

July 23, 2018

Chief of Police Michael Geier
Albuquerque Police Department
400 Roma NW
Albuquerque, New Mexico 87102

RE: Prosecutorial review of the February 10, 2017, discharge of a firearm by Officers Mel Acata, Paul Bellgardt, and James Ortiz

APD case # 17-0014127

DA case # 2017-01466-1

Dear Chief Geier,

I have been appointed as a Special Prosecutor by Raul Torrez, the Second Judicial District Attorney, to review the events surrounding the discharge of a firearm by Officers Mel Acata, Paul Bellgardt, and James Ortiz during the arrest of Lee Brandenburg on February 10, 2017, for potential prosecution in this incident. After reviewing all available evidence, including law enforcement reports, officer statements, civilian witness statements, photographs, lapel videos, a business video, and a visit to the scenes I have concluded that it is not possible to prove, to a unanimous jury beyond a reasonable doubt, that Officers Acata, Bellgardt, and Ortiz were not justified in acting under the belief that Lee Brandenburg posed an immediate threat of death, or great bodily harm, to themselves, other officers, and/or members of the public. Accordingly, no criminal charges will be filed against Officers Acata, Bellgardt, and Ortiz in State District Court, and this case will be closed. My decision, however, does not limit administrative or criminal action by other agencies, or civil actions by other parties.

FACTS SUPPORTED BY EVIDENCE

On February 10, 2017, shortly before 12:16 p.m., Mr. Michael Little, who was a Fugitive Recovery Agent for Aladdin Bail Bonds, went to the Crossland Hotel, located at 5020 Ellison St. NE, in an attempt to apprehend Mr. Lee Brandenburg. Brandenburg had active warrants for his arrest for, among other things, failing to appear in court for a bond hearing. Little had received information that Brandenburg was at the Crossland Hotel, and he went there to arrest him. Upon arrival Little spoke with the hotel manager and confirmed Brandenburg was staying in a room there. The manager told Little that Brandenburg was overdue on his room payment, so the manager called Brandenburg, in his room, and told him to come to the office to pay for his room. Little waited in the office, but Brandenburg did not appear, so he went to Brandenburg's

room and attempted to contact him. Little knocked repeatedly on Brandenburg's door, but got no response. Little attempted to open the door using the manager's key, but discovered it was locked from the inside with the security latch. Still receiving no response from inside the room, Little waited outside, a few doors down. A few minutes later Brandenburg emerged from his room and, upon seeing Little, who he knew and recognized as a bail bond agent, immediately fled on foot. Little pursued him, and while doing so Brandenburg looked over his shoulder and simultaneously pointed a handgun at Little, who immediately ceased his pursuit and took cover. Little called 911 and told the dispatcher that while he was attempting to arrest Brandenburg for two felony arrest warrants, Brandenburg fled on foot towards Ellison NE from the hotel, and pointed a handgun at him. Little also provided the dispatcher with a description of Brandenburg: a white male, 6'2", 215 pounds, wearing blue jeans, a dark shirt, and carrying a brown backpack, armed with a semi-automatic handgun.

Officers L. Acosta and D. Padilla were dispatched to the Crossland Hotel regarding this aggravated assault. While they were enroute 911 received another call about a man climbing into the storm drainage hole on the southwest corner of Pan American NE and Ellison NE, which is about 500 feet north of the Crossland Hotel. The caller's physical description of this subject matched Brandenburg's. Radio Dispatch then confirmed that Brandenburg had outstanding felony arrest warrants for aggravated residential burglary, violating his conditions of release, and a misdemeanor arrest warrant for domestic violence and probation violation. Dispatch apprised responding officers of Brandenburg's description and criminal history. Officers D. Martinez, S. Miera, I. Hernandez, and R. Sanchez headed to the area of the drainage hole, while Officers Acosta and Padilla met with the second caller in the parking lot of the La Quinta Hotel, at 7439 Pan American West NE. The second caller confirmed that Brandenburg was still in the drainage hole.

Sgt. Ingram responded to the calls and directed officers to set up a perimeter in order to contain Brandenburg and prevent his escape. While this was being done Brandenburg suddenly emerged from the drainage hole and ran, eastbound on Ellison NE, under Interstate 25, then southbound in the northbound lanes of Pan American East NE, up a dirt embankment, and into the parking lot of the Cracker Barrel at 5200 San Antonio Dr. NE. Officers R. Sanchez and R. Graves, who were in uniform, were in this parking lot and, upon exiting their police vehicles, ordered Brandenburg to surrender and get on the ground. Brandenburg then produced his handgun and put the barrel to his head. As they continued to order Brandenburg to surrender, he then placed the barrel of his handgun in his mouth. Brandenburg then walked away from officers, eastbound on the north side of the Cracker Barrel, alternately holding his gun to his head and placing the barrel in his mouth.

Brandenburg then ran eastbound from the Cracker Barrel and jumped the fence of the Hilton Garden Inn at 5320 San Antonio Dr. NE, and walked toward its entrance. Brandenburg continued to hold his gun to his head. Two civilians were near the front of the Hilton and heard officers issuing commands to Brandenburg to stop and drop his weapon. He did not do so but

continued to walk past the front of the Hilton, and then southbound between the Hilton and Homewood Suites at 5400 San Antonio Dr. NE.

Detectives M. Acata and J. Ortiz, who were wearing police vests that clearly identified them as officers, arrived and parked on the median on San Antonio, in front of Homewood Suites. They met Officer D. Padilla who accompanied Officer Acata on foot, southbound between the hotels and toward Brandenburg. Detective Ortiz was walking southbound between the Homewood Suites and the New Mexico State Regulation and Licensing Division at 5500 San Antonio Dr. NE when he observed Brandenburg rounding the corner of the Homewood Suites and now walking toward him. Brandenburg was holding his gun to his chin, and began walking eastbound on the south side of the Licensing Division. Detectives Ortiz and Acata, and Officer Padilla met up and followed Brandenburg. Officers P. Bellgardt, L. Acosta, R. Graves, and M. Benavidez then arrived on the north side of Homewood Suites. They began to move eastbound toward the Licensing Division.

Leaving the Licensing Division at this time was Mr. Scott Christiansen. As he entered his vehicle, which was parked in the southeast corner of the parking lot, Brandenburg approached the driver's door, pointed his gun at Christiansen's head, and demanded his vehicle. Christiansen, fearing for his life, exited his vehicle and ran south across the parking lot toward a vehicle occupied by Mr. Jose Carrasco and Mr. Martin Romero. Brandenburg attempted to start Christiansen's vehicle, but could not do so because it was a keyless ignition and Christiansen had the key fob in his pocket, and was too far away from his vehicle for it to start. Christiansen saw officers coming around the southeast corner of the building and he informed them Brandenburg had just threatened to shoot him in the attempt to steal his car.

Christiansen, Carrasco, and Romero then saw Brandenburg exit Christiansen's vehicle, and attempt to open the door of another vehicle parked nearby. The door was locked and he was unable to make entry. As officers approached them they advised the officers that Brandenburg had pointed his gun at Christiansen's head. Detective Acata then walked northbound on the east side of parking lot while Detective Ortiz walked northbound on the west side, in an attempt to contain Brandenburg. They then observed Brandenburg approach a third vehicle which was backing out of a parking space on the east side of the Regulation and Licensing building. This vehicle was driven by Ms. Becky Nottke.

Detectives Acata and Ortiz then saw Brandenburg point his gun toward Nottke's head, while they continued to issue commands that he drop his weapon and get on the ground. Nottke stopped her vehicle, which was facing northbound and in front of Acata and Ortiz. She could not go forward because another vehicle was in front of her. Brandenburg then closed the distance between himself and Nottke, while continuing to point his gun toward her head. He was yelling at Nottke, "Get out of your car! I need your car or I will shoot you!" Nottke began to open her driver's door and Brandenburg immediately attempted to pull her out, but only her left leg came outside of her vehicle while her right leg and the rest of her body remained inside.

Fearing that Brandenburg was going to shoot Nottke, in order to steal her vehicle, Detective Acata began firing at Brandenburg with his handgun, while he and Ortiz took up a position of cover behind a pickup truck parked nearby. They were 60 feet away and 5° to their left of Nottke's open driver's door. Brandenburg then pointed his gun toward Acata and Ortiz (see attachment #1), ignored their commands to drop his weapon and surrender, and then leaned into Nottke's vehicle through the open driver's door. Fearing again that Brandenburg was about to shoot Nottke and that the rounds fired thus far were not stopping Brandenburg, Acata and Ortiz began firing at Brandenburg again. Officers Bellgardt and Padilla had simultaneously taken up a position of cover behind the front of Mr. Carrasco's vehicle, which was facing westbound. Bellgardt was 185 feet away and 5° to his right of Nottke's open driver's door. Bellgardt then fired one round. Padilla did not fire because Acata and Ortiz were in his line of fire. The only portion of Brandenburg's body that was visible to all officers was his waist down, as the upper portion of his body was leaning into Nottke's vehicle. All shots fired by Acata, Ortiz, and Bellgardt were fired in 10 seconds. Acata fired a total of 16 rounds, Ortiz fired 8 rounds, and Bellgardt fired 1 round. Brandenburg then stood up, raised his hands, tossed his gun away from him, and said "I give up." He then complied with commands to lay on the ground. Brandenburg was bleeding significantly from one leg, and officers immediately procured a tourniquet and applied it to his leg. Nottke had been struck by a bullet directly on the outside of her left knee. Officers immediately applied a tourniquet to Nottke's leg and called for rescue. After rescue arrived Brandenburg and Nottke were transported to University of New Mexico Hospital.

Approximately 8 feet away from where Brandenburg had tossed his gun, officers recovered a pellet gun, which was black in color and strongly resembled a 9mm semi-automatic handgun (see attachment #2). Also a few feet from this gun officers recovered the backpack Brandenburg had on at the time. Inside this backpack officers discovered another stainless steel colored air gun that strongly resembled a semi-automatic handgun.

During surgery a single bullet was removed from Nottke's left knee. This bullet was examined by criminalistics, and it was determined to have been fired by Detective Ortiz. Brandenburg had 5 bullet wounds to his right leg, one of them not being an entry or exit wound, but having grazed his leg, and 4 bullet wounds to his left leg. No bullets were located inside of or recovered from Brandenburg's legs, therefore it is uncertain from which officers' guns these wounds were sustained.

On February 13, 2017, Detective Davis interviewed Brandenburg. Brandenburg said he had smoked methamphetamine that morning before Little came to his door. He knew Little was a bounty hunter and was there to arrest him. In order to prevent Little from arresting him Brandenburg took his pellet gun, exited his room, and put the barrel in his mouth when he saw Little. Brandenburg stated his intention was not to hurt anyone that day, but to force officers to kill him. He did not want officers to kill him in front of other people, but at a remote location. Because he did not have a vehicle the only way to accomplish this was for him to

immediately steal a vehicle and flee the area. Knowing that officers would pursue him, he said he attempted to steal Christiansen's, and then Nottke's vehicles by "showing" them his gun, which he acknowledged looked real. He also acknowledged that he knew that all of the officers who were issuing commands to him to disarm and surrender were police officers.

Officers Ortiz and Acata stated that they feared for the lives and safety of Nottke, other members of the public, and themselves when they fired at Brandenburg. Little, Christiansen, Carrasco, Romero, and Nottke all stated that they believed Brandenburg's gun was real. Christiansen and Nottke feared Brandenburg would shoot them if they did not comply with his demands.

On April 5, 2018, Lee Brandenburg was convicted by a jury of: 2 counts of attempted robbery, assault on a peace officer, auto burglary, and resisting, evading, or obstructing an officer.

LEGAL ANALYSIS

At trial Officers Acata, Ortiz, and Bellgardt would be entitled to raise the defense of justifiable homicide by a public officer. These officers, on trial for their use of deadly force, could raise this defense if, at the time of their use of deadly force:

1. Officers Acata, Ortiz, and Bellgardt were public officers or employees,
2. The [shooting] was committed while they were performing their duties as public officers or employees,
3. The [shooting] was committed while overcoming the actual resistance of Lee Brandenburg to the execution of officers who were attempting to arrest him, *or* The [shooting] was committed while arresting Lee Brandenburg, who was committing a carjacking, had committed another attempted carjacking, and aggravated assaults, and was fleeing from justice, and
4. A reasonable person in the same circumstance as Officers Acata, Ortiz, and Bellgardt would have reasonably believed that Lee Brandenburg posed a threat of death or great bodily harm to themselves, other officers, Becky Nottke, or another person. The burden is on the state to prove beyond a reasonable doubt that the [shooting] was not justifiable.

N.M.R.A. 14-5173 (uniform jury instruction for justifiable homicide by public officer)

CONCLUSION

Officers Acata, Ortiz, and Bellgardt were public officers, performing their duties while attempting to arrest Lee Brandenburg for a carjacking taking place in their presence, another attempted carjacking, aggravated assaults, and an outstanding felony warrant, who was fleeing

officers on foot, and was attempting to flee by motor vehicle. Officers Acata, Ortiz, and Bellgardt could have reasonably believed that Lee Brandenburg posed an immediate threat of death, or great bodily harm to themselves, other officers, Becky Nottke, and members of the public.

A jury is likely to find that Officers Acata, Ortiz, and Bellgardt acted reasonably, and I also believe that a reasonable person, in the same circumstance as Officers Acata, Ortiz, and Bellgardt, would have acted in a similar fashion, and therefore the shooting was justified. In the absence of any evidence to contest this finding, prosecution is not warranted. Accordingly, no charges will be filed against Officers Acata, Ortiz, or Bellgardt in state court. This case will be closed.

Very truly yours,



Chris Schultz

Special Prosecutor

Cc: Raul Torrez, District Attorney, Second Judicial District

Detective Michael Davis, Albuquerque Police Department

Officer Mel Acata, Albuquerque Police Department, c/o Luis Robles

Officer James Ortiz, Albuquerque Police Department, c/o Luis Robles

Officer Paul Bellgardt, Albuquerque Police Department, c/o Fred Mowrer

Ms. Becky Nottke

Mr. Lee Brandenburg, c/o Jason Bowles

Attachment #1

(sequential frames from Officer Acata's lapel video)





