July 16, 2009

Chief Luke Hecker
Loveland Police Department
10 East 10th Street
Loveland, CO 80537
SENT VIA FACSIMILE: 970-962-2917

Elliot Phelps
Chief Investigator
Office of the District Attorney
8th Judicial Office
LaPorte Avenue Suite 200
Ft. Collins, Colorado 80521
SENT VIA FACSIMILE: 970-498-7250

> Re: Seizure of Bill Miller by Loveland police officers in violation of the
>   Fourth Amendment; CCJRA request

Dear Chief Hecker and Mr. Phelps:

I write regarding a complaint received from Mr. Bill Miller describing his
encounter with three Loveland Police Department officers on October 7, 2008.
During that encounter, Mr. Miller was detained based solely on the fact that he
had an unconcealed handgun, the possession of which undisputedly did not
violate any Colorado or Loveland laws. Pursuant to the Colorado Criminal
Justice Records Act ("CCJRA"), the ACLU requests all records related to any
internal review or investigation of the search and seizure of Mr. Miller and his
firearm. I also write to ask for your assurance that the actions of your officers
were not acceptable to the Loveland Police Department and will not be repeated.

Mr. Miller alleges that he was sitting on a park bench overlooking Lake Loveland,
eating an apple and enjoying the view, in the early evening hours of October 7,
2008. At the time of the incident, Mr. Miller was 71 years old. Mr. Miller states
he was unexpectedly approached by Loveland Police Department ("LPD")
officers, who told Mr. Miller they had received a "tip" that Mr. Miller had a gun on
his person. Mr. Miller did, in fact, have an unconcealed, holstered handgun
attached to his waistband. Mr. Miller alleges that LPD officers seized his
handgun without his consent, and emptied it of ammunition. Mr. Miller states that
LPD officers also ordered him to produce his driver's license over his objections.
LPD officers detained Mr. Miller for some time before finally returning Mr. Miller's

handgun and license. Mr. Miller states that LPD officers told him he could expect the same treatment should similar encounters occur in the future.

LPD records corroborate Mr. Miller's recollection of events. LPD incident reports (attached) indicate that three LPD officers contacted Mr. Miller on October 7, 2008, around 6:20 p.m. The incident report records that officers seized Mr. Miller's handgun, "cleared" the serial number on the handgun, and then concluded: "Carry weapon in view, not concealed, no violation, explained our and citizens [sic] initial concern over the weapon."

Subsequent to a complaint made by Mr. Miller to the office of the 8th Judicial District Attorney, Chief Investigator Elliot Phelps informed Mr. Miller that his complaint would be reviewed by the Loveland Police Department (*see* letter attached). In that letter, Mr. Phelps also stated:

> While citizens have many constitutional rights, the right to possess and carry a firearm is a right which, in the hands of the wrong person, in the wrong circumstances, may cause harm to an officer. There is a fine balance between the protection of an individual's right and the protection of a law enforcement officer.

The ACLU of Colorado certainly agrees with Mr. Phelps that in some circumstances there can be a "fine balance between the protection of an individual's right and the protection of a law enforcement officer." In this case, however, LPD officers did not confront a situation which called for striking a "fine balance" between individual constitutional rights and officer safety. Instead, the facts as presented clearly and unambiguously required that LPD officers respect Mr. Miller's constitutional rights, which they failed to do.

Mr. Miller's right to be free from unreasonable searches and seizures is protected by the Fourth Amendment to the federal constitutional and by Article II Section 7 of the Colorado constitution. Those constitutional protections clearly prohibit officers from seizing an unconcealed, legally-possessed firearm, and prohibit officers from detaining and investigating the individual carrying that firearm, in the absence of any suspicion of criminal activity. While it is true that in some cases an officer may be entitled to search and remove firearms during a legitimate investigative detention if officers reasonably fear for their safety, the facts of this case are totally devoid of any such justification.

Numerous courts that have examined similar situations have consistently held that police officers are not entitled to stop or search an individual merely because that person is reported to be, or is seen, carrying a firearm. The U.S. Supreme Court weighed in on a similar question in 2000, when it held that police officers were not justified in stopping and searching an individual based only upon a tip from a caller who claimed the individual was carrying a firearm. *Florida v. J.L.*, 529 U.S. 266 (2000).

The Tenth Circuit has also held police officers' acts unconstitutional in cases with similar facts. In *United States v. King*, 990 F.2d 1552 (10th Cir. 1993), the Tenth Circuit rejected arguments made by police officers that the Fourth Amendment permitted them to detain individuals who presented "any articulable" threat to their safety in the form of a legally-possessed, loaded firearm. The court noted as follows:

> In a state . . . which permits persons to lawfully carry firearms, the government's argument would effectively eliminate Fourth Amendment protections for lawfully armed persons . . . if a police officer's safety could justify the detention of an otherwise lawfully armed person, the detention could last indefinitely because a lawfully armed person would perpetually present a threat to the safety of the officer.

Id. at 1563.

Other courts have reached similar conclusions. In *United States v. Ubiles*, 224 F.3d 213 (3rd Cir. 2000), the Third Circuit held that police officers' decision to stop and search an individual during a local carnival, based only upon a tip that that person had a firearm, violated that person's Fourth Amendment rights. The court explained its reasoning by use of a hypothetical:

> [T]he Government adduced no evidence suggesting that . . . the gun [plaintiff] possessed was defaced or unlicensed, that [plaintiff] posed a safety risk to the authorities or the . . . celebrants, or that [plaintiff] was acting in a manner indicating that he was involved in a different crime. For all the officers knew, even assuming the reliability of the tip that [plaintiff] possessed a gun, [plaintiff] was another celebrant lawfully exercising his right under Virgin Islands law to possess a gun in public . . . This situation is no different than if . . . officers [received a tip] that [plaintiff] possessed a wallet, a perfectly legal act in the Virgin Islands, and the authorities had stopped him for this reason. Though a search of that wallet may have revealed counterfeit bills--the possession of which is a crime under United States law--the officers would have had no justification to stop [plaintiff] based merely on information that he possessed a wallet.
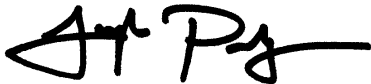
Id. at 218. *See also Brown v. City of Milwaukee*, 288 F. Supp. 2d 962, 971 (E.D. Wis. 2003) (rejecting officers' claims that they were immune from civil suit arising from officers' search and seizure of a woman based only upon information that she might possess a firearm) ("the dispatch report stated only that the individual possessed a gun, which is not necessarily a crime."); *United States v. Dudley*, 854 F. Supp. 570, 580 (S.D. Ind. 1994) (holding that a search of a vehicle based upon a report that there were guns inside was unconstitutional) ("A telephone report of citizens possessing guns . . . standing alone, cannot amount to reasonable suspicion of crime").

Based upon Mr. Miller's account and LPD's own reports, no reasonable officer could have believed Mr. Miller was doing anything more on October 7, 2008, than "lawfully exercising his right under . . . [the] law to possess a gun in public." *Ubiles*, 224 F.3d at 218. LPD officers were not justified in seizing Mr. Miller's personal property, nor did they have a right to detain Mr. Miller in order to investigate him or his firearm based only on the fact that Mr. Miller possessed an unconcealed weapon. The actions of LPD officers are especially troubling in light of the officers' alleged promise that Mr. Miller would receive similar treatment each and every time he carried a legal, unconcealed firearm in the future. The threat raises a question regarding whether LPD officers believe they have the right to stop, detain and investigate anyone in Loveland merely because that person possesses, or is alleged to possess, an unconcealed firearm.

Pursuant to the Colorado Criminal Justice Records Act, please produce all criminal justice records connected with the October 7, 2009, search and seizure of Mr. Miller. This request includes, but is not limited to, any internal affairs records or other internal review records generated in response to the complaint forwarded to the Chief of Police by the District Attorney, such as officer statements, internal correspondence, and the discipline or additional training, if any, imposed on the involved officers.

In addition, I request the assurance of the Loveland Police Department that the actions of its officers on October 7, 2008, were not appropriate under department policies and procedures, and will not be repeated. I look forward to hearing from you at your earliest convenience.

Very truly yours,

Taylor Pendergrass
Staff Attorney, ACLU of Colorado

Enc.   LPD Incident Report (10/7/08); Phelps letter (5/6/09)

cc.   Miller

Bill Miller
2176 Westbourne Drive
Loveland, CO 80538

May 6, 2009

Dear Mr. Miller;

I have reviewed your correspondence with Mr. Abrahamson regarding your encounter with Loveland Police Officers in early October 2008. Based on his legal opinion and my law enforcement opinion, we concluded that this issue is an internal matter for the Loveland Police Department to review. Therefore; I have referred your complaint to the Loveland Chief of Police for his review.

While citizens have many constitutional rights, the right to posses and carry a firearm is a right which, in the hands of the wrong person, in the wrong circumstances, may cause harm to an officer. There is a fine balance between the protection of an individual's rights and the protection of a law enforcement officer.

I am confident your complaint will be reviewed fairly and professionally by the Loveland Police Department.

Thank you;

Elliott Phelps
Chief Investigator
Office of the District Attorney
8th Judicial District
(970 498-7265)

Incident Detail Report

Data Source: **Data Warehouse**
Incident Status: **Closed**
Incident number: **2008-00059098**
Incident Date: **10/07/2008 18:21:29**
Last Updated: **05/11/2009 11:31:26**

Incident Information

Incident Type:	Double Officer Emergent	Alarm Level:	
Priority:	P2 Urgent	Problem:	Weapons
Determinant:		Agency:	01 Police
Base Response#:	10072008-0012439	Jurisdiction:	Loveland Police
Confirmation#:		Division:	District 3
Taken By:	Kuehl, Amanda S	Battalion:	District 3
Response Area:	District 3	Response Plan:	Dist 3 double
Disposition:	No Criminal Violation	Command Ch:	
Cancel Reason:		Primary TAC:	
Incident Status:	Closed	Secondary TAC:	
Certification:		Delay Reason (if any):	
Longitude:	105087411	Latitude:	40404690

Incident Location

Location Name:	LAKE LOVELAND SOUTH	County:	LARIMER
Address:	800 W Eisenhower Blvd	Location Type:	LANDMARKS
Apartment:		Cross Street:	N COLORADO AVE/LOCHMOUNT DR
Building:		Map Reference:	
City, State, Zip:	LOVELAND CO 80537		

Call Receipt

Caller Name:	anique		
Method Received:	7 Digit Emergency	Call Back Phone:	970-443-8474
Caller Type:		Caller Location:	

Time Stamps / Elapsed Times

Description	Date	Time	User	Description	Time
Phone Pickup	10/07/2008	18:21:02			
1st Key Stroke	10/07/2008	18:21:19		Received to In Queue	
In Waiting Queue	10/07/2008	18:21:29		Call Taking	
Call Taking Complete	10/07/2008	18:24:48	Kuehl, Amanda S	In Queue to 1st Assign	00:00:35
1st Unit Assigned	10/07/2008	18:22:04		Call Received to 1st Assign	00:01:02
1st Unit Enroute	10/07/2008	18:23:19		Assigned to 1st Enroute	00:01:15
1st Unit Arrived	10/07/2008	18:28:33		Enroute to 1st Arrived	00:05:14
Closed	10/07/2008	18:51:27	VisiNetMobileInterface	Incident Duration	00:30:25

Resources Assigned

Unit	Assigned	Disposition	Enroute	Staged	Arrived	At Patient	Delay Avail	Complete	Odm. Enroute	Odm. Arrived	Cancel Reason
S10	18:22:04		18:23:19		18:29:17			18:51:14			
B95	18:23:30	No Criminal Violation	18:23:30		18:28:33			18:48:35			
B114	18:25:05		18:25:05		18:30:22			18:51:27			

Personnel Assigned
No Personnel Assigned

Pre-Scheduled Information
No Pre-Scheduled Information

Transports
No Transports Information

Comments

Date	Time	User	Type	Comments
10/07/2008	18:21:47	ASK	Response	male got out of veh and put a handgun into his pants
10/07/2008	18:21:49	ASK	Response	is walking around now
10/07/2008	18:21:59	ASK	Response	sitting now over on the bench
10/07/2008	18:22:04	ASK	Response	old male white beard white hat
10/07/2008	18:22:15	ASK	Response	striped and plaid checkered shirt
10/07/2008	18:22:33	ASK	Response	got out of tan and red truck
10/07/2008	18:22:50	ASK	Response	truck parked by the statue parking lot
10/07/2008	18:23:20	ASK	Response	sitting on bench east of the plot

10/07/2008	18:23:31	CRS	Response	Backed up S10 with B95
10/07/2008	18:23:50	ASK	Response	large handgun silver and black
10/07/2008	18:24:23	ASK	Response	comp is in a blue pontiac vibe....parked in same plot
10/07/2008	18:28:13	CRS	Response	B95 male walking around now - officer sees male
10/07/2008	18:28:30	CRS	Response	B95 male has food in hand - sees officer and is walking towards him
10/07/2008	18:29:14	CRS	Response	B95 in contact Code Four 1 coop male
10/07/2008	18:32:40	CRS	Response	B114 cl ser # pf1445 tj7246 handgun -
10/07/2008	18:32:53	CRS	Response	B114 cl miller, bill l 070238
10/07/2008	18:33:49	CRS	Response	gun is clear
10/07/2008	18:34:41	CRS	Response	B114 Clear and Valid
10/07/2008	18:48:36	B95	Response	code 4, carry weapon in view, not concealed, no violation, explained our and citizens initial concern over the weapon
10/08/2008	08:55:12	CRS	Response	
10/08/2008	08:55:12	CRS	Response	
10/08/2008	08:55:12	CRS	Response	
10/08/2008	08:55:12	CRS	Response	

Address Changes
No Address Changes

Priority Changes
No Priority Changes

Alarm Level Changes
No Alarm Level Changes

Call Activities

Date	Time	Radio	Activity	Location	Comments	User
10/07/2008	18:21:29		Incident in Waiting Queue			
10/07/2008	18:21:30		Incident in Waiting Queue Timer Clear			
10/07/2008	18:21:43		Read Incident		Incident 700 was Marked as Read.	KG
10/07/2008	18:22:04	S10	Dispatched	800 W Eisenhower Blvd [LAKE LOVELAND SOUTH]	Response Number (10072008-0012439)	KG
10/07/2008	18:22:09		Read Comment		Comment for Incident 700 was Marked as Read.	CRS
10/07/2008	18:23:14		UserAction		User clicked Exit/Save	CRS
10/07/2008	18:23:19	S10	Responding	800 W Eisenhower Blvd [LAKE LOVELAND SOUTH]	Responding From = W 37TH ST\N GRANT AVE	CRS
10/07/2008	18:23:30	B95	Dispatched	800 W Eisenhower Blvd [LAKE LOVELAND SOUTH]	Response Number (10072008-0012440)	CRS
10/07/2008	18:23:30	B95	Responding	800 W Eisenhower Blvd	Responding From = 374 Blue Azurite Ave	CRS
10/07/2008	18:23:30	S10	Unit Backed up	LAKE LOVELAND SOUTH	Backed up with B95	CRS
10/07/2008	18:24:07		Read Comment		Comment for Incident 700 was Marked as Read.	CRS
10/07/2008	18:24:40		UserAction		User clicked Exit/Save	CRS
10/07/2008	18:24:48		UserAction		User clicked Exit/Save	ASK
10/07/2008	18:24:56		UserAction		User clicked Exit/Save	KG
10/07/2008	18:25:05	B114	Dispatched	800 W Eisenhower Blvd [LAKE LOVELAND SOUTH]	Response Number (10072008-0012441)	VNM
10/07/2008	18:25:05	B114	Responding	800 W Eisenhower Blvd [LAKE LOVELAND SOUTH]	Responding From = N Boise Ave & E Eisenhower Blvd	VNM
10/07/2008	18:27:25		Read Comment		Comment for Incident 700 was Marked as Read.	CRS
10/07/2008	18:27:35		UserAction		User clicked Exit/Save	CRS
10/07/2008	18:28:33	B95	At Scene	800 W Eisenhower Blvd		CRS
10/07/2008	18:29:17	S10	At Scene	800 W Eisenhower Blvd		CRS
10/07/2008	18:30:22	B114	At Scene	800 W Eisenhower Blvd		VNM
10/07/2008	18:32:18		Read Comment		Comment for Incident 700 was Marked as Read.	ASK

10/07/2008	18:32:42		Read Comment		as Read. Comment for Incident 700 was Marked as Read.	KG
10/07/2008	18:32:48		UserAction		User clicked Exit/Save	KG
10/07/2008	18:33:09		UserAction		User clicked Exit/Save	ASK
10/07/2008	18:35:01		UserAction		User clicked Exit/Save	CRS
10/07/2008	18:38:33		Incident Late		Active incident marked as late	
10/07/2008	18:45:39		UserAction		User clicked Exit/Save	CRS
10/07/2008	18:48:35	B95	Available	LAKE LOVELAND SOUTH		VNM
10/07/2008	18:50:50		Read Comment		Comment for Incident 700 was Marked as Read.	CRS
10/07/2008	18:50:51		UserAction		User clicked Exit/Save	CRS
10/07/2008	18:51:14	S10	Available	800 W Eisenhower Blvd [LAKE LOVELAND SOUTH]		VNM
10/07/2008	18:51:27	B114	Available	800 W Eisenhower Blvd [LAKE LOVELAND SOUTH]		VNM
10/07/2008	18:51:27		Response Closed	LAKE LOVELAND SOUTH		VNM
10/08/2008	03:09:12		UserAction		User clicked Exit/Save	RJH
10/08/2008	03:20:29		UserAction		User clicked Exit/Save	RJH
10/08/2008	08:53:03		UserAction		User clicked Exit/Save	CRS
10/08/2008	08:55:16		UserAction		User clicked Exit/Save	CRS
10/08/2008	12:09:52		UserAction		User clicked Exit/Save	KG

Edit Log

Date	Time	Field	Changed From	Changed To	Reason	Table	Workstation	User
10/07/2008	18:21:20	Address	(Blank)	lake	New Entry	Response_Master_Incident	LOVPOL01DS	ASK
10/07/2008	18:21:24	Address	lake	800 W EISENHOWER BLVD	Premise Verifie	Response_Master_Incident	LOVPOL01DS	ASK
10/07/2008	18:21:24	Latitude	0	40404690	Premise Verifie	Response_Master_Incident	LOVPOL01DS	ASK
10/07/2008	18:21:24	Longitude	0	105087411	Premise Verifie	Response_Master_Incident	LOVPOL01DS	ASK
10/07/2008	18:21:29	Response_P		Dist 3 double	(Response Viewe	Response_Master_Incident	LOVPOL01DS	ASK
10/07/2008	18:21:29	ResponsePl	0	1	(Response Viewe	Response_Master_Incident	LOVPOL01DS	ASK
10/07/2008	18:21:29	Priority_D		P2 Urgent		Response_Master_Incident	LOVPOL01DS	ASK
10/07/2008	18:21:29	Priority_N	0	2		Response_Master_Incident	LOVPOL01DS	ASK
10/07/2008	18:21:43	Read Call	False	True	(Response Viewe	Response_Master_Incident	LOVPOL01DS	KG
10/07/2008	18:22:09	Read Comme	False	True	(Response Viewe	Response_Master_Incident	LOVPOL01DS	CRS
10/07/2008	18:22:26	MethodOfCa		7 Digit Emergency	(Response Viewe	Response_Master_Incident	LOVPOL01DS	ASK
10/07/2008	18:24:02	Call_Back_		970-443-8474	(Response Viewe	Response_Master_Incident	LOVPOL01DS	ASK
10/07/2008	18:24:07	Read Comme	False	True	(Response Viewe	Response_Master_Incident	LOVPOL01DS	CRS
10/07/2008	18:24:10	Caller_Nam		anique	(Response Viewe	Response_Master_Incident	LOVPOL01DS	ASK
10/07/2008	18:27:25	Read Comme	False	True	(Response Viewe	Response_Master_Incident	LOVPOL01DS	CRS
10/07/2008	18:32:18	Read Comme	False	True	(Response Viewe	Response_Master_Incident	LOVPOL01DS	ASK
10/07/2008	18:32:42	Read Comme	False	True	(Response Viewe	Response_Master_Incident	LOVPOL01DS	KG
10/07/2008	18:50:50	Read Comme	False	True	(Response Viewe	Response_Master_Incident	LOVPOL01DS	CRS

Custom Time Stamps
No Custom Time Stamps

Custom Data Fields
No Custom Data Fields

Attachments
No Attachment