

September 23, 2019

To: Sheriff Manuel Gonzales III
Bernalillo County Sheriff
400 Roma Ave., NW
Albuquerque, NM 87102

BCSO case # 18-689421
DA case # 2018-05664-1

RE: Prosecutorial review of the August 6, 2018
non-fatal shooting of Carlos Ochoa, involving Detectives
Luke Edwards and Joaquin Rodriguez of the Bernalillo
County Sheriff's Office.

Dear Sheriff Gonzales:

I have been appointed Special Prosecutor by Raul Torrez, the Second Judicial District Attorney, to review the incident of August 6, 2018 for potential prosecution. My role is to determine whether Bernalillo County Sheriff Detectives Luke Edwards and Joaquin Rodriguez should be prosecuted for their action involving this incident. I have reviewed all of the available evidence, including: all police reports, diagrams, and supplemental reports from the Albuquerque Police Department, the Bernalillo County Sheriff's Department, the New Mexico State Police Department, and the Rio Rancho Police Department, lapel and belt tape audio and video recordings, audio witness interviews and transcripts, surveillance videos, criminalistics report and photos, CAD printouts, four search warrants and search warrant affidavits, criminal complaint, dispatch recordings, firearm report, drug lab report, a viewing of the surrounding area where the shooting occurred, and the criminal history of Mr. Ochoa. I conclude that it is not possible to prove beyond a reasonable doubt, that either Detective Edwards or Detective Rodriguez was not acting under the reasonable belief that the actions of Carlos Ochoa posed a threat of death or great bodily harm to themselves, or towards others. No charges will be filed: the case will be closed. My decision does not address nor limit administrative or criminal action by other agencies, or civil action by other parties.

STATEMENT OF FACTS

On August 6, 2018, at about 12:42 p.m., Carlos Ochoa was shot at and wounded by two officers from the Bernalillo County Sheriff's Department. A multi-agency task force was assembled the same day, and immediately after the shooting to conduct the investigation. This task force consisted of officers from four police agencies to include: the Bernalillo County Sheriff's Office (BCSO), the Albuquerque Police Department (APD), the New Mexico State Police Department (NMSP), and the Rio Rancho Police Department (RRPD). The following information is a summary of what was learned from that investigation.

The week prior to August 6th, 2018, members of the Fugitive Apprehension and Surveillance Team, (FAST) were involved in the surveillance and capture of fugitive Lawrence Chavez at the Bow &

Arrow Lodge, at 8300 Central Avenue S.E. The Bow & Arrow Lodge is a motel, and it is located on the south side of Central Avenue. Utah Street is located directly west of the motel, and runs in a north-south direction. Zuni is located directly south of the motel, and runs parallel to Central. It is a single story motel with the driving and parking area located in the middle, and surrounded by the motel rooms in a “U” shaped pattern. The backside of each room on the west side of the motel runs along Utah Street from Central to Zuni. During the targeted surveillance of Chavez, a second individual, Carlos Ochoa was identified as possibly residing in room 17 at the Bow and Arrow Lodge. Ochoa was a known fugitive, however he was not arrested at that time due to the focus on Chavez, and because the police needed to verify that valid arrest warrants for Ochoa’s were still active.

The FAST verified that multiple felony warrants were active on Ochoa, and in the early morning hours of August 6, 2018, surveillance was set up at the Bow and Arrow Lodge in an attempt to capture Ochoa. During the briefing, all members of FAST were advised that Ochoa had multiple outstanding warrants involving the charges of Aggravated Assault with a Deadly Weapon, Narcotics Trafficking and Resisting, Evading or Obstructing a Peace Officer. The team was instructed that Ochoa was usually armed, and was to be considered a violent fugitive, and that he was the primary suspect in a year old homicide case that was still under investigation. The officers involved in the surveillance were BCSO Detectives Lorenzo Mora, Joaquin Rodriguez, Luke Edwards, John Barricklow, and BCSO Sargent J. Kimbrough.

The plan was to surveil the Bow & Arrow Lodge until Ochoa was positively identified. Once Ochoa entered into one of the motel rooms, the plan was to then set up a parameter around the room, and using the public address announcement, call him out in an attempt to have a peaceful surrender. Each officer wore a ballistic vest that had a large badge printed on the left shoulder, and the word “Sheriff,” printed on the front and back of each vest. (See photos 1 and 2)



Photo #1



Photo #2

After surveilling the Bow & Arrow Lodge for several hours, Ochoa was spotted as he exited room 17, and then entered into room 27. Room 27 was the last room located on the northwest corner of the motel. At about 12:30ish p.m., the plan to surround the room was implemented while Ochoa was still inside room 27. Barricklow positioned himself on the northeast corner of the motel, and had a clear view of all activity looking towards the western portion of the motel. Kimbrough was positioned west of the motel in his patrol car on the south side of Utah near Zuni. Mora then drove into the motel parking area in an unmarked black truck with Rodriguez in the right front passenger seat, and Edwards in the right rear passenger seat. Mora parked his truck in a southern direction with the passenger side of the truck facing room 27. Ochoa then unexpectedly exited from room 27, and began speaking with two other individuals just outside of the room. At that time, Rodriguez was in the process of exiting from the passenger front door of the truck, when he and Ochoa made eye contact. Ochoa then fled on foot northbound around the northwest corner of room 27. He then ran westbound between the motel and a dumpster on the northwestern corner of the motel, and then towards Utah on the west side of the motel. (See photos 3 to 7)



3. Bow & Arrow Lodge, south to north view, truck in front of room 27



4. B & E Lodge, north to south view



5. Western view of motel & dumpster



6. Room 27 at northwest corner

Ochoa then ran in a southwestern direction Across Utah, and as he fled, Rodriguez and Edwards gave chase. Rodriguez ran in between the motel and the dumpster, and Edwards ran wide around the outside of the dumpster. Rodriguez shouted commands at Ochoa ordering him to stop, but Ochoa continued to flee, and ignored the commands. At one point Ochoa shouted back at Rodriguez asking, "what did I do?"



7. Utah Street west of motel

During the foot pursuit Edwards observed that Ochoa was reaching with his right hand towards either his right pocket or his waist band. He was concerned that Ochoa was reaching for a gun, or was

attempting to dispose of drugs. He believed that Ochoa was in a panicked state because his eyes were wide open, and because of his behavior. As they chased Ochoa onto Utah, Rodriguez and Edwards were about the same distance away from Ochoa, with Rodriguez to the left of Edwards. Kimbrough was in his patrol car with his emergency lights flashing traveling northbound on Utah, and had a good view of Edwards, Rodriguez and Ochoa, as the two detectives chased Ochoa towards his direction.

Edwards saw the butt end of a handgun in Ochoa's hand as he ran onto Utah Street. He was concerned because there was a daycare center located on the west side of Utah in the direction where Ochoa was running. He heard Rodriguez shout, "drop the gun." He then saw Ochoa twist his body with the firearm in his hand as he continued to run, and without saying a word, he pointed the weapon in the direction of Kimbrough and Rodriguez. Edwards did not see a muzzle flash, but believed that he heard three to four gun shots at the same time that Ochoa twisted his body and pointed the gun. Edwards believed that Ochoa had fired the weapon based upon his actions, but he was not positive. He remained concerned when he saw Ochoa stumble yet he continued to run in the direction of the daycare center. It was then that Edwards fired one round at Ochoa. Ochoa then buckled, and fell down in the middle of the street. As Ochoa fell, Edwards saw Ochoa's firearm land in the street. Edwards described the gun as a black semi-automatic handgun. The weapon was ultimately photographed where it lay, without being tampered with or moved prior to it being collected. (See photos 8 and 9)



8. Utah Street, Kimbrough's vehicle, and items in road where Ochoa fell; daycare center behind the red fence on south side.



9. N to S view on Utah where Ochoa fell, and was treated by paramedics; note gun to the right; note also back side of motel along Utah.

In the statement provided by Rodriguez he indicated that he was unable to see Ochoa's right hand during the chase, and thought that Ochoa was holding up his pants as he ran. After he commanded that Ochoa show his hands, Rodriguez then saw the butt end of a gun on the right side of Ochoa. He ordered Ochoa to drop the gun, but Ochoa continued to run. Ochoa then twisted his body, and then pointed a gun over his left shoulder in his direction. Rodriguez believed that he had heard gun fire at this time, yet never saw a muzzle flash. There is no evidence that Ochoa ever fired his gun. Rodriguez described seeing the entire barrel of a gun being pointed at him by Ochoa, and believed that he or Edwards was about to be shot. Rodriguez already had his gun in hand, and fired what he believed was two rounds at Ochoa. Criminalistics would later reveal that Rodriguez had fired three rounds. After he fired, Rodriguez saw Ochoa fall to his knees, and he saw a black semiautomatic handgun fly out from Ochoa, and land in the street to the right of where Ochoa fell.

Rodriguez had his belt tape running and the entire incident was recorded. It took eleven seconds from the moment Ochoa fled the motel, up until the fourth shot was fired. Rodriguez can be heard yelling commands to Ochoa during the chase in the following order: "better stop right there," "I'll fucken tase you," "where is your fucken hands," and "drop the weapon." After that last command, three shots can be heard in rapid succession, and then a final shot after a pause of less than one second. Rodriguez can be heard after the final shot as he shouted commands at Ochoa ordering, "don't fucken move." This last command is heard simultaneously over the screaming and moaning by Ochoa after being shot. Edwards then attempted to place handcuffs on Ochoa, but he was not able to move his right arm, and he was bleeding profusely. Immediately after the shooting Kimbrough, Mora, and Barricklow ran up and took control of the situation, contacted rescue, secured and coordinated the scene until they were relieved. Ochoa was shot once in the left arm and once in his left buttocks. He underwent surgery and was considered stable two days later on August 8th.

After he was shot and while still at the scene, Ochoa apologized to the police for his actions. Ochoa was not interviewed until August 13 while still in the hospital. In a formal interview he waived his Miranda rights, and provided a statement to BCSO Detective, Mark Craver. Ochoa indicated to Craver that he was staying with his girlfriend in room 17 at the Bow and Arrow Lodge. He said that he saw the officers as they exited from the black truck holding guns and he then fled. He did not however realize that they were officers at the time, and thought that he was about to be robbed. He did not see the police vests, and realized they were cops only after he was shot. He admitted that he had a gun in his waist band on his right side. He then changed his story, and said that he knew they were cops while running, and that his plan was to pull the gun out from his waist band, and then to surrender. He denied ever pointing the gun at the officers.

Mora did not chase after Ochoa because he needed to secure weapons that were still inside of the truck. He felt that the weapons if not secured would pose an additional danger given the pedestrian traffic in the area. He however did see Ochoa pull out a handgun as he ran towards Utah Street. He was not in position to see the shooting, but heard four shots fired. Then after securing the weapons in his truck, he proceeded on foot to the west side of the motel, and saw that Ochoa had been wounded. He saw a black semiautomatic handgun in the street just to the right of Ochoa. Mora then called dispatch, and made sure that the scene remained secure.

Kimbrough saw the handgun in Ochoa's right hand as Ochoa ran onto Utah southbound towards his direction, with Rodriguez and Edwards chasing after him. He saw Ochoa reach around the front of his body with his right hand while holding the gun, and then appeared to have fired one round in the direction of Rodriguez and Edwards. He then saw Rodriguez shoot at Ochoa first, and then saw Edwards shoot, and watched as Ochoa then fell onto the street. Kimbrough immediately called out over the radio that shots had been fired, and requested for rescue to be in route. He saw Ochoa's black and silver pistol lying about 8 feet north from where Ochoa lay, and remained near both Ochoa and the pistol until he was relieved.

Barricklow also gave chase, and was able to observe Ochoa run and reach into his waist band while looking back at the two detectives who were chasing him. He heard the "shots fired" call over the radio, but did not otherwise hear or see the gun fire because his line of vision was blocked by the motel. Barricklow was on scene within seconds after the shooting, and rendered aide to Ochoa.

Barry Lane owns a business located directly north of the Bow and Arrow Lodge at 8705 Central N.E., which is across the street from the Bow and Arrow Lodge. At the time Ochoa fled from the police, Barry was standing on his ladder working on solar panels. He saw the shooting from across Central on Utah Street as it occurred from his position on top of the ladder. He had just climbed the ladder and had heard shouts coming from the Bow and Arrow Lodge. He saw three officers wearing police vests running after a man who was refusing to stop. He heard the police give numerous commands to stop, but the male continued to run between the blue trash cans and the Bow and Arrow Lodge. The man then ran in a southwest direction across Utah with his hands closely guarded near his waist band. The police had their weapons drawn as they shouted commands to stop. As they ran, all of the officers and the male had their backs to Barry. Barry believed that he heard the police fire three shots. He did not see the male with a weapon from his position, but did see the male fall to the ground. He observed as the officers checked the male for weapons and as rescue arrived, and quickly took the male away. (See photos 9 & 10)



9. Photo of ladder that held Barry Lane.



10. Southern view of Utah from ladder where Barry Lane stood at time of shooting.

There were four shell casings collected at the scene. Three of the casings were collected on Utah and one on the sidewalk just to the east of Utah. One of the casings collected was a 9mm casing, and the other three were .40 caliber casings. All vehicles within the scene, including the rescue vehicles were checked, and none of the tires had a casing attached. A .40 caliber pistol was collected from Rodriguez at the scene. He had twelve bullets in the magazine and one in the chamber. The capacity of the magazine was fifteen bullets. Rodriguez was missing three bullets, and that was consistent with the number of .40 caliber casings collected at the scene. A 9mm pistol was collected from Edwards at the scene. He had sixteen bullets in the magazine, and one in the chamber. The capacity of the magazine was seventeen bullets. Edwards was missing one bullet, and that was consistent with the number of 9mm casings collected at the scene. It should be noted that there was also another casing collected near the dumpster on the northwest side of the motel, however that casing was excluded as being fired by all three of the weapons collected, and did not appear to be involved with the shooting in this case.

There is no indication that the black and silver pistol collected at the scene on Utah Street was stolen. The firearm was a 9mm Ruger. There were 8 rounds in the magazine plus one in the chamber. The magazine capacity was ten, and therefore there were 2 bullets missing in order for the magazine to be considered full. Unlike with the officer's weapons, there is no information that the magazine was fully loaded prior to the shooting. Three of the bullets located inside of Ochoa's 9mm Ruger were 9mm bullets, and five were .380 caliber bullets. A Search Warrant was approved, and a search of room 17 was conducted by the police. There were sixteen 9mm bullets, a magazine, and a box containing twenty-three .380 caliber bullets collected during the search. A phone identified as belonging to Ochoa was also collected from room 17, near to where the ammunition was collected. The .380 caliber rounds matched the caliber and brand located in the magazine of the weapon collected on Utah Street. There is no indication that Ochoa fired off any rounds at the scene. I was not provided information regarding which officer's projectile struck Ochoa, and I am not aware if that testing was conducted. While it would help complete the information gathered in this case, I do not believe that the results of that testing would change the outcome, regarding whether the two officer's actions in this case were justified.

There were also two projectiles collected from the daycare center located on the west side of Utah. Those projectiles were excluded as being fired from the weapons carried by Ochoa and Edwards. However, those projectiles could not be excluded as being fired by the .40 caliber pistol belonging to Rodriguez. Two projectiles were collected from the east side of the daycare center which faced Utah Street. One projectile travelled through a window that had a bullet hole in it, and the second travelled through an outside doorframe located just south of that same window. Nobody at the daycare center was injured.

Aside from the individuals mentioned above, no one at the daycare center, at the motel, or at any of the surrounding businesses was able to provide any useful information concerning the incident at the time the shooting occurred. A canvassing of all of the motel rooms, and of all the surrounding businesses was conducted without any additional information being obtained. The police interviewed Ochoa's girlfriend, acquaintances, and multiple friends, and none of them saw the shooting, or were able to provide any useful information regarding the shooting.

There was a video from the Bow and Arrow Lodge that was collected by BCSO Detective Lance Cerros. According to Cerros, Ochoa was captured on video as he fled the motel after Mora's black truck arrived near room 17. The video did not pick up Ochoa or the shooting after he fled around the north side of the motel. It also did not capture the shooting incident on Utah Street. I was not able to view the video because it did not play on my computer, but it is not an area of contention as all parties including Ochoa admitted that he fled from the motel soon after the unmarked truck pulled up. A second video from across the street at Central Traylor Supply did not show any part of the incident that occurred at the Bow and Arrow Lodge, or of the shooting.

Ochoa's belongings were collected at the hospital, and among his belongings was located a black substance that weighed .12 grams wrapped in plastic, and tested presumptive positive for heroin

by Detective Craver. In addition, after waiving his Miranda Rights, Ochoa admitted to Craver that he was aware that he had warrants out for his arrest.

Ochoa's criminal history includes felony convictions for two counts of Receiving or Transferring a Stolen Motor Vehicle occurring on 1/16/13 and 1/14/14, Aggravated Assault on a Household Member (Deadly Weapon)(Firearm Enhancement) occurring on 7/23/14, Trafficking (By Possession With Intent To Distribute)(Heroin), and Aggravated Assault (Deadly Weapon) both occurring on 11/21/17. He was found incompetent to stand trial in six separate felony cases between the years 2010 and 2013 concerning three separate felony Possession of a Controlled Substance charges, two separate felony Trafficking charges, and one felony Embezzlement of a Motor Vehicle charge. He was charged in the current case with two counts of Aggravated Assault on a Peace Officer, and one count of Possession of a Firearm or Destructive Device by a Felon. However, a Nolle Prosequere was filed on July 16, 2019, and the entire case was transferred to the U.S. Attorney's Office for federal prosecution. He has also had contact with the criminal justice system in eleven misdemeanors cases, and multiple automobile traffic related offenses.

LEGAL ANALYSIS

NMSA 1978, Section 30-2-6 is entitled, "justifiable homicide by public officer or public employee," and establishes that a peace officer may justifiably use deadly physical force when he reasonably believes that he or another is threatened with serious harm or deadly force. The officer need not prove the suspect posed a threat of death or great bodily harm to another; he need only offer evidence that raises the possibility.

Case law has established that under Section 30-2-6, the crucial consideration is the conduct and dangerousness of the suspect, not the classification of the crime that he or she has committed or is alleged to have committed. Under the Criminal Section of the Uniform Jury Instruction, 14-5173, the burden then falls on the prosecution to prove, beyond a reasonable doubt, that the use of deadly force was not justified. If the jury has a reasonable doubt about any aspect of the prosecutions claim that the shooting was unjustified, they must acquit the officer.

CONCLUSION

The question presented in this case is whether, when Detectives Rodriguez and Edwards fired at Carlos Ochoa, they were acting under the reasonable fear that they or another would be killed or seriously injured by the actions of Ochoa. Officers Kimbrough, Rodriguez, Edwards and Mora all observed Ochoa with a gun in his hand as he fled, and Ochoa admitted to this as well. Kimbrough, Rodriguez and Edwards each observed Ochoa reach around the left side of his body, and point the gun at officers. Ochoa first indicated in his interview, that he did not even know they were officers until after he was shot. He then changed his story within the same interview, and stated that he knew they were officers while being chased. His stated plan however was to surrender, and to lay the firearm on the