

March 24, 2017

Martin Krueger
Senior Inspector
Internal Affairs
United States Marshal's Service
marty.krueger@usdoj.gov

RE: Prosecutorial review of the April 18, 2014 incident in which Deputy U.S. Marshal Hebrews Josue, fired a single shot at Rufus Phelps during an attempt to arrest Phelps on an outstanding warrant.

APD# 14-34400

DA# 2014-02370-1

Dear Inspector Krueger:

I have been appointed as a Special Prosecutor by Raul Torrez, the Second Judicial District Attorney, to review the incident of April 18, 2014 for potential prosecution. After a review of all available evidence, I conclude that it is not possible to prove, beyond a reasonable doubt, that Deputy Josue was not acting under the reasonable belief that Rufus Phelps' actions posed a threat of death or great bodily harm to Deputy Josue or his fellow officers. My decision does not limit administrative or criminal action by other agencies, or civil actions by other parties. No charges will be filed: the case will be closed.

STATEMENT OF FACTS

On September 19, 2013, Rufus Phelps was indicted by the Bernalillo County Grand Jury on charges of Aggravated Assault Against a Household Member, Aggravated Assault with a Deadly Weapon, Possession of a Firearm by Felon, and assorted drug related charges. On March 5, 2014, Judge Benjamin Chavez issued a bench warrant for Phelps based on his failure to comply with conditions of release. The warrant was given to the Fugitive Apprehension Task Force to serve. The Task Force received unexpected help from Jonathan Phelps, Rufus Phelps' brother, who wanted to see Rufus arrested, in part to prevent the loss of their mother's home, which had been posted as security for Rufus Phelps' bond.

Jonathan Phelps alerted the Task Force that he had agreed to meet Rufus at the parking lot of the ABQ Biopark on the afternoon of April 18, 2014, so that Rufus could give him a pistol.

The Task Force organized a stake-out of the Botanical Park lots, but as there are several scattered lots, the Task Force Agents were forced to separate to cover them all. Deputy United States Marshals Josue and Clint Huffman were parked in a blue Dodge Charger in the paved lot just north of Central Avenue on Tingley Drive. The lot was mostly full; it is a popular place to park for people using the adjacent bike path. Around 2:48 p.m. Rufus Phelps drove into the lot in a gold Chevrolet Cavalier. He initially pulled into a handicapped slot, but then backed into a parking space along the fence, very near the Deputies' car. Almost immediately, Phelps appeared to notice the Deputies, most likely because the tactical vests and wind breakers they were wearing displayed badges and the words "U.S. Marshal".

When they realized they had been spotted, the Deputies left their car and ran toward Phelps' car. Deputy Huffman, who had been driving, ran around the back of his car, while Deputy Josue ran more directly toward the car, and yelled "Police. Put your hand's up" as he approached the vehicle; his path placed him in front of Phelps' car. Phelps reacted by accelerating forward, toward Deputy Josue, who, leapt aside and fired one quick shot into the passenger side window of Phelps' car, piercing the window, but missing Phelps. In his interview, Deputy Josue said, "I figured if I could hit him, I could stop the car from running me over."

Phelps accelerated across the small parking lot toward the exit, which was blocked by a silver Dodge Nitro car in which Deputies Anthony Jones and Robert Median had just arrived at the lot. They attempted to box in Phelps' car, but he swerved to squeeze between the Deputies' car and a fence, forcing Deputy Jones, who was stepping out of the passenger side, to leap back in and slam the door to avoid being hit by Phelps' car. Phelps' car struck the Deputies car in a hard sideswipe, passenger side to passenger side. Phelps drove on, jumped the curb, turned right onto Tingley Drive, made a quick left on Central into heavy traffic and quickly lost his pursuers.

Phelps suffered minor bruises and abrasions on his cheek and neck, caused by the flying glass from the shattered window; otherwise he was uninjured. Phelps' car and the Deputies' car were both slightly damaged; neither of the Deputies were injured. Phelps was arrested six days later, on April 24, 2014, without incident. He declined to give a statement about the incident.

LEGAL ANALYSIS

Deputy Josue was acting in the line of duty, serving a valid warrant when he fired the shot, therefore he would be entitled to raise the defense of justifiable homicide by public officer, NMSA 1978, Section 3-2-6, which 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. Under New Mexico law, the 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 not justified. If the jury has a reasonable doubt as to whether the killing was

justifiable, they must acquit the officer, Uniform Jury Instruction-Criminal: 14-5173 Justifiable homicide; public officer or employee¹.

CONCLUSION

The question presented in this case is whether, at the moment of the shooting, Deputy Josue was acting under the fear that he, or others, would be struck and injured by the car accelerating toward him. Evidence strongly suggests that he was in fact acting out of such fear, and in the absence of sufficient evidence to prove, beyond a reasonable doubt, that he was not, or that his fear was unreasonable, there is no realistic likelihood of a successful prosecution; therefore, no charges will be filed against Deputy Josue; the case will be closed.

Very truly yours,



Michael D. Cox

Special Prosecutor

¹ 14-5173 Justifiable homicide; public officer or employee. 1

Evidence has been presented that the killing of _____ (*name of victim*) was justifiable homicide by a public officer or employee.

The killing was justifiable homicide by a public officer or public employee if:

1. At the time of the killing, _____ (*name of defendant*) was a public officer or employee; and
2. The killing was committed while _____ (*name of defendant*) was performing [his] [her] duties as a public officer or employee;

3. The killing was committed while²

[overcoming the actual resistance of _____ (*name of victim*) to the execution of _____³

[overcoming the actual resistance of _____ (*name of victim*) to the discharge of _____⁴

[retaking [_____ (*name of victim*)] [a person], who committed _____⁵ and who had [been rescued]⁶ [escaped _____

[arresting _____ (*name of victim*) [a person], who committed _____⁵ and was fleeing from justice]

[attempting to prevent the escape from _____⁷ by [_____ (*name of victim*)] [a person] who committed _____⁵]; and

4. A reasonable person in the same circumstances as _____ (*name of defendant*) would have reasonably believed that _____ (*name of victim*) posed a threat of death or great bodily harm to

_____ (*name of defendant*) or another person. The burden is on the state to prove beyond a reasonable doubt that the killing was not justifiable. If you have a reasonable doubt as to whether the killing was justifiable, you must find the defendant not guilty.

Cc: Raul Torrez, District Attorney, Second Judicial District
Detective Andrea Ortiz, Albuquerque, Police Department
Chief Gorden Eden- Albuquerque Police Department
United States Marshal, District of New Mexico, Conrad E. Candelaria
Rufus Phelps c/o Irma Rivas