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District Attorney

OFFICE OF THE DISTRICT ATTORNEY
TENTH JUDICIAL DISTRICT, COLORADO

December 14, 2012

VIA E-MAIL TRANSMISSION

Chief Luis Velez
Pueblo Police Department
Pueblo Municipal Justice Center
200 S. Main Street
Pueblo, CO 81003

Re: Decision Letter
Officer-Involved Incident Concerning
Officer Brian Laut

Dear Chief Velez:

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 Police Department where non-criminal issues can be reviewed, or a civil action where less stringent laws, rules, and legal levels of proof apply.

Based upon a newspaper article that appeared in *The Pueblo Chieftain* on December 9, 2012, it is my understanding that you will not be taking administrative action in this matter. Nonetheless, I will present options to you in that regard should any findings or conclusions in this decision letter change your mind.

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Protecting the Rights and Safety of the People



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I. Background

Effective January 1, 2006,¹ several law enforcement agencies in Pueblo County entered into a revised "Officer-Involved Incident Protocol of the Tenth Judicial District" (Critical Incident Team, or CIT, agreement). Those who are signatories to the CIT agreement include the Pueblo Police Department, the Pueblo County Sheriff's Office, the Colorado State Patrol, and the Colorado Bureau of Investigation. 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.*

II. Statement of Investigation and Facts

A. Triggering the CIT Agreement

The Pueblo Police Department invoked the CIT agreement's investigative protocols for an incident that occurred on August 29, 2012, involving a Pueblo Police officer and the death of a citizen. The investigation was conducted by investigators from the Pueblo Police Department, the Pueblo County Sheriff's Office, the Colorado State Patrol, and the Colorado Bureau of Investigation. The investigation findings were reviewed by the District Attorney's Office.²

B. Timeline

This officer-involved shooting occurred on August 29, 2012. The Critical Incident Team's initial package of reports were received by the District Attorney's Office on October 23, 2012 (a CD disc containing, among other things, investigators' reports, case core reports, identification reports, and a preliminary autopsy report. Thereafter, other reports were received on October 26, 2012. Subsequently the District Attorney required and received additional information and supplemental reports from the team during the month of

¹ 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.

² This was the twelfth investigation involving the CIT agreement.

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November. Captain Jeffrey Teschner, Pueblo County Sheriff's Office, was extremely helpful in making sure that the District Attorney's Office received the requested information and reports. The last supplemental information and reports were made available to the District Attorney's Office on November 29, 2012.

C. Facts

1. The Call

At 6:50 a.m. August 29, 2012, Pueblo Police Department dispatch received a call that a male party was riding a bicycle and was shooting out car windows in the area of Canterbury Lane between Hollywood Drive and Vinewood Lane in Pueblo's South Side neighborhoods.

2. Police Officers Dispatched and Arrive at the Crime Scene

Pueblo Police Officer Brian Laut (Laut) heard dispatch air the call.

According to Laut, he heard police dispatch air: "that the person was shooting out [car] windows and that the reporting person was being menaced by the suspect and the suspect was shooting at the RP [reporting party]." ³ Even though he had been dispatched to recover a stolen vehicle in the area of O'Neal Avenue, he believed the shooting call sounded more serious and decided to "go that way." Dispatch had aired that it was a possible paintball gun that was being used to shoot and break car windows.

Laut proceeded to Pueblo Boulevard and O'Neal Avenue and eventually turned north onto Norman Lane. While traveling in his marked police cruiser with visual signals activated (pushing the button for audible signal) he observed a person riding a bicycle believed to be the suspect (wearing a white top and black shorts). The suspect did not stop at a stop sign located at the intersection of Norman Lane and Surfwood Lane, and continued into a dirt parking lot behind Toni & Joe's Pizzeria located at 2039 Columbia Drive. Laut believed that the suspect was aware of his presence and was fleeing.

Behind and on the north and west sides of the pizza business is a cement slab resembling a loading dock. The suspect rode on the concrete slab and hit a curb with his front tire which vaulted him over the handlebars causing the suspect to crash to the ground. The crash was

³ All quotations in section II.C.2. are from the interview of Pueblo Police Officer Brian Laut, September 10, 2012, conducted by Detective Anthony Colletti, Pueblo County Sheriff's Office, and Detective James Olonia, Pueblo Police Department. Also in attendance were legal counsel for Laut.

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described by Laut as "very violent." Laut exited his patrol cruiser in full uniform (including badge, patches and duty belt) and started approaching the suspect with the intention of running over to him in order to "hurry up and handcuff him." As he approached the suspect Laut kept telling him: "stay on the ground, stay on the ground."

But as Laut approached him, the suspect jumped to his feet as if he was unaffected by the crash, which surprised Laut because of the "extremely violent crash." Laut thought the situation would turn into a foot chase, but to his astonishment "the suspect looked at him with a very disturbing face, no emotion in his face; kind of pale" ... which gave Laut "an eerie feeling."

Then the suspect " put his right hand into his right front pants pocket in a very frantic way. ... [Laut] started yelling 'show me your hands, show me your hands, show me your hands!' ... at this time the suspect pulled what appeared to be a semi automatic handgun from his right pants pocket ... the gun resembled a 1911 semi automatic handgun ... [Laut] was saying to himself this is not a paintball gun this is a real gun ... the gun did not resemble a paintball gun at all ... as soon as the suspect pulled the handgun from his pants he pointed it directly at [Laut] ... [Laut] started backing up toward his patrol car (to put cover between them) ... as he was backing up the suspect had the handgun pointed at him and [Laut] heard a 'bang, bang' ... [Laut] felt a stinging, burning sensation on the right temple area of his head ... he knew that he was in a fight for his life and retreated to the area of the driver's side of his patrol car ... [Laut] knew that he was hit with something as it was burning his head ... he saw the suspect approaching him with the gun in his hand ... the suspect's face still looked white with no emotion ... [Laut] said ... 'this person is absolutely trying to kill me, he already pointed his gun at me.' "

Laut related that he does not remember pulling his firearm out of his holster but remembers aiming his firearm at the center mass of the suspect and firing. While he did not hear his shots, Laut noticed that his slide was functioning and his shells were ejecting. About the fourth shot that he fired, Laut saw the suspect's shoulder twitch as if he may have been hit. During the confrontation Laut "kept telling the suspect, 'drop the gun, drop the gun, drop the gun!' " The suspect started slowing his walk and Laut saw the suspect's handgun fall to the ground. At this point Laut felt relief that the suspect did not have the weapon in his hands any longer. The suspect was still standing up, but was staggering with the same pale look on his face. Then the suspect started hunching over and fell to the ground approximately 15 to 20 feet behind Laut's police cruiser. The suspect never turned his back to Laut, even after he was shot. Laut said that he radioed: "shots fired, shots fired" and called for Fire/Rescue personnel.

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The suspect, later identified as Edward Valdez III (sometimes referred to herein as the suspect), was pronounced dead at the scene. Notably, Pueblo Police Officer Stephen Jesik requested that a sheet not be placed over the body in order to not disturb or alter the crime scene in any way prior to evidence location and collection.

3. Additional Police Officers Arrive at the Crime Scene

Numerous Pueblo Police officers arrived at the crime scene.

Pueblo Police Officer Phillip Trujillo was the first police officer to arrive at the crime scene and immediately noticed that Laut's patrol cruiser had its visual signals on. He observed Laut standing in the dirt lot behind Toni & Joe's Pizzeria with his firearm holstered. Laut had blood on his forehead and face area. There was a visible round entry wound on his right forehead area. According to Officer Trujillo, Laut was in pain and feared that he had been shot. Laut appeared to be in a state of shock and "was visibly shaken, trembling and distraught ... [asking Trujillo] in a nervous, urgent tone 'am I hit, have I been shot, am I bleeding?' " (Attachments: Photographs of Laut's physical condition at the crime scene – "Laut Photo 1" and "Laut Photo 2.>").

Officer Trujillo related that the suspect was lying on the ground on his right side with blood on his torso and back area and was not moving. A black semi-automatic handgun was on the ground north of the suspect. There were eight shell casings around the suspect and behind Laut's patrol cruiser. A black guitar backpack case was at the feet of the suspect and a mountain bike was lying on the ground on the north side of the Pizzeria building below the end of the loading dock.

A vehicle belonging to Clyde Laut, father of Laut and a reserve deputy with the Pueblo County Sheriff's Office, had pulled up as shots were being fired and was parked in the dirt lot on the north side of the pizzeria facing west. (Attachment: "Crime Scene Diagram" – Note: parking lot on Columbia Drive is on the east side of the building.)

The second police officer to arrive at the crime scene was Pueblo Police Officer Greg Bowen. He observed the condition of Laut and corroborated in his report Laut's condition as explained by Officer Trujillo, above.

When Pueblo Police Officer Eric Williams arrived at the crime scene he noticed the visual signals of Laut's patrol cruiser were on. Laut was bleeding from the top of his head and was yelling: "am I hit, am I hit?" as he was pointing to his head.

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Another Pueblo Police Officer who initially arrived at the crime scene was Officer Loran Unger. He, too, confirmed the condition of Laut: "Laut appeared very upset, was visibly shaking and his voice was trembling. I observed a stream of blood running down the right side of his face." Officer Unger and Pueblo Police Officer Joseph Garcia coordinated with other officers to secure the crime scene. Notably, Officer Garcia observed that Laut had blood on his face and near his right eye.

When Fire/Rescue personnel arrived at the crime scene, Laut was transported to St. Mary-Corwin Medical Center via American Medical Response (AMR) where an emergency room physician provided him with medical attention. Surgery was required to remove a BB pellet from Laut's forehead area.

4. Evidence

a. At the Crime Scene

Officers Unger and Garcia had other officers canvass the surrounding two-block area of the crime scene for possible witnesses and any businesses that may have had cameras or video surveillance capture the events of the confrontation between Laut and Edward Valdez III.

The perimeter of the crime scene was blocked with crime scene tape (approximately the area from Surfwood Lane/Pepper Lane to Surfwood Lane/Columbia Lane and north one block from each of these locations) and a crime scene log was established. Officers were positioned at intervals around the perimeter of the crime scene to maintain its integrity.

In the area behind Laut's patrol cruiser there were several items of physical evidence including spent shell casings, a CO2 BB handgun, possible bullet fragments, and many bloodstains or drops of blood in the dirt.

Physical Evidence: Numbered placards were used to identify physical evidence. Eight Federal .40 caliber spent shell casings were found near Laut's patrol cruiser. An additional Federal .40 caliber spent shell casing was observed stuck in partially dried blood to the front of the shirt of Edward Valdez III.

A small plastic container of Copperhead .177 caliber BBs and two unused CO2 cartridges were located in the front right pocket of the shorts that Mr. Valdez was wearing.

Biological Evidence: Lettered placards were used to identify biological evidence, primarily blood stains in the dirt.

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b. Basement Room

Normally, Edward Valdez III lived with his father, Edward Valdez Jr. and his stepmother on Glenroyal Court. However, on occasion Mr. Valdez stayed with his biological mother, Jessica Valdez, in a basement room in her home. A three-ring binder was recovered in the basement room containing several notebooks inside the binder. In the notebooks there were drawings of weapons and shootings by Edward Valdez III as well as references to darkness. The drawings in the binder portrayed a number of individuals shooting at another individual. In some of the drawings, the shooters were making statements. One drawing was entitled "Storm of Steel." An arrow with the word "me" was drawn pointing to the person being shot. There were several references to death and wanting to kill humans, and statements that people would understand once he (Edward) was dead.

Some of the statements appeared to be written while Edward was in school: "everyone I love is dead," "life is a mistake," "kill them all," "my gunshot itches," "suicide is self expression."

5. Firearms and Weapons

a. Laut's Firearm (Attachment: "Weapon Photo 1.")

Laut's Glock Model 22 .40 caliber semi-automatic pistol, serial number LAN174, was examined. There was a cartridge loaded in the chamber of the pistol and six live cartridges loaded in the magazine, which was removed from the magazine well of the pistol. The pouch of his duty belt contained two Glock .40 caliber pistol magazines both capable of holding a maximum of 15 rounds of ammunition. Each magazine was fully loaded.

As noted below, video from Laut's patrol cruiser demonstrated that during the confrontation nine shots were fired by Laut in rapid succession without pause between them. This is substantiated by the fact that a total of nine shell casing were found at the crime scene. Moreover, Laut's pistol holds 16 rounds of ammunition (a magazine capable of holding 15 rounds and one round in the chamber). Seven cartridges remained in the pistol and nine had been fired.

The multiple gunshot wounds inflicted on Mr. Valdez were caused by the bullets that were fired from Laut's pistol. See Autopsy, below.

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b. Desert Eagle BB Handgun (Attachment: "Weapon Photo 2")

The Baby Desert Eagle CO2 BB handgun, serial number 11C32509, used by Edward Valdez III appeared damaged. On the right hand side of the rear trigger guard and grip portion of the handgun it appeared there was a recent bullet impact or bullet strike causing damage to the weapon. In fact, the bullet strike appeared to have impacted the handgun in a front to back path as if the muzzle end of the handgun were pointed in approximately the same direction as the muzzle of the weapon firing the projectile that damaged the BB handgun.

c. Clyde Laut's Firearm

Clyde Laut's firearm was identified as a Sig Sauer manufactured Model P226 semi-automatic pistol, caliber .40 Smith and Wesson, serial number U668279. The magazine and pistol contained the maximum 12 rounds and one additional "loose" round of ammunition. The pistol had not been fired.

6. Videos and Photographs

a. Surveillance Videos

After an extensive canvass of businesses in the area of the crime scene for video surveillance it was determined that no surveillance cameras were operational such that they would have captured on video the confrontation.

b. Video From Laut's Patrol Cruiser

After Laut exits his patrol cruiser he can be seen entering the video, left to right, from the driver's side, then walking around the front of his patrol cruiser. He appears to be touching his firearm. Then he goes out of view on the passenger (right) side. Seconds later, Laut comes back into view of the video hurriedly backpedaling around the front of his cruiser (almost turning his side toward the suspect). Mr. Valdez is then seen on the video running toward Laut, from the right to left (as Laut retreats) with a black handgun clearly in the right hand of Mr. Valdez. He is beginning to point his weapon at Laut. Mr. Valdez is wearing a guitar backpack case on his back. As Mr. Valdez gets out of camera view (left), nine shots are heard. The shots are in rapid succession without pause between them. About four bullet strikes can be seen impacting a dirt field northeast of the location. As shots are fired, Clyde Laut pulls up in his personal vehicle. (Attachments: "Patrol Car Video" and "Six Photo Stills" (taken from the video))

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7. Witnesses

An extensive neighborhood canvass for witnesses was conducted. Material witnesses and their observations follow:

a. David McDonald

The morning of the episode Mr. McDonald observed a male person riding a bicycle who appeared to be shooting out car windows around his neighborhood. At that moment Mr. McDonald began following this individual in his vehicle he called 911 and started talking with a police dispatcher. He told the dispatcher the person was shooting out windows of parked vehicles and indicated the location and direction the person was riding and what he was wearing (white top and black shorts).

During the time he followed this person, the person stopped and pulled out what appeared to be a weapon, aiming it at Mr. McDonald. Apparently, an object struck Mr. McDonald's vehicle on the rear passenger side.

Prior to the fatal shooting, Mr. McDonald observed a police cruiser pass him as he pulled over to the curb and parked. It was from this position (a distance of several city blocks) that Mr. McDonald observed the confrontation that then transpired.

Mr. McDonald related that the police officer chased the person riding the bicycle, stopped his police cruiser and exited his cruiser. McDonald gave one account that the police officer had a weapon in his hand pointing it at the person but also stated that he was not able to see the police officer with his weapon drawn from his vantage point, but did see the police officer's stance. The person started running toward the direction of the police officer. Then the person fell to the ground. Mr. McDonald did not hear shots as his vehicle windows were rolled up and he was talking to the dispatcher.

b. Clyde Laut

Clyde Laut is a reserve deputy with the Pueblo County Sheriff's Office. While on his way to his personal work in his personal vehicle (off duty) he was monitoring the police channels. He heard a dispatch that a person was possibly shooting out car windows with a paintball gun near his neighborhood. The person who reported the incident was following a male person who was riding a bicycle and, at one point, had allegedly pointed the gun at the reporting party.

Mr. Laut realized that his son (Officer Brian Laut) was en route to the call. He

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contacted Laut by cell phone and advised him that he, Clyde Laut, was on his way to the location.

Notably, thereafter and while en route, Clyde Laut saw the male suspect riding his bicycle and cautiously approached him. He rolled down his vehicle window and told the suspect to stop. The suspect had no reaction to this command. But the suspect continued riding his bicycle toward Toni & Joe's Pizzeria. Clyde Laut then proceeded to that location and parked his vehicle on the north side of Toni & Joe's Pizzeria. His personal firearm was underneath the seat of his personal vehicle. He thought that he grabbed his firearm upon exiting his vehicle as he observed the suspect "approximately 30 feet in front of him standing (sic) in front of Brian Laut's patrol cruiser, and he could see the suspect holding a black handgun in his right hand." He heard (Officer Brian) Laut yell for the suspect to drop the weapon or get on the ground or both. (Officer Brian) Laut was moving or stepping backward as he was shooting. Clyde Laut heard four or five shots.

After he heard the last shot being fired, Clyde Laut noticed that the black handgun that the suspect had held in his right hand was lying on the ground. It appeared to be a black semi-automatic handgun with a missing or broken grip. He looked over at (Officer Brian) Laut and observed blood running down the right side of his head from his hairline into his right eye as well as bleeding from his left elbow.

As he knelt down over the suspect, Clyde Laut checked the suspect's pulse, then rolled the suspect over ½ turn to make sure he didn't have another weapon on him.

Clyde Laut then returned to his personal vehicle and put his firearm back underneath the seat, retrieved his badge and police radio, and aired "shots fired." During the incident, Clyde Laut never discharged his duty firearm.

c. Karen Wheeler

Karen Wheeler was at a workout facility directly behind Toni & Joe's Pizzeria when the episode occurred. She watched a police officer in his cruiser chase a person on a bicycle. A short time later the person on the bicycle crashed extremely hard, having gone end over end.

The police officer stopped his cruiser, exited it, ran around the front of the cruiser as if he was going to assist the person who was riding the bicycle, but then she could see that the police officer abruptly stopped and drew his weapon and pointed it at the

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male person who had been riding the bicycle. "The police officer then started backing up, walking backwards, re-tracing his steps from the front of the cruiser around; walking backwards towards the rear of the police cruiser." The male person who had crashed his bicycle was holding a handgun and pointing it at the police officer and was walking toward the officer. Then she heard six to eight shots and saw that the male person who had been riding the bicycle was down on the ground.

d. Jessica Valdez

Jessica Valdez is the biological mother of Edward Valdez III, whom she described as a quiet, soft spoken young man who "had lots of patience and never really lashed out." She related that he was a graduate of Pueblo South High School in 2012. He turned 21 years of age on August 21, 2012.

According to Ms. Valdez, she gave Edward a Baby Desert Eagle BB handgun as a present. Edward's father, Edward Valdez Jr., had taken the handgun from the younger Edward in the recent past (it looked too much like a "real" weapon). In fact, Edward enjoyed shooting at cans in the prairie. Once, however, the younger Edward had shot out his stepmother's car windows. Notably, the BB handgun Ms. Valdez purchased for Edward is the identical brand and model used by him in this incident.

Ms. Valdez admitted that on the day he was fatally shot he seemed "lost and did not know what to do ... he was sad and ... something was bothering him." Although he had stopped by her home that morning to pick up his bicycle and some guitar string, she thought that he was going back to his father's house located on Glenroyal Circle.

8. Autopsy

A forensic pathologist, Michael Burson, M.D., PhD, conducted an autopsy on the body of Edward Valdez III.

Six gunshot wounds were evident:

Wound #1 entered the left shoulder at indeterminate range without exit. The trajectory was front to back; a deformed copper-jacketed lead bullet was recovered from the left back.

Wound #2 entered the right chest at indeterminate range and exited the right back. The trajectory was front to back; the bullet was not recovered.

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Wound #3 entered the abdomen at indeterminate range and did not exit. The trajectory was front to back. A deformed copper-jacketed lead bullet was recovered from the right psoas muscle.

Wound #4 entered the abdomen (right) at indeterminate range and did not exit. The trajectory was front to back. A deformed copper-jacketed lead bullet was recovered from the right psoas muscle.

Wound #5 entered the left wrist at indeterminate range and exited the wrist. The trajectory was front to back; the bullet was not recovered.

Wound #6 was to the right index finger at indeterminate range without exit. The trajectory was front to back. A deformed copper-jacketed lead bullet fragment was recovered from within the wound.

In the expert medical opinion of the forensic pathologist the cause of death was multiple gunshot wounds and internal injuries. Notably, there was no evidence that the wounds were inflicted except front to back (entering his torso while facing Laut). Additionally, no evidence exists that the wounds were inflicted while Edward Valdez III was lying on the ground.

According to the forensic pathologist, acute ethanol intoxication may have been a contributing factor to the events which led up to his death.

III. Procedural Considerations

A. 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 agency or department's "internal affairs" investigation and provides significantly broader latitude in accessing and using information concerning the background, history and job performance (prior conduct) of the involved officer(s). Issues related to the strategical decisions made by the involved officer(s) 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.

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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 determine 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(s).

B. 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 prosecution 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 person who kills another person can be guilty of a crime and also 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.

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IV. Legal Analysis – Criminal Law

A. Criminal Liability in General

Criminal liability is established in Colorado only if it is proved beyond a reasonable doubt that someone has committed all of the elements of an offense defined by Colorado law, and it is proved beyond a reasonable doubt that the offense was committed without any statutorily-recognized justification or excuse. *See* Sections 18-1-407, 18-1-502, 18-1-701 and 18-1-710, C.R.S.

B. Use of Deadly Force by a Peace Officer

1. Legal Justification: Colorado’s Use-of-Force Statutes

Subject to the provisions of section 18-1-707, C.R.S., a peace officer who uses excessive force in pursuance of such officer’s law enforcement duties is subject to the criminal laws of Colorado, including the laws relating to homicide, to the same degree as any other citizen. Section 18-8-803, C.R.S.⁴

While knowingly or intentionally shooting and causing the death of another person is generally prohibited as homicide in Colorado, section 18-3-101(1), C.R.S., the Colorado Criminal Code specifies certain circumstances in which the use of deadly physical force is justified. *See* Sections 18-1-701 and 18-1-707, C.R.S.

A peace officer is justified in using deadly physical force upon another person to effectuate an arrest, or when attempting to effectuate an arrest, only when he reasonably believes that it is necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force. Section 18-1-707(2)(a), C.R.S.

Additionally, a peace officer is justified in using deadly physical force upon another person to effect an arrest, or when attempting to effectuate an arrest, when he reasonably believes that it is necessary to effect an arrest, or to attempt to effectuate an arrest, of a person whom he reasonably believes “[o]therwise indicates ... that he is likely to endanger human life or

⁴ Section 18-8-803 C.R.S. “is consistent with national norms of acceptable force. Colorado officers may be charged with: (1) manslaughter, where they recklessly cause the death of another;” (18-3-104) “and (2) criminally negligent homicide, where they cause death by conduct constituting criminal negligence” (18-3-105). McGuinness, *Constitutional Issues in the Criminal Prosecution of Law Enforcement Officers*, 33 Colo. Law. 55 (2004).

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to inflict serious bodily injury to another unless apprehended without delay.” Section 18-1-707(1) and (2)(b)(III), C.R.S.

In summary, these “use-of-force” statutes establish Colorado standards that provide that officers are “justified in using reasonable and appropriate physical force upon another person when and to the extent that the officer reasonably believes it necessary ...” *Boykin v. People*, 45 P. 419 (Colo. 1896) [A police officer who did not provoke an assault and was engaged in making an arrest is not obligated to retreat before defending himself].

2. Legal Justification: Colorado’s Use-of-Force Statutes – Apparent Necessity v. Actual Necessity

Section 18-1-704(1), C.R.S. 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.” Notably, deadly force may be used if the officer reasonably believes a lesser degree of force is inadequate and the officer has reasonable grounds to believe, and does believe, that he or another person is in imminent danger of being killed. Section 18-1-704 (2)(a), C.R.S. and *See Campbell v. People*, 133 P. 1043 (Colo. 1913).

3. Public Entities: Policies Required Under Colorado Law

Section 18-8-804, C.R.S. provides that each public entity that employs police officers shall adopt policies or guidelines concerning the use of force by officers within that jurisdiction which must be complied with by the officers in carrying out their duties within that jurisdiction.

4. Effectuating an Arrest

A peace officer may arrest a person when he has a warrant commanding that a person be arrested or when he has probable cause to believe that an offense was committed and has probable cause to believe that the offense was committed by the person to be arrested. Section 16-3-102(1)(a) and (c), C.R.S. All necessary and reasonable force may be used in making an arrest. Section 16-3-101(2), C.R.S. Moreover, an officer can rely upon and accept information provided by another officer when formulating probable cause. *People v. Names*, 483 P.2d 958 (Colo. 1971).

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5. The Split-Second Decision

Officer-involved shootings ultimately result from what is commonly called the “split-second decision to shoot.” “In a split second, law enforcement officers must recognize a threat, evaluate its seriousness, and instantaneously employ potentially deadly force against criminal suspects to combat apparent dangers to citizens, bystanders, fellow officers, and themselves.” McGuinness and Tucker, *Police Use of Force Standards under Colorado and Federal Law*, 36 Colo. Law. 47 (2007).

Put simply, the split-second decision is generally made to stop a real or perceived threat or aggressive behavior by the citizen. It is often the culmination of a string of decisions by the officer and the citizen that ultimately creates the need for a “split-second decision to shoot.” It is this split-second time frame which typically defines the focus of the criminal filing decision, not the string of decisions along the way that placed them in the “life or death” final frame.

Typically, when a police-citizen encounter reaches this split-second window, and the citizen is armed with a firearm, the circumstances generally make the shooting justified or, at the least, difficult to prove criminal responsibility under the criminal laws and required legal levels of proof.

6. Reactive Deadly Force Response

In deadly force confrontations which are fully justified, “... [T]here is a ‘lag time’ between the recognition of the apparent threat and the actual use of force. In the time it takes to unholster, prepare, and fire a weapon, the position of the suspect often has changed.”⁵ For example, when a suspect is moving, his position will be different when a bullet strikes him than it was when the officer’s decision was made to shoot.

Research by Bill Lewinski, Ph.D., “... proves that in the street, action really does beat reaction.”⁶ Dr. Lewinski notes:

“In an actual street encounter, an officer will never know whether he is facing the fastest, slowest or just the average person. The only way an officer can ensure his survival is to prepare for, and react as if

⁵ McGuinness and Tucker, *Police Use of Force Standards under Colorado and Federal Law*, 36 Colo. Law. 47 (2007).

⁶ Lewinski, “Why is the Suspect Shot in the Back? Finally, Hard Data on How Fast the Suspect Can Be — in 11 Different Shooting Scenarios.” *The Police Marksman*, (Nov./Dec.2000), pp. 20-28.

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he's facing the fastest person out there. All of the motions studied ... have come from actual officer-involved shootings, and reflect the real-life threats or circumstances.”⁷

Notably, Lewinski's research finds that when “an officer gets the signal that his life is in danger, his concentration becomes exclusively focused on the threat, specifically the movement of the gun in his direction.” According to Dr. Lewinski, “once the brain decides it's time to shoot, it is virtually impossible to interrupt the completion of that action.”⁸

C. Can a BB Handgun be Considered a Deadly Weapon?

A firearm,⁹ whether loaded or unloaded, or “any other weapon, device, instrument, material, or substance, whether animate or inanimate” if in the manner it is used or intended to be used is capable of producing death or serious bodily injury can be a “deadly weapon.” Section 18-1-901(3)(e)(I) and (IV), C.R.S. If a person is hit with a BB in a vulnerable area of the body, such as the eyes, it can cause serious bodily injury and would be considered a “deadly weapon.” *People In Interest of J.R.*, 867 P.2d 125 (Colo. App. 1993); *See People v. McPherson*, 200 Colo. 429, 619 P.2d 38 (1980) [a victim may not know whether an object is a firearm, and the victim's apprehension and consequent reactions will be the same as if the object were a firearm]; and *Hutton v. People*, 156 Colo. 334, 398 P.2d 973 (1965) [a simulated pistol may become dangerous].

D. A Prosecutor Must Act Within the Bounds of Professional Ethics

A district attorney is not an ordinary litigant. He represents the People of the State of Colorado. Section 20-1-102, C.R.S. “In representing citizens, the prosecutor is vested with broad discretionary authority to investigate and charge criminal conduct.” *See People in Interest of J.A.L.*, 761 P.2d 1137 (Colo. 1988). Put simply, the role of a prosecutor is to seek the truth and for justice to be done, not merely to convict. ABA Standards for Prosecution and Defense Standards, 3-1.2(c) (1993).

A prosecutor's duty is to “refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.” Rule 3.8(a), Colo. RPC [Colorado Rules of Professional Conduct].

⁷ Id.

⁸ Lewinski, “The Suspect is Shot in the Back. Is your Shooting Clean?,” *The Police Marksman*, (Sept./Oct.1999), p.23.

⁹ Section 18-1-901(3)(e)(I), C.R.S.

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E. Question Presented

As there is no dispute that Laut intended to shoot at the person he said pointed what appeared to be a firearm at him, the determination of whether the conduct of Laut was criminal is primarily a question of legal justification. That is, the question presented in this case is whether, at the instant Laut fired the shots that mortally wounded Edward Valdez III, he reasonably believed, and in fact did believe, that he was in imminent danger of great bodily injury or death from the actions of Mr. Valdez.

F. Standard of Review

“The evolving body of use-of-force law mandates a complete factual assessment of the unique facts and circumstances ‘at the moment’ of the particular use of force.” McGuinness and Tucker, footnote 5, *supra*. As previously stated, it is the split-second time frame which typically defines the focus of the criminal filing decision, not the string of decisions along the way that placed Laut and Edward Valdez III in the “life or death” final frame.

“The examination of a duty-related law enforcement incident with possible criminal implications necessitates a contextual analysis of instantaneous decision-making.”¹⁰ According to *Smith v. Freland*, 954 F.2d 343 (6th Cir., 1992):

“... [W]e must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes ‘reasonable’ action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.” *Smith v. Freland*, at 347.

V. Conclusions

The events described by Laut and witnesses in this case are in pertinent part internally consistent, are consistent with one another, and are consistent with the physical evidence developed in the investigation. There is no direct evidence or physical evidence that materially contradicts or differs from the basic account given by Laut.

¹⁰ McGuinness, *Constitutional Issues in the Criminal Prosecution of Law Enforcement Officers*, 33 Colo. Law, 55 (2004).

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The inspection of the firearms by investigators confirms that Laut fired the shots that mortally wounded Edward Valdez III. The shell casings recovered at the scene, which were identified as being fired from Laut's firearm, add further confirmation of this fact. The description of the actions taken by Laut during the final frames of his split-second decision to shoot is consistent with causing the type of fatal wounds sustained by Mr. Valdez.

A. Events During the Critical Time Frame Immediately Preceding Laut's Split-Second Decision

Jessica Valdez admitted that on the day her son Edward Valdez III was fatally shot he seemed "lost and did not know what to do ... he was sad and ... something was bothering him." Although he had stopped by his mother's home that morning to pick up his bicycle and some guitar string, she thought that he was going back to his father's house located on Glenroyal Circle.

She had given Edward a Baby Desert Eagle BB handgun as a present. The BB handgun Ms. Valdez purchased for Edward is the identical brand and model used by him in this incident.

At 6:50 a.m. August 29, 2012, Pueblo Police Department dispatch received a call that a male party was riding a bicycle and was shooting out car windows in the area of Canterbury Lane between Hollywood Drive and Vinewood Lane in Pueblo in Pueblo's South Side neighborhoods.

Neighborhood resident David McDonald observed a male person riding a bicycle who appeared to be shooting out car windows around his neighborhood. At that moment Mr. McDonald began following this individual on the bicycle in his vehicle he called 911 and started talking with a police dispatcher. He told the dispatcher the person was shooting out windows of parked vehicles and indicated the location and direction the person was riding and what he was wearing (white top and black shorts).

During the time McDonald followed this person, the person stopped and pulled out what appeared to be a weapon, aiming it at Mr. McDonald. Apparently, an object struck Mr. McDonald's vehicle on the rear passenger side. Prior to the fatal shooting, Mr. McDonald observed a police cruiser pass him as he pulled over to the curb and parked. It was from this position (a distance of several city blocks) that Mr. McDonald observed the confrontation that then transpired.

Clyde Laut, a reserve deputy with the Pueblo County Sheriff's Office, heard a dispatch that a person was possibly shooting out car windows with a paintball gun

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near his neighborhood. The person who reported the incident was following a male person who was riding a bicycle and, at one point, had allegedly pointed the gun at the reporting party.

Mr. Laut realized that his son (Officer Brian Laut) was en route to the call. He contacted his son by cell phone and advised him that he, Clyde Laut, was on his way to the location.

Notably, thereafter and while en route, Clyde Laut saw the male suspect riding his bicycle and cautiously approached him. He rolled down his vehicle window and told the suspect to stop. The suspect had no reaction to this command. But the suspect continued riding his bicycle toward Toni & Joe's Pizzeria. Clyde Laut then proceeded to that location and parked his vehicle on the north side of Toni & Joe's Pizzeria.

Laut heard dispatch air the call.

According to Laut, he heard police dispatch air: "that the person was shooting out [car] windows and that the reporting person was being menaced by the suspect and the suspect was shooting at the RP (reporting party)."¹¹ Even though he had been dispatched to recover a stolen vehicle in the area of O'Neal Avenue, he believed the shooting call sounded more serious and decided to "go that way." Dispatch had aired that it was a possible paintball gun that was being used to shoot and break the vehicle windows.

Laut proceeded to Pueblo Boulevard and O'Neal Avenue and eventually turned north onto Norman Lane. While traveling in his marked police cruiser with visual signals activated (pushing the button for audible signal) he observed a person riding a bicycle believed to be the suspect (wearing a white top and black shorts). The suspect did not stop at a stop sign located at the intersection of Norman Lane and Surfwood Lane and continued into a dirt parking lot behind Toni & Joe's Pizzeria, located at 2039 Columbia Drive. Laut believed that the suspect was aware of his presence and was fleeing.

Behind and on the north and west sides of the pizza business is a cement slab resembling a loading dock. The suspect rode on the concrete slab and hit a curb with his front tire which vaulted him over the handlebars causing the suspect to crash to the ground. The crash was described by Laut as "very violent." Laut exited his patrol cruiser in full uniform (including badge, patches and duty belt) and started approaching the suspect with the intention of

¹¹ See Footnote 3.

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running over to him in order to “hurry up and handcuff him.” As he approached the suspect Laut kept telling him: “stay on the ground, stay on the ground.”

But as Laut approached him the suspect jumped to his feet as if he was unaffected by the crash, which surprised Laut because of the “extremely violent crash.” Laut thought the situation would turn into a foot chase, but to his astonishment “the suspect looked at him with a very disturbing face, no emotion in his face; kind of pale” ... which gave Laut “an eerie feeling.”

B. Description of the Action During the Final Frames of Laut’s Split-Second Decision

Then the suspect “put his right hand into his right front pants pocket in a very frantic way. ... [Laut] started yelling ‘show me your hands, show me your hands, show me your hands!’ ... at this time the suspect pulled what appeared to be a semi automatic handgun from his right pants pocket ... the gun resembled a 1911 semi automatic handgun ... [Laut] was saying to himself this is not a paintball gun this is a real gun ... the gun did not resemble a paintball gun at all ... as soon as the suspect pulled the handgun from his pants he pointed it directly at [Laut] ... [Laut] started backing up toward his patrol car [to put cover between them] ... as he was backing up the suspect had the handgun pointed at him and [Laut] heard a ‘bang, bang’ ... [Laut] felt a stinging, burning sensation on the right temple area of his head ... he knew that he was in a fight for his life and retreated to the area of the driver’s side of his patrol car ... [Laut] knew that he was hit with something as it was burning his head ... he saw the suspect approaching him with the gun in his hand ... the suspect’s face still looked white with no emotion ... [Laut] said ... ‘this person is absolutely trying to kill me, he already pointed his gun at me.’ ”

Laut related that he does not remember pulling his firearm out of his holster but remembers aiming his firearm at the center mass of the suspect and firing. While he did not hear his shots, Laut noticed that his slide was functioning and his shells were ejecting. About the fourth shot that he fired, Laut saw the suspect’s shoulder twitch as if he may have been hit. During the confrontation Laut kept telling the suspect to: “drop the gun, drop the gun, drop the gun!” The suspect started slowing his walk and Laut saw the suspect’s handgun fall to the ground. At this point Laut felt relief that the suspect did not have the weapon in his hands any longer. The suspect was still standing up, but was staggering with the same pale look on his face. Then the suspect started hunching over and fell to the ground approximately 15 to 20 feet behind his police cruiser. The suspect never turned his back to Laut, even after he was shot. Laut said that he radioed: “shots fired, shots fired” and called for Fire/Rescue personnel.

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Karen Wheeler's eyewitness observations corroborate Laut's version. She watched a police officer in his cruiser chase a person on a bicycle. A short time later the person on the bicycle crashed extremely hard having gone end over end.

The police officer stopped his cruiser, exited it, ran around the front of the cruiser as if he was going to assist the person who was riding the bicycle, but then Ms Wheeler could see that the police officer abruptly stopped and drew his weapon and pointed it at the male person who had been riding the bicycle. "The police officer then started backing up, walking backwards, re-tracing his steps from the front of the cruiser around; walking backwards towards the rear of the police cruiser." The male person who had crashed his bicycle was holding a handgun and pointing it at the police officer and was walking toward the officer. Then she heard six to eight shots and saw that the male person who had been riding the bicycle was down on the ground.

The video surveillance from Laut's patrol cruiser corroborates his account and that of the witnesses. After Laut exits his patrol cruiser he can be seen entering the video, left to right, from the driver's side, then walking around the front of his patrol cruiser. He appears to be touching his firearm. Then he goes out of view on the passenger (right) side. Seconds later, Laut comes back into view of the video hurriedly backpedaling around the front of his cruiser (almost turning his side toward the suspect). Mr. Valdez is then seen on the video running toward Laut, from the right to left, (as Laut retreats) with a black handgun clearly in the right hand of Mr. Valdez. He is beginning to point his weapon at Laut. Mr. Valdez is wearing a guitar backpack case on his back. As Mr. Valdez gets out of camera view (left), nine shots are heard. The shots are in rapid succession without pause between them. About four bullet strikes can be seen impacting a dirt field northeast of the location. As shots are fired, Clyde Laut pulls up in his personal vehicle.

Notably, there was no evidence that the fatal wounds were inflicted other than by trajectories of front to back (entering the torso of Edward Valdez III while facing Laut). The suspect suffered six gunshot wounds; one bullet entered the right chest and exited the right back. Additionally, no evidence exists that the wounds were inflicted while Edward Valdez III was lying on the ground.

Laut was justified in using physical force upon Edward Valdez III in order to defend himself from what he reasonably believed to be the use or imminent use of unlawful physical force by Edward Valdez III. Laut justifiably used a degree of force which he reasonably believed to be necessary for that purpose. His use of deadly force was justified as he reasonably believed a lesser degree of force was inadequate and he had reasonable grounds to believe,

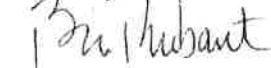
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and did believe, that he was in imminent danger of being killed.¹² Section 18-1-704(1) and (2)(a), C.R.S. *See Campbell v. People*, 133 P. 1043 (Colo. 1913). (Attachment: "Weapon Comparisons")

VI. Decision¹³

Taking into consideration the quantity, quality, admissibility and credibility of available evidence I conclude that at the instant Laut fired the shots that mortally wounded Edward Valdez III he reasonably believed, and in fact did believe, that he was in imminent danger of death from the actions of Mr. Valdez. Put simply, the action taken by Laut is statutorily-recognized justification. Therefore, there is not a reasonable likelihood or probability that Laut committed a chargeable offense that can be proven beyond a reasonable doubt, unanimously, to a jury. Accordingly, no charges will be filed against him.

Sincerely,



Bill Thiebaut
District Attorney

BT:rd

Cc: Sheriff Kirk Taylor, Pueblo County Sheriff's Office
Capt. Brian C. Lyons, Colorado State Patrol
Agent in Charge Marc Micciche, Colorado Bureau of Investigations
John Baker, Acting Chief Investigator, Office of the District Attorney
Enclosures

Addendum

In the last seven years there have been 12 Critical Incident Team investigations. One-third of these investigations involved the shooting deaths of citizens by five Pueblo Police officers and in each incident, none of the officers faced criminal charges based on their conduct. Several other investigations have involved vehicle pursuits of citizens by law

¹² A comparison of five handguns is attached. It is difficult to distinguish the Baby Eagle BB handgun from the Magnum Baby Eagle 9 mm or the Baby Eagle .40 Cal S&W or the Baby Eagle .45.

¹³ 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.

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enforcement officers in marked patrol cruisers (Pueblo Police, Pueblo County Sheriff and Colorado State Patrol) that resulted in the death of or serious bodily injury to citizens. Based upon the investigations by the Critical Incident Team, in two of these pursuit cases criminal charges were filed against two law enforcement officers — one a Sheriff's Office deputy, the other a Pueblo Police officer.

Based upon events that have occurred during the 12 investigations, in my judgment it is time to evaluate the effectiveness of the Critical Incident Team protocol.

Based on trends or situations that have taken place in many of the 12 investigations, there are six areas that raise questions for law enforcement and the new district attorney's administration to answer if the Critical Incident Team protocol is kept in place:

- Is the integrity of the CIT protocol compromised or undermined when the law enforcement agency that employs the officer who is the subject of the investigation takes on a substantial role in the investigation? Or, should that agency have any role in the investigation considering the community's concern about "blue on blue" investigations?
- Is the integrity of the CIT protocol compromised or undermined when a law enforcement officer who is the subject of the investigation is placed back on duty and/ or his law enforcement agency publicly comments on the officer's culpability, pending the completion of the investigation or decision letter?
- Is the integrity of the CIT protocol compromised or undermined when an officer who is the subject of an investigation is given an award from his agency or a public law enforcement organization for his conduct related to the critical incident, pending the completion of the investigation or decision letter ?
- Is the integrity of the CIT protocol strengthened or enhanced by having regularly scheduled training for law enforcement officers who are designated by their respective agencies to serve on the investigative team, especially in the area of multi-jurisdictional pursuits?
- Is the integrity of the CIT protocol strengthened or enhanced by having a citizens' review of the results of the investigation prior to a decision letter being released?
- Is the integrity of the CIT protocol strengthened or enhanced by having a citizens' review committee or police monitor review allegations of misconduct by police separate from the CIT protocol or investigation?