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MEMORANDUM

To: Death Investigation, DA 2128646
From: Chuck Sparks, Senior Deputy District Attorney
Date: January 8, 2008
Subject: Memorandum declining prosecution for criminal homicide

Legal overview:

Under Oregon law, unintentional vehicular homicide usually includes both intoxication and willfully reckless driving. In some cases, other dangerous behaviors such as fleeing the scene or eluding the police also occur. It is possible, though rare, for a person to engage in negligent driving so clearly criminal, yet not involving willful recklessness or intoxication, that charging for the felony crime of criminally negligent homicide is appropriate. "Criminal negligence" is more than mere civil negligence; it is a significantly higher level of misconduct with a much higher burden of proof ("beyond a reasonable doubt" versus "a preponderance of the evidence"). It is unusual to have negligent driving rise to such a high level that it becomes "criminal negligence," with a felony conviction and possible prison sentence then being appropriate.

In this case, the evidence does not show conduct rising to the level of criminal negligence. The driver's prior traffic record is the most negative factor present, but this record is not admissible in trial to prove criminally negligent homicide, and would not be enough to tip the scales even if it were since, in the final analysis, it is the driving itself that is the crime. Since this collision was witnessed by other, neutral witnesses, the driving itself is known, and does not prove a felony homicide.

Facts:

This fatal collision occurred between a garbage truck and a bicyclist at the intersection of North Interstate Avenue and Greeley Street in Portland. From the north, Interstate Avenue runs straight and flat until about a quarter mile before its intersection with Greeley. From there it curves to the driver's left, proceeds downhill and straight for about 200 yards, then curves to the right, still downhill, into the intersection. The right turn onto Greeley is deceptively abrupt, and a vehicle making this turn is not fully visible from the 200 yard straight section above. Interstate here is one lane each way, with the Max line running between them. There is a well-marked bicycle lane to the driver's right along this entire section of Interstate. Trees and shrubbery line the sidewalk to the driver's right for part of the 200 yard descent toward the intersection, and at

the time of the collision partially screened the intersection from above. The speed limit is 30 mph. The downhill grade is significant (7.4%).

At the bottom of the grade are two standard (red, yellow, green) traffic lights mounted on a single overhead arm. These control access into the Interstate/Greeley intersection. On the date of this collision, the right traffic light was not completely visible on Interstate when approaching the intersection from the straight 200 yard section because the right curve of the road and roadside foliage partially obscured it; this light is slightly "around the bend" from the straight section of Interstate preceding the curve, and demonstrates the curve of the road itself.

Monday, October 22nd, 2007 was clear and sunny, with good visibility. The road was dry and in good condition. At approximately 12:22 pm that day Bryan Lowes drove his AGG Company garbage truck, a large Peterbuilt equipped to unload dumpsters over the cab, on North Interstate southbound toward its intersection with Greeley. He had finished his route and was helping another driver complete his. Mr. Lowes had a passenger next to him, Steven Sorrells, another AGG employee. Lowes drove from the flat, upper section of Interstate into the left and downward-sloping curve, then onto the straight downhill grade that leads to the final right curve into the intersection. He intended to turn right onto Greeley.

At the same time, Brett Jarolimek, a bicyclist, rode along the same section of N. Interstate that Mr. Lowes was driving. Mr. Jarolimek, an experienced cyclist, was riding a good quality bike that appeared well-maintained.

Mr. Lowes in his truck passed Mr. Jarolimek as they approached the downhill, left-curving section of Interstate above the 200 yard straight leading downhill to the intersection with Greeley. As discussed below, this pass happened 0.27 miles before the collision.

A security camera on a nearby building was trained on the upper part of Interstate that leads into the area of the collision. It encompassed the end of the flat section of Interstate and the left curved section leading to the 200 yard straight. Video footage of Mr. Jarolimek and Mr. Lowes' truck was found and copied. In it, Mr. Jarolimek is seen briefly on his bike about one quarter mile (0.27) from the intersection with Greeley. At the intersection of Interstate and North Fremont Street, Mr. Lowes' truck passes him and quickly leaves him behind as it heads downhill. Mr. Jarolimek follows. After him comes a white Nissan Armada occupied by witnesses Delores and Steven Harris. Officer Chris Johnson, the case investigator, used this video to estimate Mr. Lowes' speed at 31-32 mph and Mr. Jarolimek's speed at 21 mph. Officer Johnson noted that Mr. Jarolimek apparently gained speed as he entered the downhill grade.

Mr. and Mrs. Harris were directly behind Mr. Lowes' truck during the collision. Both Mr. and Mrs. Harris said that they were slowing to a stop for a red light at the bottom of the hill, at the intersection with Greeley, as was the garbage truck ahead of them. The truck had its right turn signal on, indicating a turn onto Greeley. As both the Harris vehicle and Mr. Lowes' truck approached the red light both vehicles were slowing when the light turned green. Neither vehicle had to come to a stop. As the Harris vehicle passed a sign reading "stop here on red," Mr. Jarolimek passed them and collided with the truck as it turned. Both Mrs. and Mr. Harris were close to the collision and saw it happen. Mr. Harris said he knew the bike was going to hit

the garbage truck when it passed them, and that "the bike passed us not slowing down enough." Mr. Harris told Officer Johnson that there was nothing the truck driver could have done to avoid the collision.

Mr. Lowes told Officer Ron Hoesly that he slowed as he approached the intersection, preparing to turn right onto Greeley, and activated his right turn signal. He said he did not see a bicyclist in the bike lane, but knew about the bike lane and checked the lane via his mirrors before making his turn. Mr. Lowes said he slowed to a near-stop before making his turn, and this matches what Mr. and Mrs. Harris observed. Mr. Lowes reported that as he made the turn he heard a loud crash, stopped, got out, and found Mr. Jarolimek beneath his truck.

After the collision, Mr. Lowes was very upset. He cooperated fully with the investigation. Nothing indicated to investigators that Mr. Lowes was under the influence of alcohol or any controlled substance. He voluntarily gave a blood sample, which was analyzed by the Oregon State Police Forensic Laboratory and Legacy Metrolab. His blood was negative for alcohol and all classes of controlled substances. Mr. Lowes was taking a prescription anti-anxiety medication, Buspar, at the time. He was familiar with and stable on his dose. He reports no side-effects from the medication. This medication does not appear to have impacted his driving on this date or been a factor in this collision.

The truck itself is a large vehicle designed to unload dumpsters into its compactor via a hydraulic fork lift on the front. It has two rear axles, with a third, drop-down axle that was not in use at the time. It weighs 17 tons and contained a half ton of trash. There were liquid waste deposits on the front windshield, smeared by the wipers.

The truck's passenger side mirrors included a flat, rectangular mirror on top and, directly below, a circular, convex mirror. Investigators found that the mirrors, as positioned post-collision, did not give a good view of the area behind the truck from a normal driving position. Specifically, while sitting in the driver's seat with hands on the wheel, Officer Johnson had to move forward up to 8 inches in order to get a proper view via the upper, rectangular mirror. When asked about this, Mr. Lowes said that when his passenger, Mr. Sorrells, used the door on which the mirror is fastened, the mirror's position would change and he would then have Mr. Sorrells adjust the mirror back to the proper position. He said Mr. Sorrells had used the door several times since the collision and that this would have altered the mirror's position, but that it was in a proper position before the collision. Officer Johnson noted that the mirror was held in position in part by a bungee cord and a wire, and that the lower half of the circular, convex mirror was obscured by the door. In reviewing photos, as well as having sat in the driver's seat at the scene, it is apparent that the rectangular mirror is the one that provides the most meaningful view for distance behind the truck, and that the driver would logically use that mirror to view the bike lane. This mirror, in proper position, provided a rather narrow view of the area alongside and behind the truck.

Mr. Sorrells was interviewed twice about his activities up to and during the collision. He said he was looking down at a clipboard before the collision, and heard it but did not see it. He looked out and told Mr. Lowes that they had "run over a bike." They both got out and he saw the bike under the passenger side front set of rear tires. He walked around the truck and saw

Mr. Jarolimek under the truck and the driver, Mr. Lowes, holding his head saying "Oh, my God." Mr. Sorrells confirmed having repeatedly adjusted the mirror for Mr. Lowes during the day because it would get out of adjustment when the door was shut.

Crash scene reconstruction and investigation reveals that the truck was traveling at low speed during the turn. Mr. Jarolimek's bicycle was equipped with red rubber tires. They left a distinct, red 36 foot skid-mark leading to the collision point, indicating that the brakes were applied and locked onto the rear wheel for at least that distance. Mr. Jarolimek hit the front passenger side of the truck as it crossed over the bicycle lane. The point of impact appears to be the front wheel. From there he fell under the truck as it continued turning and went under the lead pair of driver's side rear wheels. The cause of death was crushing chest injuries.

Testing was done to determine Mr. Jarolimek's speed before the collision. Two officers, both experienced cyclists, attempted to reconstruct his speed and braking before the collision. They used a section of the bike lane on Interstate back from the intersection since it was dry, as was the scene at time of collision. From these tests, Mr. Jarolimek's probable speed was found to range from 22 to 28 mph going into the collision. This is consistent with what was found on the security video noted above (21 mph before the downhill section). Using this range of speeds, Mr. Jarolimek's minimum speed was 32 feet per second (22 mph) prior to braking, or 96 feet in 3 seconds. It may have been as high as 42 fps, or 126 feet in 3 seconds, at 28 mph.

This rate of travel gave little time for Mr. Jarolimek to react to the situation as it unfolded before him, especially since the roadway curved into the accident scene, interfering with his view from above. This apparent lack of reaction time is consistent with the impressions of the witnesses, Mr. and Mrs. Harris. This curved section of road goes downhill and beneath an overpass where the intersection lies. A driver can then turn right onto Greeley or continue straight on Interstate. Approaching the curve, the activity at the intersection with Greeley is partially obscured by the curve itself, including from the bike lane. Vehicles turning onto Greeley are somewhat "around the bend" from a cyclist traveling downhill into the area due to this curve, which deviates visibly from the straight line of the bike lane on the 200 yard approach above. There were also sign poles, roadside foliage, and shadows from the overpass further complicating the visual picture for an approaching cyclist on that date.

While the curve and some visual clutter made it hard for a cyclist to see ahead into the intersection, a driver in the curve would also lose a clear view back up the 200 yard straightaway into the bike lane since the mirror's view changes with the vehicle's position as it rounds the curve. Assuming proper positioning, the rectangular mirror on the passenger side of the truck provided a narrow view toward the rear of the truck. Going into the intersection, this view would change with the truck's movement through the curve. As the truck turned to the right through the curve, the driver would no longer have a clear view back up the bicycle lane except for the immediate area near the truck on the curve, making it harder, if not impossible, to see a bicyclist on the upper 200 yards, especially one traveling quickly.

Mr. Lowes was also responsible to watch for cyclists in the bike lane as he came down the 200 yard straight section before entering this curve into the intersection. From the video previously mentioned we see the truck rapidly pass and pull-away from Mr. Jarolimek a quarter-mile before

the point where they collided. This pass happened as they both navigated a busy intersection, so Mr. Lowes' statement that he did not notice Mr. Jarolimek traveling in the same direction is plausible. There was considerable distance between the two after the pass, so that gaining a view of the receding cyclist became less likely via the mirrors. The distance between them would have closed only after Mr. Lowes slowed his truck going into the right curve in preparation for stopping at the light at Greeley.

Once the truck went into the turn Mr. Lowes and Mr. Jarolimek would have been at least partially out of each other's view, but the distance would have closed rapidly since Mr. Jarolimek was still riding downhill at 22-28 mph and the truck was slowing down. The truck was partially out of Mr. Jarolimek's view, and Mr. Jarolimek out of Mr. Lowes' view, immediately before Mr. Jarolimek came into the final curve, perceived the truck and began emergency braking. Mr. Jarolimek then entered the area of full visibility at a rate of 32 to 42 feet per second, when Mr. Lowes had begun his turn. Neither person had adequate time to perceive and react to this situation.

Mr. Jarolimek was wearing an iPod at the time of this collision. This does not appear to have been a cause of the collision.

History of each person:

Mr. Lowes has a significant and negative traffic record. He has been cited for 21 violations in the past 16 years, including several driving suspended citations in the late 1990's and 6 moving violations between 8/02 and 3/07. He was also sued once for a 9/26/05 rear-end collision while driving a garbage truck and this settled. The moving violations include running a stop sign on 6/9/05 at work, several non-work citations for speeding and disobeying a traffic control device, and one careless driving cite 12 years ago, on 9/12/95. Mr. Lowes also has convictions for misdemeanor assault in 1994 and possession of a controlled substance, marijuana, in 1997. On 10/22/07, Mr. Lowes had a valid CDL and had never been convicted of a traffic crime. The citation history itself is disturbing. It has value at a sentencing, but does not prove that, because of the history itself, Mr. Lowes acted, or failed to act, in any particular way on this occasion. It would not be admissible at trial. This history does not determine whether Mr. Lowes should be charged with homicide in this case. It is what happened on this date that determines what is appropriate.

Mr. Jarolimek had a clear driving record. There is one citation on 4/30/07 for running a stop sign on his bicycle with another cyclist. The incident involved their running the stop sign in front of a truck, which had to brake quickly to avoid hitting them. He was cited and apparently failed to appear in court on the citation, resulting in a default judgment against him. This citation does not appear on his driving record since he was not driving a car at the time. This citation is given no weight in determining what happened here.

Conclusion:

The issue is whether Mr. Lowes acted with criminal negligence in this collision leading to Mr. Jarolimek's death. Criminal negligence is the failure to be aware of "a substantial and unjustifiable risk that the result will occur or the circumstance exists," with the risk being "of such nature and degree that the failure to be aware of it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation." The evidence must prove beyond a reasonable doubt that Mr. Lowes acted with criminal negligence before the state can prosecute for homicide.

The evidence here does not prove beyond a reasonable doubt that Mr. Lowes committed criminally negligent homicide. The investigation shows that he drove through the final right curve into the intersection, properly activated his turn signal, slowed considerably and began turning right onto Greeley. He indicated that he checked the bike lane in his mirrors before making his turn. From above, his truck was not completely visible to Mr. Jarolimek as the latter came down the 200 yard straightaway toward the intersection, nor apparently was Mr. Jarolimek visible to him in his mirrors. Mr. Jarolimek entered scene of the collision at 22-28 mph and was clearly surprised by the presence of the truck starting to turn. He immediately braked and skidded for 36 feet but was unable to avoid the truck. Officer Johnson's collision reconstruction showed the time from Mr. Jarolimek's first perception of the truck to impact was 2-3 seconds, and the time from braking to impact was 1-2 seconds. This is a very short period of time for a driver to both perceive and react to an emergency situation. Even if we assume more time was available (3-4 seconds from perception to impact), it was still too little time for a driver to perceive and react to the emergency, or be charged with felony homicide if he failed.