



**Second Judicial District**

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**Decision Letter**

March 7, 2003

Contact: Lynn Kimbrough, 720-913-9025

Gerald Whitman  
Chief of Police  
Denver Police Department  
1331 Cherokee Street  
Denver, CO 80204

RE: Investigation of the wounding of Tracy  
Dean Nunez, DOB: 6/25/67, DPD #414521, by  
Officer Michael Howell, #79030, on October  
17, 2002 in the 100 block of Monroe Street,  
Denver Colorado.

Dear Chief Whitman:

The investigation and legal analysis of the wounding of Tracy Dean Nunez have been completed, and I conclude that under applicable Colorado law no criminal charges are fileable against Officer Michael Howell. My decision, based on criminal-law standards, does not limit administrative action by the Denver 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. The complete file of the investigation will be open to the public at our office at the conclusion of the criminal prosecution of Nunez. At that time, any interested party is welcome to review the investigation and my decision in greater detail.

### **SYNOPSIS**

On Thursday afternoon, October 17, 2002, Denver police officer Michael Howell ("Officer Howell"), 79030, was working in an "off-duty" capacity as a security-police officer at the Compass Bank, 101 Garfield Street, Denver, Colorado. Officer Howell was dressed in a Denver-police uniform and was working in the lobby area of the bank. At about 3:30 p.m., Officer Howell and several bank employees and customers noticed a man enter the lobby, wearing a hooded sweatshirt, gloves and sun glasses and carrying a backpack. The day was warm and sunny and several of the witnesses noticed that the man's apparel was inappropriate for the day. The man, later identified as Tracy Dean Nunez ("Nunez"), DOB 6-25-76, DPD # 414521, approached a teller, holding a piece of paper in one of his hands and said something about opening an account. He then moved away from the teller line and took a seat in the area. Officer Howell started to approach Nunez and Nunez stood up and walked out of the bank. Officer Howell followed Nunez out of the bank, saw him disappear around a corner of the bank and followed him. With Officer Howell in pursuit, Nunez ran south down the alley behind the bank and out to First Avenue where he turned west. Nunez reached the corner of First Avenue and Monroe Street, then ran north up Monroe Street. Officer Howell followed, trailing Nunez by several strides and yelling at him to "Stop!" There was a construction crew working on a building site on the west side of Monroe Street. One of the construction workers, Mr. Francisco Varela ("Mr. Varela"), saw Officer Howell pursuing Nunez. Mr. Varela left his job site, chasing and eventually catching Nunez in front of a house at 136 Monroe Street. Mr. Varela was wrestling with Nunez when he saw Nunez reach into his backpack and pull out a handgun. Officer Howell, who had closed to within a few feet of Nunez, also saw him pull out the handgun. Officer Howell quickly drew his own service pistol. Mr. Varela was either pushed or fell away from Nunez when he saw the gun. Officer Howell saw Nunez bring his gun up. From Officer Howell's position it appeared that the muzzle was pointed toward Mr. Varela. Officer Howell fired his service pistol once. The bullet struck Nunez in the left arm. Nunez dropped his pistol and Officer Howell placed him in custody.

Officer Craig Scott, 01043, was on patrol and driving east on First Avenue when he saw Officer Howell chasing Nunez. He pulled up alongside Mr. Varela and Nunez just as Mr. Varela caught Nunez. He was getting out of his patrol car when Officer Howell fired his service pistol. Officer Scott immediately advised the police dispatcher that there had been an officer-involved shooting

and requested an ambulance. Nunez was taken to Denver Health Medical Center where he was treated for a gunshot wound to his left arm. He was then released to the custody of the Denver Sheriff.

## **STATEMENT OF INVESTIGATION**

This investigation involves the shooting of Tracy Dean Nunez by uniformed Denver Police Officer Michael Howell, 79030, who was working in an off-duty capacity at the Compass Bank at 101 Garfield Street, Denver, Colorado. Officer Howell, who was working in a full blue Denver Police Department uniform, saw a suspicious male, later identified as Nunez, enter the bank. Officer Howell pointed Nunez out to at least two bank officials and then walked toward him. Nunez, who had taken a seat in the lobby, got up and walked out of the bank. When Officer Howell followed, Nunez started running.

A brief foot pursuit followed. Nunez led Officer Howell south down the alley just west of the bank. The men ran west on First Avenue to Monroe Street and Nunez turned north on that street. Officer Howell was yelling at Nunez to "stop." Mr. Francisco Varela, a member of a building-construction crew working on the west side of Monroe street, ran to aid Officer Howell. Mr. Varela grabbed or "tackled" Nunez, who then pulled out a handgun. Officer Howell saw Mr. Varela wrestling with Nunez and quickly approached the two men with his service-pistol drawn. He then saw Nunez pull a handgun and start waving it. It was during this confrontation that Denver Police Officer Craig Scott, 01043, arrived in a marked-patrol car. He, also, saw Mr. Varela struggling with Nunez and he started to get out of his police car, while drawing his service pistol. Mr. Varela also saw Nunez's handgun and he pushed or fell away from him. Officer Howell, seeing that Mr. Varela was no longer in the line of fire and fearing that Nunez was about to shoot either Mr. Varela or him, fired a single shot. Nunez, struck in the arm, dropped his pistol, moved a short distance away from the gun and fell to the ground. Officer Howell approached Nunez and placed him in handcuffs.

After Officer Howell placed Nunez in handcuffs, he looked up and saw Officer Scott. He verified that Officer Scott had called an ambulance and reported the officer-involved shooting. Officer Howell then confirmed that Nunez's weapon was still on the ground. He also noted that the magazine had fallen out and was on the ground a few feet away from the pistol. When Officer Howell moved to hand-cuff Nunez, Officer Scott moved up to provide cover, placing himself between Nunez and his handgun. He, also, noted the pistol and magazine on the ground and remained in the area, guarding both items of evidence, until paramedics and additional officers and investigators arrived.

Denver police computer aided dispatch (CAD) records reflect at 3:36 p.m., police dispatchers call on a possible bank robbery at the intersection of First Avenue and Adam Street. At 3:37 p.m., the information was amended to show the location as the Compass Bank at First Avenue and Garfield Street. Those calls appear to have been made just after the shooting incident as the records suggest that Officer Scott aired the shooting call at 3:34 p.m. By 3:37 p.m., the dispatcher had commenced the "call-out" required by the officer-involved shooting protocol.

As noted previously, Nunez was transported by ambulance to Denver Health Medical Center

where he was treated for a gun-shot wound to his left arm. He was released from the hospital to the custody of the Denver Sheriff. On October 23, 2002, this office filed a count of Criminal Attempt Robbery and two counts of Felony Menacing against Nunez. However, the Federal Bureau of Investigation determined that Nunez was a prime suspect in several other area robberies. On October 22, 2002, the United States Attorney for the District of Colorado obtained indictments against Nunez for several robberies, including the one here under investigation. As a result of the Federal indictments, our office dismissed the state charges on November 22, 2002. The federal charges are pending in the United States District Court for the District of Colorado.

Officer Howell was wearing a full blue Denver Police Department uniform. He was armed with a Sig-Sauer model P226, 9mm semi-automatic pistol. This handgun may be carried with one round in the chamber and fifteen rounds in the magazine. It was fully loaded with Denver Police Issue ammunition at the time of this incident. Following the incident and in compliance with the protocols established for officer-involved shootings, Officer Howell provided his weapon to Denver police crime lab personnel for appropriate testing.

When he was shot, Nunez dropped a handgun. This gun was secured by Officer Scott and later recovered by investigators at the scene. It was determined to be a Glock model 17, 9mm semi-automatic pistol. There was no round in the chamber when the pistol was recovered. There was a ten-round magazine found on the ground near the weapon and it was loaded with ten cartridges. Investigators noted a possible bullet strike to the sidewalk near the scene of the shooting and a spent projectile was located in the street near Officer Scott's police car. This bullet fragment was examined by Denver police firearms examiners who determined that it was "consistent in class characteristics" with bullets test-fired in Officer Howell's pistol, but the "bullet fragment [was] too damaged for further identification purposes."

A backpack was recovered from Nunez when he was placed in custody. In the backpack, investigators found a plastic baggie containing another forty-five live 9mm cartridges. Also found at the scene, in the street near where Nunez was placed in custody, was a pair of gloves and a small note. Hand printed on the note was the following:

"This is a robbery  
No one will get  
hurt Just hand over  
100. 50. 10. Dollars bills.  
No die packs"

Numerous bank employees and customers took note of Nunez while he was in the bank and provided written statements to investigators. A number of other individuals saw at least some part of the foot chase involving Nunez and Officer Howell chasing Nunez. Written statements were also obtained from those who made themselves known or whom investigators were able to locate. In addition to Officer Scott and Mr. Varela, three individuals advised investigators that they saw the actual shooting incident. These witnesses, Mathew Burdick, 10/13/75, Derek Owens, 9/1/82, and Manuel Tarin, 12/2/61, provided written and video-taped statements to investigators, as did Mr. Varela and Officer Scott. In accordance with protocol, Officer Howell

was separated from the other witnesses and taken to Denver Police Headquarters by an uninvolved supervisor. At headquarters, Officer Howell gave a voluntary video-taped statement concerning his role in the incident.

Nunez was taken to Denver Health Medical Center by ambulance. At about 4:25 p.m. on October 17, 2002, Denver police investigators spoke with Nunez. At that time, and following an advisement of his constitutional rights, he agreed to give a statement. The following morning, Denver Police investigators and Federal Bureau of Investigation agents met with Nunez at Denver Police Headquarters. At that time, Nunez agreed to give another statement. This statement was videotaped.

The facts are not in dispute. When Nunez entered the bank, several people remarked on his unusual appearance. In a written statement, bank teller Addis Abbetew, 5/16/67, stated that she saw Nunez enter the bank wearing a “big hat & big sun glasses (black sunglasses) [and] he wear gloves.” Ms. Abbetew saw Nunez pull a piece of paper from his pocket and get in a teller line. “When the police officer [Officer Howell] approach to the tellers [Nunez] said, “I need to open an account.” In a second he left. Ms. Abbetew told investigators that when she saw Nunez she thought “he may rob the bank.”

Ms. Suzanne Bastin, 8/9/60, provided a written statement which fully describes the occurrence in the bank. In her statement, Ms. Bastin indicated that she became aware that something was amiss when Officer Howell came into her office and

“pointed out that the gentleman in the teller line had his hood up, gloves on & was wearing sunglasses. [Officer Howell] said that really “set his rockets off.” I asked him if the gentleman saw that Mike [Howell] was in the bank. He said that he’d been standing at the desk & didn’t think he could miss him. I said it was too hot to be dressed like that & Mike left the office and stood across from the person. The gentleman saw Mike & removed his hood. He went up to the teller [and] was there a very short time. He went & sat in one of the chairs in the waiting area. It appeared that he noticed we were looking at him. He grabbed his backpack & walked out the door. Mike followed him out.”

The front door to the bank is on the east side of the building and opens into a small parking lot. Officer Howell told investigators that when he stepped out of the bank, he first thought Nunez had disappeared. He then looked to the north and saw Nunez just rounding the north end of the building. Officer Howell began to pursue Nunez, drawing his service pistol as he approached the corner of the building. Officer Howell stated that he followed Nunez around the building and “saw him running southbound in the alley toward First Avenue.” Officer Howell pursued as Nunez “made First Avenue and turned and went west on First Avenue and then turned and went north on Monroe Street.” Mathew Burdick saw Officer Howell chasing Nunez “down the street” and heard Officer Howell yelling “call the police!” A construction worker named Donnie Duncan, 4/2/70, was working a crane and, from the cab, he saw “a Spanish kid run around the off [sic] of 1<sup>st</sup> onto Monroe Street. Then about 30 feet away I saw an officer chase after the suspect. Then I couldn’t see anymore.”

Mr. Varela and Mr. Tarin were at the Monroe Street entrance to the construction site when

Nunez and Officer Howell turned north on Monroe Street. In his written statement, Mr. Tarin indicated:

“I was standing at my work site when I saw a young man come running around the corner from 1<sup>st</sup> Ave., running north. He was carrying a backpack around his arm. Then I saw a police officer come around the corner, running after the man. I was going to start running after the man but one of my co-workers did first. I saw my co-worker catch the man in the middle of the street. They started struggling with each other in the street. I then saw the man pull a handgun out of the backpack and he started waving back and forth out in front of himself at the police officer. I noticed that it was a black semi-automatic. I heard a gunshot, but I didn’t know who shot or if anyone was hit. Then I saw my co-worker walking back toward me.”

Mr. Tarin told investigators that when he first saw the officer pursuing Nunez, he heard the officer yelling “Stop! Stop!” He started to join the chase and then saw Mr. Varela give pursuit. He saw Mr. Varela grab Nunez from behind and, when he did so, the officer circled onto the grass to the east of the two men. Mr. Tarin stated that when he saw the officer running after Nunez he had his hand on his gun holster, but he was unable to determine whether the gun was out of the holster. Tarin estimated that he was no more than twenty-five or thirty feet away from the two men when he heard the gunshot. In his opinion, Nunez was waving the gun about in a manner that endangered “everybody.”

Mr. Varela told investigators that he saw an officer pursuing a man and he joined the chase because he concluded that the “man had done something bad.” He stated that he

“caught up with [the suspect] first-- the officer was quite aways [sic] behind... I got him from behind with both arms, got my arms around his shoulders. He did a half turn and that’s when he reached into the bag, pulled out the gun and I didn’t want to let go of him. That’s when I heard the gunshot. And then I let him go. He fell down and I got out of there real quick.”

Both Mr. Varela and Mr. Tarin believe that Mr. Varela was still holding onto Nunez when they heard the gunshot. Mr. Varela was asked where Nunez was pointing his gun and told investigators that, as he was behind Nunez, and Nunez was between him and Officer Howell, Nunez “had it pointed at the officer.”

When Officer Howell followed Nunez around the corner onto Monroe Street, he saw a group of construction workers on the west side of Monroe Street. His first impression was that “they were gonna block his way.” And then one of the construction workers started chasing Nunez. Although Nunez had not displayed his gun in the bank, Officer Howell was convinced that he was armed. Accordingly, he started yelling to the workers that Nunez was armed. Officer Howell saw Mr. Varela grab the back of Nunez’s jacket and saw the two men start wrestling. As noted previously, Officer Howell had already drawn his service pistol. With

his gun drawn, he began advancing toward Mr. Varela and Nunez. In his statement to investigators, Officer Howell estimated that he was about ten feet away from the two men when he saw Nunez pull a gun out of his backpack. At that point, Officer Howell was

“concerned that the construction worker was about to be shot. I, I believe the man did intend to rob the bank. . . that he was going to shoot the construction worker and, perhaps, turn the gun on myself to make good his escape.”

Concerned about both his and Mr. Varela’s safety, Officer Howell fired one shot aimed at Nunez’s “center mass.” Nunez immediately dropped his weapon and Officer Howell ceased firing. It was at this point that Officer Howell looked over and noted that Officer Scott had arrived. He asked him to request an ambulance on his police radio.

Officer Scott was driving eastbound on First Avenue, on his way to an unrelated report, when he saw a uniformed officer chasing a party westbound on First Avenue. He saw the two men turn north on Monroe Street and he, too, saw a “group of construction workers gathering on the west side of Monroe.” Officer Scott saw Mr. Varela run to Officer Howell’s aid and he turned his patrol car north on Monroe to provide whatever assistance he could. At the time he did so, he was unaware of the reason Officer Howell was pursuing Nunez. As Officer Scott drove up the street, he saw Mr. Varela “lunge after and tackle the suspect, with the officer only a few feet away.” Officer Scott stopped his patrol car in the street alongside the point where Nunez was struggling with Varela. He was able to hear Officer Howell yelling some verbal commands but, from inside his police car, was unable to distinguish what was being said. He then saw Mr. Varela “breaking free or making his way from” Nunez. Officer Scott got out of his car and as he did so he saw Nunez “standing up and, and coming up in a motion like this with one hand on a, on a sil-. . . or on a black, I’m sorry, um handgun of some sort.” Officer Scott started to draw his own service pistol when he heard the gunshot. Officer Scott approached to cover Officer Howell as he placed Nunez in handcuffs. He was able to see that Nunez was injured and he advised the police dispatcher that there had been an officer-involved shooting at his location and that an ambulance was needed “Code—10.”

In his first statement to investigators, taken at Denver Health Medical Center, Nunez denied planning or attempting to rob the bank. He claimed that he had found the gun, the backpack, and the bullets in the backpack in a dumpster near Alameda Avenue and Colorado Boulevard. He stated that he had gone to the bank to open an account and that he ran when he saw the cop. He claimed that he had taken the gun out to scare an “honest Samaritan” who had grabbed him. This is when he was shot.

Nunez’s second statement was recorded on videotape. In this statement, he first reiterated the statement he had given at the hospital. Ultimately, he admitted to police investigators and FBI agents that he had intended to rob the bank, but decided to abort the attempt when he saw the police officer. In this statement he claimed that he had taken the gun out of the backpack in an effort to discard it so that he would not have it on his person when he was placed in custody.

## LEGAL ANALYSIS

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 wounding another human being is generally prohibited as assault in Colorado, the Criminal Code specifies certain circumstances in which the use of physical force and deadly physical force is justified. Because the evidence establishes in this case that the officer shot Nunez, the determination whether his conduct was criminal is primarily a question of legal justification.

Section 18-1-707(2) of the Colorado Revised Statutes defines the circumstances under which a peace officer can use deadly physical force in Colorado. In pertinent part, the statute reads as follows:

- (2) A peace officer is **justified** in using deadly physical force upon another person ... 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:
    - 1. Has committed or attempted to commit a felony involving the use or threatened use of a deadly weapon; or
    - 2. Is **attempting to escape by the use of a deadly weapon**.

Section 18-1-901(2)(e) of the Colorado Revised Statutes defines the term “Deadly weapon” as follows:

(2)(e) “**Deadly Weapon**” means any of the following which in the manner it is used or intended to be used is capable of producing death or serious bodily injury: (I) **A firearm**, whether loaded or unloaded; (II) A knife; (III) A bludgeon; or (IV) Any other weapon, device, instrument, material, or substance, whether animate or inanimate.

Also pertinent to the facts and circumstances of this case is Section 18-3-202 (1)(e), Assault in the first degree, of the Colorado Revised Statutes, which reads as follows:

- (1) A person commits the crime of assault in the first degree if:
  - (e) With intent to cause serious bodily injury upon the person of a peace officer or firefighter, he or she threatens with a deadly weapon a peace officer or firefighter engaged in the performance of his or her duties, and the offender knows or reasonably should know that the victim is a peace officer or firefighter acting in the performance of his or her duties.

In reference to the pertinent section of the “Assault in the first degree” statute in which the victim is a peace officer, in *People v. Prante*, 177 Colo. 243, 493 P.2d 1083 (1972), the Colorado Supreme Court stated:

“The General Assembly recognizes that peace officers are placed in a position of great risk and responsibility, so to invoke a special punishment for an assault upon a peace officer acting in the scope of his official duties is neither arbitrary, capricious, nor unreasonable.”

Therefore, the question presented in this case is whether, at the instant the officer fired the shot that caused the injury to Nunez, he reasonably believed that Nunez was or was about to direct deadly physical force against him or another person or was attempting to escape by the use of a deadly weapon. In order to establish criminal responsibility for an officer knowingly or intentionally causing injury to another, the state must prove beyond a reasonable doubt that the officer doing the shooting either did not really believe in the existence of these requisite circumstances, or, if he did hold such belief, that belief was, in light of all available facts, unreasonable.

## **CONCLUSION**

Tracy Dean Nunez, by his own admission, intended to commit a bank robbery. When he entered the bank, he possessed a note that made his intent clear and he possessed a loaded handgun with a significant amount of additional ammunition. There is only one reason he did not follow through with his plan—the presence of Officer Michael Howell. While attempting to escape, Nunez eventually pulled his handgun from his backpack. At this instant, Nunez was “attempting to escape by means of a deadly weapon.” In addition to this justification for Officer Howell to shoot him, Nunez posed a direct and imminent deadly threat to Mr. Varela, Officer Howell, and all others in the vicinity. Officer Howell’s use of force against Nunez was absolutely necessary and justified. In neutralizing and controlling the deadly threat posed by Nunez, Officer Howell displayed excellent weapon control by firing only a single shot. Under the intense pressure and danger of the moment, he controlled his fire to the minimum required by the circumstances. He was successful at ending this deadly confrontation very quickly and effectively. It is fortunate that only Nunez was injured during this criminal episode.

Based on the totality of the facts developed in this investigation, as summarized in this letter, there is no reasonable likelihood of proving beyond a reasonable doubt that Officer Michael Howell committed any criminal act. In fact, he acted with professionalism and commendable restraint. Therefore, I conclude that under applicable Colorado law no criminal charges are fileable against the officer in the shooting of Tracy Dean Nunez.

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

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[1] A scene diagram depicting the location of items of recovered evidence is attached as Appendix 1.

[2] Bank Teller Yuliua Sidelnikova, 5/16/79, provided a similar statement: "A person came in, came to my window, asked about what he needed to open up an account. Very suspicious looking, Hispanic, about 5'7", 160 lbs. Acted as if he was very nervous. Was afraid to make an eye contact. I had a customer at my window, so didn't see if he had any note or any weapon. All I could see was a very suspiciously dressed up person who was nervous. When he asked me about opening an account, I told him to have a seat, which he did. The minute later I saw him walking out of the branch."

Very truly yours

**Original Hard Copy is signed**

Bill Ritter, Jr.  
District Attorney

