

May 2, 2018

Sheriff Manual Gonzales III  
Bernalillo County Sheriff  
Bernalillo County Sheriff's Department  
400 Roma NW  
Albuquerque, NM 87102

Re: Prosecutorial review of the May 3, 2016, shooting of David Hickey.

BCSO CASE # 16-6514444  
DA # 2016-D26301

Dear Sheriff Gonzales:

I have been appointed as a Special Prosecutor by Raul Torrez, the Second Judicial District Attorney, to review the shooting of David Hickey which occurred on May 3, 2016, for potential prosecution. I reviewed all available evidence, including including police reports, witness statements, videos, and photographs.

Substantial evidence demonstrates that David Hickey placed the lives of four Bernalillo County Deputies and other members of the public at risk for serious bodily harm or death with a motor vehicle while resisting his arrest for larceny. Therefore, criminal charges against Deputy Barker and Deputy Davis for the May 3, 2016, shooting of David Hickey will not be filed. My decision does not limit administrative or criminal action by other agencies, or civil action by other parties.

#### **RELEVANT FACTUAL BACKGROUND**

On the afternoon of May 3, 2016, Rick Perez, was washing his clothes at the Spin Cycle Coin Laundromat located at 715 Bridge SW, in Albuquerque, New Mexico. While at the Laundromat Perez saw two men and a female drive up in a silver-colored Saturn. The two men later identified as David Hickey and Zachary Weiss entered the Laundromat and began looking at the washing machines in a suspicious manner. The female, later identified as Phylcia Baca, initially remained seated in the Saturn.

Perez observed Hickey and Weiss as they tried to “jimmy” the locks to the washing machines. Baca entered the Laundromat and spoke briefly with Hickey and then returned to the Saturn. Unable to break into the laundry machines, Hickey and Weiss turned to the coin operated candy machines. While stealing candy and money from the machines, Hickey and Weiss told a female customer who was watching them to “mind your own business”. Perez walked outside and called 911.

The dispatch operator announced the larceny in progress at the Laundromat. Four members of the Bernalillo County Bike Patrol team, consisting of Deputy Chris Starr, Deputy Micah Barker, Deputy Steve Aldrege, and Deputy Matt Davis, were in the area and responded to the scene. Deputy Davis and Deputy Barker approached the Laundromat from the southeast side with their weapons drawn. They made contact with a male who was leaving the Laundromat and soon discovered that it was Perez, the calling party. Perez told the deputies that the two men were still inside the Laundromat.

Deputies Starr and Aldrege, approached the Laundromat from the northwest side and looked into the Laundromat through a door. Hickey and Weiss, were manipulating the locking mechanisms on the top of candy machines. Deputy Starr entered the Laundromat, drew his firearm, and identified himself as “Sheriff’s Department”. Deputy Starr directed Hickey and Weiss to put their hands in the air. Hickey looked Deputy Starr up and down, turned, and walked away from Deputy Starr. Deputy Starr commanded Hickey to stop and walk back towards him, which Hickey did do. By this time Deputies Barker and Davis had entered the Laundromat through the southeast entrance.

Deputy Starr backed out of the Laundromat and directed Hickey and Weiss to follow him outside. Once outside, Deputy Starr ordered Hickey and Weiss to sit on the ground. Weiss sat down as directed. Hickey did not. Hickey walked towards the silver Saturn that he arrived in. Deputy Starr ordered Hickey to stop. Hickey, who was wanted on a felony arrest warrant responded “No! I’m going over here!” Hickey made a break for the Saturn. Deputies Starr and Aldrege ran after Hickey.

Hickey reached the driver’s side of the Saturn with Deputy Starr close behind him. Hickey reached for the door. Deputy Starr tried pushing Hickey away from the door. Hickey managed to open the door and jump into the driver’s seat. The driver’s side door remained opened. Deputy Starr still had his gun drawn and

tried without success to pull Hickey out of the car with one hand. Deputy Starr gave Hickey multiple commands to get out of the car.

Deputies Davis and Barker ran towards the front of the Saturn and saw Baca seated in the front passenger seat. Deputy Barker ran to the front passenger door and shouted to Baca "Sheriff's Department! Let me see your hands!" "Keep your hands where I can see them!" Baca did not comply.

Deputy Barker reached through the open passenger side window and tried to grab Baca with his left hand. Deputy Barker could not use both hands to extract Baca from the vehicle because he was holding his firearm with his right hand. While trying to control Baca, Deputy Barker observed Deputy Starr engaged in a violent struggle with Hickey. Deputy Davis reached through the open rear passenger window and grabbed Baca's hair and head. Deputy Davis was trying to keep Baca from reaching the center console where the gear-shift was located.

Hickey began revving the engine. He also reached for the gear-shift. Deputy Starr struggled with Hickey to keep him from placing the vehicle in gear. Deputy Starr knew if Hickey placed the vehicle in gear he and the other officers were at a high risk of being hit or run over. The risk of danger escalated. Deputy Starr holstered his firearm so he could use both hands to prevent Hickey from placing the vehicle in gear.

Deputy Starr's hand slipped off the gear and he heard the vehicle shift into reverse. The vehicle violently shot back because Hickey had been gunning the engine. Deputy Starr, jumped into the vehicle and onto Hickey's lap in order to avoid being dragged, run over, or possibly killed by the moving vehicle.

As the vehicle shot back, the open driver's side door struck Deputy Aldrege on the back knocking him to the ground. Deputy Barker was still engaged with Baca through the passenger side window and had no time to pull his upper body out of the moving vehicle. Deputy Barker did his best not to be dragged by the moving vehicle. While attempting to run with the vehicle, Deputy Barker's legs swiped Deputy Davis, who was trying to pull his arms out of the vehicle. The vehicle struck Deputy Davis on the hand before he was knocked to the ground.

Deputy Barker believed he was going to be dragged and possibly run over so he fired his gun at Hickey. The round from his gun struck Hickey on the left side below the ribcage area. Deputy Starr heard the shot and felt the vehicle slow and come to a stop in the street.

While the vehicle was still in reverse and prior to Deputy Barker firing his gun, Deputy Davis jumped up from where he had been knocked to the ground and observed Deputy Barker hanging out the right side passenger window of the moving vehicle. He also saw the vehicle headed through the parking lot and toward the wall of a daycare center. Deputy Davis feared that the vehicle, if not stopped, was going to drag Deputy Barker and ram into the wall of the day care center.

Deputy Davis drew his gun and shot out the right front tire of the vehicle because he could not get a clear shot of Hickey without placing Deputy Starr at risk of being hit. Deputy Starr later stated that when the vehicle was in motion he was in such fear he would have shot Hickey himself but was unable to retrieve his firearm without sacrificing what control he did have over Hickey.

When the vehicle came to a stop Deputy Starr pulled Hickey out of the vehicle and handcuffed him. He and Deputy Aldrege rendered medical aid to Hickey. Several small candies and quarters fell out of Hickey's pockets along with a small leather pouch containing lock-picking tools. The candies were of the same type as those for sale in the vending machines located inside the Laundromat. Hickey was quickly transported by ambulance to UNMH where he received treatment for his gunshot wound. Hickey declined to give a statement.

Deputy Mark Cerna arrived on the scene and observed Weiss flee the scene on foot. Deputy Cerna quickly apprehended Weiss. Weiss had candies and a large amount of quarters in his pockets. Baca and Weiss were transported and booked into MDC. Baca told detectives during an interview that she had been in a relationship with Hickey for about eighteen years. She claimed that she, Hickey, and Weiss, had gone to the Laundromat to do laundry. Baca denied knowing that Hickey and Weiss were stealing candy and money inside the Laundromat.

Weiss initially claimed that he met his cousin Hickey at the Laundromat. He then admitted to having arrived at the Laundromat in the silver Saturn with Hickey and Baca. Weiss claimed he purchased candy inside the Laundromat and did not know what Hickey was doing. Weiss then stated that he knew Hickey was breaking into the machines. Weiss claimed that he ran from the scene when he heard the gun shot because he "got scared".

Search warrants were obtained for the Saturn. While executing the search warrants, detectives located narcotics, narcotic paraphernalia, counterfeit mail cluster keys, a large quantity of stolen mail, and an accordion file with several

identification cards that had Hickey's picture on them but with different names. The accordion file also contained checks, and several bank cards with the names of people not associated with Hickey, Wiess, or Baca.

A June 17, 2016, Grand Jury Indictment charged Hickey with thirteen (13) criminal offenses including one count of aggravated battery upon a peace officer (deadly weapon) as to victim Deputy Aldrege and three counts of aggravated assault upon a peace officer with a deadly weapon as to victims Deputy Starr, Deputy Barker, and Deputy Davis. On January 11, 2017, Hickey entered a plea of guilty to nine crimes including aggravated battery upon a peace officer with a deadly weapon as to victim Deputy Aldrege and to two counts of aggravated assault upon a peace officer as to victims Deputy Starr and Deputy Barker. On April 4, 2017, Hickey was sentenced to an aggregate sentence of twenty-one (21) years with sixteen (16) of those years suspended.

### LEGAL ANALYSIS

It is irrefutable that Deputies Barker and Davis were acting in the line of duty, attempting to apprehend Hickey when they fired their weapons. Therefore, if charged for the May 3, 2016, shooting of Hickey, Deputies Barker and Davis would be entitled to assert a defense under NMSA 1978 § 30-2-6. This statute provides that an officer is entitled to use deadly force when the officer reasonably believes that he or another is threatened with serious harm or deadly force. Section 30-2-6.

In New Mexico, an officer who uses deadly force 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 rests with the prosecution to prove, beyond a reasonable doubt, that the use of deadly force was not justified.

The reasonableness of the officer's actions is an objective analysis evaluated from his or her perspective at the time of the incident with the understanding that officers must often make split-second decisions in difficult situations about what type of force is necessary. *State v. Mantelli*, 2002-NMCA-033, ¶ 29, 42 P.3d 272.

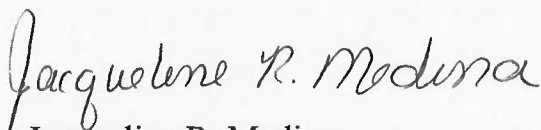
Deputies Barker and Davis were attempting to apprehend Hickey on suspicion of larceny when they fired their weapons. Prior to firing their weapons, Hickey struck Deputies Aldrege and Davis with a vehicle. He also placed Deputy Starr and Deputy Barker at risk of being dragged or run over by the same vehicle. In addition, Hickey was about to strike the wall of a daycare facility with a vehicle,

placing the occupants of the facility at risk of harm or death. Given these facts Deputy Barker and Deputy Davis would have no trouble successfully arguing that their use of deadly force was justified under Section 30-2-6.

### CONCLUSION

At the time Deputy Barker fired his weapon he was acting out of fear that he and Deputy Starr were going to be dragged and injured by the vehicle Hickey was driving. Similarly, Deputy Davis fired his weapon out of fear that Deputy Barker and others were going to be killed or seriously injured as the vehicle accelerated in reverse. In the absence of any evidence to prove otherwise, and given Hickey's pleas of guilt to committing aggravated battery upon a peace officer (deadly weapon) and to two counts of aggravated assault upon a peace officer (deadly weapon), there is no possibility of a successful prosecution against Deputy Barker or Deputy Davis. Therefore, no charges will be filed against either deputy and this case will be closed.

Sincerely,



Jacqueline R. Medina  
Special Prosecutor

Cc: Raul Torrez, District Attorney Second Judicial District  
Fred Mowrer, counsel for Deputies Barker and Davis  
D. Hickey