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**ATTN: Captain Brigit Clary**  
**RICHLAND POLICE DEPARTMENT**  
871 George Washington Way  
Richland WA 99352

**RE: WHITAKER, GORDON – PROSECUTOR REVIEW**

Dear Captain Clary:

On February 9, 2020, at 11:45 p.m., Kennewick Police Officers Dylan Markley and Zachariah Moore contacted Gordon Whitaker and Logan Nichols in the area of Columbia Drive and Fruitland Avenue in Kennewick. They were soon joined by Officer Becca Henry.

During that contact, Officer Markley advised that since they were unable to identify Mr. Whitaker, they were going to have to detain him. Mr. Whitaker then fled from the scene. Officer Henry immediately chased after him, caught up to him and took him to the ground. Officer Markley followed them. Mr. Whitaker was fighting against Officer Henry's attempts to restrain him, while she was telling him to stop resisting. During this time, Officer Markley saw Mr. Whitaker reach into his jacket and pull out a gun. Officer Markley shouted out commands to stop reaching and get to the ground. He then saw Mr. Whitaker pull his handgun clear from his jacket and begin to turn towards Officer Henry. Officer Markley then fired his weapon multiple times at Mr. Whitaker. Mr. Whitaker died as a result of the gunshot wounds.

Officer Markley's actions were appropriate under RCW 9A.16.040, the statute governing the use of deadly force by a police officer. Under all of the circumstances known to Officer Markley, he had a good faith belief that the use of deadly force was necessary to prevent death or serious physical harm to Officer Henry.

A detailed discussion of the evidence that supports this decision follows.

Officer Markley stated that he and Officer Moore were doing extra patrol in Columbia Park, and headed back to Fruitland when they saw two males walking north of the fence line. One had a flashlight and stopped every now and then to shine it through the fence.

Officer Markley's statement is corroborated by video obtained by Bush Car Wash, a business in the area, that shows the use of a flashlight behind the chain link fence between 11:42 p.m. and 11:45 p.m. That is consistent with video footage collected from Mathew's Auto Body, and USA Car Sales. It is also corroborated by Mr. Whitaker's having a flashlight on him when he was contacted by police.

Officer Markley and Officer Moore detained Mr. Whitaker and Mr. Nichols and had them sit down. They then asked Mr. Whitaker and Mr. Nichols for their names and birthdates, which is corroborated by dispatch records and notecards collected from Officer Markley immediately after the shooting. Officer Henry wrote the name and birthday that Mr. Whitaker gave her on a card and gave that to Officer Markley so he could run it through the data system. The name and birthdate that Mr. Whitaker gave to Officer Henry was, "John R. Stormen," date of birth: February 13, 1978. When the name came back with no record, Officer Moore signaled to Officer Markley to detain Mr. Whitaker. Officer Markley then told Mr. Whitaker that they were not able to identify him, and they were going to detain him until they could identify him. At this point, Mr. Whitaker got up and started running away.

In deciding that Officer Markley's actions were appropriate under RCW 9A.16.040, I do not have to resolve the legal issues surrounding the arrest of Mr. Whitaker. There certainly was reasonable suspicion to contact Mr. Whitaker and Mr. Nichols, as they were behind a fence in an area of a closed business at 11:45 p.m. with a flashlight. When contacted, Mr. Whitaker and Mr. Nichols not only had the flashlight, but also had a 12-inch metal file.

There were two reasons given for Mr. Whitaker's arrest: that he was trespassing in Columbia Park and that he gave a false name to officers. There could be a public premises or knowledge defense to the trespass arrest. There are also defenses to a charge based on giving a false name to police as illustrated in State v. Williams, 171 Wash.2d 474 (2011), which reversed such a conviction.

However, while lawyers can spend days after the fact researching case law concerning the arrest, police officers have to make decisions in the field in a matter of minutes. This is why there are Court decisions such as State v. Valentine, 132 Wn2d, 1 (1997), which holds that even if the initial arrest was unlawful, a subsequent assault on an officer can be prosecuted. There are good reasons for that rule. If an officer makes a good faith mistake, he should not be at the mercy of an individual later using force against him. Here, if Mr. Whitaker was turning to shoot Officer Henry with his gun that he pulled out of his jacket, Officer Markley should be able to take actions to protect her, even if a Court could later decide that the initial arrest was not lawful. Conversely, if an initial arrest was lawful, that does not give an officer carte blanche to use unreasonable or unjustified force against an individual subject to a lawful arrest.

Therefore, I find that Officer Henry and Officer Markley had good faith reason to pursue Mr. Whitaker when he fled from them, and that Officer Markley's actions should be reviewed based on what happened after Officer Henry caught up to Mr. Whitaker.

Logan Nichols, Officer Markley, Officer Henry and Officer Moore all state that Mr. Whitaker ran away when he heard he was being arrested. In my two meetings with members of the Whitaker family, different family members expressed skepticism that Mr. Whitaker could have ran away given the injury to his leg. However, Mr. Whitaker only “ran” a few feet before Officer Henry caught up to him, which indicates Mr. Whitaker did not run fast or far. Also, the four statements are corroborated by video footage obtained by USA Auto Sales, a nearby business, that shows one individual moving quickly/running in front of a KPD vehicle’s headlights, immediately followed by a second person, with a third person running past shortly after that. The time on the video for these images is from 11:44:18 p.m. to 11:44:23 p.m. When the video was collected, SIU investigations checked the time and calculated it to be seven minutes and 28 seconds slow, so that the time was actually 11:51:45 p.m. to 11:51:50 p.m. This timing is consistent with the statements and dispatch records of times, which show that a field contact was made at 11:45:28, data checks at 11:47:46 and 11:49:28, and a call that one subject was down at 11:52:04.

Officer Markley stated that he followed Officer Henry as she chased after Mr. Whitaker. This would be consistent with him being the third person to cross the abovementioned headlights. Officer Markley saw Mr. Whitaker reach into his jacket and pull out a gun. Officer Markley yelled at Mr. Whitaker to stop reaching and to get to the ground. During that time, Officer Henry was struggling with Mr. Whitaker and telling him to get on the ground and stop fighting. Officer Markley then saw Mr. Whitaker’s gun clear his jacket and turn around towards Officer Henry. At that time, Officer Markley fired multiple shots at Mr. Whitaker.

Officer Henry gave a similar account from her perspective of catching up to Mr. Whitaker and taking him down, while telling him to stop resisting. She did not see Mr. Whitaker’s gun, which is not surprising, given her different angle and proximity to Mr. Whitaker. The descriptions of Officer Henry being involved in a struggle with Mr. Whitaker is corroborated by photos taken of Officer Henry showing her injuries and bruises.

Officer Moore was able to watch the struggle between Officer Henry and Mr. Whitaker, but he did not see Mr. Whitaker’s gun before Officer Markley fired his gun. This is consistent with Officer Moore being further away, which was accentuated by the darkness and different angle.

Logan Nichols also described what happened. Mr. Nichols was with Gordon Whitaker when they were contacted by police. Mr. Nichols told police that he had known Mr. Whitaker for a brief time, had connected with him earlier that evening and they left the vicinity of Mr. Nichols’ home together. In the portion of the interview where he describes the circumstances leading to the shooting, I am quoting from the recorded transcript to show the narrative manner of his statement, as opposed to answering leading questions:

*Nichols:* “And then she said his name didn’t get-his name didn’t show up.”  
**Question:** “Okay.”  
*Nichols:* “And then – and then from there he got up, he-he ran. He started running. He was reaching for his gun.”  
**Question:** “Who was reaching for his gun?”  
*Nichols:* “My buddy.”  
**Question:** “Okay.”  
*Nichols:* “I had no idea he had it on ‘em.”  
**Question:** “Okay, how do you know he was reaching for his gun?”  
*Nichols:* “He was reaching like that in his coat.” (Showing lifting jacket away from his chest as he’s reaching in.)

Mr. Nichols also stated that he heard an officer say that Mr. Whitaker was reaching for a gun. Mr. Nichols later said that he did not know why they shot him. In the interview, Mr. Nichols appears emotional at that point, which is understandable. Also, Mr. Nichols was further away from Mr. Whitaker and Officer Henry than Officer Markley was. The effect of the greater distance on the vision of what happened is increased by the darkness. Mr. Nichols also had a different angle. If Mr. Nichols had seen Mr. Whitaker holding the gun while turning toward Officer Henry, he may have had a different opinion.

Officer Markley's statement is corroborated by Mr. Whitaker's gun being found within a couple of feet from Mr. Whitaker's body. The location of the gun is consistent with him holding it in his hand and then dropping it when he was shot.

The location of the gun is corroborated by the Kennewick Fire Department medics who arrived almost immediately after the shooting. This is shown by a review of the timeline. The USA Auto Sales video shows three individuals moving quickly in front KPD headlights between 11:51, 45 seconds and 11:51, 50 seconds. The call to dispatch that a man was down came at 11:52 p.m., and Kennewick Fire Department records also show a call occurring at 11:52 p.m. The Kennewick Fire Department medics arrived at the scene at 11:57 p.m. They first observed officers giving medical aid to Mr. Whitaker. All five medics saw a black handgun near Mr. Whitaker, the estimated distances between one and three feet. They took care to avoid the gun and warn each other about the presence of the gun as they provided medical attention. Officer Reil of the Kennewick Police Department was on patrol at the time and also immediately went to the scene when he heard the call. He took photos of the scene while medics were still giving medical aid. Those photos show the same location of the gun as are shown in later photographs taken by SIU investigators.

The handgun did belong to Mr. Whitaker. The Washington State Patrol Crime Lab collected DNA from three different locations: the muzzle, the exterior excluding the muzzle, and from the magazine and cartridges. Mr. Whitaker's DNA profile was found on all three locations.

Officer Markley's gun was seized by SIU investigators. It had a round in the chamber and nine in the magazine. The magazine could hold 15 rounds. This means that depending on whether there was a round in the chamber, in addition to the 15 in the magazine, Officer Markley would have fired either five or six rounds.

SIU investigators collected five spent cartridges at the scene. The Washington State Patrol Crime Lab examined the fired cartridges and cartridges test fired by Officer Markley's gun, and concluded that it was Officer Markley's gun that fired the spent cartridges found at the scene.

An autopsy performed on Mr. Whitaker found that he died of multiple gunshot wounds. The report describes different wounds identified as wounds A through O. It also notes that many of the separate wounds were entrance and exit wounds caused by the same projectile. For example, wound F is the exit wound of the entrance wound of wound O. It also noted projectiles that caused multiple wounds. For example, wounds B, C, D and E were an entrance wound, exit wound, re-entrance wound and re-exit wound. The wound descriptions are consistent with being caused by five or six projectiles.

The autopsy report also describes different locations of the entrance wounds. Numerous wounds were to the front of Mr. Whitaker, the underside of his chin, his mid-abdomen, his right forearm and his chest. One wound was on his side. One wound was on his back. This is consistent with Mr. Whitaker moving at the time he was shot, which is consistent with the witness descriptions of Mr. Whitaker moving at the time.

The evidence shows that Mr. Whitaker fled from police officers after being told he was under arrest, and that they would be confirming his actual identity as opposed to the name he gave them. The evidence also shows that Mr. Whitaker struggled with Officer Henry when she caught up to him, and that he pulled a handgun from his jacket and was turning toward her when he was shot. There is a question of why Mr. Whitaker would attempt to flee from police and then pull out his handgun from his jacket while struggling with Officer Henry. Part of the answer may be that his judgment was impaired by the amphetamine and methamphetamine that were found in his system by toxicology testing. Another part of the reason may have been the existence of two active warrants for him at the time.

Another reason for Mr. Whitaker to flee from police and pull out his gun while fighting with Officer Henry is if Mr. Whitaker knew that the Richland Police Department was looking for him as a suspect in a January 2020 home invasion/robbery. The victim in that case told police that Stevie Trott and Trott's boyfriend, who the victim knew as G-Money, forced their way into her apartment. Mr. Whitaker is known as G-Money. She said that G-Money had a black and tan handgun. They demanded money they knew she had. G-Money put his gun to the victim's head and later placed the muzzle to her thigh saying the gun was getting hot. They also put duct tape on her mouth and zip-tied her wrists in front of her. The victim eventually told them where the money was, and Trott and G-Money then took the money and left.

Stevie Trott was arrested on January 16, 2020. Police also interviewed Marcel Combs, a friend of Mr. Whitaker, about the robbery and Mr. Whitaker on January 20, 2020. It is highly likely that Mr. Whitaker knew that police were looking for him as the other suspect in the home invasion robbery. This is especially true since his girlfriend, Stevie Trott, stayed in jail on the charge of the home invasion/robbery after she was arrested. Also, DNA testing has confirmed the identification of Mr. Whitaker as the other participant. His DNA profile was found on the tape that Trott and Mr. Whitaker put over the victim's mouth.

The evidence concerning the home invasion is only relevant as a motive or explanation as to why Mr. Whitaker attempted to flee and then resist the police. It is not intended to lessen the value of Mr. Whitaker's life. I know from meeting with Mr. Whitaker's family that he was loved and valued by them, and they continue to suffer from his loss.

However, my role is to decide whether to file criminal charges against Officer Markley. Based on the evidence that Mr. Whitaker had a motive to flee and resist arrest, that he did attempt to flee, that he possessed a gun and that he drew that gun out of his jacket while fighting with Officer Henry, I find that Officer Markley had good reason to believe that his use of force was needed to protect Officer Henry.

This case was the first Benton County Independent Investigation of police use of deadly force subsequent to the adoption of WAC 139-12, which was effective January 6, 2020. That rule establishes the criteria for independent investigations, which is required by the newly adopted

RCW 10.114.011. The Washington Association of Police Chiefs and Sheriffs have recommended that a prosecuting attorney receiving an investigative report pursuant to RCW 10.114.011, make an independent and individualized assessment as to whether the investigation satisfied the requirements of the statute and rules. The Attorney General has stated an intent to review the investigation of this case. There have also been questions about the process from the public and Mr. Whitaker's family. Therefore, it is appropriate to address issues of the independent investigation and compliance with WAC 139-12. I find that there was substantial compliance with the statute and rule in this investigation. I also find that the independent investigation was thorough, professional, and excellently done. There were a few issues discussed below that reflected the newness of this procedure, but they were either resolved or did not substantially affect the independence of the investigation.

WAC 139-12 requires a minimum of two non-law enforcement community representatives to be assigned to each Independent Investigative Team (IIT). Unfortunately, the local IIT team had not assigned any non-law enforcement community representatives to the team at the time of the shooting of Mr. Whitaker. This was discussed at the first meeting of the team after the shooting of Mr. Whitaker, and it was decided to encourage the selection of the representatives. As a result, two community representatives were selected and assigned to this case. However, since they were selected during the investigation, they were not able to participate in the vetting, interviewing and/or selection of IIT investigators. The WAC rule does anticipate issues of timeliness by stating that existing teams have until January 2021 to provide necessary information about the qualifications to the non-law enforcement community representatives for review. The community representatives were also not able to review the conflict of interest issues within 72 hours of the commencement of the investigation, as they were not selected until well after that. There was discussion of conflict of interest, as I witnessed one IIT investigator mention that his wife was employed by the Kennewick Police Department and that his wife knew Officer Henry. That officer was excused from the IIT investigation team.

The past practice of local Special Investigations Unit (SIU), which is the IIT unit for Benton, Franklin and Walla Walla Counties, was to allow the involved agency command staff to attend SIU briefings. Kennewick Police Department command staff showed up for the first briefing on the Whitaker case. When WAC 139-12 that limited information sharing with the involved agency was shown to them, they understood and did not attend the briefing.

The past practice of the local SIU investigations prior to adoption of WAC 139-12 was to allow the involved agency to have a representative observe the interview of the involved officers by the SIU investigators. After the SIU/criminal investigators finished their interview they left, and the involved agency representative would conduct an internal investigation interview. However, WAC 139-12 prohibits that practice. It states: "No information about the ongoing investigation of police use of deadly force will be shared with any member of the involved agency, except limited briefings given to the chief or sheriff of the involved agency about the progress of the investigation so that they can manage the internal administrative investigation and communicate with their community about the progress of the investigation." Unfortunately, the past practice was used in this case. A representative of the Kennewick Police Department was allowed to observe the interviews of the three involved Kennewick Police Officers. I do not remember being consulted about this at the time.

There has been spirited debate about this practice among the Prosecutors, Sheriffs and Chiefs in the three counties, and I have advised that I will not sign any agreement that incorporates the past

practice that is prohibited by WAC 139-12. This issue was discussed by the membership of the Washington Association of Prosecuting Attorneys with unanimity that the practice is prohibited by the WAC. Other prosecutors also stated that having an involved agency representative attend the criminal investigation interview is likely to be a de facto trigger of Garrity, meaning that the statements could not be used in any criminal investigation or trial. I am hoping that this issue will be resolved in the near future, and I understand that a meeting to further discuss this is being set up for local Chiefs, Sheriffs and Prosecutors.

In this case, the interviews were exculpatory to the officers, and I have seen no evidence that the involved agency, the Kennewick Police Department, used any of the information to affect the SIU investigation. Therefore, I find that while there was a violation of WAC 139-12, there was still substantial compliance with the requirements of an independent investigation.

During the investigation, there was a media release by the Richland Police Department on their home invasion/robbery discussed above where Mr. Whitaker was a suspect. It released the information about Mr. Whitaker's DNA being found on the tape that was placed on the victim's mouth. The community representatives were appropriately concerned that if the information was released by the SIU investigation team or the Kennewick Police Department, it would violate the portion of WAC 139-12, which provides that "neither the involved agency nor the IIT will provide the media with criminal background information of the person against whom deadly force has been used, unless it is specifically requested, and release of the information is required by the Public Records Act or other applicable laws." This is an example of the value of non-law enforcement community representatives.

There was an issue concerning the meeting to discuss this. It was appropriate to have the involved agency attend at least a portion of the meeting with the commander of the SIU agency, community representatives and prosecutor. However, I expressed reluctance to attend the meeting at the Kennewick Police Department. The decision was made to have the meeting at the Kennewick Police Department after I advised that I would not feel comfortable attending the meeting, and I did not attend. This could be an issue for future discussion about this process in general, but I am aware of the already present concerns about the closeness between the Prosecuting Attorney and the Chiefs and Sheriffs of affected agencies. I believe that having a Prosecuting Attorney go to the involved agency's office to discuss the pending investigation would be contrary to the spirit of independence and transparency in WAC 139-12. I also understand that I could be wrong.

On July 1, 2020, I received an email stating "SIU case KPD 20-05642 has been reassigned to Sergeant Florence at the direction of Chief Hohenberg and Chief Bruce." It had been assigned to a commander with the Benton County Sheriff's Office. I was concerned because it appeared that Chief Hohenberg was making decisions about the direction of the independent investigation of officers in his agency. In follow-up emails and telephone calls, it appeared that Chief Hohenberg and Commander Randy Maynard's roles were more ministerial than substantive, as Commander Maynard has been the leader of SIU Command Staff. However, I still contacted the Governor's Office and Attorney General's Office for both a second opinion and offer to step aside if there were concerns that this tainted the independent investigation. Neither office expressed concern, given my representation that there did not appear to be any substantive involvement. By July 1, 2020, the investigation interviews and evidence collection had largely been concluded. I understand the reasons for the transfer. However, it would be nice to have a mechanism of making such changes without any role from the involved agency.

In summary, it is not surprising that there were some issues in compliance with the new law and WAC rule. The absence of community representatives at the beginning of the investigation and the presence of the representative of the Kennewick Police Department at the interviews of the involved officers, were particularly troublesome. However, I find there was substantial compliance with the requirement of an independent investigation and implementation of the WAC rule. Of course, the planned review by the Attorney General's Office could address these and other issues.

During my meetings with the Whitaker family, they asked about body cameras. I said that the Kennewick Police Department did not use body cameras. I know this is a complex issue. However, for reviewing cases involving deadly force by police officers, the use of body cameras would be beneficial not only for the integrity of the investigation but also for the decedent's family and involved police officers. I believe that use of body cameras would have re-enforced my finding that Officer Markley acted in good faith and was justified in his use of deadly force. The use of body cameras would also help answer questions and doubts by the Whitaker family. I understand that this is a complex issue beyond the scope of a prosecutor's authority. However, I believe that this case is an example of the need for continued discussion and research on the use of body cameras.

I told the Whitaker family and the attorney representing Officer Markley that I would notify them of my decision before it was made public. I will send this letter after that is done.

Very truly yours,

A handwritten signature in cursive script that reads "Andy Miller".

**ANDY MILLER**  
*Prosecuting Attorney*