

March 21, 2018

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

APD case # 16-0047335  
DA case # 2016-03112-1

To: Acting Chief, James Burrell  
U.S. Marshall Service  
333 Lomas Blvd. N.W., Suite 180  
Albuquerque, N.M. 87102

RE: Prosecutorial review of the May 24, 2016  
fatal shooting of Mario Montoya, involving Albuquerque  
Police Department Officer Jerrod Pelot, and U.S.  
Marshal Service Agents Anthony Jones, Chris Roberson  
and Todd White.

Dear Chief Geier and Acting Chief Burrell:

I have been appointed Special Prosecutor by Raul Torrez, the Second Judicial District Attorney, to review the incident of May 24, 2016 for potential prosecution. My role is to determine whether any law enforcement officers or agents should be prosecuted for their actions during the incident. I have reviewed all of the available evidence, including: autopsy report, police reports, witness statements and transcripts, criminalistics report and photos, firearm and tool mark report and conclusion, CAD transcripts and recordings, police radio communications during the incident, and crime scene photos. I conclude that it is not possible to prove beyond a reasonable doubt, that the law enforcement officers involved were not acting under the reasonable belief that the actions of Mario Montoya posed a threat of death or great bodily harm to Officer Pelot, and to USM Service Agents Anthony Jones, Chris Roberson, Todd White, as well as to multiple law enforcement agents. 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 May 19, 2016 Mario Montoya appeared for an initial appearance in federal court concerning the charges of Possession of a Firearm and Ammunition by a Felon, and Possession of Stolen Mail Matter. The Court ordered a pre-plea-report to determine whether Mr. Montoya qualified under the guidelines as an "Armed Career Criminal" which could carry up to a life sentence. He had prior convictions for Aggravated Assault with a Deadly Weapon, for Battery on a Police Officer, and two convictions for Felon in Possession of a Firearm. Montoya was released from custody, but ordered to reside at the La Posada Halfway House, located at 2206 4<sup>th</sup> Street NW, in Albuquerque. He was also ordered to wear a GPS ankle bracelet as part of his conditions of release. The bracelet was placed on his ankle, and he was released from custody, and transported to La Posada on May 20<sup>th</sup>. Less than five hours after his arrival, Montoya absconded from La Posada. A video retrieved from La Posada showed Montoya at about 3:30 pm running, and entering the passenger seat of a dark colored SUV, which then

sped away. The SUV did not have a license plate attached. Montoya had cut off his GPS bracelet, and left it on the sidewalk near La Posada. An arrest warrant was issued for Montoya for violating his conditions of release by absconding from La Posada, and for cutting off his bracelet.

Deputy U.S. Marshal Anthony Jones was immediately assigned as case agent. Jones learned that Montoya had lived with his girlfriend, Coleen Calamia at 312 Western Skies SE, apartment one, prior to his arrest. On May 23<sup>rd</sup> surveillance was set up at 312 Western Skies. The same dark colored SUV observed on video driving away with Montoya from La Posada, was parked in front of apartment one, and was still missing a license plate. The SUV was a black Cadillac Escalade that belonged to Montoya's girlfriend, Collen Calamia. On May 23<sup>rd</sup> agents did not see Montoya, but did see Calamia enter and exit apartment one several times.

On May 24<sup>th</sup> Agent Jones and two other agents continued their surveillance at 312 Western Skies. At about 7:00 p.m., Calamia pulled up in the black SUV with Montoya in the passenger seat. Montoya was positively identified when he exited the vehicle and quickly entered apartment one. Agent Jones then organized a ten person fugitive retrieval team to assist him with the arrest of Montoya. The team was briefed on the operational plan while other agents continued to monitor the apartment complex. The team consisted of Deputy U.S. Marshals Anthony Jones, Chris Roberson, Matthew Ortiz, Jim Glisson, Gary McCoy, Robert Medina, Antonio Ramirez, Todd White, Alcohol Tobacco and Firearms Agent Lisa Gaul and Albuquerque Police Department Officer Jerrod Pelot. Everyone on the team wore clothing and vests that identified them as law enforcement. The team was briefed concerning Montoya and his history. This included information that Montoya had threatened police in the past with a gun, as well as his convictions. They were also warned that he may be armed, and that he may suffer from schizophrenia, and bipolar disorder. At 8:32 p.m. the fugitive team was setting up at 312 Western Skies when Calamia entered the SUV alone, and drove away from the apartment complex. A decision was made to confront Calamia while away from the apartment complex. She was approached and questioned by Agent Ortiz when she stopped for gas at a 7-11 convenience store. Calamia initially denied knowing the whereabouts of Montoya. When confronted with the information that her vehicle was seen on video picking him up at La Posada, she then admitted that Montoya was alone in the apartment.

Calamia was told that the agents would have to breach the doors to her apartment. She then offered and gave the keys to her apartment to Agent Ortiz, and he returned to the Western Skies address. Agents Gaul and Glisson monitored the N.E. and S.E. corners of the apartment complex while multiple agents approached the front door. Agent Roberson knocked and announced the presence of the U.S. Marshals, the fact that a warrant had been issued for the arrest of Montoya, and ordered Montoya to exit the apartment. Multiple requests were made in the same manner without response from Montoya. Medina then used the keys provided by Ortiz, and opened the outside and inside doors to the apartment. Before they entered, the agents shouted their identity, and requested that Montoya give himself up, but without any response. The inside of the apartment was dark, and an alarm was triggered, but was quickly dismantled by the agents. Roberson held the protective shield, and was the first of multiple agents to enter.

The agents carefully cleared the living room area, and within moments of entering the master bedroom, Ramirez saw Montoya's foot sticking out from behind the closet door in the master bedroom. Ramirez immediately called for the shield, and told Montoya that he could see his foot, and multiple times ordered Montoya to exit the closet, and to show his hands. It was then that Agents Ramirez, Ortiz, Roberson, Jones and White all heard a metallic sound coming from within the closet area, described as a weapon being racked, or a magazine being loaded into a firearm. Multiple team members then shouted out the word "gun," to alert one another about the presence of a firearm. Montoya was again ordered multiple times to exit the closet and show his hands, but he did not comply. The team decided to back out of the room, call for SWAT, and keep Montoya contained in the master bedroom until SWAT arrived. While backing out of the room they all heard a popping sound, and several agents saw a flash believed to be gun fire coming from within the closet area. Agents White, Pelot and Jones all returned fire. When White saw another flash, he returned fire as they all scrambled to back out of the master bedroom, while taking cover.

Jones and White hid in the bathtub directly across from the master bedroom, with only the open door between them. It was dark, but they were still able to see. They both had their weapons drawn, and pointed in the direction of the master bedroom. Pelot, Roberson, Ramirez and other agents took cover in the living room. Montoya then walked to the bedroom door, and Pelot ordered him twice to surrender. Montoya then moved his arm as if he were going to raise something up, but instead just closed the door. As he closed the door, multiple agents then fired their weapons. According to Robison, Montoya looked directly at him while he stood in the doorway. Fearing that Montoya was about to get the drop on him, Roberson then fired in the direction of the master bedroom until the door was closed. According to Jones and White, as Montoya was closing the bedroom door, they both fired their weapons from the bathtub after hearing shots, and believing that they were being fired upon by Montoya. Officer Pelot did not give a statement.

Once the shooting stopped, agents Jones, White, Medina and Ortiz retreated and hid in an adjoining bedroom. They remained quiet, to not give away their position for fear that Montoya would shoot through the wall. The bedroom windows had steel security bars preventing them from exiting, and they felt pinned down. The only other exit was to cross in front of the master bedroom exposing them to gun fire. The other agents took cover in the living room, and could hear Montoya moaning. They demanded that Montoya exit the master bedroom and surrender. Montoya responded twice, stating that he was "unable to move his legs." The agents did not detect any panic in Montoya's voice, and given his actions, did not trust him. The SWAT team was called out immediately after the shots were fired. They were able to extract the four agents who were pinned down in the second bedroom, by creating an escape hole through the common wall connecting apartments one and two.

SWAT tried to communicate with Montoya prior to entering the master bedroom, but he did not respond. A robot with a camera attached was sent into the master bedroom to determine his status. SWAT officers were able to see Montoya on camera lying on his back, with his eyes open, but he was not moving. They were also able to observe by camera that Montoya had no response to a noise flash

diversionary device. SWAT then secured the master bedroom, and Montoya was pronounced dead at the scene by paramedics. The autopsy revealed that Montoya was shot twice. He was shot in his right chest below the nipple, and in his left anterior shoulder. According to the pathologist, the trajectory patterns were from front to back, right to left, and downward. The type of wound to the left shoulder suggested that the missile had struck another object prior to entering Montoya's shoulder. The two missiles recovered from his body were from two different types of ammunition, and were turned over to APD criminalistics. It is difficult to know in which flurry of shots Montoya was hit, because both of his socks were blood stained, and they left blood transfer patterns on the bedroom floor, indicating, that he was walking around the bedroom after he was shot.

All weapons, cartridge casings, projectiles and missiles were collected for comparison purposes, and were examined by the APD Criminalistics Unit. Jones and Roberson each had a Smith & Wesson 40 caliber Glock pistol. White had a 9mm Luger caliber, H & K Submachine gun, and Pelot had a 223 Wylde caliber, PWS rifle. Montoya had a fully functional black Beretta, Model 21A, 22 Long Rifle caliber, semiautomatic pistol which was collected from the master bedroom. It was loaded with a .22 LR caliber cartridge in the chamber, and two in the magazine. Three fired .22 caliber casings were collected from the floor inside the closet space of the master bedroom; which could only have been fired from Montoya's Beretta. There were two impact sites that began in the interior side of the closet wall, and exited into the bedroom. The trajectory pattern showed that one missile then ricocheted onto the TV, and another onto the bedroom wall. The protective shield carried by Robison was also struck by a projectile in the upper left corner. The missiles recovered by OMI from the chest and shoulder of Montoya were examined, and based upon the weapons collected at the scene, criminalistics was able to determine that the missile recovered from the chest of Montoya could only have been fired by one of the two 40 S & W Glock Pistols collected from Jones and Roberson. The missile recovered from the shoulder of Montoya could only have been fired from the 223 Wylde PWS rifle collected from Pelot.

In addition to the three casings collected in the closet, there were forty-one additional shell casings collected. These casings were identified by APD Criminalistics as having been fired as follows: White-18, Robison-4, Pelot-17, and Jones-2. The casings were consistent with being fired from the locations as indicated by the agents regarding their own actions, and their observations. Four casings were collected from within the master bedroom, and two casings from the doorway too the master bedroom. These six casings were identified as having been fired from weapons belonging to the following: White-three casings, Jones-one casing, and Pelot-two casings. This was again consistent with their statements and observations provided.

#### 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



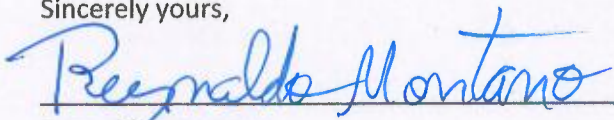
not prove the suspect posed a threat of death or great bodily harm to another; he need only offer evidence that raises the possibility.

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 the law enforcement agents fired at Montoya, they were acting under the reasonable fear that they, or others, would be killed or seriously injured by the actions of Montoya. Montoya fired his weapon three times at law enforcement while inside the closet. There were multiple agents, and he was surrounded. He had made up his mind that he was not going to be arrested, and not going back to jail. The agents involved were aware of Montoya's criminal history, and gave him every opportunity to surrender. He was asked multiple times to surrender during the knock and announce, again when the apartment doors were opened, and then when the alarm was shut down after entry. Then, when surrounded by multiple armed law enforcement agents in a dark bedroom pleading with him to surrender, Montoya chose to shoot at them three times from behind the closet. The agents returned fire in self-defense. After backing out of the bedroom, they again asked Montoya to surrender without success. The evidence strongly suggests that the agents were justified in their concerns for themselves, and for one another, and responded to the threat of deadly force or serious harm posed by Mr. Montoya when they returned fire. They 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 Officer Pelot, and Agents Jones, Robison and White; the case will be closed.

Sincerely yours,



Reynaldo Montano  
Special Prosecutor

Cc: Raul Torrez, District Attorney, Second Judicial District  
T.S. Babcock, APD Detective  
Raymond Del Greco, APD Sgt.  
Fred Mowrer, Attorney for Officer Pelot  
Richard Montoya, father to Mario Montoya