

May 11, 2018

Sheriff Manuel Gonzales III  
Bernalillo County Sheriff  
Bernalillo County Sheriff's Department  
400 Roma NW  
Albuquerque, NM 87102

Re: Prosecutorial Review of the April 26, 2016 fatal  
shooting of Jacquelyn Burke, BCSO case # 16-48544  
DA case # 2016-03113-1

Dear Sheriff Gonzales:

I have been appointed as a Special Prosecutor by Raul Torrez the Second Judicial District Attorney, to review the fatal shooting of Jacquelyn Burke, which occurred on April 26, 2016 for potential prosecution. After a review of all available evidence, including police reports, witness statements, laboratory and medical reports, audio recordings, photographs, and a visit to the scene of the incident, I conclude that it is not possible to prove beyond a reasonable doubt, that Detective Timothy Hix was not acting under the belief that Jacquelyn Burke's actions posed a threat of death or great bodily harm to himself or others in the immediate area. No charges will be filed. The case will be closed. My decision does not limit administrative or criminal action by other agencies or civil actions by other parties.

#### Statement of Facts

On April 26, 2016 Bernalillo County Detectives Charles Lill and Timothy Hicks in one vehicle were attempting to arrest Jacquelyn Burke for absconding from probation. Her original charges were Possession of a Controlled Substance, and Battery on a Peace Officer. The arrest order issued on April 18, 2016 noted that Jacqueline Burke was considered to be a risk to the public. Earlier that morning Jacquelyn Burke had been found at her apartment. She threatened to shoot herself and then escaped from officers by climbing out of an unsecured bathroom window and driving away in a stolen Nissan pick up truck.

After evading officers for several hours in the Northeast Heights area of Albuquerque Jacquelyn Burke was located at her apartment complex driving the stolen truck. While Burke was driving through the apartment complex Deputies Hix and Lill were able to pin her vehicle between an apartment building and their undercover police vehicle. As Deputy Lill was getting out of his truck Burke backed into his truck forcing it backward. Deputy Lill then approached from the driver's side door shouting commands, while Deputy Hix took a position on the passenger side of

Burke's truck. Deputy Lill saw Burke digging into her jacket pockets and yelled "don't do it" Deputy Lill then reached into the cab of the of the truck from the driver's side and attempted to pull Jacquelyn Burke from the truck. Burke kicked him forcing him back. In the next instant Deputy Lill saw Burke pointing a handgun at him. Deputy Lill drew his gun to shoot Burke, as he did so Deputy Hix still on the passenger side of truck fired one time striking Burke in the back. A short struggle ensued as Deputy Lill pulled Burke from the truck. Rescue was called and emergency medical attention was given to Jacquelyn Burke. Medical efforts were unsuccessful and Jacqueline Burke was pronounced dead at 2:30 on April 26, 2016.

The gun Jacquelyn Burke used to threaten Deputy Lill with was found on the floorboard of the stolen truck. The gun had been stolen during the burglary of a residence on February 23, 2016. The gun was loaded with one round in the chamber and six rounds in the magazine. A DNA test dated June 17, 2016 showed Jacquelyn Burke as being the source of the major DNA profile found on the gun. An autopsy concluded that Jacquelyn died of a single gunshot to the back of her neck. Toxicology showed levels of methamphetamine in her system.

Tuan Nyugen, a civilian, was standing in the parking lot just yards from the incident and was an eyewitness to the shooting. He saw Jacquelyn Burke driving erratically just before Deputies Hix and Lill blocked her in. Nyugen saw Hix and Lill get out of their vehicles and walk towards Burke's truck yelling "get out of the car". Nyugen then heard one of the Deputies yell "drop the gun" several times. He then saw the Deputy on the passenger side of the truck fire one shot into the passenger side compartment of the truck. From his vantage point Nyugen could see Deputy Hix on the passenger side clearly while his line of sight to Deputy Lill on the drivers side was partially obstructed by Burke's truck. Nyugen described the behavior of Deputies Hix and Lill as controlled.

Russell Eaton was a second eyewitness to the shooting. Russell Eaton was in the gym of the apartment complex when he witnessed the incident. Because he viewed the incident through the window of the gym Mr. Eaton did not hear what was being said during the shooting. Russell Eaton saw Burke's truck drive up on the grassy area. He then saw Deputies Hix and Lill go up to the truck one on the passenger side and one on the driver's side. He then saw Deputy Hix fire his gun into the passenger side of the truck. Eaton was not able to see Jacquelyn Burke from his vantage point. Shortly afterward Eaton saw deputies pull Jacquelyn out of the truck.

Merrie Erickson, Jacquelyn Burke's mother was interviewed by detectives after the shooting. Mrs. Erickson told detectives that Jacquelyn had been depressed because of her upcoming court dates. Jacquelyn had attempted suicide several years earlier, and was aware that Jacquelyn had taken several types illegal of drugs in the past. When detectives shared information with Mrs. Erickson that deputies were heard to say "drop the gun" Mrs. Erickson responded by saying "that's what she wanted to happen"; an apparent reference to a syndrome commonly known as "suicide by cop". In addition Mrs. Erickson shared a text she received from Jacqueline the day before. The theme of the text appeared to be Jacquelyn saying good by to her mother thanking her for all she has done for her over the years.

Also present at the interview with Mrs. Erickson was Tyler Welby, Jacquelyn's spouse. Tyler Welby confirmed that Jacquelyn possessed a gun. Similarly when Tyler Welby was informed of the detail about deputies telling Jacquelyn to drop the gun, Welby's response was that Jacquelyn had "thought about something like that". Again an apparent reference to creating a situation which required officers to shoot Jacquelyn.

### Legal Analysis

Deputy Hix was in the process of arresting Jacquelyn Burke on a warrant for absconding from probation. This would allow Deputy Hix to raise the defense of justifiable homicide by a public officer, NMSA 1978 section 30-2-6. Section 30-2-6 allows a peace officer to use deadly force while arresting, or preventing the escape of a suspect when he believes he or another is threatened with serious harm of deadly force.

Under New Mexico law an 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 justified, they must acquit the officer. The reasonableness of an individual officer's actions is an objective analysis evaluated from the perspective of the officer at the time of the incident and is necessarily a factual inquiry. State v. Mantelli, 2002 NMCA-033, 131 N.M. 692. Uniform Jury Instruction-Criminal 14-5173 Justifiable Homicide: Public Officer or Employee.

### Conclusion

Deputy Lill's eyewitness account of being threatened with the handgun held by Jacquelyn Burke placed him in danger of being shot and killed. Deputy Hix returned fire based on that threat. There is substantial evidence that Deputy Hix was justified in using deadly force against Jacquelyn Burke. In a successful trial against Deputy Hix for the murder of Jacquelyn Burke the jury would have to conclude that Jacquelyn Burke did not have a gun in her hand when she was shot by Deputy Hix. Deputy Hix could and would offer evidence to prove that she did have a gun.

Tyler Welby her spouse confirmed that she did possess a gun. She was seen by law enforcement officers earlier in the day threatening to shoot herself with a handgun. A handgun was found on the floor board of the truck in which Jacquelyn Burke was shot. The same gun contained Jacquelyn Burke's DNA. Deputy Lill saw her point the gun at him. At least one civilian witness heard the officers say "drop the gun", and least two civilian witnesses corroborate the sequence

of events as described by Deputy Lill just prior to and during the shooting. In addition Deputy Hix could offer evidence from Burke's spouse and family that she was depressed and under the influence of methamphetamines and sought her own death at the hands the police. Under State v. Stanley, 2001 NMSC-037 37 P.2d 85 this evidence would support the defense theory that Jacquelyn Burke deliberately created the lethal situation to which Deputy Hix responded.

To convict at trial the prosecution would have to prove that all this evidence is false, that Deputy Hix's use of force was unreasonable and prove beyond a reasonable doubt that Jacquelyn Burke did not possess a gun at the time she was shot. The jury confronted with substantial evidence that Burke did threaten Deputy Lill with a gun would be forced to acquit Deputy Hix for the shooting death of Jacquelyn Burke. There is no reasonable likelihood of a successful prosecution. No charges will be filed against Deputy Hix. The case will be closed.

Sincerely,



Jody R. Curran  
Special Prosecutor

cc: Raul Torrez, District Attorney Second Judicial District  
Detective James Frederickson, Bernalillo County Sheriffs Department  
Fred Mowrer, Esq.  
Merrie Erickson, Mother  
Stoney Burke, Father  
Tyler Welby, Spouse