June 28, 2018

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

APD case # 17-0002345
DA case # 2017-01464-1

RE: Prosecutorial review of the January 7, 2017 fatal shooting of Gilbert Lovato by Albuquerque Police Department Officers Eric Brown, Russell Carter and Nava Marquez.

Dear Chief Geier:

I have been appointed Special Prosecutor by Raul Torrez, the Second Judicial District Attorney, to review the incident of January 7, 2017 for potential prosecution. My role is to determine whether APD Officers Eric Brown, Russell Carter and Nava Marquez should be prosecuted for their actions during this incident. I have reviewed all of the available evidence, including: police reports, audio interviews, criminalistics report and photos, crime scene photos, search warrant, CAD printouts, 911 and dispatch calls, criminal history for Lovato and Guzman, lapel videos, and a viewing of three scenes. I conclude that it is not possible to prove beyond a reasonable doubt that Officers Eric Brown, Russell Carter and Nava Marquez were not acting under the reasonable belief that the actions of Gilbert Lovato posed a threat of death or great bodily harm to Audrey Guzman, to themselves, and to other police officers. No charges will be filed: the case will be closed. My decision does not limit nor address administrative or criminal action by other agencies, or civil actions by other parties.

STATEMENT OF FACTS

On January 7, 2017 at about 11:22 p.m., Gilbert Lovato robbed the Village Inn when he demanded cash from the clerk, and then threatened the clerk by lifting his sleeve, and showing the clerk that he was armed with a handgun. At that time, Lovato was being surveilled by undercover officers with the Albuquerque Police Department's Investigative Support, and Armed Robbery Units, because he was suspected of committing multiple armed robberies. That night Lovato was in a black Nissan Versa that was missing the front bumper, and the front driver's side hubcap. A vehicle with the same unique description was involved in multiple armed robberies over the previous month. Audrey Guzman drove the Versa to the Village Inn located near University and Interstate 40, and parked the Versa just outside the front door of the Village Inn facing the street, while Lovato robbed the cashier at gun point. Lovato was observed by the police as he exited the front passenger side of the Versa, as he entered the Village Inn, interacted with the cashier, exited the Village Inn, and returned to the front passenger side of the Versa, which then fled the scene.

The police covertly followed the Versa until dispatch confirmed that an armed robbery had just occurred at the Village Inn. The police then contained the Versa while it was stopped at a red light, by pulling their vehicles directly in front and behind the Versa. Guzman and Lovato were ordered by the police to raise their hands in the air, but Lovato responded by pointing his handgun directly at the head of Guzman, and then in the direction of APD Sargent Eric Brown. He did not respond to officer commands to "drop the gun." At 11:29 p.m., APD Officers Erick Brown, Russell Carter and Nava Marquez opened fire, and Lovato was fatally wounded. The gun that Lovato used to threaten the cashier, Guzman, and Officer Brown, turned out to be a BB gun/pistol.

APD began its coordinated investigation into the Versa at Christmas time of 2016, but Lovato and Guzman were not identified as suspects until January 6, 2017. Multiple businesses were being robbed at gun point by a male, who fled the scenes in a black Nissan Versa that was missing both its front bumper, and its front driver's side hubcap. The Versa was also captured on video as it fled from several armed robbery scenes. The driver of the Versa was a female, and at times had children inside the Versa as it fled the scene. The male was described as being about six feet tall; skinny; Hispanic or White; and wearing a baseball cap or a beanie; he wore thick framed glasses; had facial hair; and always threatened use of a handgun.

As of January 7, 2017 there were about sixteen armed robberies being investigated that had involved the described Versa as the getaway vehicle. The robberies mostly occurred within the area surrounding Menaul, San Mateo and Montgomery, between the hours of 4:30 p.m. and midnight. The businesses that were robbed included: multiple Starbucks locations, Churches Chicken, McDonalds, Village Inn, KFC, and other like businesses including a hotel, and an Attempted Armed Robbery at a Wells Fargo Bank. When later interviewed, Guzman stated that she and Lovato had gone to Village Inn to purchase some pie. When confronted with the evidence that her car was on video at several robbery scenes, she then admitted to her involvement in eight armed robberies, and identified Lovato as the male who had entered, and robbed the various businesses with the use of a handgun. Guzman stated that because she did not have her ledger with her at the time of the interview, she was unable to identify additional robberies that she and Lovato had committed. She admitted to robbing the Village Inn with Lovato because they did not have enough money to pay for another day at the Motel.

APD Officer Eric Endzel was the lead detective with the Armed Robbery Unit, and together with the APD Investigative Support Unit formulated a plan to locate the Versa, which included surveilling the plotted area where the robberies mostly had occurred, and contacting the local businesses, motels, and confidential sources to assist as lookouts for the Versa. On January 6, 2017, at about 10:00 p.m., APD Officer Koury Church located a black Nissan Versa that matched the unique description, parked at the Motel 6 near University Blvd. and I-40.

A male later identified as Gilbert Lovato exited the motel from the second floor, and drove away in the Versa. He was surveilled as he drove to a Circle K for gasoline, and as he returned and parked in front of the Motel 6. He then walked around the entire motel for about five minutes before entering the motel's front office. It appeared that he was trying to determine whether he was being watched. Lovato

then drove to the west side of the motel, and entered room 249. Room 249 was rented to Gilbert Lovato according to the motel's roster. After a few minutes, Lovato exited room 249 and walked to room 256 accompanied by a female and three children. The motel roster again identified the renter of room 256 as Gilbert Lovato. The police were able to positively identify Gilbert Lovato from a previous photo, as the same male in room 256.

The lights to room 256 went out at about 2:00 a.m., and the police decided to continue the surveillance on January 7th, at 4:30 p.m. An officer was assigned to randomly check the motel parking lot to ensure that the Versa was still there. The vehicle identification number for the Versa identified Alvaro Guzman as the owner. The police were able to establish that Alvaro fathered three children with a woman identified as Audrey Guzman. A police report was located that involved Gilbert Lovato and a female identified as Audrey Guzman. The police obtained a photo of Audrey Guzman, and positively identified her as the female in room 256 with Lovato.

On January 7th at about 6:30 p.m., Guzman drove the Versa to an Albertsons store, with Lovato in the front passenger seat. They remained at Albertsons for about an hour. Over the course of the next four hours the Versa was surveilled by eight APD officers. They maintained their anonymity while monitoring the actions of Lovato and Guzman as they drove to multiple small businesses, including: several Starbucks, Churches Chicken, Chili's, Walgreens, Freddy's Steak Burger, Jack In The Box, Taco Cabana, Golden Corral, Chick Filet, Burger King, Panda Express, Wendy's, Owl Cafe', McDonalds, and Whataburger. These businesses were located in Albuquerque from the heights to the valley, and mostly, but not exclusively between Central and Menaul. The Versa drove very slowly in front of each business, often two to three miles per hour. It then circled around the back of the smaller businesses, and often repeated this pattern before parking for several minutes without entering the business. The Versa was observed several times as it left one business, traveled to another business, and then returned back to the first location. The same driving behavior was repeated upon return trips. This pattern continued throughout the evening with the Versa stopping only to put air in the tires and for gas. Given the armed robbery history involving the use of the Versa, and the exhibited behavior pattern, the police were convinced that Lovato and Guzman were casing the businesses before attempting a robbery.

Many of the businesses closed their doors between the hours of 9:00 p.m. and 10:00 p.m. On four occasions at closing time, Lovato attempted to enter several of the businesses listed above, but the doors were locked. Consistent with his other robberies, Lovato wore a baseball cap. After 10:30 p.m., Lovato and Guzman drove to the Whataburger on Second Street and Menaul, and parked near the front entrance. Lovato entered the Whataburger wearing his baseball cap. He walked up to the counter as if to place an order, but he was not waited on. There was a security guard on the premises, and Lovato then left without being waited on.

At 11:22 p.m., Guzman drove to the Village Inn located near University and Menaul. She drove around the business at a very slow speed and parked at the front entrance, with the front of the Versa facing Menaul. Lovato exited the Versa wearing his baseball cap, and once inside, he walked up to the cashier, Gilbert Duran, and ordered two slices of pie to go. Duran put the slices in a bag, and when he

went to collect payment, Lovato told him, "give me the fucken money." Lovato made sure that Duran saw, what Duran described as a "9mm glock sticking out of his left sleeve." Duran handed Lovato all the money in two registers, and Lovato left. Lovato was monitored the entire time by APD Officer Koury Chruch from the parking lot across the street from Village Inn. Lovato's actions were communicated via radio to all surveillance team members, however Lovato's back was facing the door. Church could not see the weapon, and despite believing that a robbery was taking place, was only able to report that Lovato was interacting at the register with the cashier.

Lovato exited the Village Inn, and entered the front passenger side of the Versa with the pie slices in a bag. Guzman then drove away at a higher rate of speed than had been observed all night. The officers continued to covertly maintain their surveille on the Versa, while Church attempted to contact the employees at Village Inn. The doors to the Village Inn were locked, which was consistent with protocols after a robbery has occurred. Church was unable to get the attention of the Village Inn staff, so he had APD dispatch contact Village Inn to determine whether a robbery had occurred. Church then joined the surveillance team while awaiting the response from dispatch.

The APD officers involved in the surveillance were: Eric Brown, Russell Carter, Nava Marquez, Eric Endzel, Koury Church, Chris Maes, Geoffrey Stone, and Steven Welsh. Officer Michael Hernandez and his trained K9 were tracking the team in close proximity. Every officer was aware that Lovato had threatened the victims with a handgun in all of his previous robberies. While awaiting confirmation of the robbery, the team discussed their options should the robbery be verified. It was not an option to allow Guzman to drive back to the motel where they believed the children were located. Guzman drove in an opposite direction from the Motel 6 where they were staying. The police were aware that in the past, Lovato and Guzman had committed multiple armed robberies on the same night, and were therefore concerned about the potential risk of injury to other victims. The police also did not want to engage in a pursuit, because that would place other drivers and pedestrians in danger. The team settled on what is called, a vehicle containment technique, or VCT. This VCT involves utilizing the officer's vehicles to make contact with, and to cut off the suspect's ability to go forward and backward, by driving the police vehicle directly in front and behind the suspect's vehicle.

After fleeing the Village Inn, the Versa drove to random areas, and then doubled back to determine if they were being followed. After a few minutes, dispatch reported that the Village Inn had indeed just been robbed at gun point, and the description of the offender matched that of Lovato. The surveillance team then waited until the Versa had stopped for a red light, traveling northbound at the intersection of Comanche and Carlisle. There were two lanes for northbound traffic on Carlisle, and the Versa was in the lane closest to the curb when the VCT was conducted. Endzel prevented the Versa from going northbound by driving his grey Dodge Ram in an eastward direction, and directly in front of the Versa in a "T" pattern. At the same time, Brown drove his white Dodge Ram northbound, and up against the rear of the Versa, boxing it in, and prevented it from traveling in reverse. Carter parked his green Expedition in the second lane, parallel too, and west of Brown's vehicle. Carter's vehicle was also parked at a 45 degree angle from the driver's side front window of the Versa. Marquez pulled up behind Brown's car, Maes behind Carter's vehicle, and Church parked behind the vehicle driven by Marquez.

Walsh, Hernandez and Stone were parked behind the other vehicles on Carlisle. All officers were wearing vests that had police insignias on the front and back of the vest identifying them as police officers.

After Endzel blocked the forward travel of the Versa, he immediately exited his car and sprinted to the rear of Carter's vehicle to avoid a cross fire situation. While he was sprinting, he heard the engine of the Versa raving. Guzman was unsuccessfully trying to escape in reverse, but Brown's truck prevented it from any backward travel. Lovato and Guzman were ordered four times by the police to place their hands in the air. Carter specifically shouted, "APD, put your hands in the air." Carter saw Guzman raise and maintain her hands in the air, and then knew that Lovato and Guzman understood that they were not in a traffic accident. Brown and Marquez illuminated the inside of the Versa from behind, and Brown saw both Guzman and Lovato raise their hands, but Lovato did so only momentarily. He then saw Lovato place a "large frame semi-automatic pistol" to the head of Guzman. Brown ordered Lovato to "put the gun down." Lovato complied by lowering the gun, but then raised it, and pointed it at Guzman's head once again.

Brown again ordered Lovato to "put the gun down." Brown felt that there was a serious threat to the life of Guzman, and that "deadly force was necessary." While holding the gun to Guzman's head, Lovato stared at Brown. Brown saw the muzzle of the gun arch back, and Lovato then pointed the gun directly at Brown, as he continued to stare at Brown. Marquez was positioned on the passenger side of Brown's vehicle behind the passenger door, and had his rifle pointed at Lovato. Marquez could be heard on the lapel camera asking Brown if Lovato was pointing the gun in his direction. Brown then responded, "he pointed it at her and at me." From Brown's training as a firearms instructor, he felt that Lovato "was going to shoot someone, right now," and based upon his training, knew that, "you typically shoot at what you are looking at." Brown then fired his rifle twice, aiming at Lovato's head to immediately incapacitate him, and to prevent him from harming anyone. Brown then heard additional gunfire, and later learned it was from Marquez to his right and from Carter to his left. Marquez did not provide a statement.

Carter observed Lovato point and hold a handgun to the head of Guzman. Carter described Lovato as "holding it with his right hand, reaching across his body, and it looked like it was against her head." Carter believed that Lovato had "taken the driver as a hostage," and believed that he, "needed to stop his actions." Carter stated that he "believed that this guy is going to shoot her, and kill her, and I couldn't let that happen," and he had "already made the decision for deadly force." Just then, Brown fired his weapon, and Carter fired immediately after. None of the other officers were in position to see Lovato's actions from inside of the Versa.

Guzman complied with the police commands to exit the vehicle immediately after the shots were fired. Her first words to the police were, "he had that gun to my head!" She repeated that comment several times to various officers. There was a six second difference between when Lovato and Guzman were ordered to raise their hands, to the commencement of the gunfire. When interviewed, Guzman told the police that she believed Lovato was shot because, "I figured they saw when he pointed

the gun at me." The officers all had their lapel cameras running, but they did not capture Lovato's actions from inside of the Versa.

The police were still unaware of the seriousness of Lovato's injuries, because he sat upright with his head on his left shoulder, and at times moved his head. Carter moved up from his position, and was able to see through the front driver's door that Lovato's hands and arms were covered by a blanket, and given his actions, the police were not willing to take a risk. Walsh fired one .40 mm round through the back window of the Versa in the hopes of breaking the window, to obtain a better view of Lovato's actions. It did not work because the tint held the window together, and made it more difficult to see inside. Hernandez then deployed his canine to extract Lovato from the Versa, or until they had a full visual of Lovato's hands. When Hernandez observed that Lovato had no response from the dog bite, and that his hands were clear, he grabbed the dog and helped pull Lovato out of car. Lovato appeared to be seriously injured as the ambulance arrived within minutes, and immediately drove him to the hospital. Lovato was pronounced dead shortly after arrival at the hospital, at 11:52 p.m.

The autopsy revealed that Lovato had five gunshot wounds and two dog bite wounds. The first wound was a lethal wound, to the back of his head. The trajectory was from Lovato's left to right, backwards and upwards. The second wound was to his left posterior auricular (ear) region. The trajectory was forward and downward, with no lateral deviation. The bullet did not enter the skull, and bullet fragments were recovered. The third and fourth wounds were to his left superior back, with two left lateral exits wounds. The trajectory was from his back to front, right to left, and minimally upwards. The fifth wound was to his right anterior thigh. The trajectory was from backwards and upwards with no lateral deviation, and a projectile was collected from his right femur, and was believed to be the result of a bullet that had ricocheted off another surface. The two dog bite wounds were located on his neck and right arm. The autopsy examination concluded that Lovato died from the gunshot wounds. During her interview, Guzman stated that Lovato had taken methamphetamine the day before, and the autopsy revealed that Lovato tested positive for both methamphetamine and morphine. He had $242 in small bills recovered from his possession during the autopsy in the following denominations: 5-$20's; 1-$10; 12-$5's and 72-$1's. This amount was consistent with the amount stolen from Village Inn.

The rifles from Carter, Brown and Marquez were collected, and were identified as the only weapons fired at the scene, and all three rifles were identified as PWS brand AR-15, model MKI rifles. There were eight .223 caliber shell casings collected at the scene that were the same type of ammunition used by the three PWS rifles that were collected. As of this report, the firearms and tool mark comparison report had not been done. Such a report might identify the shots fired from the weapons collected, and their final destination, but is not necessary for the conclusions reached regarding the purpose of this report. The criminalistics report identified nine bullet impact points on the Versa, and the trajectory angle of those impact points. There were two bullet impact points into the center rear window of the Versa, which was consistent with the location of Officer Brown's position when he fired his weapon. There were two bullet impact points on the driver's side rear window of the Versa, which was consistent with the location of Officer Carter's position when he fired his weapon.

There were five bullet impact points into the rear passenger side vent window of the Versa, which was consistent with where Officer Marquez was located when he fired his weapon.

The police met with Lovato's mother and sister, and formally provided them with a death notification. The first question asked by his sister, Felicia Lovato, was whether her brother had committed, "suicide by cop." Felicia replied that she had asked that question, because she was aware that her brother, "won't go back to prison," and indicated that he had just completed a three year prison sentence in March for drug possession. At the end of the meeting Felicia told the detectives that she had been in denial concerning her brother, and stated that Lovato was the bank robber whose photo was shown on TV about one month prior. The robbery had occurred at a Wells Fargo Band, and Felicia identified Lovato as "the one wearing the blue Duke's hat."

A search warrant for the Versa was approved and a search was conducted. Several of the items collected from the Versa included: a white bag containing two pieces of pie; BB gun with a black muzzle; black beanie; white baseball cap; Duke's baseball cap; a note stating, "GIVE ME ALL THE MONEY AND NO-1 WILL GET HURT;" unused needles; a spiral ledger belonging to Guzman; and several projectiles and projectile fragments.

The criminal history for Guzman included convictions for: Burglary, Conspiracy to Commit Burglary and Larceny in 2002; Embezzlement of a Motor Vehicle in 2012; Robbery in 2012; Robbery, two counts of Attempted Robbery, and three counts of Conspiracy to Commit Robbery in 2012. In the case at hand, Guzman is charged in Bernalillo County District Court with seventeen counts of Armed Robbery and seventeen counts of Conspiracy to Commit Armed Robbery. Her trial is set for November 5, 2018.

The criminal history for Lovato included convictions for: Possession of Marijuana in 2000; DWI First Offense in 2003; Possession of Drug Paraphernalia in 2009; Tampering with Evidence, Trafficking with Intent to Distribute, and two counts of Possession of a Controlled Substance (Heroin) in four separate cases in 2010; Battery Against a Household Member in 2011; In 2014 an Attempted Robbery charge was dismissed because the victim saw that the weapon was actually a cell phone wrapped in a newspaper, and disguised to appear as a handgun. He had a pending case charged by way of a Criminal Complaint on December 30, 2016, with Possession of a Controlled Substance. In the case at hand, Lovato was looking at charges similar to those charged against Guzman.

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 the officer reasonably believes that the officer 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; the officer 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 Officers Brown, Carter and Marquez fired at Gilbert Lovato, they were acting under the reasonable fear that Audrey Guzman, themselves or another officer would be killed or seriously injured by the actions of Lovato. It is unclear whether Lovato simply wanted to escape when he pointed his BB gun to the head of Guzman, or whether his intention was to force armed police officers to shoot him. There is a strong argument that his intention was the latter. Lovato knew that the officers had no way of knowing that his weapon was a BB gun. He had just used it to commit an armed robbery, and had convinced the clerk at Village Inn that the gun was real. Guzman believed that the gun was real. When she was arrested and then again when she was interviewed, she stated multiple times that Lovato had put a gun to her head, and she believed that was the reason why he was shot. Marquez was heard on several different lapel cameras asking Brown whether Lovato had pointed the gun at Brown. Brown acknowledged that Lovato had pointed it both at Guzman and at himself. Carter independently had also decided that the actions of Lovato required him to take lethal measures in order to protect Guzman.

The evidence strongly suggests that Officers Brown, Carter and Marquez were reasonably concerned for themselves, for Audrey Guzman, and for the other officers involved, in responding to the threat of deadly force or serious harm posed by Mr. Lovato, and fired their weapons based upon those concerns. Officers Brown, Carter and Marquez are therefore entitled to raise the defense of justifiable homicide by public officer. Based upon these facts there is no reasonable likelihood of successful prosecution: therefore no charges will be filed against Officers Brown, Carter and Marquez; the case will be closed.

Sincerely yours,

Reynaldo Montano

Reynaldo Montano
Special Prosecutor

Cc: Raul Torrez, District Attorney, Second Judicial District
David Gonzales, APD Detective
Luis Robles, Attorney for Officers Carter, Brown and Marquez
Mary Lovato, mother of Gilbert Lovato
Felicia Lovato, sister to Gilbert Lovato