



February 18, 2020

Chief Tim Carlson
Westminster Police Department
9110 Yates Street
Westminster, CO 80031

Re: Investigation of the officer-involved shooting of Oscar Rubira-Diaz, DOB 10/24/1966, on September 19, 2019, in Westminster, Colorado.

Dear Chief Carlson:

The investigation and legal analysis of the officer-involved shooting of Oscar Rubira-Diaz occurring on September 19, 2019, is complete. The 17th Judicial District Critical Incident Investigation Team (CIIT) conducted this investigation. The CIIT is comprised of detectives and crime scene technicians from multiple police agencies within the 17th Judicial District, as well as investigators from the Office of the District Attorney for the 17th Judicial District. Thornton Police Department Detective Scott Hendrickson presented the CIIT factual findings of the investigation to my office on January 14, 2020. The CIIT presented police reports, videos, audio interviews, and transcripts of the interviews of witnesses, along with photographs and diagrams of the scene investigation. The Office of the District Attorney concludes that the investigation was thorough and complete.

This review is strictly limited to determining whether criminal charges are warranted against the involved officer based on the CIIT investigation. The standard of proof for filing a criminal case is whether there is sufficient evidence to prove any criminal violations beyond a reasonable doubt to a unanimous jury. Here, the prosecution also has the burden to prove beyond a reasonable doubt that the use of force was not justified under Colorado law.

This review expressly does not evaluate the appropriateness of the actions of the involved officer, whether department policies or procedures were followed, or whether the policies, practices, or training at the involved agency are sufficient. That evaluation is left to each individual involved agency.

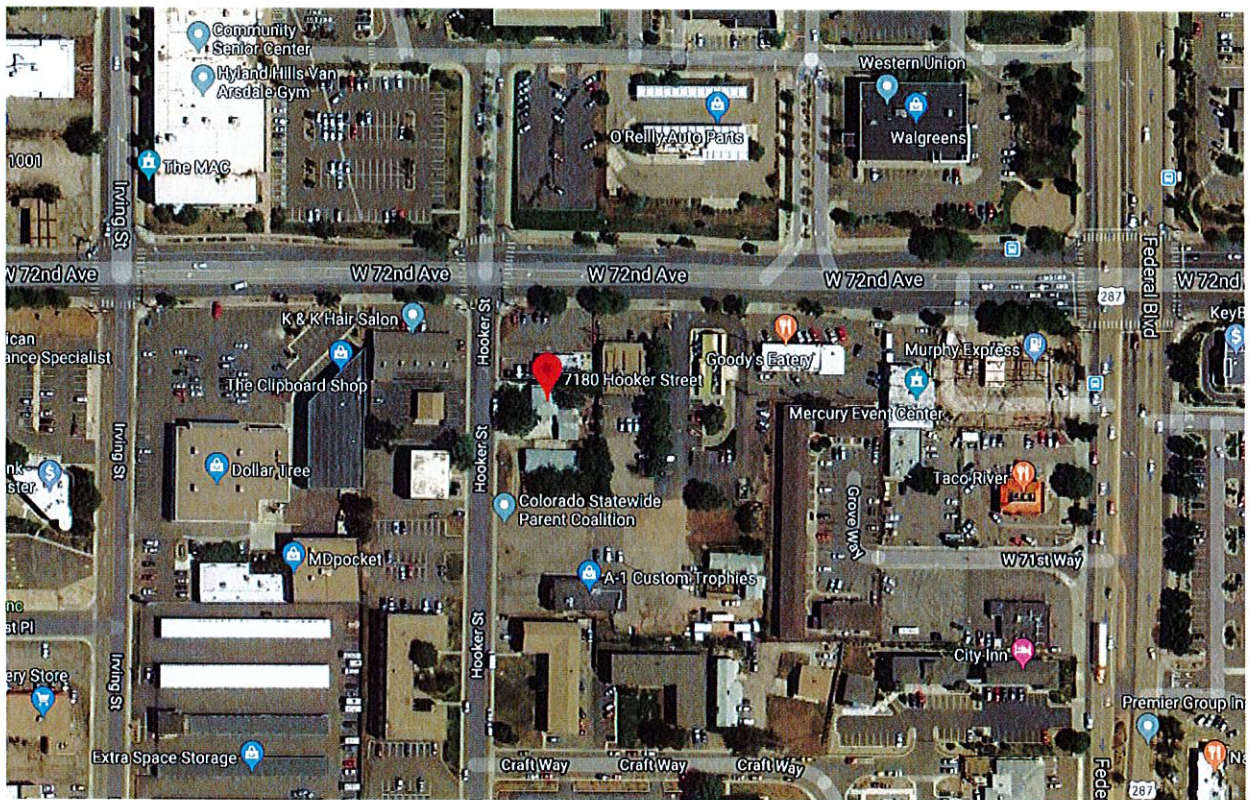
As further set forth herein, based on the evidence presented and applicable law, there is no reasonable likelihood of success of proving that the involved officer committed any crime beyond a reasonable doubt at trial. Therefore, no criminal charges will be filed

against the officer involved in this incident.

Statement of Facts¹

The Aurora Police Department was conducting an investigation in the 18th Judicial District into illegal marijuana grow operations. As part of that investigation, the Aurora Police Department applied for a search warrant for 7180 Hooker St., Westminster, in Adams County Colorado. The Chief Judge of the 18th Judicial District, the Honorable Michelle Amico, approved the search warrant on September 13, 2019.

The Westminster Police Department SWAT was responsible for executing the search warrant. For several days, the SWAT team prepared for the execution of the “knock-and announce” search warrant, where they did additional investigation into the location, 7180 Hooker St., including who the probable occupants of this residence were. The SWAT team prepared a tactical operation plan, and were set to execute the warrant on September 19, 2019, at approximately 5:30 a.m.



On September 19, 2019, the SWAT team did final preparations and then approached 7180 Hooker St. at approximately 5:45 a.m. As part of the tactical operation, the SWAT team utilized an Armored Rescue Vehicle (ARV) to transport personnel and equipment. As part of an entry team, Sgt. David Galbraith arrived riding on the ARV; other SWAT members and uniformed police officers surrounded the location on foot.

¹ The Statement of Facts are culled from the overall CIIT investigation and are presented here largely in chronological order.



The ARV parked near the home and the door entered (not shown).

As Officers approached the home, they repeatedly announced their presence. The ARV was also clearly marked with “SWAT” and “Westminster.” The ARV parked approximately 15-20 feet from an entrance to the home. On arrival, using the public address system, SWAT members gave loud announcements that identified themselves and their purpose. The SWAT team leader recalled the announcements as, “occupants of 7180 Hooker Street it is the Westminster Police Department we have a search warrant for the premises we demand entry can you open the door.” A neighbor, C.B.,² reported that she was awakened when she heard repeated announcements of “Westminster Police.”

With no response from the occupants, the SWAT team breached the door and entered the home. All SWAT members wore uniforms labeled with “police” on the front and back. Once inside the home, the team issued more verbal commands, including announcements and commands in Spanish.

Inside the home were Oscar Rubira-Diaz and his wife, N.R. Mr. Rubira-Diaz declined to make any statements to police as part of this investigation. However, N.R. said that she and her husband were asleep when she heard a “commotion” coming from the kitchen and Mr. Rubira-Diaz retrieved his handgun from the nightstand and went to the bedroom door. N.R. said she thought burglars were causing the “commotion.” N.R. does not speak English³ and said that she did not realize that it was the police inside the home causing the commotion. N.R. reported that Mr. Rubira-Diaz went to the bedroom door, and she thought he fired his handgun⁴ and then she realized that Mr. Rubira-Diaz was shot as he retreated into the bedroom with a gunshot wound.⁵

² I use initials to maintain the privacy of citizen-witnesses.

³ Mr. Rubira-Diaz’s primary language is Spanish; per a neighbor, he has limited English skills.

⁴ There was no evidence that Mr. Rubira-Diaz actually fired his handgun.

⁵ The Westminster police officers did not have any video of this incident. Although 7180 Hooker St. had surveillance cameras, no video of this incident was ever recovered.

Sgt. Galbraith was the first officer in the residence with the assembled SWAT team members directly behind him when they made entry into the home. Upon entry, Sgt. Galbraith took a position in the kitchen, looking over a countertop, facing other doors that were in "unsecured locations" within the residence. At first, his attention was drawn to two pit bulls in the home. Almost immediately after entry, and assessing the pit bulls, Sgt. Galbraith encountered Mr. Rubira-Diaz.

Sgt. Galbraith said that he saw a man (later identified as Mr. Rubira-Diaz) come out from the bedroom, and Mr. Rubira-Diaz then charged, or "racked," the semi-automatic handgun he was holding. A wall partially concealed Mr. Rubira-Diaz, but Sgt. Galbraith could see the handgun, and saw that it was coming up in his direction. Given the positions of the SWAT Officers, only Sgt. Galbraith saw Mr. Rubira-Diaz at this time. Sgt. Galbraith described the encounter as follows:

I could see [Mr. Rubira-Diaz] kind of lean down, the gun rack and then comeback and then it was coming up around the corner and I remember instantly knowing that I don't have a shot on his body, all I have is a gun, and that's why I started drilling or shooting where I thought his body was kind of hunkered up against that wall...-- it happened real fast, so. I mean, his gun racked and was pointing at me type of thing, you know, so I had to react to it.

At that moment, Sgt. Galbraith concluded, "I thought myself and my partners were going to be shot or killed" and he braced himself to be shot.



This approximates the view Sgt. Galbraith had when Mr. Rubira-Diaz emerged from the bedroom (to the left in hallway) holding his .45 caliber handgun

Sgt. Galbraith then shot his weapon, striking the hand and gun held by Mr. Rubira-

Diaz. The Colorado Bureau of Investigations assisted with this investigation and located and documented Mr. Rubira-Diaz's damaged handgun at the scene of the incident.



The 45 caliber handgun used by Mr. Rubira-Diaz, showing a bullet strike on the grip.

When Mr. Rubira-Diaz lifted his gun and pointed it, Sgt. Galbraith fired nine rounds into the wall concealing Mr. Rubira-Diaz. One of the rounds hit Mr. Rubira-Diaz on the left side of his abdomen.⁶ Mr. Rubira-Diaz was also shot in his right hand.⁷ Paramedics were on-scene for the execution of the search warrant and quickly attended to Mr. Rubira-Diaz and transported him to the hospital.

The home, garage, and out building at 7180 Hooker were subsequently searched pursuant to the warrant. Multiple marijuana plants and a significant marijuana cultivation operation were located on the premises.

LEGAL ANALYSIS

Criminal liability is established only if it is proved beyond a reasonable doubt that all of the elements of an offense have been committed without legal justification as set forth in Colorado statutes. Primarily applicable here is the Colorado law for the justification of using physical force in defense of a person. The justification of using physical force in self-defense is described in §18-1-704, C.R.S. (2018). As pertinent to this case, §18-1-704 (1) 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.

⁶ Mr. Rubira-Diaz declined to disclose his medical records, therefore the extent of his injuries is not known.

⁷ Sgt. Galbraith recalled Mr. Rubira-Diaz holding the gun with his right hand. N.R. said Mr. Rubira-Diaz's dominant hand was his right.

When a police officer has probable cause to believe that a suspect poses a threat of serious physical harm, either to the officer or to others, it is constitutionally reasonable to prevent escape by using extreme physical force. Tennessee v. Garner, 471 U.S. 1 (1985). This constitutional law is codified in Colorado by §16-3-101(2), C.R.S. (2018), which further authorizes police officers to use “all necessary and reasonable force may be used in making an arrest.”

APPLICATION OF LAW

The foregoing justification – defense of a person – is an “affirmative defense.” Section 18-1-710, C.R.S. (2018). This means that a person accused of a crime for using this type of force does not need to prove that he or she was justified in using the force. Instead, the prosecution must prove, to a unanimous jury, that the force was not justified. Accordingly, the issue here is whether the evidence would lead a jury to unanimously find beyond a reasonable doubt that Sgt. Galbraith acted without lawful justification.

As the United States Supreme Court has mandated, the test is whether the nature and degree of force used is objectively reasonable after considering the totality of the circumstances. Graham v. Connor, 490 U.S. 386 (1989). Alternatively phrased, the question here is whether a reasonable police officer, confronted with the same facts and circumstances, could have concluded that it was necessary to discharge his firearm to defend himself and others from Mr. Rubira-Diaz.

As the United States Supreme Court has instructed regarding assessing the reasonableness of an officer’s beliefs when using physical force: “The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation.” Graham v. Connor, 490 U.S. 386, 396-97 (1989).

Numerous courts have declined to force officers to determine (and then use) the least amount of force necessary to stop the threat the officer faces. Illinois v. Lafayette, 462 U.S. 640 (1983); Scott v. Henrich, 39 F.3d 912 (9th Cir. 1994). The 9th Circuit Court of Appeals has stated:

[r]equiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgment. In the heat of battle with lives potentially in the balance, an officer would not be able to rely on training and common sense to decide what would best accomplish his mission ... and choose that option and that option only. Imposing such a requirement would inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves. It would also entangle the court in endless second-guessing of police decisions made under stress and subject to the exigencies of the moment. Scott v. Henrich, supra, 39 F.3d at 915.

CONCLUSION

Under the particular facts of this case, the actions of Sgt. David Galbraith are legally justified under Colorado law and United States Supreme Court precedent. Under §18-1-704(1), Sgt. Galbraith was justified in using physical force against Mr. Rubira-Diaz.

An initial consideration is whether Mr. Rubira-Diaz was aware that the police were lawfully present in his home. Under Colorado law, it is sufficient if Mr. Rubira-Diaz knew the other person (Sgt. Galbraith) was a peace officer, or Mr. Rubira-Diaz “*reasonably should know*” that he was a peace officer. *E.g.*, §18-3-202(1)(e), C.R.S. (2018).⁸ Under the totality of the circumstances, Mr. Rubira-Diaz reasonably should have known police officers were lawfully in his home. Mr. Rubira-Diaz had a significant marijuana cultivation operation. With such an operation, he reasonably should have known that he was under constant risk of police intervention. That intervention came on September 19, 2019, by way of a lawfully issued search warrant. In executing the Court Order, Officers reported that they made multiple announcements of their identity and purpose prior to the entry. These announcements were sufficient to wake a neighbor and put the neighbor on notice the police were present. All of the police officers and vehicles were clearly marked and identified as police. Additionally, once in the home, Officers used loud distraction devices and also made additional announcements in English and Spanish. Under these circumstances, at a minimum, Mr. Rubira-Diaz should have known the police were lawfully present in his home.

Even if Mr. Rubira-Diaz did not know the police were lawfully present, Sgt. Galbraith’s response to Mr. Rubira-Diaz and his handgun was reasonable and lawful. It is clear that Mr. Rubira-Diaz emerged with a handgun. He then pointed the deadly weapon in the direction of Sgt. Galbraith. Thus, it was an objectively reasonable conclusion that Sgt. Galbraith, and the other officers in the home, were in danger of “the use or imminent use of unlawful physical force” by Mr. Rubira-Diaz. As such, Sgt. Galbraith’s response is justified under Colorado law, §18-1-704(1), in defending himself and the other officers.

In order to file criminal charges, the prosecution is legally required to prove criminal conduct and disprove beyond a reasonable doubt to a unanimous jury the validity of the foregoing affirmative defenses. Applying the facts of this incident to the applicable law, the evidence does not support the filing of any criminal charges against Sergeant David Galbraith for discharging his weapon and injuring Oscar Rubira-Diaz on September 19, 2019. Please feel free to contact me if you have any questions or if you believe that further investigation is warranted.

Sincerely,

A handwritten signature in dark ink, appearing to read 'D. Young', is written over the printed name.

Dave Young
District Attorney
17th Judicial District
Adams and Broomfield Counties

⁸ Mr. Rubira-Diaz is currently charged with First Degree Assault – using a deadly weapon and threatening a peace officer with intent to cause serious bodily injury, a class 3 felony, pursuant to §18-3-202(1)(e), C.R.S. (2018). His case, 19CR3802, is scheduled for an arraignment on February 18, 2020.