

# CITY OF ALBUQUERQUE

*Albuquerque Police Department*



Gorden E. Eden, Jr., Chief of Police



May 8, 2017

Edward W. Harness, ESQ.  
Executive Director  
Civilian Police Oversight Agency  
600 2<sup>nd</sup> Street NW, Room 813  
Albuquerque, NM 87102

RE: Internal Affairs Investigation I-169-15

Dear Mr. Harness,

On September 22, 2015, the Office of the District Attorney (DA) notified the Albuquerque Police Department of their findings in this accidental firearms discharge which resulted in injury to a non-involved person. The review by the DA concluded, "There is no evidence to suggest that Officer XXXXX act was criminal."

400 Roma NW

Internal Affairs case I-169-15 was reviewed, findings made and specific recommendations made by the Albuquerque Police Department chain-of-command on April 7, 2017. The involved officer was notified by the Internal Affairs of the proposed discipline and of this date, the involved officer has not appealed the proposed action and I am now able to respond to your letter dated March 16, 2017.

Albuquerque

New Mexico 87102

According to a review of the case on December 14, 2014 at approximately 5:00 a.m. in the morning two officers with the Albuquerque Police Department were dispatched to an apartment on Charleston in the Southeast area of Albuquerque, New Mexico. The call was to investigate a residential burglary in progress. Comments on the call indicate that two male subjects had arrived at the location in a red pickup. The two male subjects had entered the apartment and were removing items from the dispatched location.

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Upon arrival at the scene the officers met and approached the apartment complex on foot. While making their approach the officers observed a Green Chevy Sedan leaving the apartment complex. Officers were able to obtain a license plate from the Green Chevy Sedan however did not stop the vehicle.

In addition to the observation of the Green Chevy leaving the apartment complex, the officers observed a red pickup truck parked on the opposite side of the street from where the apartment was located. The officers continued their approach and the red pickup truck attempted to leave the scene. The officers then conducted a felony stop of the red pickup truck due to the fact that this vehicle matched the description of the vehicle that was noted in the call for service. Suspects were seen entering the

apartment, and they had reason to believe that this red vehicle, as well as the two persons involved may have been the person or persons who were involved in the residential burglary.

According to the officers, the one male subject inside the vehicle told the officers that they were there to remove some of the items out of apartment #4 for a friend. However, the detained subject did not know the friend's full name they only knew the person by a name Drew. The person who the officers made contact with said that they made entry through a window of the apartment complex. Witnesses had told the officers on the scene that they saw at least a TV, a scooter and other items being removed from the apartment through the window. The officers did locate the scooter in the back of the red pickup truck and again the red pickup truck was attempting to leave the scene.

According to reports, the officers had reason to believe that another person may be at large and in the apartment. The officers then travelled to the apartment and requested maintenance personnel meet with the officers. They observed that a window was broken and covered by a plastic bag. The officers had removed this screen in the window to see if they can gain entry into the apartment without waiting for a key. The officers aware (based on the original call for service) that a person may still be at large. The officers gave voice commands into the apartment announcing that APD police officers were present and telling the person or anyone inside the apartment to come to the front with their hands free and clear. This is consistent with the video tape from the officer's lapel camera. It is clear based on the information contained in the internal affairs investigation and consistent with the statements from the officers that the officers were going to conduct a protective sweep of the apartment.

In the evaluation and review by the CPOA, the letter cites information that was not known to officers at the time of the search of the possible burglary in progress location. The safety necessity, expectation and justification for police to search a suspected burglarized residence for victims and suspects has been recognized by well established case law. This was not a search incidental to arrest and in this matter and the suspect has no expectation of privacy in a residence that isn't his. The officers were faced with a broken window, reported criminal conduct by two unknown suspects, possible ongoing criminal activity and evidence that property was taken from the unsecured apartment.

There are numerous scenarios in which the courts have found it would be reasonable for an officer to clear a residence or business as a function of the community caretaker. In most of the cases the court(s) held the police were justified in searching residences believed to be burglarized and further held evidence discovered was admissible against the home owner or resident even though it wasn't part of the officer's original intent to clear a residence.

Officers are expected and permitted under certain circumstances to enter and search for persons when a home or business has signs of a burglary. Under community

caretaker theory and emergency circumstances not a protective sweep. We are not dealing with a suspect's residence or vehicle. The physical "clearing" of a dwelling takes place all across America every day and is expected action by the police. In performing this community caretaking function, officers are "expected to aid those in distress, combat actual hazards, prevent potential hazards from materializing and provide an infinite variety of services to preserve and protect public safety." *United States v. Smith*, 522 F.3d 305 (3d Cir.2008) quoting *United States v. Rodriguez-Morales*, 929 F.2d 780 (1st Cir.1991).

The courts have upheld that similar warrantless searches of private residences by officers responding to calls in progress such as a burglary in progress or an activated burglar alarm that these warrantless searches are permissible. The courts have found that officers have had probable cause to believe that a breaking and entering subject or a person who has committed a burglary may be present. The court has emphasized that the officers need to know if an intruder managed to get inside the residence or even may be injured or captured a resident then fled or might be caught off guard by the police. Several courts have ruled that these circumstances justify a warrantless search when officers respond to a burglary in progress even after a neighbor reported seeing individuals crawl through a window of a residence and upon arriving at the scene the officers observed a broken window.

Other courts have upheld similar warrantless searches of private residences by officers responding to an activated burglar alarm. For example, in *United States v. Tibolt*, 72 F.3d 965, 969-71 (1st Cir.1995), police were called by a security company to investigate an activated burglar alarm. The officers entered the wrong driveway and mistakenly believed defendant's residence was the source of the alarm. Finding no signs of forced entry, police discovered an unlocked door on the rear deck and mistakenly believed it was the source of the alarm. When no one responded from inside the residence, police entered, conducted a protective sweep, and discovered an indoor marijuana growing operation. The court found the officer had probable cause to believe a breaking and entering had been or was being committed, and this established exigent circumstances. The court emphasized that without entering the residence, the officers could not know whether "an intruder had managed to get into the residence, and even injured or captured a resident, then fled; or had been caught off guard by the police and remained in the residence with a forcibly detained resident." *Id.* at 970.

"Holding that probable cause and exigent circumstances justified a warrantless search when officers responded to a burglary in progress after a neighbor reported seeing individuals crawl through a window of a residence, and upon arriving on the scene, the officers observed a broken window and two individuals inside" *U.S. v. McCLAIN*, 430 F.3d 299 (6th Cir. 2005)


"The establishment of probable cause `requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.'" *United States v. Ogbuh*, 982 F.2d 1000, 1002 (6th Cir. 1993).

*United States v. McClain*, 444 F.3d 556, 562 (6th Cir. 2005) (quoting *United States v. Reed*, 141 F.3d 644, 649 (6th Cir. 1998)). Although both probable cause and exigency are needed under this rule, "when the police have probable cause to believe that a burglary is in progress, they are also confronted with the necessary exigency, that is, the need 'to ensure the protection of everyone on the scene and to prevent the loss or destruction of the owner's property.'"

After making entry into the apartment through the broken window one of the officers had an accidental discharge. After reviewing the facts of this case as well as the standard operating procedures for the department, I have determined that SOP Violation I-04-6 Code of Conduct Subsection K states personnel shall, at all times, be responsible for safeguard and proper use of all departmental issued property. All authorized equipment shall be utilized only for its intended purpose, in accordance with established departmental procedures. Based on reviewing this case I exonerate the officer in this case.

As pertains to standard operating procedure (SOP) 2-52-6 (I)(1), I find that the officer is sustained in this matter. After reviewing the personnel record of the involved officer as well as his disciplinary history, the record does not show a pattern or history of him violating the firearms procedures and/or use of any equipment policy. Taking into consideration both aggravating and mitigating circumstances and based on my review and the recommendations of the chain-of-command, officer has received a written a reprimand as it pertains to this particular incident.

Respectfully,



GORDEN E. EDEN, JR.  
Chief of Police