

October 7, 2019

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

RE: Prosecutorial review of the June 16, 2018, discharge of a firearm and fatal shooting by Officer Jon O'Guin of Richard Rivera

APD case #18-0058242

DA case # 2018-04295-1

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 and fatal shooting by Officer Jon O'Guin of Richard Rivera on June 16, 2018, for potential prosecution in this incident. After reviewing 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, unanimously to a jury beyond a reasonable doubt, that Officer O'Guin was not justified in acting under the belief that Richard Rivera posed an immediate threat of death, or great bodily harm, to himself, other officers, and/or members of the public. Accordingly, no criminal charges will be filed against Officer O'Guin, 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 Saturday, June 16, 2018, at 3:24 p.m., Officers Anthony Romero and D. Figueroa of the Albuquerque Police Department were dispatched to the Verizon Store, located at 2525 San Pedro Blvd. NE, in response to an armed robbery that had just happened there. Upon arrival they spoke with store employees who said an individual, later identified as Richard Rivera, had pointed a handgun at them, demanding money. An employee gave Rivera the money in the cash register. Rivera became agitated and said "that's not enough money." Rivera then pointed his gun at two customers who were in the store at that time and demanded money from them. These customers opened their purses and showed Rivera that they had no money. Rivera demanded they give him the rings on their fingers. They complied. Rivera then took the cell phones these customers had placed on the counter. Rivera then ordered the store

employee and customers into the back room where he demanded the employee open the safe. The employee complied and opened the safe. Inside were two cell phones. Rivera took these phones and left the store. One of the customers whose phone had been taken had a tracking feature on that phone that had just been turned on by the salesperson, before the robbery. The salesperson had the customer log into her account on a store tablet computer. Officers were able to track the phone and determine that it was in motion until it became stationary, at 3:35 p.m., at the KFC restaurant at the southwest corner of Louisiana and Central. The employee gave officers the tablet and they, in turn, were able to track the movements of the cell phone, in real time. Officers gave dispatch a description of Rivera, and advised dispatch of the cell phone's location, with continuing updates. Dispatch broadcast this information to all units working in the area of the KFC.

Officer Yurcisin heard dispatch advise that the phone that was taken in the robbery from the Verizon store was being tracked and was presently at the southwest corner of Louisiana Blvd. and Central Ave., and was stationary. A description of the offender was given as a Hispanic male, 40-50 years of age, with graying hair and wearing a grey shirt, black pants, and a black hat. A description of the offender's vehicle was not yet available. Officer Yurcisin went to the Kentucky Fried Chicken, located at this intersection (7010 Central Ave. SE), and waited for a vehicle to leave that location. Dispatch then advised that the phone was now moving and heading eastbound on Central Ave. SE. At 3:38 p.m. Officer Yurcisin saw Rivera's van exit the Kentucky Fried Chicken parking lot onto Central Ave SE, also heading eastbound. Because it was the only vehicle that left the parking lot when dispatch advised the suspect vehicle was now in motion Officer Yurcisin was confident that the white van was the suspect vehicle. He then broadcast the vehicle's description and license plate number to all units in that area. Officer Yurcisin and Sgt. Edison, who were in marked patrol units, followed the van as it went eastbound on Central Ave. SE, and then turned northbound onto Charleston St. NE. Dispatch then advised that the phone was now also northbound on Charleston St. NE from Central Ave. SE. Officers then knew they were following the vehicle from the Verizon robbery. Sgt. Amy Sedler, who had passed Rivera in the opposite direction he was heading, could see that Rivera had a female passenger in his vehicle and she advised the other officers of this.

Officers followed this van as it drove into a residential neighborhood. Rivera drove in a random manner on several residential streets, at about 10 miles per hour, before it became apparent that he was attempting to elude officers. Rivera drove northbound on Charleston St. NE, then westbound on Grand Ave. NE, and then southbound onto Espanola St. NE. A spike belt was authorized to be deployed and it was set up on Espanola St. NE at Copper Ave. NE, which is one block south of Grand Ave. NE. Rivera's van went over the spike belt, causing its driver's side front tire to slowly deflate, shred and eventually come off during the pursuit that soon followed. Rivera, with officers behind him, then turned westbound, onto Central Ave. NE.

Immediately after Rivera's van turned onto Central Ave. NE, it accelerated quickly. Rivera was weaving around vehicles in an attempt to elude officers who were pursuing him.

Officers had their emergency equipment engaged, which included overhead flashing lights and sirens. Officer O'Guin was the first officer behind Rivera's van in the pursuit on Central. Officer Yurcisin was behind him, and Sgt. Edison was behind both of them. These officers were all in marked patrol units, had their emergency equipment engaged, attempting to stop Rivera. Rivera did not stop, but continued westbound on Central Ave. SE, at a high rate of speed. Because Rivera had just committed an armed robbery, was travelling at a high rate of speed, and was not stopping, a pursuit intervention technique (PIT) was authorized. This involves accelerating into and deliberately striking the rear corner of a suspect's vehicle, causing it to spin around and come to a stop. Officer O'Guin, who was the first officer in pursuit directly behind Rivera chose not to PIT Rivera's van anywhere on Central because of the high volume of vehicular and pedestrian traffic, and he was concerned that Rivera's van could easily strike another vehicle or person. While westbound on Central, travelling at 50-60 miles per hour, at about 5715 Central Ave. NE, just east of San Mateo Blvd. NE, Rivera leaned out the window and fired four or five rounds from a handgun at Officer O'Guin, who was in the adjacent lane on the driver's side of Rivera's van, and slightly behind him. None of these rounds struck any of the officers' vehicles. Rivera then crossed over Central at Girard Blvd. and drove westbound in the eastbound lanes of Central, going through at least one intersection on a red light. During this time Rivera ejected the magazine in his handgun and inserted a new one, which contained six rounds. Rivera then turned south onto Stanford SE, with Edison, Yurcisin, and O'Guin in pursuit, following him. While southbound on Stanford SE, between Lead Ave. SE and Coal Ave. SE, Sgt. Edison performed a pursuit intervention technique on Rivera's van. This caused Rivera's van to spin approximately 90°, resulting in it facing eastbound, and in front of Edison's, Yurcisin's, and O'Guin's vehicles. These Officers exited their vehicles and attempted to take Rivera into custody. Rivera pointed his handgun out the driver's window and again began firing at officers. None of the officers were struck by any of the rounds Rivera fired. Officer O'Guin returned fire, firing five rounds, which struck the side of the van just behind the driver's door. Rivera went south on Stanford Dr. SE to Coal Ave. SE, then east on Coal Ave. SE to Columbia Ave SE, then south on Columbia Ave. SE to Garfield Ave SE. Just before reaching the intersection of Columbia and Garfield, Sgt. Edison attempted another pursuit intervention technique on Rivera's van. He struck the van from behind, causing it to momentarily skid. Rivera's van did not spin around, however, but regained traction and headed west on Garfield Ave SE, and then turned northbound onto Yale Blvd. SE.

Rivera next turned eastbound onto Coal from Yale, in front of the Smith's supermarket at 320 Yale Blvd. SE. Officer O'Guin then performed a PIT to Rivera's passenger side causing it to spin around and strike the passenger side of O'Guin's vehicle, and coming to rest beside O'Guin's vehicle with the respective passenger sides of their vehicles facing each other. Rivera's van was now facing westbound, O'Guin's eastbound, on Coal. Rivera exited his van and began to run, northbound, through the parking lot of the Smith's store at 320 Yale Blvd. SE, towards the front door. The parking lot at Smith's was very crowded with people going into and out of the store, and Officer O'Guin feared for their safety if Rivera should enter the store.

Officer O'Guin pursued him on foot, yelling commands for Rivera to stop and submit. Rivera yelled "I've got a gun. I've got a gun" as he ran from Officer O'Guin. Rivera moved his hand toward his waistband and it appeared to Officer O'Guin that he was about to retrieve something, possibly a gun. See Officer O'Guin's lapel camera still-frame at Appendix "A". Officer O'Guin fired six rounds from his handgun, striking Rivera four times, and killing him. A shopper (Diane Martinez) who had just exited Smith's, and was walking towards her vehicle, saw Rivera reaching into his pocket while exclaiming "I've got a gun!" just before Officer O'Guin shot him. Rivera had run approximately 250 feet from his vehicle when he was shot.

Inside the driver's door compartment of Rivera's van was a 9mm semi-automatic handgun, which had one round in the chamber and two rounds in the magazine. On the pavement just outside the driver's door was a handgun magazine. Rivera did not have a handgun on his person when he was shot by Officer O'Guin.

Rivera was struck by four bullets fired by Officer O'Guin:

1. One entered through the left side of the middle of his back, going through his liver and spleen.
2. One entered through the right side of his lower back, going through soft tissue and muscle.
3. One entered through the back outer side of his left thigh, striking his femur.
4. One entered the back inner side of his right thigh, going through soft tissue and muscle.

Toxicology analysis revealed Rivera had the following substances in his system:

1. Amphetamine, at a level approximately four times above therapeutic range.
2. Methamphetamine, at a level approximate seventy-five times above therapeutic range.
3. Codeine, at a level within therapeutic range.
4. Morphine, at a level within therapeutic range.
5. Alcohol, with a blood/alcohol concentration of .016.

#### LEGAL ANALYSIS

At trial Officer O'Guin would be entitled to raise the defense of justifiable homicide by a public officer. Officer O'Guin, on trial for his use of deadly force, could raise this defense if, at the time of his use of deadly force:

1. Officer O'Guin was a public officer or employee,
2. The [shooting] was committed while he was performing his duties as a public officer or employee,

3. The [shooting] was committed while overcoming the actual resistance of Richard Rivera to the execution of officers who were attempting to arrest him, *or*  
The [shooting] was committed while arresting Richard Rivera, who had committed an armed robbery and aggravated assaults against law enforcement officers who were attempting to apprehend him, and was fleeing from justice, and
4. A reasonable person in the same circumstance as Officer O'Guin would have reasonably believed that Richard Rivera posed a threat of death or great bodily harm to Officer O'Guin, other officers, and/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

Officer O'Guin was a public officer, performing his duties while attempting to arrest Richard Rivera for an armed robbery, shooting at Officer O'Guin, and then shooting at Officers O'Guin and Yurcisin, and Sgt. Edison. Officer O'Guin could have reasonably believed that Richard Rivera posed an immediate threat of death, or great bodily harm to himself, other officers, and members of the public.

A jury is likely to find that Officer O'Guin acted reasonably, and I also believe that a reasonable person, in the same circumstance as Officer O'Guin, 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 Officer O'Guin in state court. This case will be closed.

Very truly yours,



Chris Schultz

Special Prosecutor

Cc: Raul Torrez, District Attorney, Second Judicial District

Detective David Gonzales, Albuquerque Police Department

Officer Jon O'Guin, Albuquerque Police Department, c/o John D'Amato

Appendix "A"

