

June 27, 2019

Chief Tim Johnson
New Mexico State Police
4491 Cerrillos Rd.
Santa Fe, NM 87507

Re: Prosecutorial Review of the July 15, 2018 shooting
death of Jonathan Molina by New Mexico State Police
Officer Kevin Smith.
NMSP Case #18-23-3-0099; DA Case # 2018-05803-1

Dear Chief Johnson:

I have been appointed as a Special Prosecutor by Second Judicial District Attorney Raul Torrez to review, for potential prosecution, the July 15, 2018 shooting death of Jonathan Molina by New Mexico State Police Officer Kevin Smith. After a review of all available evidence, including police reports, witness statements, audio and video recordings, photographs, laboratory and medical reports, trajectory analysis, and a visit to the scene of the shooting, I conclude that there is not sufficient evidence to prove, beyond a reasonable doubt, that Officer Smith was not acting in the reasonable fear that Jonathan Molina's actions posed a significant threat of death or great bodily harm. Accordingly, criminal charges against Officer Kevin Smith for the shooting death of Jonathan Molina are not warranted and the case will be closed. This decision does not limit administrative or criminal action by other agencies, or civil actions by other parties.

RELEVANT FACTUAL BACKGROUND

New Mexico State Police Officer Kevin Smith voluntarily provided a statement to investigating officers. According to Officer Smith, on July 15, 2018 he was on regular patrol

along the highways of Albuquerque. At approximately 2:00 a.m., while patrolling southbound on Interstate 25, near mile marker 223, Officer Smith observed a blue Honda sedan travelling at a high rate of speed. The Honda was clocked at 101 mph in a posted 65 mph speed zone. Officer Smith enacted his emergency equipment and radioed in to dispatch his location and the license plate number of the Honda. The license plate number came back as belonging to a different vehicle. Based on the speeding violation and the possibility that the vehicle was stolen, Officer Smith conducted a traffic stop on the blue Honda just north of the Avenida Cesar Chavez offramp. Before Officer Smith exited his vehicle, he noticed that the Honda's engine was revving very loudly. Over his public address system, Officer Smith directed the driver of the Honda to shut the engine off. The driver complied.

Officer Smith made a driver's side approach and observed two male occupants in the vehicle. The driver identified himself as Brandon Smith (Brandon). Brandon explained that he had just recently purchased the vehicle and did not have a vehicle registration or proof of insurance for the Honda. Brandon also stated that he was aware that the license plate on the Honda belonged to another vehicle. Officer Smith asked Brandon to exit the vehicle. Officer Smith stated that he asked Brandon to exit the vehicle because he intended to issue citations for speeding and improper use of registration. Officer Smith also wanted to separate the occupants to compare their statements regarding the license plate, because his initial thought was that the Honda may have been stolen because it is common for car thieves to place different license plates on stolen cars.

Officer Smith stated that Brandon complied with the request to exit the vehicle, but some of Brandon's actions were peculiar and caused the officer some concern. Brandon was nervous and visibly shaking. Officer Smith thought Brandon became overly distressed when asked the

name of the male passenger in the Honda. Brandon stated that the passenger's name was Johnny, but that Brandon could not remember Johnny's last name, even though Brandon said he had known Johnny for a couple of months. Brandon's actions raised Officer Smith's suspicions because such memory lapses are common when someone is trying to conceal their identity or if someone has a warrant out for their arrest.

Officer Smith directed Brandon to stand in front of the patrol vehicle and made a passenger side approach to the Honda in order to talk to the passenger. Officer Smith stated that his purpose was to continue his investigation into whether the vehicle was stolen and whether anyone was concealing their identity. Officer Smith stated that the passenger was nervous and trembling, and would not look Officer Smith in the eye. The passenger identified himself as Jonathan Molina. Mr. Molina's voice squeaked as he identified himself which, according to Officer Smith, was another sign of nervousness. Officer Smith asked Mr. Molina if he had any outstanding warrants. Mr. Molina admitted that he had an outstanding warrant and that he was an absconder. Officer Smith asked Mr. Molina to step out of the vehicle to confirm the warrants. Instead of immediately complying with Officer Smith's request to exit the vehicle, Mr. Molina just looked straight ahead and began rocking back and forth, repeating "I'm not going back to prison. I'm not going back to prison".

Mr. Molina's actions alarmed Officer Smith, because Mr. Molina had already admitted that he was a felon and that he had a warrant out for his arrest for absconding. Mr. Molina also made himself clear that he was not going back to prison. As the door to the Honda opened, Officer Smith observed Mr. Molina clench up his muscles and pull his legs underneath him, as if to gain leverage. Officer Smith believed that Mr. Molina was preparing himself for a confrontation and was going to try and flee. Mr. Molina charged out of the vehicle in an attempt

to get past the officer. Officer Smith prevented Mr. Molina's escape and pushed him back into the Honda. A struggle ensued between Officer Smith and Mr. Molina. Officer Smith pulled out his handcuffs in an attempt to restrain Mr. Molina. Mr. Molina, with a look of desperation on his face, swung his arms around in a punching manner and repeatedly said "No, no, no". Mr. Molina was able to knock the handcuffs out of Officer Smith's hands. Officer Smith believed that Mr. Molina, an absconded felon who attempted to flee from the officer and was actively fighting in a relatively small area within the two-door Honda, posed a threat. Officer Smith used closed-hand strikes in response to the threat Mr. Molina posed. Officer Smith stated that the closed-hand strikes landed on Mr. Molina's head area.

During the struggle, Officer Smith heard Mr. Molina call for Brandon to get back in the vehicle. Brandon remained by Officer Smith's patrol vehicle and did not try to get back in the Honda. As the struggle between Officer Smith and Mr. Molina continued, Officer Smith heard a "boom" and "felt pain explode in his left leg". Officer Smith initially thought that Mr. Molina had taken his taser and that he had been tazed in the leg. When Officer Smith gained control over Mr. Molina's hand, a muzzle of a gun came into Officer Smith's view. Officer Smith described the gun as a small, silver, semi-automatic handgun. At the moment Officer Smith saw the gun, he knew that he had been shot. Officer Smith believed, based on the fact that he was dealing with a violent felon armed with a handgun, who had just shot the officer, that Mr. Molina was trying to kill him to avoid being apprehended. While the two men were fighting for control over Mr. Molina's gun, Officer Smith observed Mr. Molina reach for the Officer Smith's gun which was still holstered. Officer Smith simultaneously tried to keep Mr. Molina from aiming the silver handgun at the officer and tried to maintain control over his own firearm. There was no doubt in Officer Smith's mind that Mr. Molina would use either gun to kill the officer. Also

on Officer Smith's mind was his concern about the blood loss from the bullet wound to his leg. In an attempt to keep Mr. Molina from seizing the holstered gun, Officer Smith bit down on Mr. Molina's arm which was directly in front of the officer's face. The bite seemed to break Mr. Molina's focus on taking the officer's holstered gun. Mr. Molina started screaming and immediately bit back on the officer's left shoulder. As Mr. Molina was biting Officer Smith's shoulder, Officer Smith was able to secure his firearm, draw it fully from the holster, and fire one round towards Mr. Molina.

After firing the first shot, Officer Smith was able to create some distance between himself and Mr. Molina. As the officer created distance, however, he had to surrender any control he had over Mr. Molina's arm and handgun. Officer Smith knew Mr. Molina was still in possession of a deadly weapon, so he retreated to the rear of the Honda. Officer Smith's intention was to continue shooting at Mr. Molina to end the threat. Officer Smith's gun, however, malfunctioned and would not fire. Officer Smith quickly ejected the magazine from his handgun and speed loaded another magazine. Officer Smith then fired his weapon numerous times into the rear window of the Honda towards Mr. Molina in the front passenger seat. Officer Smith moved toward the right side of the vehicle and fired more shots until Mr. Molina stopped moving and the threat was ended. Officer Smith stated that he did not know how many times he fired his weapon and that he believed Mr. Molina only fired once.

Officer Smith returned to Brandon and ordered him to get on the ground. Officer Smith handcuffed Brandon and placed him in the backseat of the patrol car. Officer Smith then placed a tourniquet on his left leg to stop the bleeding and notified dispatch of the situation. Officer Smith then returned to the blue Honda. Officer Smith could not immediately see the silver handgun, so he grabbed Mr. Molina by the left hand and pulled him out of the car onto the

ground. Officer Smith then secured Mr. Molina with handcuffs. Once Mr. Molina was out of the vehicle, Officer Smith observed the silver handgun on the floorboard of the passenger side of the Honda. Officer Smith retrieved his medical bag from his patrol unit and attempted to administer first-aid to Mr. Molina. Officer Smith applied gauze and pressure to Mr. Molina's wounds until paramedics arrived. Mr. Molina, however, died of his injuries. Officer Smith was taken to the hospital by Sergeant Kurtis Ward, one of the first officers to arrive on scene.

Officer Smith's dashboard camera system captured the events surrounding the shooting of Jonathan Molina. The video recording clearly shows the traffic stop, the officer's discussion with Brandon, the struggle between Officer Smith and Mr. Molina and the exchange of gunfire that resulted in Mr. Molina's death. Officer Smith can be seen drawing his firearm from its holster as Mr. Molina is grabbing for the gun. Although the video does not record what took place inside the blue Honda, the video corroborates Officer Smith's account of events that led up to the shooting, the struggle between Officer Smith and Mr. Molina, and Officer Smith's return of gunfire after being shot by Mr. Molina. Much of what is said on the video is inaudible, but the dashcam system records Officer Smith ask Mr. Molina to exit the vehicle, and during the struggle between Officer Smith and Mr. Molina, Mr. Molina can be heard screaming for Brandon to get back in the car.

Just hours after the shooting, Brandon Smith, the driver of the blue Honda, provided a voluntary statement describing the events that led up to the shooting of Jonathan Molina. Brandon stated that in the early morning hours of July 18, 2018, he and Mr. Molina were travelling southbound on Interstate 25 after spending some time on the west side of Albuquerque. Brandon was the driver and Mr. Molina was sitting in the passenger seat of Brandon's blue two-door Honda Del Sol. Brandon was driving fast because his car kept

breaking down and he was trying to get home before it broke down again. The Honda had broken down just minutes earlier, but Brandon was able to get it started again. Brandon was driving over 100 mph when he saw the police lights behind him. Brandon said that Jonathan urged him not to stop but to try and get away from the police officer. Brandon stated that Mr. Molina said “Just go. I’m on the run. I don’t want to go back and do time”. Brandon was also nervous about being stopped by police because he was on a 90-day probation for a traffic violation. Nonetheless, Brandon did not try to elude the police officer but pulled off to the side of the highway at mile marker 223.

Officer Smith approached the driver’s side of the Honda. The officer told Brandon that he clocked the vehicle going 106 mph. Brandon explained to the officer the reason he was driving so fast and acknowledged that he was on a 90-day probation due to a careless driving ticket. Brandon admitted to investigators that he was trying to “bullshit” the officer, hoping that the officer would let him go. Officer Smith asked Brandon if he had any drugs in the vehicle. Brandon told the officer that to his knowledge there were no drugs in the vehicle. Officer Smith told Brandon to wait at the patrol vehicle and proceeded to approach the passenger side of the Honda. Brandon stated that Officer Smith wanted to talk to Mr. Molina. Brandon heard Officer Smith ask Mr. Molina to step out of the vehicle. Brandon stated that as soon as the door to the Honda opened, Mr. Molina tried to rush the officer and get away. Officer Smith, however, wrestled Mr. Molina back into the vehicle. Brandon stated that after Officer Smith and Mr. Molina wrestled for approximately two to three minutes, he heard a gunshot, but did not know from whose gun it came. After the first gunshot, Brandon heard Mr. Molina yell “Hurry, get in the car. Let’s go”.

Brandon admitted that he knew Mr. Molina had a gun, but that he had no idea that Mr. Molina was going to use it that morning. Brandon stated that he had never seen Mr. Molina's gun, but that Mr. Molina had mentioned earlier in the day that he had a small gun. Brandon also stated that Mr. Molina is known to carry a gun. Brandon stated that he saw Mr. Molina shoot at Officer Smith, but that he did not see when Mr. Molina had actually pulled out the gun.

When Brandon heard a second gunshot, he moved to the rear of the police vehicle for protection. Brandon then observed Officer Smith jump away from the Honda and "empty his whole clip" shooting at Mr. Molina. Brandon stated that Officer Smith fired his gun at least five times. Brandon could see that Officer Smith had been shot in the leg. Officer Smith then ordered Brandon to get on the ground. Officer Smith placed handcuffs on Brandon and put him in the backseat of the police vehicle. Brandon observed Officer Smith put a tourniquet on his leg and then radio for assistance. Officer Smith then went back to the blue Honda and pulled Mr. Molina out of the car and onto the ground. Brandon recalled hearing a total of eight shots. He believed that Mr. Molina fired his gun twice and that Officer Smith fired his gun at least five times. Brandon was also clear that Mr. Molina fired his gun first and that Officer Smith returned gunfire.

Brandon stated that he believes Mr. Molina was high on methamphetamine because Brandon and Mr. Molina have gotten high on methamphetamine before, and Mr. Molina's behavior on July 18th was consistent with how Mr. Molina has acted previously while high on methamphetamine. Brandon stated that while the two men were together, Mr. Molina was acting jumpy, agitated, nervous and frustrated. Brandon also stated that Mr. Molina had expressed earlier that he wanted to "go to a dope dude's house and re-up". Brandon believed this to mean

that Mr. Molina wanted to go purchase and use more drugs. Brandon also stated that Mr. Molina's odd behavior indicated to him that Mr. Molina had not slept for a few days.

In the aftermath of the shooting, a multijurisdictional task force consisting of the New Mexico State Police, the Rio Rancho Police Department, the Albuquerque Police Department, and the Bernalillo County Sheriff's Office conducted an exhaustive canvass of the residents of the neighborhood to determine if anyone had witnessed the shooting or the events leading up to the shooting. Although several residents heard gunshots and some screaming, no one saw the incident or the circumstances leading up to the shooting. In addition, a thorough investigation into whether any portion of the incident was captured on surveillance cameras was conducted. None was found.

At the shooting scene, investigators recovered a great deal of evidence corroborating Officer's Smith's and Brandon Smith's account of events. Brandon's blue Honda was found directly in front of Officer Smith's patrol unit at mile marker 223. The Honda had numerous bullet impacts and a shattered rear window. A white and silver .25 caliber handgun was located on the passenger side floor mat of the Honda. The magazine inside the .25 caliber handgun contained five bullets. Numerous shell casings were located in the area of the Honda. One .25 caliber shell casing was found twelve inches south of the Honda passenger side rear tire. Eight 9mm Luger casing were located in and around the Honda. Seven bullet fragments were located on the passenger side front floor mat area. One fully loaded 17-round black handgun magazine was also recovered from the scene.



Photograph of Brandon Smith's Honda Del Sol with shattered rear window.



Photograph of silver handgun found on the passenger side floorboard of the Honda

ADDITIONAL CONSIDERATIONS

An autopsy was conducted on the body of Jonathan Molina. The autopsy revealed that Mr. Molina died of multiple gunshot wounds. An initial blood screening of Mr. Molina's blood indicated the presence of methamphetamine and cannabinoids, the active constituents of cannabis. A confirmation toxicology test indicated that a sample of Mr. Molina's blood contained 1200 ng/ml of methamphetamine and 10 ng/ml of Delta-9 Carboxy THC, a metabolite of marijuana. Blood concentrations of methamphetamine ranging from 150 ng/ml to 560 ng/ml have been reported in methamphetamine abusers showing violent and irrational behavior.

Jonathan Molina's criminal history includes numerous drug charges, including two felony convictions for possession of controlled substances, two convictions for aggravated fleeing of a law enforcement officer, escape from a community custody release program, two convictions for unlawful possession of a handgun, unlawful carrying of a weapon on school property, aggravated battery and aggravated burglary.

LEGAL ANALYSIS

Officer Smith stated that he shot Jonathan Molina because Mr. Molina was in possession of a deadly weapon and by shooting the officer once, Mr. Molina had demonstrated his intent to kill. Officer Smith believed that Mr. Molina intended to kill him. Based on these statements, Officer Smith would be entitled to raise the defense of Justifiable Homicide by Public Officer. § 30-2-6 NMSA 1978. Under New Mexico law, a peace officer, while in the performance of his lawful duties, may justifiably use deadly force when the officer reasonably believes that the officer or another is threatened with serious harm or deadly force. § 30-2-6. An officer who uses deadly force need not prove that a suspect actually posed a threat of death or great bodily harm to another, he need only offer evidence that the suspect's actions raise the possibility of

death or great bodily harm. Once an officer who uses deadly force raises the possibility that a suspect's actions posed a threat of death or great bodily harm, the burden is on the prosecution to prove beyond a reasonable doubt that the use of deadly force was *not* reasonable. This inquiry is an objective standard, viewed from the perspective of the officer at the time of the incident with the understanding that officers often must make split-second decisions in difficult situations about what type of force is necessary. It requires only a finding that a reasonable person in the same circumstance as the officer would have come to the same conclusion that the use of force was necessary because of the threat of death or great bodily harm posed by the suspect. *State v. Mantelli*, 2002-NMCA-033. If the jury has a reasonable doubt as to whether the shooting was justifiable, the jury must find the officer not guilty. Uniform Jury Instruction-Criminal 14-5173.

CONCLUSION

The question presented in this case is whether Officer Kevin Smith, at the moment he fired his weapon, was acting under a reasonable belief that Jonathan Molina presented a threat of death or serious harm? Evidence shows that on July 15, 2018, Officer Smith was acting in the performance of his lawful duties when he made a traffic stop of Brandon Smith's blue Honda for speeding. Upon learning that the passenger of the Honda, Mr. Jonathan Molina, had an outstanding warrant for his arrest, Officer Smith attempted to detain Mr. Molina. Officer Smith was in the process of detaining Mr. Molina when Mr. Molina attempted to flee to avoid arrest. Officer Smith struggled with Mr. Molina to prevent his escape. During the struggle, Mr. Molina attempted to seize Officer Smith's gun. Mr. Molina was also able to retrieve his own gun and shoot Officer Smith in the leg. Officer Smith returned fire after being shot in the leg by Mr. Molina.