

December 13, 2018

Sheriff Manuel Gonzales III  
Bernalillo County Sheriff  
400 Roma Ave. NW  
Albuquerque, NM 87102

RE: Prosecutorial review of the August 6, 2017 shooting of Kendall Duran by Bernalillo County Deputy John McCauley.

BCSO case # 17-690032; DA case # 2017-08589-1

Dear Sheriff Gonzales:

I have been appointed as a Special Prosecutor by Raul Torrez, the Second Judicial District Attorney, to review, for potential prosecution, the shooting of Kendall Duran on August 6, 2017 by Bernalillo County Deputy John McCauley. After a review of all available evidence, including police reports, witness statements, laboratory reports, videos, and photographs, and a visit to the scene, I conclude that there is not sufficient evidence to prove, beyond a reasonable doubt, that Deputy McCauley was not acting in the reasonable fear that Kendall Duran was about to shoot his father, Kenneth Duran. No charges will be filed: the case will be closed. My decision does not limit administrative or criminal action by other agencies, or civil actions by other parties.

#### STATEMENT OF FACTS

On August 6, 2017, Bernalillo County deputies were called to the home at 50 Roberts Road, in Sandia Park. In that home were three generations of the Duran family: Diego Duran, the grandfather, Kenneth Duran, the son, and Kendall Duran, the grandson. Over the preceding two years, Kendall, age 22, had been losing a battle with alcohol and drugs, particularly methamphetamine, which he both smoked and injected. Earlier in the day, Kendall had injected some methamphetamine, and as his dad said, when Kendall gets high, "he turns into the devil."

Kendall became belligerent and irrational and began arguing with his dad about borrowing his car. At some point during the argument, Kendall appeared on the second-floor balcony of the home with a shotgun and threatened to shoot his father, who was working in the yard below. Diego became afraid that Kendall would kill Kenneth and called 911.

Deputies were dispatched to the home: Deputies Natasha Nieto and Andrew Limon approached the residence from the north, off of Frost Road while Deputies Mark Cerna and John McCauley came in from the east off of Rider Road, after stopping to put on their bullet proof vests. Deputies Nieto and Limon encountered Diego who had left the house and started down the road to open the gate. They could hear Kendall shouting as they approached cautiously, but could not see him. Kenneth was visible in the yard below, raking absent mindedly, while arguing with Kendall, who was saying bizarre things and occasionally singing. Deputy Nieto approached Kenneth in a spot where Kendall couldn't see her and motioned to Kenneth to come toward her and put her finger to her lips to signal that he should stop arguing with Kendall. Kenneth ignored both requests and started yelling at Kendall to put the gun down, but Kendall refused, saying the cops couldn't do anything to him because he had special powers.

Deputies McCauley and Cerna, walked in from behind the home, and saw Kendall on the balcony, pacing back and forth with the shotgun and arguing loudly with his father, below. They worked their way down toward the home, using the trees for concealment. McCauley sat down and watched the scene through the magnifying scope on his AR15 rifle. He saw Kendall moving about aimlessly until Kenneth started yelling, "Drop the gun" when he seemed to become more upset and focused on his father. Kenneth moved closer to Kendall, putting himself in a more vulnerable position. Earlier that day, when he saw the shape his son was in, he had unloaded and hidden the shotgun, but Kenneth wasn't certain that Kendall hadn't found some shotgun shells somewhere in the meantime, so when the gun was pointed at him, he feared for his life.

As the argument heated up, Deputy McCauley moved to a prone position and watched. He saw Kendall, becoming more agitated, point the shotgun at his father and place his right hand on the stock and his left hand near the trigger, as if he was preparing to shoot. Deputy McCauley fired one round at Kendall, as he explained later, "To stop him from shooting or killing his dad." The bullet passed through Kendall's arm and struck his chest, passing through the edge of his chest without causing any life-threatening injury. Kendall dropped the shotgun: he was removed



*shotgun at scene*

from the house and taken to the hospital, where he remained, until he was released to jail on August 28, 2017. He was charged with Aggravated Assault against his father, but the charges were dropped within a few days because Kenneth Duran refused to cooperate with the prosecution.

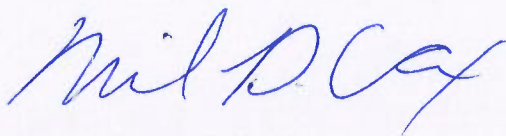
#### LEGAL ANALYSIS

Deputy McCauley said that he shot Kendall to prevent him from shooting or killing his father, and would therefore be entitled to raise the defense of Justifiable homicide by public officer, NMSA 1978, Section 3-2-6. That statute establishes that a peace officer may justifiably use deadly physical force when he believes 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 unreasonable. If the jury has a reasonable doubt about any aspect of the prosecution claim that the killing was unjustified, they must acquit the officer, Uniform Jury Instruction-Criminal: 14-5173 Justifiable homicide; public officer or employee.

## CONCLUSION

Deputy McCauley said that he fired because he believed that Kendall was about to shoot his father. There is no evidence to suggest, much less prove beyond a reasonable doubt, that he shot Kendall Duran for any other reason. In the absence of such evidence, a jury will almost certainly accept this element of the defense, which would lead them to the next question: was Deputy McCauley's fear unreasonable under the circumstances? Evidence establishes that Kendall Duran was under the influence of methamphetamine, was armed and angry and acting irrationally. He was threatening to kill his father and aimed the shotgun at him in a way that indicated he was about to shoot. Under these circumstances, it is unlikely that any jury would conclude, beyond a reasonable doubt, that it would be reasonable to take no action and allow Kendall to shoot at his father. In the absence of sufficient evidence to prove, beyond a reasonable doubt, that the shooting was unjustified, there is no real likelihood of a successful prosecution; therefore, no charges will be filed against Deputy McCauley. The case will be closed.

Very truly yours,



Michael D. Cox

Special Prosecutor

Cc: Raul Torrez, District Attorney, Second Judicial District

Sergeant Robert Warrick, Bernalillo County Sheriff's Office

Kendall Duran