



**BILL THIEBAUT**  
District Attorney

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

May 22, 2009

VIA HAND DELIVERY

Chief Jim Billings  
Pueblo Police Department  
130 Central Main  
Pueblo, CO 81003

Re: Decision Letter  
Officer-Involved Incident Concerning  
Detective Gerald LeRay

Dear Chief Billings:

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.

**Background**

Effective January 1, 2006,<sup>1</sup> several law enforcement agencies in Pueblo County entered into a revised "Officer-Involved Incident Protocol of The Tenth Judicial District" (CIT agreement). Among those who are signatories to the CIT agreement include the Pueblo Police Department, the Pueblo County Sheriff's Office, the Colorado State Patrol, and the Colorado Bureau of Investigation (CBI).<sup>2</sup> 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

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

<sup>2</sup> Although not a part of the CIT agreement, The Florence Police Department and the Fremont County Sheriff's Office assisted Pueblo County law enforcement agencies with parts of this investigation.

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.*

## **Statement of Investigation and Facts**

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

The Pueblo Police Department invoked the CIT agreement's investigative protocols for this incident. The investigation was conducted by investigators from the Pueblo Police Department, the Pueblo County Sheriff's Office, the Colorado State Patrol, the CBI and the District Attorney's Office.<sup>3</sup> Reports were received from agencies involved in the investigation as well as an autopsy report prepared by a forensic pathologist.

### ***Facts***

#### **The Alert**

Based upon a court order for arrest issued March, 7, 2009, by a district court judge in the Eleventh Judicial District (Fremont County) and an arrest warrant, on March 11, 2009, peace officers in Fremont and Pueblo Counties were on the lookout for a male by the name of David Leroy Wiggs (Wiggs) in order to effectuate his arrest. Wiggs was a suspect who was alleged to have committed sexual assault on a child in Fremont County. The alert indicated that Wiggs was last seen wearing blue jeans, a grey hoodie and sunglasses, was believed to be in the Pueblo area and "subject left (Fremont County) with a handgun ... he has said he will not be taken alive, he will either kill himself or kill someone else." All law enforcement agencies were advised to use extreme caution in making contact with Wiggs.

#### **Wiggs' State of Mind**

According to Wiggs' daughter, Diedra Collins, she received a letter that was sent to her from Wiggs which was dated March 7, 2009. In the envelope he sent money, evidence of vehicle registration and the insurance identification card for his 1998 Saturn vehicle, and

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<sup>3</sup> This was the fifth investigation involving the CIT agreement.

a document that can be described as granting power of attorney to his daughter, Diedra. Wiggs also had given Diedra verbal instructions on how to deal with his possessions and landlord. Her last conversation with Wiggs was on March 10, 2009. She said that he told her that he would rather die than go to prison again. On March 11 Deidra contacted law enforcement and told them that Wiggs "knew the police were looking for him and he would not be taken alive. He did not want to go back to jail."

The day before his death, Wiggs also contacted his sister, Rebecca Swift, and told her that the sexual assault allegations against him were false, and that he was not going to go back to prison for something he didn't do. Mrs. Swift also stated that Wiggs had said that "they'll (referencing law enforcement) have to shoot (me), ... I'll either shoot myself, or ... I'll make them shoot me."

Based upon information provided to law enforcement officers by Diedra Collins, on March 11, a 1998 Saturn vehicle, which was believed to be that of Wiggs, was found in the parking lot of the Belmont Square Apartment Complex, 2020 Jerry Murphy Road in Pueblo, and east of Fountain Creek. Additionally, an upright tent was located by law enforcement officials searching the Fountain Creek area (northeast of a building that was formerly Toys-R-Us and west of the Fountain Creek). Wiggs' daughter, Deidra, confirmed that Wiggs had told her that he had bought a new tent the previous evening.

#### **The Encounter with Wiggs**

On March 11, 2009, Pueblo Police Detective Gerald LeRay (LeRay) had the information from dispatch and other officers about Wiggs. The information he received was that contained in the alert — Wiggs was armed and dangerous and had made threats to harm others, including police, and would not be taken alive or without a fight. In fact, LeRay had printed a photo of Wiggs and the photo was located in the speedometer area of his unmarked police vehicle.

Mid-afternoon, LeRay, while in his unmarked police vehicle, observed a male matching the description of Wiggs walking from the area of Chester Avenue at East 4<sup>th</sup> Street. The male covered his face when LeRay looked at him making LeRay think: "Does this guy not want to be identified?" Then the male was walking eastbound on the north side of the East 4<sup>th</sup> Street Bridge on the sidewalk. LeRay drove eastbound by the male. The male was looking toward the Fountain Creek to the north so LeRay could not see his face clearly.

LeRay used his radio to contact dispatch. He advised that he had a subject matching the

description of Wiggs and requested a cover car so that contact with the male could be initiated.

When LeRay approach the intersection of East 4<sup>th</sup> Street and Erie Avenue he turned his unmarked police vehicle around and stopped facing southbound on Erie at East 4<sup>th</sup> Street. He continued to watch the male who, as he was standing, was still looking at the creek.

By the time Officer Kimberly Polk (Polk) arrived at the scene in her marked police vehicle, LeRay had pulled up his unmarked police vehicle into the north driving lane of westbound East 4<sup>th</sup> Street and stopped, with emergency visual signals flashing. He exited his vehicle from the driver's side of the vehicle to make contact with the male and walked around to the front bumper of his unmarked police vehicle where he began to talk to the male, who was approximately 25-40 feet away from him standing on the north sidewalk of the East 4<sup>th</sup> Street Bridge.

LeRay called out: "How's it going partner? How's it going Dave? Hey, David, how's it going? Police, I need to talk to ya." According to LeRay, the suspect turned facing him, looked at him, and then turned away from him and began to walk west, away from LeRay along the north sidewalk of the East 4<sup>th</sup> Street Bridge. LeRay yelled: "Hey hold up, I need to talk to you."

LeRay indicated that he observed Wiggs reach into the left side of his gray hoodie with his left hand. Wiggs pulled out an object LeRay believed to be a firearm as he saw the black slide of a semi-automatic firearm when Wiggs pulled it from his left pocket. LeRay yelled "gun" and drew his duty firearm from his holster and pointed it at Wiggs. LeRay commanded Wiggs: "Police, drop the gun, Police, Police let me see your hands; Police let me see your hands. Police." Wiggs did not obey the commands. Instead, while his back was turned to LeRay, Wiggs brought his left hand and the firearm around the front of his body's mid-section. His right arm bowed and the firearm was positioned underneath Wiggs' right arm at about waist level with the muzzle pointing at LeRay. At *that* moment LeRay believed that Wiggs was going to shoot him and LeRay was in fear of his life.

LeRay then fired three times at Wiggs<sup>4</sup> and saw Wiggs fall forward, face down on the

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<sup>4</sup> LeRay was still approximately 25-40 feet away from Wiggs when he fired the shots. He was standing in the street in front of the left front bumper of his unmarked police vehicle. With Wiggs' position on the sidewalk an angle was created between the two men of about 45-60 degrees. Because the sidewalk rises from the street pavement about 6" or more, Wiggs was at a higher elevation than LeRay. It is not clear if LeRay fired his shots as he back peddled to be closer to his unmarked police vehicle, which may account for the position of the three shell casings from LeRay's duty firearm located at the scene. Notably, following LeRay's radio broadcast that he had observed Wiggs, ATF agent Mark Wood arrived at the scene

north sidewalk of the bridge near the guard rail with his head in a northwest direction. Polk did not fire any shots.<sup>5</sup>

After Wiggs fell down, LeRay approached him with his duty firearm still drawn and focused on Wiggs who was lying down. LeRay then moved Wiggs' body to check for a firearm and also for any signs of life. LeRay rolled Wiggs over so that he was then lying on his back. LeRay did not find a firearm near the body and also determined that Wiggs was dead.

#### **Polk's Observations**

Polk corroborates most of these events. However, Polk remembers that Wiggs "kept look'n' back at LeRay and then the gun ..." while walking west, away from LeRay. According to Polk, she never saw Wiggs' left hand and recalls seeing a black object, which she believed to be a firearm, in Wiggs' right hand. Polk was in full uniform standing directly behind Wiggs but farther away from him than LeRay. In essence, her position formed a triangle with Wiggs and LeRay.<sup>6</sup>

#### **The Investigation of the Scene**

Other law enforcement officers arrived on scene and could not find a firearm on or near Wiggs. It was surmised that Wiggs' firearm had fallen over the edge of the north side of the East 4<sup>th</sup> Street Bridge into Fountain Creek which flows under the bridge.

Various citizens witnessed the events immediately preceding the shooting. At least one account was that Wiggs had an object in one of his hands which fell into the Fountain Creek over the edge of the north railing on the East 4<sup>th</sup> Street Bridge. Scuff marks were located on the concrete toward the edge of the bridge where Wiggs' body was positioned.

A search for an object thought to be Wiggs' firearm was conducted by the Pueblo County Sheriff's Office. In order to more effectively search the creek, it was determined by the

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and observed LeRay facing Wiggs with his firearm drawn but moving backward toward the front of LeRay's unmarked police vehicle.

<sup>5</sup> LeRay's duty firearm was a Glock Model 27, 40 S&W #DZB-429; Polk's duty firearm was a Glock Model 22, 40 S&W BTA-987.

<sup>6</sup> Polk is a School Resource Officer. On March 11, 2009 she was assigned to Risley Middle School. Pueblo City Schools (District 60) sent information to the school about Wiggs being in the area of the school. Polk, who knew about Wiggs, left school later than usual that day to be sure the children were safe. On her way to the police station via East 4<sup>th</sup> Street she responded to the scene after she heard LeRay's radio broadcast that he had someone on the East 4<sup>th</sup> Street Bridge matching the description of Wiggs.

investigating officers that rerouting the flow of the creek would enhance the search for the object. On March 12, 2009, the creek was channeled in a different direction. An object, a Winchester 9mm Luger firearm, was found by Sheriff Kirk Taylor. The safety on the firearm, a semi-automatic handgun, was not enabled and the hammer on the firearm was cocked, and in single action.

Two spent shell casings were lying on the north sidewalk about 25-40 feet east of the body of Wiggs. A third shell casing was found under LeRay's unmarked police vehicle just in front of the front passenger tire. This shell casing was to the south and slightly behind the shell casings found on the sidewalk.

#### **Search of Wiggs' Vehicle**

On March 12, 2009, a search warrant was executed on the 1998 Saturn vehicle found in the Belmont Square Apartment Complex, near Fountain Creek where Wiggs' tent had been set up. The vehicle was confirmed to be owned by Wiggs.

A suicide note written and signed by Wiggs was found in the vehicle, in which he commented about the mistakes he had made and that suicide was the only option he felt he had available. Wiggs' daughter, Diedra, confirmed that it was her father's handwriting and it was his signature on the note.

A box of Winchester 9mm Luger ammunition was found in the trunk of the vehicle. The box was open and 12 of the 100 bullets were missing, leaving 88 bullets in the box. The ammunition found in the car is the same kind of ammunition that was in the firearm that was recovered from Fountain Creek.

#### **Colorado Bureau of Investigation – Recovered Firearm**

On March 13, 2009, CBI determined that the firearm recovered from the Fountain Creek was loaded with 11 rounds of ammunition, and had another round of ammunition in the chamber, for a total of 12 rounds of ammunition. All of the bullets in the weapon were Winchester 9mm Lugers. Examination of the firearm did not disclose any trace DNA, or latent prints that were suitable for comparison to known prints.

#### **The Autopsy**

On March 13, 2009, a postmortem examination of Wiggs was conducted by forensic pathologist Dr. Kelly Lear-Kaul of the Arapahoe County Coroner's Office. Trace metal detection spray was applied at the examination and it was found that Wiggs' left palm and fingers had come into contact with a metal object.

The forensic pathologist determined that Wiggs sustained a single gunshot entry wound to the base of the neck. There was no exit wound and the bullet from this single gunshot wound was lodged behind his left eye. Dr. Lear-Kaul indicated that the bullet severed the carotid artery on the left side of the neck, which caused the death of Wiggs. An examination by the CBI of the bullet indicated that it was consistent with test-fired bullets from LeRay's duty firearm in "class characteristics ... , caliber and direction of twist."

## **Procedural Considerations**

### ***Administrative Actions***

An administrative review is controlled by less stringent legal levels of proof and rules than a *criminal review* and can provide both positive remedial options and punitive sanctions. This process can be said to result from an agency'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. Issues related to the strategic decisions made by the involved officer leading up to the critical incident are most effectively addressed by the department's administrative review. This type of information may have limited or no applicability to *criminal reviews*, but is very important in making administrative decisions.

There are a variety of actions that can be taken administratively by the department in response to its review. On the one hand, the department's review may reveal that no action is required. On the other hand, the department may 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.

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

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

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

It is the general responsibility of a district attorney to review cases prior to placing them into the judicial branch’s court system. Put simply, a district attorney has a criminal “charging” responsibility. Charging may be through the complaint/information process or the grand jury presentment process. The charging “discretion” reposed in a district attorney is an awesome power to be used judiciously. If ever justice is to be established in a community, it will first come from a local district attorney’s charging practices. This is the area of discretionary power that best defines a prosecutor’s personal criminal justice philosophy. Accordingly, if there is reasonable likelihood or probability of conviction, a district attorney may conclude that one has committed a chargeable offense. Among other things, this standard takes into account the quantity, quality, admissibility and credibility of available evidence.

## **Legal Analysis – Criminal Law**

### ***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.

### ***Use of Deadly Force by a Peace Officer***

#### **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.<sup>7</sup>

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 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].

**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

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<sup>7</sup> 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).

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).

**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.

***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. Nanes*, 483 P.2d 958 (Colo. 1971).

***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.

### ***Reactive Deadly Force Response***

Often the threatening suspect may end up being shot and hit in side or rear angles as a result of an officer's reactive deadly force response. When an officer shoots a suspect and a bullet hits the subject in side or rear angles, this is a very different angle of entry than the average, uninformed civilian, law enforcement officer or officer of the court would expect.

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."<sup>8</sup> 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 ... [and] will provide a clear explanation for ... why so many suspects get shot in the back."<sup>9</sup> 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 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."<sup>10</sup>

According to Dr. Lewinski's research, it was apparent in most situations where the subject utilizes almost no hip rotation and little shoulder or upper body rotation to point the firearm back at the officer and shoot, the consequence of this is that any officer who shoots a subject in this position — either when the firearm is pointed at them or in immediate reaction to that pointing — will hit the subject from a rear angle.

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

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<sup>8</sup> McGuinness and Tucker, *Police Use of Force Standards under Colorado and Federal Law*, 36 Colo. Law. 47 (2007).

<sup>9</sup> 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.

<sup>10</sup> *Id.*

decides it's time to shoot, it is virtually impossible to interrupt the completion of that action."<sup>11</sup>

### **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].

### **Question Presented**

As there is no dispute that LeRay intended to shoot at the person he said pointed a firearm at him, the determination of whether the conduct of LeRay was criminal is primarily a question of legal justification. That is, the question presented in this case is whether, at the instant LeRay fired the shot that mortally wounded Wiggs, he reasonably believed, and in fact believed, that he or another person, was in imminent danger of great bodily injury or death from the actions of Wiggs.

### **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 8, *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 LeRay and Wiggs 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."<sup>12</sup>

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<sup>11</sup> Lewinski, "The Suspect is Shot in the Back. Is your Shooting Clean?," *The Police Marksman*, (Sept./Oct. 1999), p. 23.

<sup>12</sup> McGuinness, *Constitutional Issues in the Criminal Prosecution of Law Enforcement Officers*, 33 Colo. Law. 55 (2004).

According to *Smith v. Freland*, 954 F.2d 343 (6<sup>th</sup> 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.

## Conclusions

The events described by LeRay, Polk 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 LeRay, with the exception of Polk’s contention that Wiggs held a firearm in his right hand rather than his left hand as described by LeRay.<sup>13</sup>

The officers’ statements to the contrary, the inspection of both officers’ firearms by investigators confirms that LeRay fired the shot that mortally wounded Wiggs. The shell casings recovered at the scene, which were identified as being fired from LeRay’s firearm, adds further confirmation of this fact. The description of the action taken by LeRay during the final frames of his split-second decision to shoot is consistent with causing the type of fatal wound sustained by Wiggs.

**Events During the Critical Time Frame Immediately Preceding LeRay’s Shot:** From LeRay’s frame of reference he had probable cause to effectuate or to attempt to effectuate the arrest of Wiggs. LeRay was familiar with the alert from law enforcement about the warrant to arrest Wiggs and about Wiggs’ dangerous state of mind. Wiggs was noncompliant with LeRay’s verbal statements and commands, and made aggressive actions toward LeRay subsequent to them.

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<sup>13</sup> It is entirely probable that Polk could have concluded that Wiggs was holding his firearm with his right hand, especially with his right arm bowed and the firearm positioned underneath his right arm at about waist level with the muzzle pointing at LeRay, even though Wiggs was holding the firearm with his left hand.

**Description of the Action During the Final Frames of LeRay's Split-Second Decision:**

Wiggs' tense, rapidly evolving, uncertain actions with vigorous intensity and speed were a precursor to the shooting decision made by LeRay. These actions by Wiggs understandably could be perceived by LeRay as life threatening. Obviously, Wiggs' body language tended to be associated with LeRay's decision to shoot. LeRay saw Wiggs reach into the left side of his grey hoodie with his left hand and pull out a semi-automatic firearm with a black slide.<sup>14</sup> Then Wiggs brought his left hand and the firearm around the front of his body's mid-section, his right arm bowed, and the firearm was positioned underneath Wiggs' right arm at about waist level with the muzzle pointing at LeRay. LeRay was mentally processing the general shape of the object in Wiggs' hand faster than the fine details. Wiggs did not turn and face LeRay — Wiggs' back was facing LeRay. LeRay believed that Wiggs was going to shoot him and he was in fear for his life. LeRay drew his duty firearm and then fired at Wiggs three times. In that split-second time frame, LeRay chose to shoot to live.

LeRay was justified in using deadly physical force upon Wiggs to effectuate the arrest, or when he attempted to effectuate the arrest, as he reasonably believed that it was necessary to defend himself or a third person from what he reasonably believed to be the use or imminent use of deadly physical force. Section 18-1-707(2) (a), C.R.S.

Additionally, LeRay was justified in using deadly physical force upon Wiggs to effect the arrest or to attempt to effectuate the arrest as he reasonably believed that it was necessary to effect the arrest, or attempt to effectuate the arrest, of Wiggs whom he reasonably believed otherwise was likely to endanger human life or to inflict serious bodily injury to another unless apprehended without delay." Section 18-1-707(1) and (2)(b)(III), C.R.S.

In any event, LeRay was justified in using physical force upon Wiggs in order to defend himself or Polk from what he reasonably believed to be the use or imminent use of unlawful physical force by Wiggs, and LeRay justifiably used a degree of force which he reasonably believed to be necessary for that purpose. LeRay's use of deadly force was justified as he reasonably believed a lesser degree of force was inadequate and he had reasonable grounds to believe, and did believe, that he and Polk were in imminent danger of being killed. Section 18-1-704 (1) and (2)(a), C.R.S. *See Campbell v. People*, 133 P. 1043 (Colo. 1913).

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<sup>14</sup> A firearm is a deadly weapon. Section 18-1-901 (3)(e)(I), C.R.S.

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**Decision<sup>15</sup>**

Taking into consideration the quantity, quality, admissibility and credibility of available evidence I conclude that at the instant Detective Gerald LeRay fired the shot that mortally wounded Wiggs, he reasonably believed, and in fact did believe, that he was in imminent danger of death from the actions of Wiggs. Put simply, the action taken by Detective Gerald LeRay is statutorily-recognized justification. Therefore, there is not a reasonable likelihood or probability that Detective Gerald LeRay 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  
Agent-in-Charge Mark Micciche, Colorado Bureau of Investigation  
Agent-in-Charge Gerald Palomino, Colorado Bureau of Investigation  
Captain Scott Copley, Colorado State Patrol

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<sup>15</sup> According to the CIT agreement, as soon as practical after the critical incident and receipt of the investigative report, the District Attorney "...shall determine whether anyone committed a crime. The District Attorney shall communicate his findings, conclusions of law and decision via a decision letter to the chief law enforcement officer of the venue and employer agencies involved. ." *Officer-Involved Incident Protocol of the Tenth Judicial District, District Attorney Responsibilities*, at page 37.