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May 10, 2007

Dan Montgomery
Chief of Police
Westminster Police Department
9110 Yates Street
Westminster, CO 80031

RE: Investigation of the shooting of David Oath Powell, DOB 05/14/1982, by Westminster Police Officer Brandon Barajas, 01-06, on February 17, 2007, in the 4500 block of Elizabeth Street, Denver, Colorado.

Dear Chief Montgomery:

The investigation and legal analysis of the wounding of David Oath Powell ("Powell") have been completed, and I conclude that under applicable Colorado law no criminal charges are fileable against Westminster Police Officer Brandon Barajas. My decision, based on criminal-law standards, does not limit administrative action by the Westminster Police Department where non-criminal issues can be reviewed and redressed, or civil actions where less-stringent laws, rules and legal levels of proof apply. A description of the procedure used in the investigation of this shooting by a peace officer and the applicable Colorado law is attached to this letter. It is my understanding that the District Attorney for the Seventeenth Judicial District has filed criminal charges against Powell. Accordingly, the file of the investigation will be open to the public at our office upon completion of those criminal proceedings and, at that time, any interested party is welcome to review the investigation and my decision in greater detail.

FACTS

At 3:59 a.m. on February 17, 2007, a Westminster, Colorado, Police Department 911 calltaker received a call on a street robbery. The caller stated that "they had just been held at gunpoint and robbed." ("They" were the victims, Amanda Wall, 11-28-87, and Jason Huening, 1-23-84. Mr. Huening was making the call.) Mr. Huening advised the dispatcher they were at 76th and Raleigh and that the robbery had taken place about six blocks away from their location, adding that they were on-foot and trying to get away from the location. He told the dispatcher that the robbers were in a black pick-up truck which "had the left taillight out," that there were four individuals in the truck – three men and one woman – and that two of the men, the driver and a person in the back seat, displayed guns. Mr. Huening said a man in his "mid 20's" with a shaved head, was holding a gun that was "all black [and] looked to be about a .45 or a .22." Mr. Huening said that the party in the back was wielding a rifle or shotgun.

Computer-Aided Dispatch [“CAD”] records indicate that Adams County Communications issued a “BOLO” [Be On LookOut] at 4:02 a.m. At 4:06:05 a.m., Westminster uniformed Police Officer Craig Communal, 04-06, driving a marked police car with radio call sign 333, advised the dispatcher that a vehicle¹ matching the suspect vehicle’s description was eastbound on 72nd Avenue, approaching Federal Boulevard. Officer Communal, who was driving in the opposite direction, noted in his rear-view mirror that the truck’s tail-light was out. He turned around and activated his over-head emergency lights. When he did so, the pick-up sped up. Officer Communal later told investigators that the truck sped up and had “blown the light” at 72nd and Federal. At 4:06:08, the dispatcher is advised that the truck was traveling at 60 miles per hour. Westminster police officers were engaged in a high-speed pursuit.

Officer Brandon Barajas, 01-06, was working a uniformed assignment as a K-9 officer. He was driving a marked patrol car and he was in the area when Officer Communal advised the dispatcher that he had the vehicle in sight. He arrived at 72nd and Federal before Officer Communal, fell in behind the pick-up, and assumed the role of the primary pursuit vehicle. Officer Communal became the secondary pursuit officer and assumed the responsibility of calling out the chase. As he told investigators:

I was the second car and we continued east on 72nd. The [pick-up] was going from speeds to 60 to 80 to 90. We ended up going north on Pecos and then from Pecos we went onto Highway 36 and once we hit the ...Highway 36, the speeds started getting up to about 100, 120 miles an hour. The [pick-up] was driving extremely recklessly, cutting cars off . . . We continued east on [U.S.] 36 and then we got onto [Interstate] 270 and then I believe from there we went to Vasquez.

The pursuit wound through Commerce City and into Denver. The Westminster and Adams County dispatchers were airing the pursuit on “clear channel” and officers from Commerce City also responded to the area to assist. At 4:10:25 a.m., CAD records note that the pick-up almost “rammed” a Commerce City police car at Vasquez Boulevard and 56th Avenue. At 4:11:09 a.m, CAD records reflect that the truck was “SB [southbound] passing 48th.” Eight seconds later the Denver police dispatcher was alerted to the pursuit. CAD records indicate that 4:11:41 a.m. the suspect vehicle crashed. In fact, the truck had driven through a concrete barrier which was blocking the entryway into a private industrial area on Elizabeth Street and rolled over onto the passenger side. The suspects had crashed in Denver, Colorado.

Two Commerce City police officers, Officers Jason Gilmore and Jerry Jenkins, had positioned themselves in the area of I-270 and Vasquez Boulevard so as to be able to assist in the pursuit. Officer Gilmore had gotten out of his vehicle and was beginning to place “stop sticks” on the road when the pick-up “blew” past them with two Westminster police cars in pursuit. Officer Jenkins joined the pursuit behind the Westminster cars and Office Gilmore returned to his car and fell in behind Officer Jenkins. Officer Jenkins described for investigators how the pick-up traveling at speeds in excess of 100 miles per hour, led the officers off the highways and onto local streets as it headed into Denver. He saw the truck turn

¹ The subject vehicle will hereafter be described as the “pick-up” or the “truck.”

south on Elizabeth [Street]. He went through a, about a six foot chain link fence and some concrete barriers and there was a cloud of dust and [inaudible] cars. I wasn't exactly sure, I'm not exactly sure what happened right at, how he rolled and such but the fact of the matter is that the truck ended up on its passenger side and came to a rest and I pulled in behind [Westminster] Officer, uh, Communal, it is?"

Stopped one-after-the-other behind the crashed pick-up truck were Officer Barajas, then Officer Communal, then Officer Jenkins, then Officer Gilmore. As Officer Jenkins got out of his car he saw a man with a "red shirt" (Powell) running from the truck. He saw that there were other people in the truck but that other officers had them covered. Officer Barajas was following Powell on foot and Officer Jenkins fell in behind Officer Barajas.

The pick-up truck had crashed in the entrance to an industrial lot that was being used to store brick and ceramic roofing tiles on pallets. Aisle or corridors separated the pallet stacks (see the diagram and photo attached hereto as Exhibit A). Powell ran a short distance down one of the aisles, then stopped, picked up some bricks or debris pieces and threw them at Officers Barajas and Jenkins. Officer Jenkins described the items thrown as "large projectiles," "the average size of them was probably 5 x 8 inches" and "3 x 5 [inches]." He estimated that at this point he was "7 to 10 yards" away from Powell and that Officer Barajas was "three to four yards closer" than was he. When Powell started throwing the bricks, Jenkins slowed and started looking for cover. Powell turned and ran and it appeared to Jenkins that Officer Barajas was "starting to close on him." Powell ran around the corner of some pallets and when Officer Barajas followed, Officer Jenkins lost sight of both men. He followed around the corner and estimated that he was "maybe 15 or 20 yards behind the K9 Officer [Barajas] and 20 or 25 yards behind the suspect," when he heard "what sounded to me was like three gunshots."

Officer Jenkins told investigators that just before he heard the shots, he saw Powell reaching down to his waistband. Based upon his awareness that suspects "commonly" carry weapons in their waistband, and because the information dispatched was that the suspects were armed, Officer Jenkins

Began to move back behind those, uh, ceramic pallets again to a position of cover. So I might [inaudible] weapon drawn and tried to get smaller behind that, uh, and that's when I heard the shots. . . . I looked over and I saw the suspect turn again and started to take, started to run again back towards the northeast, the same direction he was running through the yard and he took, I'm gonna say, maybe five steps when he started to run and then he slowed again and stopped. And he turned around, threw his hands up in the air, [and] began cursing at us. He says, I, uh, believe his exact words were: "shoot me! Shoot me, mother fuckers."

Powell had stopped because the corner he had turned led to a dead-end. When he saw that Powell had nothing in his hands, Officer Jenkins returned his pistol to his holster and drew his TASER. He and Officer Barajas repeatedly ordered Powell to show his hands and get on the ground. Powell continued to curse at the officers and, when he did not comply with their orders, Officer Jenkins deployed his TASER. Powell fell and, after a brief struggle, Jenkins and other covering officers were able to place him in custody.

Officer Barajas description of the pursuit and its termination is essentially the same as is set forth above. In his statement to investigators, he describes the point at which the pick-up truck loses control and rolls much as does Officer Jenkins. He told investigators that as he was approaching the vehicle he thought, "Okay, got to get behind cover. These guys got guns." He started to look for something that would provide him with some cover when he saw Powell, whom he described as a "male wearing a red shirt and. . . blue jeans," jump down from the pick-up and start running to the south.

Officer Barajas had drawn his gun, but as he followed Powell into the industrial lot he found that the footing was unstable because there was brick and tile on the ground. He was concerned that he might trip and fall so he returned his gun to his holster. It was at about this point that he saw Powell making a throwing motion, (he was unable to determine what, if anything, Powell was throwing at him.) He then saw Powell turn and run through the pallet aisles. Officer Barajas told investigators that he continued to give chase and, at this point, he was able to see Powell's arms and he could see that Powell had nothing in his hands. He stated that he actually considered attempting to tackle him, however, he quickly realized that Powell might have a weapon concealed on his person.

Officer Barajas told investigators that Powell rounded a corner and he lost "sight of his hands." When he rounded the corner, Powell was fairly close to him and he was no longer running -- Officer Barajas said that he was "not seeing the deliberate arms moving." Officer Barajas had drawn his handgun. There was a flashlight mounted on the firearm and Officer Barajas used that light to illuminate Powell as he ordered him to show his hands. He described the sequence of events:

I'm still moving forward and then the [Powell's] hands are gone. He kinda, he, he almost, it wasn't a complete stop, but he slows way down and the next thing I see is he's, he starts to spin and I-I'm - I'm slowing down, he's starting to spin and then just I - I'm thinking, "he's coming up with a gun. It's him or me."

Officer Barajas started to move to cover and, as he did so, he fired his pistol three times in quick succession. Powell was ultimately taken into custody as described above.

Powell was checked after he was taken into custody and he neither complained of injury nor did he appear to have wounds consistent with a bullet strike. However, officers at the scene advised dispatchers from Westminster, Commerce City and Denver that shots had been fired. Investigators responded but, as all initial indications were that Powell had not been shot, it was decided that the Westminster Police Department would conduct the investigation. Denver's involvement in the incident was minimal. Because Powell had been TASED and suffered injuries in the crash and subsequent arrest, he was examined by paramedics and taken to Denver Health Medical Center. At the hospital, physicians noted what appeared to be a graze wound on his right hip. When his trousers were examined, investigators located holes or tears which lined up with the graze wound and, based upon these facts, determined that one of Officer Barajas's rounds had, indeed, grazed Powell.

The other parties in the pick-up truck were arrested. They were identified as: Steven Mills, 1-19-89, Vincent Rael, 11-9-85, and Kristina Garcia, 12-28-81. Each provided statements to investigators. In addition, Powell made statements in the presence of paramedics and others in which he admitted that he was the driver of the pick-up. The pick-up truck, a black 2006 Dodge Ram 1500,

was determined to have been stolen from a ranch in Park County, Colorado, on 2-16-07 (Park County Case # 200700237). The Park County Sheriff reported that several firearms (rifles and pistols) had been stolen in the same incident. When investigators searched the pick-up truck, they located seven stolen firearms in the truck, including a 9mm semi-automatic pistol.

LEGAL ANALYSIS AND CONCLUSION

In the initial stages of the investigation of this incident it appeared that Powell was not wounded by the shots fired by Officer Barajas. Consequently, after discussions with Denver Police Department command and our office it was determined that the case would be investigated by the Westminster Police Department. When it was later determined that Powell had suffered a graze wound the investigation was proceeding and it was decided that it should continue to be handled by the Westminster Police Department. Because the shooting aspect of the case occurred in Denver, Colorado, the decision of whether criminal charges are fileable is under the jurisdiction of the Denver District Attorney.

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 homicide in Colorado, the Criminal Code specifies certain circumstances in which the use of physical force or deadly physical force is justified. As the evidence establishes that Officer Barajas shot Powell, the determination whether his 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.

Therefore, the question presented in this case is whether, at the instant Officer Barajas fired the shots that caused Powell's injury, he reasonably believed, either that Powell was about to use deadly physical force against him or that it was necessary to use the force used in order to arrest Powell.² In the instant case, Officer Barajas and the other officers were in pursuit of suspects who had

² 16-3-101(2) of the Colorado Revised Statutes provides that "all necessary and reasonable force may be used in making an arrest." Although a firearm is a deadly weapon as defined by Colorado law, deadly physical force is not involved unless the recipient of the force dies as a result of the force. See 18-1-901(3)(d), Colorado Revised Statute. Thus, Officer Barajas did not use deadly physical force in this incident. Under the specific facts of this case, our analysis and conclusion would be the same as to Officer Barajas's actions even if Powell had been killed.

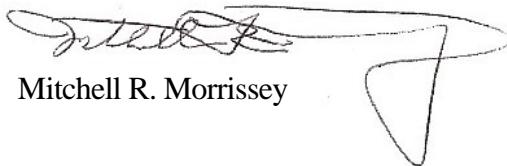
robbed two people at gunpoint and who, in their flight from the robbery, drove for several miles at speeds in excess of 100 miles per hour, placing citizens and the pursuing officers at risk of injury or death. Powell, who was driving the suspect vehicle, crashed and then ran from the officers, stopping at one point, to hurl bricks or heavy objects at the officers who pursued him. When Officer Barajas caught up to him, he was aware that Powell had tried to injure him and had a reasonable basis for believing that Powell was armed with a handgun. In light of these facts, Officer Barajas's decision to fire his weapon when Powell slowed and start to spin towards him was clearly reasonable.

Based on the totality of the facts developed in this investigation we could not prove beyond a reasonable doubt that it was unreasonable for Officer Barajas to perceive that Powell's conduct posed an imminent threat to Officer Barajas when he fired the shots. Therefore, no criminal charges are fileable and provable against Officer Barajas in the wounding of Powell.

I want to thank and commend all of the Westminster Police Department personnel who participated in the investigation of this shooting incident. Their investigation was extremely thorough, complete, and professional. It is apparent that this matter received the focus of attention and resources the community expects when an officer-involved shooting occurs. The in-person presentation to my First Assistant District Attorney and Chief Deputy District Attorney was impressive and left no unanswered questions.

As in every case we handle, any interested party may seek judicial review of our decision under C.R.S. 16-5-209.

Very truly yours,



Mitchell R. Morrissey

cc:

Officer Brandon Barajas, Westminster Police Department)
Sarah McCutcheon, Esq.
Don Quick, District Attorney, 17th Judicial District
Detective Mike Lynch, Westminster Police Department
Deputy Chief Mike Cressman, Westminster Police Department
Deputy Chief Lee Birk, Westminster Police Department
Commander Tim Carlson, Westminster Police Department
Chuck Baker, Acting Chief, Commerce City Police Department
Alvin LaCabe, Denver Manager of Safety
Chief Gerald Whitman, Denver Police Department
Captain John Burbach, Denver Police Department
Lieutenant Jon Priest, Denver Police Department
Chuck Lepley, First Assistant District Attorney
Lamar Sims, Chief Deputy District Attorney
Dick Reeve, General Counsel, Deputy District Attorney

Westminster Police		Shooting	Case Number 2007-02063
Drawn By K. Smart	Date Drawn 2/28/2007	Incident Date 2/17/2007	Scale 1" = 43'
		Location: 4500 Elizabeth St	

