

September 14, 2018

Chief Michael Geier  
Chief of Police  
Albuquerque Police Department  
400 Roma Ave. NW  
Albuquerque, NM 87102

RE: Prosecutorial review of the June 21st, 2017 incident in which Albuquerque Police Officers Ray Marquez and Phetamphone Pholphiboun used a ramming maneuver to end the high-speed chase of David Barber.

APD case # 17-0058885; DA case # 2017-03772-1

Dear Chief Geier:

I have been appointed as a Special Prosecutor by Raul Torrez, the Second Judicial District Attorney, to review the incidents of June 21, 2017, for potential prosecution. I reviewed all available evidence, including police reports, witness statements, laboratory and autopsy reports, experts reports, videos, photographs, and visited the various scenes of the incident. Based on my review, I conclude that it is not possible to prove, beyond a reasonable doubt, that the police officers were not acting under the belief that David Barber's actions posed a threat of death or great bodily harm to police officers or the public in general. No charges will be filed: the District Attorney's case will be closed. This decision does not limit administrative or criminal action by other agencies, or civil actions by other parties.

#### STATEMENT OF FACTS

In the spring of 2017, the Albuquerque Police Department was trying to locate David Barber to arrest him on several warrants for a variety of charges including, Felon in Possession of a Firearm, Burglary, Battery on a Peace Officer, Larceny, and Failure to Pay Child Support. He was also the suspect in a series of burglaries he had committed with Stephanie Pacheco. On May, 11, 2017, a dark van that had been linked to the burglaries was found parked in front of apartments at 608 Grove Street NE. Officers watched the van, hoping to see Barber. When a

tow truck arrived to tow the van, which was parked illegally, Barber appeared, but escaped by knocking down the first officer who approached him. The apartment manager led the officers to an apartment 16, in which they found drug paraphernalia, and firearms that had been stolen from Ron Peterson's Guns on April 29, 2017.

On June 20<sup>th</sup>, 2017, the officers received information that Barber might be living in an RV parked at Balloon View RV Park, 500 Tyler Road NE. They began surveillance of the RV Park and saw Barber park a 26 foot Ford Gulfstream RV and connect it to the sewer and electric lines.



**The Ford Gulfstream driven by Barber during the chase.**

The officers formulated a plan to arrest Barber in the RV by bracketing it with police cars, but when they moved in, Barber was outside and saw them. He jumped in the RV and drove off, breaking the sewer and electrical connections. He drove through the locked gate in a metal fence and north on Edith Blvd. NE, running red lights and swerving around cars in his path, hitting 80 miles per hour.

When the officers saw the dangerous way he was driving, Sergeant Albert Sandoval, who was in charge of the operation, ordered all units to disengage from the chase, hoping the lack of pursuit would allow him to drive less recklessly, but the police airplane watching from above reported that he continued to speed, swerve in and out of traffic, run red lights and force cars off

the road. He drove on recklessly, constantly turning, until he turned south onto Burlison Drive NE, where he collided with a car driven by Larry Bitsoih. Barber drove on, swerving through traffic and running lights, until he reached a cul-de-sac where he let Stephanie Pacheco out near the dark van. He drove off alone, she was arrested nearby, in the van.

Barber drove on, turning and swerving to avoid the spike belts left by the officers. He attempted to drive into the covered parking lot of the Target on 2120 Louisiana Blvd.NE, but the RV was too tall and it struck the building. Nearby officers, assuming the RV was stuck, approached, but Barber suddenly reversed, almost striking one police car, driven by Doug Moore, who backed up hurriedly and forcing another officer, Matt Fisher, to run out of Barber's path to avoid being run over. Barber jumped the curb onto Indian School Road and headed north, running the red light at Menaul Blvd. At that point, Sergeant Albert Sandoval, the officer in charge, realizing that Barber was continuing to drive recklessly, and had attempted to run over a police officer, reauthorized the pursuit.

Barber drove on, turning repeatedly, avoiding spike belts, running red lights and driving the wrong way, into on-coming traffic. He ran a light at San Mateo Blvd. and struck the white pickup being driven by Juan Miguel Esparza-Carmon. Barber. Barber, still turning frequently, headed in a generally western direction, along Avenida Caesar Chavez, he drove north on 8<sup>th</sup> Street, going around the round-about on Central Blvd. in the wrong direction. At Lomas Blvd. he collided with a red Volkswagen driven by Mary Slagle. He turned toward Rio Grande Blvd., avoiding a spike belt along the way. Eventually he raced through a residential neighborhood near Indian School Road and San Pedro Drive, hitting a gray Hyundai being driven by Neil McCormick.

Sgt. Sandoval was following Barber in a canine truck driven by Officer Johnathon Walsh. After many abrupt turns and changes of direction, Barber was headed north on Washington Street toward Indian School Road. Sgt. Sandoval and Officer Walsh considered using a Pursuit Intervention Technique, or PIT maneuver: which involves pushing the back of the vehicle being pursued at an angle, which causes it to spin to a stop. The maneuver requires a road wider than Washington Street, so as Barber turned onto the wider Indian School Road, Walsh planned to initiate the PIT as Barber turned; but before he could make contact with the RV, Walsh's truck

was struck by a Lexus being driven by Gregory Cimino. The impact seriously damaged both vehicles which took Walsh and Sandoval out of the chase.

Turning west again, Barber ended up on the West Frontage Road, driving the wrong way down the one-way street, forcing vehicles to swerve and leave the road to avoid a head on collision with the RV. At Candelaria, he encountered cars waiting for the light to turn green, and rather than swerve around them, he crashed through instead, colliding with James Moore and Tyler Raines, injuring both drivers. Another spike belt was laid down, which he avoided by doing a 180 degree turn, and going airborne onto Interstate 25. He drove south on Interstate 25 and went west on Interstate 40 to Coors Blvd., where he exited and again drove the wrong way, into heavy on-coming traffic.

Sergeant Sandoval, upon hearing that Barber had apparently struck tow vehicles on the frontage road by choice, becomes more concerned. As he'd say in a later statement, "The fact that's he's displayed no concern for human life, um, whether it be the citizens or the officers involved at this point, and I know that the percentages of someone getting seriously hurt, injured, or killed are so high at this point and the direction he's going, it's just been by sheer luck or a miracle at this point that it hasn't happened yet, I wanted to make sure and stop this RV, um, by lethal force at this time." Sergeant Sandoval announced over the radio, "I am authorizing to stop this vehicle by any means necessary at this point to protect the public and also the other officers involved (inaudible.)" "By any means necessary" meant that officers were authorized to use lethal force to stop Barber.

Following behind the RV, Officer Ray Marquez, watching Barber becoming more reckless and dangerous, reached his own conclusion, "Um, the offender made the decision to drive into oncoming lanes of southbound Coors, um, with this 10,000 pound RV with heavy traffic conditions, still presenting that imminent and immediate threat to the public." Marquez began planning a ramming. He waited for the right moment and drove his vehicle into the side of the RV near the rear, but Barber prevented Marquez from positioning himself by braking abruptly and swerving toward him, trying to strike the patrol car. Finally, Officer Marquez was able to push the RV, but its greater weight prevented it from spinning: instead, it forced Officer Marquez car to swerve, striking an oncoming vehicle, and taking him out of the chase. Barber continued on in the RV.

Officer Phetamphone Pholphiboun moved into the lead chase position. He followed Barber for a few moments, but as they approached Paseo del Norte, Officer Pholphiboun, realizing that Barber was headed into the heavily congested Cottonwood Mall area, filled with numerous businesses, a large mall, restaurants, and schools concluded that, “it was just a matter of time before this guy was going to kill someone”. He decided to attempt a ramming maneuver before they reached the congested area. He positioned himself on the left side of the RV, but as he began the maneuver, Barber swerved suddenly to the left. The two vehicles collided, the RV continued its leftward path crossing the median into oncoming traffic, now pushed almost sideways on the road by Pholphiboun’s car. Barber collided with a black Malibu, driven by Tito Pacheco, who sustained serious injuries; he died approximately three weeks later.

When the crash stopped the RV, Barber jumped out and ran onto a nearby car lot where he tried to steal a jeep but was unable to start it. Officers surrounded the vehicle and he surrendered without incident.

In preparation for the trial in the civil suit filed by Tito Pacheco’s family against the city and the Police Department, both sides have hired experts to evaluate the conduct of the police officer involved. The Pacheco family hired Scott Defoe; the City and the Police Department hired Travis Yates. Both are highly qualified experts in police tactics, and not surprisingly, they have reached diametrically opposed opinions: Defoe finds the conduct unreasonable; Yates concludes that it was reasonable.

## LEGAL ANALYSIS

The officers who pursued David Barber were in the process of attempting to serve arrest warrants and would therefore be entitled to raise the defense of Justifiable homicide by public officer, NMSA 1978, Section 3-2-6. That statute establishes that a peace officer may justifiably use deadly physical force to prevent the escape of a suspect when he believes he or another is threatened with serious harm or deadly force. This same principle appears in case law: *Scott v.*

Harris 550 U.S.372 (2007) , in which Harris attempted to escape arrest by driving at high speed, swerving through traffic and running red lights. The U.S. Supreme Court concluded that such behavior constituted “an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers present.” The Court indicated, “The car chase that respondent initiated in this case posed a substantial and immediate risk of serious physical injury to others; no reasonable jury could conclude otherwise. Scott’s attempt to terminate the chase by forcing respondent off the road was reasonable.”

In New Mexico law, when one person is the target of lethal force, but another innocent person is actually killed, the intent to kill or harm the first person is considered transferred to the unintended victim, UJI 14-255.<sup>1</sup> Both logic and caselaw therefore require that any legal defenses to that transferred intent also be transferred. “The inquiry must be whether the killing would have been justifiable if the accused had killed the person whom he intended to kill, as the unintended act derives its character from the intended.” People v. Matthews, 91 Cal.App 3d 1018, 1023. In essence, the jury would be instructed to analyze the case as though Barber, not Pacheco had been killed.

Under New Mexico law, the officer need not prove that the suspect posed a threat of death or great bodily harm to another; he need only offer evidence that raises the possibility. The burden then falls on the prosecution to prove, beyond a reasonable doubt, that the use of deadly force was unreasonable. If the jury has a reasonable doubt about any aspect of the prosecution claim that the killing was unjustified, they must acquit the officer, Uniform Jury Instruction-Criminal: 14-5173 Justifiable homicide; public officer or employee.

---

<sup>1</sup> 14-255 Intent to kill one person: another killed.

When one intends to kill or injure a certain person, and by mistake or accident kills a different person, the crime, if any, is the same as though the original intended victim had been killed. In such a case, the law regards the intent as transferred from the original intended victim to the actual victim.

## CONCLUSION

The officers who used their vehicles to stop Barber said they acted because they were afraid that, if not stopped, he would kill or seriously injure someone. There is no evidence to suggest, much less prove beyond a reasonable doubt, that the officers acted for any other reason. In the absence of such evidence, a jury will almost certainly accept this element of the defense, which would lead them to the next question: were the officers' fears unreasonable under the circumstances? Evidence establishes that by the time the officers decided to ram Barber, he had been racing throughout the city for almost 80 minutes, swerving through traffic, running red lights, and driving into on-coming traffic; he'd collided with five civilians and tried to run down an officer on foot, and was attempting to cause another collision with the police cars chasing him. In addition, he showed a remarkable ability to avoid the spike belts and was headed into the most congested road on the west side of the city. In essence, he was using the 10,000 pound RV as a weapon to attempt to escape arrest. Under these circumstances, it is unlikely that any jury would conclude, beyond a reasonable doubt, that it would be reasonable to allow him to continue to careen through the city, endangering everyone in his path.

The experts hired in the civil suit would have little impact in any potential criminal case against the officers. In the civil suit, in which the jury applies the preponderance of the evidence standard, one expert need be only slightly more persuasive to carry the day; but in a criminal case, with the proof beyond a reasonable doubt standard, the expert who criticizes the police needs to be far more persuasive to be effective. In essence, the expert who finds the conduct reasonable would be raising reasonable doubts, which the opposing expert would need to eliminate- a tall order in this case. As Defoe notes, the standard to determine if an officer acted reasonably is simply whether a similarly trained officer, in the same situation would reach the same decision. In this case, three similarly trained officers, Sgt. Sandoval, Officer Marquez, and Officer Pholphiboun, all concluded that Barber posed a lethal threat requiring deadly force to stop him. The opinions of the officers on the scene are likely to carry greater weight than the paid opinion of an expert relying on hindsight.. In addition, a jury would likely be swayed by the fact that all three officers risked their own lives and safety when using the Pit or ramming maneuvers, which certainly supports the sincerity of their belief that they had run out of options.

The officers' successfully stopped Barber's rampage, but at a tragic cost- the death of an innocent driver: Tito Pacheco. A civil jury might one day conclude that the decision to ram Baber was negligent, but there is no reasonable possibility that a criminal jury, after hearing all the evidence, would conclude that the decision was criminal. In the absence of sufficient evidence to prove, beyond a reasonable doubt, that the ramming maneuver was unjustified, there is no real likelihood of a successful prosecution; therefore, no charges will be filed against Sgt. Sandoval, Officer Marquez or Officer Pholphiboun. The case will be closed.

Very truly yours,



Michael D. Cox

Special Prosecutor

Cc: Raul Torrez, District Attorney, Second Judicial District

Detective Michael Davis, Albuquerque, Police Department

Jason Bowles and Robert Gorence, attorneys for Tito Pacheco's family

Luis Robles, attorney for Phetamphetamine Pholphiboun and Ray Marquez