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9th Judicial Critical Incident Team Coordinator
107 8th Street
Glenwood Springs, Colorado 81601

Brooks Bennett
Agent-Colorado Bureau of Investigation
2797 Justice Drive
Grand Junction, Colorado

Re: Officer Involved Shooting Investigation-DANIEL B. PIERCE-Rangely Police Lt. ROY
G. KINNEY/CBI Case No. 2018-389

Dear Commander Craine and Agent Bennett,

The purpose of this correspondence is to memorialize my charging decision regarding the officer involved shooting which occurred on Monday, December 10, 2018 in or near Rangely, Colorado. In short, I decline to file charges against Lt. Roy G. Kinney ("Lt. Kinney") of the Rangely Police Department or any other officer involved in the incident, the explanation for which is contained herein below.

I have thoroughly reviewed the 9th Judicial District Critical Incident Team's ("CIT") investigation packet which includes multiple interviews, police reports, forensic and toxicology testing, and the autopsy report of the decedent named Daniel B. Pierce. The investigation was thorough, professional, objective and complete. Thank you Agent Bennett for serving as lead investigator for the CIT and Commander Craine, thanks to all of the members of the CIT who aided and assisted in the quality investigation. I have also consulted with my staff and other elected district attorneys regarding the facts of this matter and legal conclusions reached. The important facts upon which I have relied to reach my decision to "no file" bear some highlighting. However, I should note that I have not summarized every single fact or detail of the incident herein.

Important Facts

According to his mother, Daniel Pierce suffered from mental illness. He moved to Rangely, Colorado sometime during the late summer of 2018. Prior to December 10, 2018, Mr. Pierce committed no crimes. However, Mr. Pierce did acquire the attention of local law enforcement for

behavior which caused concern of a number of citizens who contacted police as a result of his behavior.

For example, on Tuesday, December 4, 2018, kids at the local high school reported there was a man in a blue van trying to coax them into his van. Lt. Kinney and Rangely Police Chief Vince Wilczek investigated this incident and identified the van as that belonging to Mr. Pierce. On the same day, Chief Wilczek and Lt. Kinney located Mr. Pierce at the local café and talked to him about the incident reported at the high school. During this conversation, Mr. Pierce stated that he was there to talk to his nephew named "Thomas" and that Thomas had ran away toward the school. Mr. Pierce also said that his sister lived in Rangely. After his explanation, Lt. Kinney and Chief Wilczek terminated their contact with Mr. Pierce. Lt. Kinney subsequently performed follow-up investigation and spoke with Mr. Pierce's mother who told Lt. Kinney that neither Mr. Pierce's sister nor his nephew lived in Rangely. Mr. Pierce's mother also told Lt. Kinney about an incident which occurred in California. She told Lt. Kinney that several years before, Mr. Pierce and his wife had separated and that Mr. Pierce had moved in with her at her residence in Riverside, California. While living at his mother's residence, Mr. Pierce had a "psychotic episode" during which he told his mother that he had heard voices that his wife had been murdered and she needed to call the police. Being scared, Mr. Pierce's mother called the police. Mr. Pierce's mother also called Mr. Pierce's ex-wife who had not been murdered as Mr. Pierce believed. Mr. Pierce's ex-wife told Mr. Pierce's mother that several years prior, Mr. Pierce had been diagnosed as paranoid schizophrenic. As a result of this incident, Mr. Pierce's mother asked him to leave her home. It is important to note that Mr. Pierce's mother had communicated the incident which occurred in her home in California and the diagnosis of paranoid schizophrenia to Lt. Kinney prior to December 10, 2018.

Another example of Mr. Pierce's behavior, which caused alarm to citizens, occurred on Saturday, December 8, 2018. Mr. Pierce visited a local bank in Rangely asking to speak with a redheaded teller who wore a microphone. Mr. Pierce wanted to know who she was and when she worked again. As Mr. Pierce turned to leave the bank, Mr. Pierce told a teller that he was "coming back Monday and Jesus was coming with him." This scared the bank personnel and they reported this incident to the police. As a result of this incident, Lt. Kinney contacted Mr. Pierce at his home in Rangely. Lt. Kinney informed Mr. Pierce that he had scared bank personnel when he told them he was coming back to the bank the following Monday and that "Jesus was coming with him." Mr. Pierce told Lt. Kinney that he was, in fact, Jesus. At one point while Lt. Kinney was communicating with Mr. Pierce, he moved forward toward Lt. Kinney raising his voice. Mr. Pierce told Lt. Kinney that he was "Jesus Christ" in the flesh and at one point asked Lt. Kinney to shoot him and he "would come back to life in three days." Mr. Pierce then went on to sit down on his couch and take off his shoes and socks and asked Lt. Kinney to look at his scars on his feet and wrists that he insisted were the scars from his crucifixion. Lt. Kinney remained calm during this contact. Lt. Kinney told Mr. Pierce that he could be whoever he claimed to be but that he (Lt. Kinney) was there to make sure that Mr. Pierce was not a threat to himself or others. Lt. Kinney asked Mr. Pierce whether "Jesus Christ felt like hurting anyone or himself today" and Mr. Pierce said "No." Lt. Kinney contacted mental health and after a brief conversation, the mental health professional informed Lt. Kinney that since he was not harmful to himself or others, Mr. Pierce was not subject to a legal mental health hold or commitment.

Earlier in the evening on Monday, December 10, 2018, Mr. Pierce approached Lt. Kinney's vehicle which was parked beside another vehicle near the Kum & Go Convenience store in downtown Rangely. Lt. Kinney was talking with the driver of the other vehicle. Mr. Pierce walked up in between the cars. Lt. Kinney greeted Mr. Pierce and shook his hand. Mr. Pierce then told Lt. Kinney, "the person who is causing all this trouble is in the school and has his girlfriend tied up in the basement." At the time Mr. Pierce was wearing a "U.S. Army" ball cap and a brown jacket. Mr. Pierce then walked away. This behavior was consistent with the previous behavior observed by Lt. Kinney at Mr. Pierce's home on December 8, 2019.

Around 8:20 p.m. on December 10, 2018, a patron at the local Kum & Go convenience store located in downtown Rangely reported that his vehicle had been stolen while parked outside the store. A review of surveillance video revealed that Daniel Pierce, without permission or authorization of the owner of the vehicle, took the victim's vehicle and drove out of the parking lot of the Kum & Go convenience store. Lt. Kinney immediately responded and began investigating the report of the stolen vehicle. During an interview with the owner of the stolen vehicle, the owner told Lt. Kinney that he had a rifle on the front seat and a large knife inside the stolen vehicle. He also told Lt. Kinney that he did not think the rifle was loaded but that there was ammunition in the vehicle. Minutes later, Rio Blanco County Sheriff Deputy Max Becker radioed dispatch that he had located the stolen vehicle heading southbound on Colorado State Highway 139 and was following it. Deputy Becker was in a marked Rio Blanco County Sheriff patrol vehicle. Deputy Becker's vehicle had visible law enforcement decals and logos and also was equipped with emergency flashing lights and sirens.

While following the stolen vehicle without activated emergency lights and sirens, Deputy Becker communicated that he was not going to initiate a traffic stop until he had back-up police support. The driver of the stolen vehicle was driving below the posted speed limit but was weaving. Lt. Kinney terminated his interview of the owner of the stolen vehicle and responded in order to provide Deputy Becker back-up assistance. Lt. Kinney, in his marked patrol vehicle, traveled toward the location on Highway 139 where Deputy Becker was following the stolen vehicle. Lt. Kinney's patrol vehicle was equipped with visible law enforcement decals and logos and also with emergency flashing lights, sirens and a loud speaker device. While enroute to provide back-up for Deputy Becker, Lt. Kinney notified Chief Wilczek about the situation. Chief Wilczek also would ultimately respond in a marked police vehicle to provide back-up assistance to Deputy Becker. Chief Wilczek's patrol vehicle was also equipped with visible law enforcement decals and logos and also emergency flashing lights and sirens. Soon thereafter, Rangely Police Officer Tirynn Hamblin drove his marked patrol vehicle toward the moving location where the stolen vehicle was being followed southbound on Highway 139 toward Douglas Pass and the Mesa County line. Officer Hamblin's patrol vehicle was also equipped with visible law enforcement decals and logos as well as emergency flashing lights and sirens.

Prior to the arrival of Lt. Kinney and while following the stolen vehicle southbound on Highway 139, Deputy Becker observed the vehicle stop in the middle of highway. The driver of the vehicle suddenly exited the vehicle at which time Deputy Becker immediately activated his emergency lights and told the driver to show his hands. The driver immediately got back inside the stolen vehicle and began travelling again southbound on Highway 139. With his emergency lights

activated, Deputy Becker continued to pursue the stolen vehicle. Lt. Kinney caught up to Deputy Becker and went around the stolen vehicle. However, after being passed by Lt. Kinney, the driver of the stolen vehicle turned around and began driving northbound on Highway 139 back toward Rangely. Lt. Kinney turned around and headed northbound on Highway 139 to catch back up to Deputy Becker and the stolen vehicle.

Deputy Becker radioed a detailed description of the driver to dispatch relaying that the driver was a male in his forties, brown hair and wearing a "military ball cap" and a "brown jacket." Overhearing this description, Lt. Kinney recognized the description as matching his observations of Mr. Pierce earlier that evening. Based upon his knowledge of, and previous contacts with, Mr. Pierce, Lt. Kinney made the decision to maneuver his vehicle around Deputy Becker falling in behind the stolen vehicle. Lt. Kinney activated his emergency lights and sirens as he was now the lead police vehicle behind Mr. Pierce with Deputy Becker in his patrol vehicle behind Lt. Kinney's patrol vehicle and the stolen vehicle. Lt. Kinney utilized his loud speaker and addressed Mr. Pierce by name and commanded him to pull over. Lt. Kinney called out "Daniel Pierce" by name several times and gave commands over his loud speaker for him to "pull over." Mr. Pierce did not pull over and continued traveling northbound on Highway 139 toward Rangely. Still being between the stolen vehicle and Rangely, Chief Wilczek decided to deploy spike strips to disable the stolen vehicle by deflating its tires. Lt. Kinney and Deputy Becker continued following the vehicle with their emergency lights and sirens activated. Mr. Pierce continued driving a number of miles until he drove over the spike strip deployed by Chief Wilczek at which time the stolen vehicle's front driver's side tire was deflated. Mr. Pierce continued traveling southbound without stopping eventually driving on the rim of the front driver's side tire.

Mr. Pierce drove erratically on the two-lane curvy highway and at some point drove completely in the southbound lane of traffic facing northbound. While observing Mr. Pierce's erratic driving, the recorded police radio traffic revealed that Lt. Kinney stated, "He may be messing with that rifle, the way he is driving, something is distracting him." As an oncoming vehicle heading southbound in the southbound lane approached Mr. Pierce while he drove northbound in the southbound lane, Mr. Pierce maneuvered the stolen vehicle from the southbound lane back into the northbound lane avoiding a head-on collision with the oncoming vehicle. The oncoming vehicle was presumably a private citizen and unaffiliated with law enforcement and continued travelling southbound passing the police pursuit. After pursuing Mr. Pierce for many miles with emergency lights and sirens and having given a number of commands over the loud speaker for Mr. Pierce to pull over, Lt. Kinney decided to pass the vehicle to get ahead of it in order to deploy another spike strip. As Lt. Kinney maneuvered around Mr. Pierce pulling alongside the stolen vehicle, Mr. Pierce swerved toward Lt. Kinney's patrol vehicle. Lt. Kinney took evasive action driving onto the shoulder of the highway to avoid a collision. Deputy Becker observed this incident and radioed that Mr. Pierce had just tried to hit Lt. Kinney's vehicle. Lt. Kinney continued northbound for a distance and deployed another spike strip, which Mr. Pierce drove over. The second spike strip caused the front passenger side tire to deflate. Mr. Pierce did not stop and continued driving northbound eventually driving on the rims of the vehicle's two front tires. Lt. Kinney got back into his patrol vehicle and continued the pursuit toward Rangely.

As the stolen vehicle got closer to the intersection of Highway 139 and Highway 64 near Rangely, Lt. Kinney reminded all officers over the police radio that there was a firearm and a knife in the vehicle. Lt. Kinney commanded Officer Hamblin to bump the vehicle if the vehicle made a left hand turn onto Highway 64 toward Rangely. Mr. Pierce did attempt a left hand turn onto Highway 64 in the town limits of Rangely at which time Officer Hamblin bumped the stolen vehicle. As a result of this contact between Officer Hamblin's patrol vehicle and the vehicle driven by Mr. Pierce, the stolen vehicle spun around 360 degrees facing northbound again with the rear of the vehicle partially off the roadway. Although the front tires were totally destroyed and down to rims, the two back tires of the stolen vehicle were still intact. By this time, Mr. Pierce was surrounded by police vehicles on every side except the rear, with Lt. Kinney's patrol vehicle in front of the stolen vehicle. Mr. Pierce then accelerated into the side of Lt. Kinney's patrol vehicle with extensive crash impact damage to the driver's side front door and the driver's side rear door of Lt. Kinney's vehicle. After crashing into Lt. Kinney's patrol vehicle, Mr. Pierce backed up and then began attempting to drive forward again in the direction of Lt. Kinney. By this time, Chief Wilczek and Officer Hamblin had exited their patrol vehicles and were yelling at Mr. Pierce to show his hands. This is clearly audible from body camera footage. Lt. Kinney was also yelling from the inside of his vehicle for Mr. Pierce to show his hands. Mr. Pierce never raised his hands.

Mr. Pierce continued his attempts to accelerate forward in the vehicle and the roar of the engine can be heard giving the impression that Mr. Pierce was going to ram into Lt. Kinney's vehicle again. During the seconds after Mr. Pierce had rammed Lt. Kinney's patrol vehicle, Chief Wilczek announced he was going to shoot out the rear tire in an attempt to further disable the vehicle. Officer Hamblin heard Chief Wilczek's announcement. Still inside his patrol vehicle, Lt. Kinney did not hear Chief Wilczek's announcement. Lt. Kinney stated that when he heard the gunshot of Chief Wilczek at the rear tire and having not heard Chief Wilczek's announcement, because he could not see Mr. Pierce's hands and knew there was a rifle and ammunition inside the stolen vehicle, he believed that Mr. Pierce was shooting at Chief Wilczek and Officer Hamblin who were standing to the left of the driver's side of the stolen vehicle. As soon as Chief Wilczek shot the rear driver's side tire, Lt. Kinney shot two times in a controlled manner with bullets passing through the windshield of the stolen vehicle striking Mr. Pierce both times in the head region. After reviewing Lt. Kinney's body camera footage, I hear a fourth shot after Lt. Kinney's two shots, which I perceived as Chief Wilczek shooting again at the driver's side rear tire. All four shots fired occur in mere seconds. At least one of Chief Wilczek's bullets did strike the tire causing the driver's side rear tire to deflate. A bullet was later recovered from the driver's side rear tire. All four shots were properly accounted for by round-count protocols as is customary in police shooting investigations.

After shooting Mr. Pierce, Lt. Kinney was able to exit his vehicle. The engine of the stolen vehicle was still running and the roar of the engine can be heard on the body camera footage. Lt. Kinney quickly moved to the passenger's side of the stolen vehicle opening the door. At that time, Lt. Kinney believed that Mr. Pierce was deceased. Lt. Kinney reached in and turned off the roaring engine. Lt. Kinney then moved around to the driver's side of the stolen vehicle to check for signs of life. Lt. Kinney observed that Mr. Pierce was still breathing, at which time Lt. Kinney began to make efforts at getting Mr. Pierce out of the vehicle for the purpose of providing emergency medical attention. Mr. Pierce was loaded into an ambulance shortly thereafter and later died at Rangely Community Hospital.

Immediately after the incident, Lt. Kinney requested the Colorado Bureau of Investigation ("CBI") to respond to the scene. As a member of the 9th Judicial District Critical Incident Team ("CIT"), CBI Agent Brooks Bennett recommended that the CIT perform the investigation of the incident. The CIT is a multi-jurisdictional team comprised of CBI and other member law enforcement agencies throughout the 9th Judicial District. The purpose of the CIT is to perform thorough, professional and objective investigation into incidents involving police personnel. CIT Team Coordinator and Commander Josh Craine of the Garfield County Sheriff's Office recommended that Agent Bennett act as lead investigator with other members of the CIT providing investigative support and assistance. Members of the multi-jurisdiction CIT mobilized quickly and arrived in Rangely a short time later. Upon arrival, the CIT initiated an investigation and worked through the night. Over the subsequent days and weeks thereafter, CIT performed a thorough investigation of the incident resulting in a complete and comprehensive investigation case file submitted to me for review.

After reviewing the investigation file completed by the CIT, my decision is that no criminal charges are warranted. Although I did consider potential violations of police policies and best practices as a factor in my decision, my decision is based on a critical legal analysis of the timeframe during which (a) Chief Wilczek fired at the rear driver's side tire in order to further disable the stolen vehicle and (b) deadly force was utilized by Lt. Kinney which killed Mr. Pierce.

Having identified critical facts that influenced my decision, I will now address critical legal aspects of the incident.

Legal Aspects and Analysis

Below are pertinent provisions of applicable and relevant statutes and case law interpretations.

I. C.R.S. § 18-1-704-Use of Physical Force in Defense of a Person:

(1) Except as provided in subsections (2) and (3) of this section, 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.

(2) Deadly force may be used only if a person reasonably believes that a lesser degree of force is inadequate and:

(a) The actor has reasonable ground to believe, and does believe, that he or another person is in imminent danger of being killed or of receiving great bodily injury; or

(3) Notwithstanding the provisions of subsection (1) of this section, a person is not justified in using physical force if:

(a) With the intent to cause bodily injury or death to another person, he provokes the use of unlawful physical force by that other person; or

(b) He is the initial aggressor; except that his use of physical force upon another person under the circumstances is justifiable if he withdraws from the encounter and effectively communicates to the other person his intent to do so, but the latter nevertheless continues or threatens the use of unlawful physical force;

II. C.R.S. § 18-1-707-Use of Physical Force in Making an Arrest or Preventing Escape must also be considered. Below are pertinent provisions of C.R.S. § 18-1-707:

(1) Except as provided in subsection (2) of this section, a peace officer is justified in using reasonable and appropriate physical force upon another person when and to the extent that he reasonably believes it necessary:

(a) To effect an arrest or prevent the escape from custody of an arrested person unless he knows that the arrest is unauthorized; or

(b) To defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force while effecting or attempting to effect such an arrest or while preventing or attempting to prevent such an escape.

(2) A peace officer is justified in using deadly physical force upon another person for a purpose specified in subsection (1) of this section only when he reasonably believes that it is necessary:

(a) To defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force; or

(b) To effect an arrest, or to prevent the escape from custody, of a person whom he reasonably believes:

(I) Has committed or attempted to commit a felony involving the use or threatened use of a deadly weapon; or

(II) Is attempting to escape by the use of a deadly weapon; or

(III) Otherwise indicates, except through a motor vehicle violation, that he is likely to endanger human life or to inflict serious bodily injury to another unless apprehended without delay.

(3) Nothing in subsection (2) (b) of this section shall be deemed to constitute justification for reckless or criminally negligent conduct by a peace officer amounting to an offense against or with respect to innocent persons whom he is not seeking to arrest or retain in custody.

(4) For purposes of this section, a reasonable belief that a person has committed an offense means a reasonable belief in facts or circumstances that if true would not in law constitute an offense. If the believed facts and circumstances would not in law constitute an offense, an erroneous though not unreasonable belief that the law is otherwise does not render justifiable the use of force to make an arrest or to prevent an escape from custody. A peace officer who is affecting an arrest pursuant to a warrant is justified in using the physical force prescribed in subsections (1) and (2)...of this section unless the warrant is invalid and is known by the officer to be invalid.

III. C.R.S. § 18-1-503(3) defines "Criminal Negligence" as "A person acts with criminal negligence when, through a gross deviation from the standard of care that a reasonable person would exercise, he fails to perceive a substantial and unjustifiable risk that a result will occur or that a circumstance exists." Willful and ordinary negligence are distinguishable from one another. The demarcation between ordinary negligence and willful and wanton disregard is that in the latter, the actor was fully aware of the danger and should have realized its probable consequences, yet deliberately avoided all precaution to prevent disaster. Omitting to weigh consequences is simple negligence; refusing to weigh them is willful. *Trujillo v. People*, 292 P.2d 980 (1956).

IV. C.R.S. § 18-1-503(8) defines "Recklessly" as "A person acts recklessly when he consciously disregards a substantial and unjustifiable risk that a result will occur or that a circumstance exists."

VI. C.R.S. § 18-2-101(1)-Criminal Attempt-A person commits criminal attempt if, acting with the kind of culpability otherwise required for commission of an offense, he engages in conduct constituting a substantial step toward the commission of the offense. A substantial step is any conduct, whether act, omission, or possession, which is strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense. Factual or legal impossibility of committing the offense is not a defense if the offense could have been committed had the attendant circumstances been as the actor believed them to be, nor is it a defense that the crime attempted was actually perpetrated by the accused.

VII. C.R.S. § 18-3-201 defines "Peace Officer" as one "engaged in the performance of his duties...and one who is engaged or acting in, or who is present for the purpose of engaging or acting in, the performance of any duty, service, or function imposed, authorized, required or permitted by law to be performed by a peace officer...whether or not the peace officer...is within the territorial limits of his

jurisdiction, if the peace officer...is in uniform or the person committing an assault upon or offense against or otherwise acting toward the peace officer...knows or reasonably should know that the victim is a peace officer..."

VIII. C.R.S. § 18-3-104(1)-Reckless Manslaughter-A person commits reckless manslaughter when he recklessly causes the death of another person. Relative to reckless manslaughter, a person acts recklessly when he consciously disregards a substantial and unjustifiable risk that his actions will cause death. *Mata-Medina v. People*, 71 P.3d 973, 978 (Colo. 2003).

IX. C.R.S. § 18-3-105-Criminally Negligent Homicide-Any person who causes the death of another person by conduct amounting to criminal negligence commits criminally negligent homicide. To be guilty of Criminally Negligent Homicide, the accused must fail to perceive a substantial and unjustifiable risk that a certain result will occur, and the risk must be of such a nature that the accused person's failure to perceive it constitutes a gross deviation from a reasonable person's standard of care. *People v. Jones*, 193 Colo. 250 (1977). To determine whether a risk was substantial and unjustifiable, one must weigh the likelihood and potential magnitude of harm presented by the conduct and consider whether the conduct constitutes a gross deviation from the reasonable standard of care. One must consider the facts and circumstances of the individual case, both to weigh the magnitude of the harm against its likelihood, and to determine whether the risk was consciously disregarded. *People v. Hall*, 999 P.2d 207, 215-16 (Colo. 2000).

X. C.R.S. § 18-3-203(1)(d)-Assault in the Second Degree-A person commits the crime of assault in the second degree if...he recklessly causes serious bodily injury to another person by means of a deadly weapon.

XI. C.R.S. § 18-3-205(1)(a)-Vehicular Assault-If a person operates or drives a motor vehicle in a reckless manner, and this conduct is the proximate cause of serious bodily injury to another, such person commits vehicular assault.

XII. C.R.S. § 18-1-901(e)-Definitions-"Deadly weapon" means: (I) a firearm, whether loaded or unloaded; or (II) a knife, bludgeon, or any other weapon, device, instrument, material, or substance whether animate or inanimate, that, in the manner it is used or intended to be used, is capable of producing death or serious bodily injury [emphasis added]. The Supreme Court of Colorado has held that for the purposes of interpreting what "deadly weapon" means depends on the manner in which the object is used. *People v. Stewart*, 55 P.3d 107, 117 (2002). Any object used in a manner capable of producing death or serious bodily injury is a deadly weapon. *People v. Bramlett*, 573 P.2d 94, 96 (1977). Although a motor vehicle is not always a deadly weapon under the statutory definition, a motor vehicle may be a deadly weapon, however, depending on how it is used in a particular situation. *People v. Stewart*, 55 P.3d 107, 117 (2002).

XIII. C.R.S. § 18-4-409(2)(d)-A person commits aggravated motor vehicle theft in the first degree if he knowingly obtains or exercises control over the motor vehicle of another without authorization...and uses the motor vehicle in the commission of a crime other than a traffic offense.

XIV. C.R.S. § 18-9-116.5-Vehicular Eluding-Any person who, while operating a motor vehicle, knowingly eludes or attempts to elude a peace officer also operating a motor vehicle, and who knows or reasonably should know that he is being pursued by said peace officer, and who operates his or her vehicle in a reckless manner commits vehicular eluding.

XV. C.R.S. § 42-4-1401(1)-Reckless Driving-A person who drives a motor vehicle...in such a manner as to indicate either a wanton or a willful disregard for the safety of persons or property is guilty of reckless driving.

After applying the pertinent provisions of the aforementioned statutory provisions to the facts of this incident, no criminal prosecution can or should occur. The attempted apprehension and arrest of Mr. Pierce by Deputy Becker, Lt. Kinney, Chief Wilczek and Officer Hamblin is supported by evidence that he initially committed theft of a vehicle. Thereafter, there is probable cause to believe that he committed the crimes of vehicular eluding, attempted second degree assault on a peace officer-deadly weapon, attempted vehicular assault, and reckless driving. Mr. Pierce eluded police officers who were operating marked patrol vehicles with flashing emergency lights and sirens and he knew or reasonably should have known he was being pursued by law enforcement. Mr. Pierce swerved toward Lt. Kinney during the pursuit causing Lt. Kinney to take immediate evasive action to avoid getting hit. At the intersection of Highway 139 and Highway 64, Mr. Pierce rammed into Lt. Kinney's vehicle. While being pursued by multiple marked police vehicles with activated emergency lights and sirens, Mr. Pierce drove the stolen motor vehicle recklessly. As a result of direct observations by law enforcement of these multiple offenses, Deputy Becker, Lt. Kinney, Chief Wilczek and Officer Hamblin were lawfully engaging in the performance of their statutorily prescribed duties and acting as authorized, required or permitted by law to be performed by a peace officer.

At the time Lt. Kinney fired his weapon, it cannot be proven beyond a reasonable doubt that he did not possess a reasonable belief that Mr. Pierce was not engaged in imminent and unlawful use of physical, and even deadly, force upon either Lt. Kinney, Chief Wilczek and/or Officer Hamblin. Lt. Kinney had previous contacts with Mr. Pierce justifying a reasonable belief that Mr. Pierce may pose a threat to others. In addition, Lt. Kinney had previous contact with the owner of the stolen vehicle who informed him that there was a rifle inside the vehicle and ammunition. Moreover, Lt. Kinney, Chief Wilczek and Officer Hamblin all yelled for Mr. Pierce to show his hands which after repeated loud commands, he refused to do. Mr. Pierce also continued to try and drive the motor vehicle at one point ramming into Lt. Kinney's patrol vehicle causing damage to the vehicle while Lt. Kinney was still inside. It cannot be said that Lt. Kinney or Chief Wilczek would not have reasonably believed that Mr. Pierce was going to ram into Lt. Kinney's vehicle a second time with Lt. Kinney still inside.

C.R.S. § 18-1-704 authorizes deadly force if Lt. Kinney or Chief Wilczek reasonably believed that a lesser degree of force would be inadequate. It cannot be proven beyond a reasonable doubt that Lt. Kinney did not possess a reasonable belief that a lesser degree of force would be inadequate. For many miles, Lt. Kinney and the other law enforcement officers had attempted to stop the stolen vehicle using emergency lights and sirens in clearly marked patrol vehicles. Lt. Kinney utilized his loud speaker to make announcements to Mr. Pierce to pull over. Both Lt. Kinney and Chief Wilczek attempted to use spike strips to disable the vehicle. All of these intermediary attempts to safely apprehend and arrest Mr. Pierce failed. Lt. Kinney and the other officers had all attempted to use lesser degrees of force to effectuate the arrest of Mr. Pierce who had committed at least one felony crime, Aggravated Motor Vehicle Theft and perhaps more felony crimes. Mr. Pierce's erratic and reckless driving during the pursuit potentially endangered the lives of other citizens travelling on Highway 139 by driving northbound in the southbound lane. In addition, Mr. Pierce's swerving his vehicle toward Lt. Kinney's vehicle could have caused Lt. Kinney's vehicle to be struck, which could have caused Lt. Kinney to lose control of his patrol vehicle on a curvy mountainous highway causing serious injury to Lt. Kinney.

After multiple attempts to use lesser degrees of force to arrest and apprehend Mr. Pierce, the only less than deadly force options may have been pepper spray or the deployment of a TAZER. However, even after the attempts to use lesser degrees of force and bumping Mr. Pierce, Mr. Pierce was still inside the stolen vehicle and attempting to accelerate toward Lt. Kinney's patrol vehicle. In addition, after being pursued by police vehicles with lights and sirens for many miles, Mr. Pierce rammed into Lt. Kinney's vehicle after he was bumped by Officer Hamblin. The manner in which Mr. Pierce used the motor vehicle when ramming into the side of Lt. Kinney's patrol car would compel a reasonable person to interpret that the motor vehicle was being used as a "deadly weapon" within the meaning of the statutory definition.

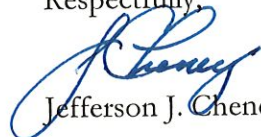
It could be said that it is somewhat foreseeable that another officer, in this case Lt. Kinney, could mistake the sound of a gunshot fired by Chief Wilczek at the tire as the suspect firing at officers. This is why many law enforcement agencies' policies are that officers refrain from firing a weapon into vehicles or firing a warning shot. However, the act of shooting at the tire as a less-than-lethal means of further disabling the vehicle does not arise to the level of failing to perceive a substantial and unjustifiable risk that a certain result (death of Mr. Pierce) would occur. At the time when Chief Wilczek fired his duty weapon into the rear tire of the stolen vehicle, less-than-lethal use of force options were unfeasible and unreasonable. Given that there was a rifle inside the vehicle and the aggressive and determined nature of Mr. Pierce's erratic driving and the fact that he had rammed into Lt. Kinney's vehicle, physically approaching the vehicle was not a reasonable option. Consequently, use of pepper spray, a TAZER or other less-than-lethal force options was not a reasonable alternative for Chief Wilczek, Lt. Kinney, Officer Hamblin or Deputy Becker.

Under prevailing Colorado law, Lt. Kinney and Chief Wilczek were entitled to defend themselves or a third person from what each reasonably believed to be the use or imminent use of deadly physical force. Consequently, it cannot be proven beyond a reasonable doubt that Lt. Kinney or Chief Wilczek were not authorized by statute to use deadly force in these circumstances. Moreover, it cannot be proven beyond a reasonable doubt that Lt. Kinney did not possess a reasonable belief that a lesser degree of force was inadequate. It cannot be proven beyond a

reasonable doubt that Chief Wilczek or Lt. Kinney acted in a criminally reckless or a criminally negligent manner.

In summary, I decline to file formal criminal charges against Lt. Kinney or any other peace officer involved in the death of Daniel B. Pierce.

Respectfully,



Jefferson J. Cheney