

**ATTORNEY GENERAL
STATE OF MONTANA**

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P.O. Box 201401
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August 6, 2020

BY EMAIL AND FIRST-CLASS MAIL

Ms. Kirsten Pabst
Missoula County Attorney
County Courthouse
200 West Broadway
Missoula, MT 59802

RECEIVED

AUG 10 2020

County Attorney

Re: Letter of Request Regarding the Prosecution of Joshua Paniagua

Dear Ms. Pabst:

Prosecution Services Bureau Chief Dan Guzynski assigned David Buchler and I to review your office's decision to decline to charge Joshua Paniagua with Deliberate Homicide for the death of Benjamin Mousso. For the reasons below, we agree with your decision to decline to charge Paniagua with Deliberate Homicide.

Our review of the investigative file included the following:

- An 84-page PDF entitled "MDP Case report" containing the written reports of the various personnel involved in the investigation.
- Two USB drives containing approximately 170 GB of audio, video and photo material from the investigation.

Upon review of these materials, it is readily apparent that none of the young men involved in this tragedy are particularly credible with regard to what happened on January 1, 2020. Any attempt at providing a detailed narrative of what actually happened that evening would be near impossible as there is little that everyone agrees on. Nevertheless, in order to provide some context for our review, we will outline here our understanding of the basic facts based on our review of the evidence:

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MONTANA DEPARTMENT OF JUSTICE

Legal Services Division * Division of Criminal Investigation* Highway Patrol Division * Forensic Science Division
Gambling Control Division * Motor Vehicle Division * Information Technology Services Division * Central Services Division

Benjamin Mousso, Simon Reed and Bridger Christensen met Joshua Paniagua at a casino for the purpose of obtaining marijuana from Paniagua. At some point it was communicated to Paniagua that they would give him methamphetamine for the marijuana. No one involved was in possession of any methamphetamine to give to Paniagua. Reed and Christensen admitted that there was a plan amongst Mousso, Reed and Christensen to rob Paniagua. While in a car outside the casino, Paniagua agreed with some combination of the plan of Mousso, Reed and Christensen that the drug deal would be completed in the bathroom. Mousso went to the bathroom first, followed shortly thereafter by Paniagua. After a very short time in the bathroom, there was a fight and Paniagua stabbed Mousso multiple times. Mousso then ran from the casino followed immediately by Paniagua, who was holding a knife.

Paniagua's story about what happened in the bathroom is inconsistent, but he generally claims that he entered the casino bathroom and Mousso asked him if he had given the marijuana to Reed. Paniagua claims he first said "no" but then quickly said "yes." He claimed that by the time he said "yes," Mousso was already throwing punches at him. Paniagua stated that he believed he was going to be beat up and robbed. Paniagua admitted to stabbing Mousso multiple times in order to make Mousso stop. Mousso died shortly thereafter as a result of injuries from the stabbing.

"In a criminal trial, when the defendant has offered evidence of justifiable use of force, the state has the burden of proving beyond a reasonable doubt that the defendant's actions were not justified." Mont. Code Ann. § 46-16-131.

The justifiable use of force statutes provide in relevant part as follows:

[A] person is justified in the use of force likely to cause death or serious bodily harm only if the person reasonably believes that the force is necessary to prevent imminent death or serious bodily harm to the person or another or to prevent the commission of a forcible felony.

Mont. Code Ann. § 45-3-102. Based on these statutes, the State would need to prove beyond a reasonable doubt at trial that Paniagua did not "reasonably believe" that stabbing Mousso was necessary to prevent serious bodily harm to Paniagua or to prevent a robbery.

Based on the evidence we have reviewed, we do not see proof beyond a reasonable doubt that Paniagua was not justified in his use of deadly force. There is ample evidence of a plan among Reed, Christensen and Mousso to physically assault and rob Paniagua prior to the altercation in the bathroom. While the evidence indicates that Paniagua did not have marijuana on him at the time he entered the bathroom, that fact makes little legal difference

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in terms of justifiable use of deadly force. Our interpretation of the law is that if Paniagua reasonably believed that Mousso attacked him in order to steal marijuana it is either robbery or attempted robbery. Factual impossibility—i.e. the fact that the marijuana was not on Paniagua’s person—is not a defense to attempted robbery. *See* Mont. Code Ann. § 45-4-103(2). In other words, regardless of whether the marijuana was actually on Paniagua’s person, if Paniagua reasonably believed that Mousso was trying to rob him of marijuana, he is justified in using deadly force under Mont. Code Ann. § 45-3-102.

We want to emphasize that the critical factor in our opinion here is that the State bears the burden of proving beyond a reasonable doubt that the force used was not justified. There is ample reason in the investigative file to doubt Paniagua’s story. However, convincing a jury that Paniagua’s story is doubtful, or even convincing a jury that Paniagua’s story is “probably not true” will not support a conviction. Rather, the State must prove that Paniagua’s story was not true, beyond a reasonable doubt. We do not believe that standard could be met here. Accordingly, we can find no fault in Missoula County for declining to charge Paniagua with deliberate homicide.

Sincerely,

PROSECUTION SERVICES BUREAU



OLE OLSON
Assistant Attorney General



DAVID A. BUCHLER
Assistant Attorney General

oo/lj

c: Ms. Aly (Mousso) Wilding (mail only)