



COPY

**BILL THIEBAUT**  
District Attorney

**OFFICE OF THE DISTRICT ATTORNEY**  
**TENTH JUDICIAL DISTRICT, COLORADO**

July 31, 2006

Dan Corsentino  
Pueblo County Sheriff  
909 Court Street  
Pueblo, CO 81003

Re: Decision Letter  
Officer-Involved Incident Concerning  
Deputy Sheriff Jonathan S. Post

Dear Sheriff Corsentino:

The investigation and legal analysis regarding the above matter have been completed. My decision, based on criminal law standards, does not limit administrative action by the Pueblo County Sheriff's Office where non-criminal issues can be reviewed, or a civil action where less stringent laws, rules, and legal levels of proof apply.

**Background**

Effective January 1, 2006<sup>1</sup> several law enforcement agencies in Pueblo County entered into a revised "Officer-Involved Incident Protocol of The Tenth Judicial District" (CIT agreement). Among those who are signatories to the CIT agreement include the Pueblo Police Department and The Pueblo County Sheriff's Office. The CIT agreement establishes a team approach to the investigation of certain critical incidents involving peace officers. Such a team provides any participating law enforcement agency requesting assistance proficient investigators to assist in the investigation of a critical incident to enable a "thorough, unbiased investigation of any critical incident involving a law enforcement officer." Notably, the protocol adopted in the CIT agreement recognizes that "[A]long with an open investigation for public evaluation, the incident investigators and agency managers must understand the legal rights, obligations and authority of the agencies and individuals involved." *Officer-Involved Incident Protocol of the Tenth Judicial District, Statement of Pueblo County Law Enforcement Agencies.*

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<sup>1</sup> Prior to its effective date of January 1, 2006 the original CIT agreement was revised on December 21, 2005. The revisions are not material or relevant to this inquiry.



## **Statement of Investigation and Facts**

### ***Triggering the CIT Agreement***

Although not required to do so pursuant to the terms of the CIT agreement, the Pueblo Police Department Chief of Police invoked the agreement's investigative protocols for this incident. The investigation was conducted by investigators from the Pueblo Police Department, The Pueblo County Sheriff's Department, the Colorado State Patrol and District Attorney's Office.<sup>2</sup> Reports were received from agencies involved in the investigation as well as diagrams of the accident scene, accident reconstruction data and a video tape taken from the Sheriff's cruiser video camera system.<sup>3</sup>

### ***Facts***

#### **Overview of Facts**

At approximately 7:17:55 p.m.<sup>4</sup> on June 16, 2006 the Pueblo Police Department was notified that a traffic accident occurred at Highway 50 West and Morris Avenue (accident intersection) in the City of Pueblo, County of Pueblo, State of Colorado.

The investigation revealed that a Pueblo County Sheriff's cruiser driven and occupied only by Deputy Sheriff's Officer Jonathan S. Post was eastbound on Highway 50 West when it impacted a Kia Sportage vehicle driven by Willis S. Green, who was the sole occupant of that vehicle. Mr. Green's vehicle was proceeding westbound on Highway 50 West and turned in front of the Sheriff's cruiser while attempting to make a left turn onto Morris Avenue from the left turn lane at Highway 50 West and Morris Avenue. Mr. Green was ejected from the passenger side of his vehicle. He was transported by ambulance to Parkview Medical Center (PMC) where he was pronounced dead. Officer Post was taken to PMC where he was treated for minor injuries and released.

#### **Gas Drive-Off Report (7:15:42 p.m.—audible or visual signals activated)**

Prior to the accident, Officer Post received a dispatch report that a person obtained about \$33.00 worth of gasoline at the Safeway store at Purcell Boulevard and

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<sup>2</sup> This was the first investigation involving the CIT agreement.

<sup>3</sup> The CIT agreement provides that "Vehicular collisions...shall be investigated with the assistance of accident investigation specialists from any of the participating agencies." *Officer-Involved Incident Protocol of the Tenth Judicial District, Venue Determination*, at page 11.

<sup>4</sup> Time is translated to twelve hour time from twenty-four hour time as used in the Sheriff's cruiser video camera system.

Highway 50 West in Pueblo West without paying for it and drove off. The description of her car and its license number were recorded on store tape. When Officer Post received the call he was on Wildhorse Road veering approximately south toward Highway 50 West. According to Officer Post, while at a point on Wildhorse Road he observed a vehicle traveling eastbound on Highway 50 West where Wildhorse Road (Pueblo Boulevard) intersects that highway, which matched the general description of the vehicle driven by the gas drive-off suspect.<sup>5</sup> At that point, he activated his emergency audible or visual signals and began a pursuit of the suspect's vehicle. He proceeded in his cruiser driving at speeds in excess of the posted speed limit from Wildhorse Road onto Highway 50 West heading eastbound toward the Pueblo city limits in pursuit of the vehicle (7:16:25 p.m.). In fact, Officer Post drove through the intersection of Highway 50 West and Wildhorse Road (Pueblo Boulevard) traveling at about 65 m.p.h., then maintained that approximate speed eastbound on Highway 50 West.<sup>6</sup>

The investigation determined that the vehicle involved in the gas purchase was owned by Bethany A. Diorio of Canon City, Colorado. Ms. Diorio attempted to pay for the gas she purchased at the Safeway store but was having problems with her debit card at the pumps. She was assisted by the clerk of the store and thought that the purchase had registered on her debit card. Having completed the purchase, she left the store in her vehicle and proceeded west on Highway 50 West to her home in Canon City. In other words, she was proceeding in her vehicle in the opposite direction on Highway 50 West as that of Officer Post at about the time the officer states he observed an eastbound vehicle matching the overall description of the gas drive-off suspect.

**The Pursuit (7:15:42 p.m. – 7:17:42 p.m. – audible or visual signals on)**

While eastbound on Highway 50 West, Officer Post maintained an average speed of 64 m.p.h. until he was within approximately 200 feet of the accident intersection. Although the video tape taken from the Sheriff's cruiser does not substantiate it, Officer Post related that at one point he closed the gap to two car lengths between his cruiser and the suspect vehicle. For that matter, no vehicle traveling eastbound on Highway 50 West at a high rate of speed is ever observed on the tape taken from the Sheriff's cruiser. Nonetheless, he proceeded through at least one intersection in the Pueblo city limits with his emergency audible or visual signals on (7:17:35 p.m.). The posted speed limit entering the city limits is clearly marked as a 45 m.p.h. speed limit zone.

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<sup>5</sup> Notably, the video tape taken from the Sheriff's cruiser does not support such an observation.

<sup>6</sup> The cruiser's video camera goes off at 7:16:28 p.m. and back on at 7:17:34-35 p.m.

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**Non-Pursuit (7:17: 42 p.m. – audible or visual signals de-activated)**

For some unexplained reason Officer Post de-activated his emergency audible or visual signals (after passing Highway 50 West and Ridge Drive), although maintaining pursuit speed, at least 850-900 feet prior to the point of impact at the accident intersection. Witnesses to the accident verify that the Sheriff's cruiser was not operating its emergency audible or visual signals as it approached and entered the accident intersection.

**Impact (7:17:55 p.m. – audible or visual signals not in operation)**

When Officer Post was at least 300 feet from the accident intersection the eastbound traffic signal turned yellow (7:17:52 p.m.). The light is yellow for 3.8 seconds during its normal light sequence. Even though his emergency audible or visual signals were not in operation when he was within 200 feet of the accident intersection, Officer Post was driving the Sheriff's cruiser at the rate of approximately 64 m.p.h., or about 20 m.p.h. over the posted speed limit zone of 45 m.p.h. Based upon the video tape taken from the Sheriff's cruiser, Mr. Green's vehicle clearly can be seen entering the accident intersection (turning left into it) when Officer Post was 150 feet from the accident intersection (7:17:53 p.m.). Apparently trying to beat the yellow light because he could not stop, Officer Post proceeded into the accident intersection traveling 53-54 m.p.h., at which time he applied full brakes and swerved right resulting in deceleration to 43 m.p.h. at the moment of impact (7:17:55 p.m.).<sup>7</sup> Accident investigators opined that if Officer Post had applied the brakes on the Sheriff's cruiser 150 feet from the accident intersection (when he clearly should have seen the turning vehicle of Mr. Green) he could have stopped before impact.

**Procedural Considerations**

***Administrative Actions***

An administrative review is controlled by less stringent legal levels of proof and rules than a *criminal review* and can provide both positive remedial options and punitive sanctions. This process can be said to result from an agencies "internal affairs" investigation and provides significantly broader latitude in accessing and using information concerning the background, history and job performance (prior conduct) of

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<sup>7</sup> This area of the city is a high volume traffic area where several accidents resulting in death have occurred.

the involved officer. Issues related to the strategic decisions made by the involved officer leading up to the critical incident are most effectively addressed by the department's administrative review. This type of information may have limited or no applicability to *criminal reviews*, but is very important in making administrative decisions.

There are a variety of actions that can be taken administratively by the department in response to its review. On the one hand, the department's review may reveal that no action is required. On the other hand, the department may have determined that rules were violated and that formal discipline may be appropriate. Or the department may make findings that support additional training for all officers on the force, or the need for changes in departmental policies, procedures and rules. In summary, departmental action can be taken for the benefit of the community, department, its officers or the involved officer.

### ***Civil Law versus Criminal Law***

The civil law provides remedies for essentially private wrongs--actions in which the state may not have an interest. Monetary damages can be sought under a civil suit for a wrongful act that violates a legal right of an injured party. Plaintiffs in civil litigation are required to prove their case by a preponderance of the evidence or some lesser standard of proof; although some cases have indicated that "clear and convincing evidence" may be the required standard of proof.

A crime normally involves a wrongful act specifically prohibited by the criminal law. In most cases the law requires the wrongful act be accompanied by criminal intent. In other words, a person intentionally commits a prohibited act. Of course, a criminal action requires that the prosecutor prove its case "beyond a reasonable doubt" — the highest standard of proof. Notably, the criminal law and civil law can overlap. Conduct by a person that constitutes a crime can also involve a tort (a wrongful act that violates a legal right of an injured party). For example, a driver whose car hits another car and kills another person can be guilty of a crime and have a verdict of guilty rendered against him or her in a civil suit for damages.

It is the general responsibility of a district attorney to review cases prior to placing them into the judicial branch's court system. Put simply, a district attorney has a criminal "charging" responsibility. Charging may be through the complaint/information process or the grand jury presentment process. The charging "discretion" reposed in a district attorney is an awesome power to be used judiciously. If ever justice is to be established in

a community, it will first come from a local district attorney's charging practices. This is the area of discretionary power that best defines a prosecutor's personal criminal justice philosophy. Accordingly, if there is reasonable likelihood or probability of conviction, a district attorney may conclude that one has committed a chargeable offense. Among other things, this standard takes into account the quantity, quality, admissibility and credibility of available evidence.

## **Legal Analysis – Criminal Law**

### ***Pursuit Law & Pursuit Policy***

#### **Statutory Law Privileges and Conditions**

Colorado law is clear that the driver of an authorized emergency vehicle, when in pursuit of an actual or suspected violator of the law, and when making use of audible or visual signals: 1) may proceed past a red or stop signal, but only after slowing down as may be necessary for safe operation; or 2) may exceed the lawful speeds or exceed the maximum lawful speed limits so long as he does not endanger life or property. Section 42-4-108 (2)(b) and (c), C.R.S.<sup>8</sup> The statute goes on to clearly state that a driver of an authorized emergency vehicle is not relieved from the duty to drive with due regard for the safety of all persons. Section 42-4-108 (4), C.R.S.

#### **Case Law Inquiries**

*Corsentino v. Cordova*, Colo., 4 P.3d 1082 (2000), dealt with a circumstance where a Pueblo County deputy sheriff received a dispatch to a home burglary alarm. The deputy responded to the dispatch as an emergency call, activating the sirens and lights of his sheriff cruiser. In route to the home burglary alarm, the deputy was driving at a speed of 50-60 m.p.h. in a 35 m.p.h. speed zone. While driving at this speed, the deputy approached an intersection at the same time as another person was making a left turn in her car. The two cars collided. Notably, before the impact, the deputy still had his emergency sirens and lights activated, but did not slow down as he approached the intersection. The resulting collision caused the death of the person making the left turn.

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<sup>8</sup> Under very narrow instances an authorized emergency vehicle being operated as a police vehicle while in actual pursuit of a suspected violator may not need to display or make use of audible or visual signals so long as such pursuit is being made to obtain verification of or evidence of the guilt of the suspected violator. Section 42-4-108 (3), C.R.S. *But cf. Tidwell v. City & County of Denver*, Colo., 83 P.3d 75 (2003).

Among other things, *Corsentino* addressed 1) the legal standard under the Colorado Governmental Immunity Act (GIA) for determining when an emergency vehicle operator faces an exigency that calls for immediate action; and 2) whether an emergency vehicle operator exceeding the legal speed limit must comply with the condition of section 42-4-108(2), C.R.S., which allows an emergency vehicle operator to speed “so long as said operator does not endanger life or property,” in order to fall within the provisions of the GIA that grant immunity to emergency vehicle operators.

In establishing the proper standard for determining whether an emergency vehicle operator was responding to an emergency call<sup>9</sup> under section 42-4-108 (2), C.R.S., the court reasoned that: “...it is an objective standard from the perspective of a reasonable emergency vehicle operator.” *Corsentino*, at p. 1088. And the court further reasoned in *Corsentino* that “...whether an emergency vehicle operator endangered life or property while speeding...” can be answered by an “...inquiry to the relationship between the conduct of the emergency operator prior to the accident and the circumstances surrounding the conduct.” *Corsentino*, at pp. 1092 and 1093.

The *Corsentino* case is instructive in analyzing this critical incident. Even though the case dealt with a civil action and the interplay between the conduct of a deputy sheriff and the GIA, its reasoning gives clarity to the standards imposed upon authorized emergency vehicle operators who are facing the possibility of criminal culpability for their conduct.

#### **Pursuit Policy Requirements**

Moreover, courts give substantial weight to a department’s pursuit policy governing the proper response action for certain circumstances. *Corsentino, supra.* Presumably, the Pueblo County Sheriff’s Office had an individual department pursuit policy in force at the time of the incident. This was not made available to the District Attorney’s office although requested on numerous occasions. However, in 1999 the Pueblo County Sheriff’s Office entered into an agreement with other Pueblo County law

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<sup>9</sup> Presumably the objective standard established in *Corsentino* applies “... when in pursuit of an actual or suspected violator of the law ...” Section 42-4-108 (2), C.R.S.; and *Corsentino, supra.*, citing with approval *Fiser v. City of Ann Arbor*, 417 Mich. 461, 339 N. W.2d 413 (1983); objective standard proper for determining whether a law enforcement officer properly responded to a car chase as an emergency.

enforcement entities entitled “Multi-Jurisdictional Police Pursuit Policy, Pueblo County” (Pursuit Policy). That policy requires that an officer in pursuit:

- “A. Give warning to other motorists that a pursuit is in progress by using emergency lights and sirens on authorized emergency vehicles involved in a pursuit.
- B. Give due consideration to the nature of the offense which gives cause to initiate the pursuit. Officers are encouraged to weigh the nature of the offense, such as serious felony vs. a misdemeanor, when opting to participate in a pursuit.
- C. Consider alternative methods of apprehending the suspect(s).
- D. Consider the danger to the public if the suspect(s) is not immediately apprehended.
- E. Weigh the risk to the public and others involved due to the continued participation of agencies involved in the pursuit. For example, the speed of a pursuit should be reasonable under the conditions.
- F. Give due consideration to existing driving conditions, including road conditions, traffic congestion, weather conditions, and vehicle conditions if known at the time.”<sup>10</sup> *Pursuit Policy*, II. A-F, p. 1-2.

## Conclusions

Assuming arguendo, Officer Post engaged in a valid pursuit when the gas drive-off was reported by dispatch, he terminated pursuit prior to the collision, which removed any statutory privileges that may have cloaked him. Once he de-activated his emergency audible or visual signals, he was not in pursuit mode and was required to drive his cruiser in a careful and prudent manner.

When any person drives a motor vehicle in a careless and imprudent manner, without due regard for the traffic, and use of streets and highways and all other attendant circumstances and the person’s actions are the proximate cause of death to another he or she is guilty of careless driving causing death. Section 42-4-1402(2), C.R.S.; and *See People v. Chapman*, 192 Colo. 322, 557 P.2d 1211 (1977).

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<sup>10</sup> Again, as the Pueblo County Sheriff’s Office would not provide the District Attorney with a copy of its individual department pursuit policy it is difficult to determine if a conflict exists between such policy and the *Pursuit Policy*.



The facts clearly disclose that for some unexplained reason Officer Post deactivated his emergency audible or visual signals, although maintaining pursuit speed, at least 850-900 feet prior to the point of impact at the accident intersection. Witnesses to the accident verify that the Sheriff's cruiser was not operating its emergency audible or visual signals as it approached and entered the accident intersection. When Officer Post was at least 300 feet from the accident intersection the eastbound traffic signal turned yellow (7:17:52 p.m.). The light is yellow for 3.8 seconds during its normal light sequence. Even though his emergency audible or visual signals were not in operation when he was within 200 feet of the accident intersection, Officer Post was driving the Sheriff's cruiser at the rate of approximately 64 m.p.h., or about 20 m.p.h. over the posted speed limit zone of 45 m.p.h. Based upon the video tape taken from the Sheriff's cruiser, Mr. Green's vehicle clearly can be seen entering the accident intersection (turning left into it) when Officer Post was 150 feet from the accident intersection (7:17:53 p.m.). Apparently trying to beat the yellow light because he could not stop, Officer Post proceeded into the accident intersection traveling 53-54 m.p.h., at which time he applied full brakes and swerved right resulting in deceleration to 43 m.p.h. at the moment of impact (7:17:55 p.m.). Accident investigators opined that if Officer Post had applied the brakes on the Sheriff's cruiser 150 feet from the accident intersection (when he clearly should have seen the turning vehicle of Mr. Green) he could have stopped his cruiser before impact which was the proximate cause of the death of Mr. Green.

Even if it can be said that Officer Post was in pursuit of an actual or suspected violator of the law, he did not follow legal and policy requirements imposed upon him. For example, an argument that he was in pursuit of a suspected violator and that he needed to exceed the lawful speeds or exceed the maximum lawful speed limits to apprehend the suspect is tenuous at best. The circumstances prior to and at the time of the accident do not fall within the statutory emergency vehicle privileges because his excessive speed of travel endangered life and property. Section 42-4-108 (4), C.R.S. and *Corsentino, supra*.

Important factors relating to the circumstances include: the 45 m.p.h. posted speed limit in the area; the speed at which Officer Post was driving (as noted above at the rate of approximately 64 m.p.h., or about 20 m.p.h. over the posted speed limit zone of 45 m.p.h.); and the accident intersection is a high volume traffic area where several accidents resulting in death have occurred. These circumstances become even more critical because it is evident that the information Officer Post received as a result of the dispatch report about the description of the suspect's vehicle could not be corroborated by him visually prior to the pursuit, and the Sheriff's cruiser tape did not verify that

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during the pursuit the suspect's vehicle was within two car lengths of him. Yet, he continued the chase over a minor offense. *Pursuit Policy*, II. B and C, p. 1.

It is apparent that Officer Post's duty to drive with due regard for the safety of all persons was breached by his excessive speed. And, of course, he failed to make use of his audible or visual signals near the accident intersection. Section 42-4-108 (2) (c), C.R.S.; and Pursuit Policy, II. A and E, pp. 1-2.

### **Decision<sup>11</sup>**

Taking in to consideration the quantity, quality, admissibility and credibility of available evidence I conclude that Officer Post has committed a chargeable offense. It is, therefore, my opinion that there is a reasonable likelihood or probability that Officer Post committed the traffic offense of careless driving causing death as set forth in section 42-4-1402(2), C.R.S., which can be proven beyond a reasonable doubt, unanimously, to a jury. Accordingly, the charge will be filed directly with the appropriate court.

Sincerely,



Bill Thiebaut  
District Attorney

cc: James Billings, Chief of Police, City of Pueblo  
Captain Tim Nawrocki, Colorado State Patrol

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<sup>11</sup> According to the CIT agreement, as soon as practical after the critical incident and receipt of the investigative report, the District Attorney "...shall determine whether anyone committed a crime. The District Attorney shall communicate his findings, conclusions of law and decision via a decision letter to the chief law enforcement officer of the venue and employer agencies involved. ." *Officer-Involved Incident Protocol of the Tenth Judicial District, District Attorney Responsibilities*, at page 37.