dr. Frank would not have expected Mr. Marshall to have difficulty breathing simply because of the prone restraint she saw on the video and as described by the witnesses. Her opinion is that Mr. Marshall did not experience "mechanical asphyxia" or

[33] In addition to having performed the autopsy and having reviewed Mr. Marshall's medical records, Dr. Frank reviewed the interview statements of the nurses and the deputy sheriffs, and she had closely watched the sally port video.
[34] The aspiration of material into Mr. Marshall's lung caused the development of pneumonia while in the hospital.
[35] Dr. Frank explained that the bronchospasm, noted by Nurse Allison when listening to Mr. Marshall's lungs, is a clue that Mr. Marshall may have already aspirated. However, in light of his chronic heart and lung disease, those sounds could have been attributable to airway changes after physical exertion and struggle.
[36] Mr. Marshall could have aspirated when he first regurgitated. However, it is also reasonably possible he did not aspirate until later when he was rolled onto his back and was lifted into the restraint chair. It is also reasonably possible that he aspirated during the CPR efforts, or during "bagging" efforts to get air into his lungs.

"compressive asphyxia" and that the deputies did not exert pressure on Mr. Marshall's thorax that restricted his ability to breathe. Being restrained prone would not be a causative factor by itself in this case. Rather, being in a prone position was only a contributing factor when added to the other factors mentioned in the Autopsy Report.[37]

Agitation during acute psychotic episode: The Autopsy Report mentions that Mr. Marshall was experiencing agitation during an acute psychotic episode. The video showed Mr. Marshall pacing back and forth. Then it showed Mr. Marshall, seemingly upset, get up from the bench and attempt to get past the deputy. Dr. Frank said it is a reasonable possibility that his heart was not functioning properly during this time of agitation even before any physical contact by the deputies.

Cardiopulmonary arrest at the detention center: Dr. Frank cannot testify with any degree of medical certainty when Mr. Marshall's heart began to malfunction. She said a reasonable possibility is that he suffered a cardiopulmonary arrest during the first 2 ½ minutes on the floor, and then recovered from it for a few minutes, but then again suffered cardiopulmonary arrest later during the incident.[38]

Dr. Frank explained that the two and a half heartbeats heard by Nurse Allison while Mr. Marshall was in the restraint chair is not a verification that his heart was working correctly at that time.

Physical exertion by Mr. Marshall: Dr. Frank cannot state with certainty what triggered Mr. Marshall's heart failure during the incident. However, her opinion is that it is likely that Mr. Marshall's physical exertion against the deputies coupled with his weakened heart and lung health, were major factors in causing his heart to fail during the incident.

LEGAL CONCLUSIONS

To file criminal charges, I must conclude that there is a reasonable likelihood that a unanimous jury would be convinced beyond a reasonable doubt that the person charged is guilty of the charges. In making this assessment ethically, I must consider the reasonable defenses that may be presented. In this type of case, I must consider Colorado's statute that authorizes the deputies to use "reasonable and appropriate physical force" in order to maintain order and discipline in the detention center. [*See C.R.S. 18-1-703(1)(b)*].

To prove criminal charges in this case a jury would have to be convinced beyond a reasonable doubt: (1) that the force used was *unlawful*, i.e., that the force was used for an

[37] Dr. Frank explained that it is more difficult for a person to breathe while lying in a prone position (i.e., face down position), given that any effort for chest expansion has to counteract the pressure of a person's body weight. If a person is already having breathing difficulty because of physical exertion or aspiration or other reasons, being held prone can present an even further challenge to getting air into the lungs.

[38] A sign of this possibility is the sequence where it appeared that Mr. Marshall "went limp" after struggling on the floor for almost 2 ½ minutes, but shortly thereafter he was observed moving again and the nurse obtained blood pressure and pulse readings that appeared stable.

improper purpose or was "unreasonable" or "inappropriate" in contravention of C.R.S. 18-1-703(1)(b); and, (2) that injury or death was *caused* by the unlawful force.

Based on the evidence in this investigation, I conclude that the physical force exerted against Mr. Marshall by the deputy sheriffs was for the lawful purpose of maintaining order in the jail as allowed by Colorado's statute, and was applied by the deputies as part of their responsibility to provide safety and security. There is no evidence suggesting any force was used for the purpose of harming Mr. Marshall. It should be remembered that this incident began as an attempt to get help for Mr. Marshall who was behaving erratically and inappropriately. The event that required the deputies to physically control him was not of their choosing and their actions were in response to Mr. Marshall's behavior. Indeed, their efforts to help him continued through the remarkable twenty minutes of CPR.

A few observations pertinent to my evaluation of whether the force applied by the deputies was "reasonable and appropriate" are worth noting here:

-The taking of Mr. Marshall to the floor was controlled. No strikes of any kind were delivered to Mr. Marshall.[39] The floor was not used to cause forceful impact to Mr. Marshall.

-The deputies noted that the pressure used to control Mr. Marshall was applied to his hands, arms, legs, lower back, and to the back side of his shoulders and scapula areas in a manner that did not interfere with Mr. Marshall's breathing. The nurses confirm this. They said that Mr. Marshall was breathing. Dr. Frank supports this also. She did not find "compressive asphyxia" or pressure on Mr. Marshall's thorax to be a factor.

-The deputies described that Mr. Marshall occasionally stopped struggling, so they eased the pressure they were applying. However, when they did so, Mr. Marshall would resume struggling, causing the deputies to again apply pressure to control him. The video supports these statements that pressure was occasionally lessened and released on Mr. Marshall. The nurses' statements support that Mr. Marshall was struggling.

-When Mr. Marshall vomited, the deputies tried to roll Mr. Marshall onto his side in an effort to prevent him from aspirating. Nurse Ajao confirms this.

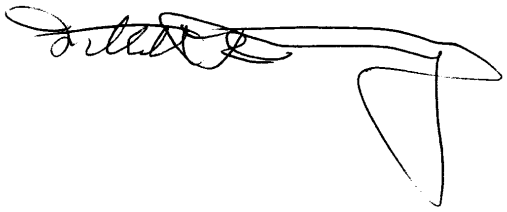
-During the time on the floor of the sally port, Mr. Marshall was able to move his head. He was not held face down. Deputies and nurses described Mr. Marshall having his head turned to the side and moving his head from side to side.

My conclusion is that, despite the unintended and unfortunate result, the evidence would not convince a jury beyond a reasonable doubt that the force applied to Mr. Marshall was either "unreasonable" or "inappropriate."

[39] The abrasions to Mr. Marshall's forehead noted in the Autopsy Report are consistent with being caused by Mr. Marshall pressing his forehead against the floor and turning his head as described in the investigation. (Abrasions on his forehead are not apparent in photos taken of him at DHMC on 11/11/15).

Additionally, even if I, or a jury, were to find that the force was unlawful, the necessary element of causation cannot be proved beyond a reasonable doubt. As should be apparent from the findings and opinions of Dr. Frank, a jury would not be convinced to the level of certainty required that the deputies caused the factors that led to Mr. Marshall's death. Dr. Frank indicated that the prone positioning alone should not have harmed Mr. Marshall. Aspiration occurred, but we do not know when, and it cannot be proved that any act of the deputies caused the aspiration. Moreover, aspiration cannot be isolated as the cause of death, but only a contributing factor in addition to the other factors. The other causative factors that were present, namely, Mr. Marshall's agitation from psychosis, his chronic heart disease, his chronic lung disease, and his physical exertion, were not caused by the deputies.

For these reasons, no criminal charges will be filed against the deputy sheriffs involved in this incident.



Mitchell R. Morrissey
Denver District Attorney