



**For Immediate Release
January 29, 2023**

District Attorney Marc Bennett has completed the review of the use of deadly force that resulted in the death of Gregorio Banuelos. The incident occurred on May 25, 2022 at 524 N. Milstead, in Wichita, Kansas.

This report was delayed by the need for the final ballistics report, which was issued December 11, 2023.

SCOPE OF REPORT

This report details the findings and conclusions limited specifically to criminal liability of the deputy employed by the Sedgwick County Sheriff's Office who shot Mr. Banuelos and the Wichita Police Officer who shot at Mr. Banuelos on May 25, 2022.

The Office of the District Attorney has no administrative or civil authority regarding use of force investigations. Therefore, this report does not address any administrative review that may be conducted by the Wichita Police Department, provide any assessment of policy considerations, or address questions of possible civil actions where a lesser burden of proof would apply.

Questions as to whether the use of force in any particular case could have been avoided or de-escalated if the law enforcement officer(s) or citizen(s) had behaved differently in the moments leading up to the fatal use of force may not be properly addressed in a criminal investigation.

The sole question addressed by the District Attorney is whether sufficient evidence exists to establish beyond a reasonable doubt that a violation of the criminal laws of the State of Kansas occurred in this instance.

SUMMARY

On May 25, 2022 at 0132 hours, dispatch received a call from a female who said she had been shot by a family member in her home. The caller identified the suspect as Gregorio Banuelos.

A teenage male occupant of the residence also called 911 and reported that Mr. Banuelos was acting crazy and that a gun had been fired. The teenage caller did not know if anyone had been injured. He described Mr. Banuelos as a Hispanic male in his 30's, approximately 5'9" with a medium build, white t-shirt and chain who associated with gangs. The caller relayed that other family members were still inside the residence at that time. The caller said Mr. Banuelos had talked about killing officers and himself. The caller said Mr. Banuelos was extremely intoxicated.

The first officers arrived at 0137 hours.

At 0147 hours, Officer 1 made contact with the initial female calling party outside the residence. She explained that the suspect and three other family members were still inside. She reported that Mr. Banuelos had arrived at her home with a girlfriend earlier that night. The female calling party relayed that Mr. Banuelos appeared intoxicated. When the girlfriend left by Uber, Mr. Banuelos became angry and retrieved a firearm.

The female calling party ran from Mr. Banuelos. He followed and grabbed her shoulders. She fell and heard a gunshot. He then struck her with the handgun leaving a visible injury to her forehead. She ran from the residence thinking she had been shot.

Officer 1 stepped away from the female calling party to notify dispatch of the description of the suspect as well as the other adult male in the home because he "didn't want him to be mistaken for the suspect." When the officer returned to the female calling party, he heard her talking on her cell phone to Mr. Banuelos, telling him, "*They are here for you. You might as well do the right thing and turn yourself in. You're done Greg, you're not going to keep doing this to people.*" Officer 1 tried to talk to Mr. Banuelos through the female calling party's phone, but Mr. Banuelos hung up.

At 0151 hours, the adult male (non-suspect), teenage male and minor female exited the residence.

At 0154 hours, officers established a perimeter around the residence. At 0156 hours, Officer 2 saw Mr. Banuelos exit the front door, holding a handgun. Mr. Banuelos said, “*Where in the fuck are you at?*” The officer gave the verbal command, “Wichita Police; drop the gun.” Mr. Banuelos shut the storm and main door, then turned off the interior lights. The officer was able to see Mr. Banuelos walking back and forth inside through a small window.

At 0157 hours, negotiators were requested to respond to 524 N Milstead. At 0202 hours, the SWAT team was mobilized.

Between 0258 and 0314 hours, the negotiators arrived on scene. Various SWAT team officers arrived between 0307 and 0436 hours. At 0631 hours, SWAT team members moved close enough to throw a phone inside the residence and mobilize a robot to clear the main floor.

At 0746 hours, the robot located Mr. Banuelos in bed in a basement room. At 0841 hours the SWAT team entered the residence and went to the basement with a K9. At 0856 hours, a basement closet door opened. Mr. Banuelos was seen by officers holding a gun to his head. He yelled that he would kill himself then threatened to shoot the dog. He said he would shoot through the door, and that “*it’s going down.*”

At 0858 hours, the SWAT team backed out and went back upstairs. At 0901 hours, Mr. Banuelos was seen on surveillance camera associated with the robot manipulating the robot. Officers lost visual contact.

At 1037 hours, a single gunshot was heard inside house. At 1212 hours, the SWAT team returned to the basement. Members saw Mr. Banuelos opening and closing the bedroom door. At 1226 hours Mr. Banuelos was seen opening the door and raising his hand. Officer

4 fired his weapon. There is no indication that Mr. Banuelos was struck at this point. The SWAT team backed out of the basement to the ground floor of the residence. Officer 4 described hearing another shot, seeing a muzzle flash from the basement and seeing the top of Mr. Banuelos head at the stairs to the basement. Officer 4 fired where he thought Mr. Banuelos was standing.

At 1229 hours, officers could hear additional shots being fired by Mr. Banuelos inside the residence. At 1234 hours, all SWAT members exited the residence. At 1240 hours, Mr. Banuelos is heard talking to someone, and seen by officers picking up what appears to be shell casings. Mr. Banuelos was heard making the comment, "*look at how many I hit*" indicating that he thought he had shot officers.

At 1244 hours, Mr. Banuelos exits the residence and enters the garage through an interior door. He walked around a car parked in the garage and approached the open bay door. Officer 5 (positioned directly west of the open garage door) saw something in Mr. Banuelos's hand that he believed to be a handgun. He fired once from his department-issued rifle. The ballistics evidence subsequently tested indicated that Officer 5 did not strike Mr. Banuelos.

Deputy 2 was positioned west and north of the open garage door. He saw Mr. Banuelos moving west in the garage toward other SWAT team members. Given Mr. Banuelos' position behind the car, Deputy 2 could not see his hands, but believed he posed a risk to the officers given the earlier exchange of gunfire. Deputy 2 made the decision to fire his weapon. Immediately before he shot, he heard another SWAT member (Officer 5) fire once. Deputy 2 fired his department-issued rifle a single time. Officers found a 9 mm handgun under Mr. Banuelos.

The subsequent autopsy established that Mr. Banuelos was struck by one bullet, with a single entrance and exit wound. A single bullet was located in the garage wall to the south of Mr. Banuelos. Separate (non-comparable) bullet fragments were located in the east wall. From the ballistics analysis conducted on that bullet in the south wall, it is reasonable to conclude that Deputy 2 fired the fatal shot.

INVESTIGATION

The Wichita Police Department officer and Sedgwick County Sheriff's deputy who fired their firearms were removed from the area and subsequently interviewed.

Crime scene investigators processed the scene. Evidence was submitted to the Kansas Bureau of Investigation for examination.

LAW ENFORCEMENT OFFICER STATEMENTS

Officer 1: Officer 1 responded to the call of a shooting at 524 N. Milstead. He observed the female calling party standing between two houses south of the residence. She was visibly upset and expressed fear for her family members (spouse and children) still inside the residence.

Officer 1 obtained a description of the woman's spouse and relayed that information to dispatch in order to better prevent the man from being mistaken for the male suspect. The officer stepped away to relay that information and when he returned, he heard the female calling party on her phone saying, "*They're here for you Greg, they're here for you.*"

Officer 1 asked her to turn on the phone's speaker. Officer 1 heard a baby crying and a male voice. The female calling party said, "*You're not leaving in my car, you're not leaving, they're already here Greg you might as well do the right thing and turn yourself in. You're done Greg you're not going to keep doing this to people.*" Officer 1 identified himself to Mr. Banuelos who hung up the phone.

Shortly thereafter, Officer 1 discovered the other family members made it out of the house safely. Officer 1 spoke again with the female calling party who said Mr. Banuelos showed up at her residence last night with a female friend and he appeared to have been drinking. The female friend told the female calling party that Mr. Banuelos wanted to fight so she

(the female friend) wanted to leave. The female calling party got an UBER for the female friend who then left. Mr. Banuelos went down to the basement to sleep and returned upstairs after about fifteen to twenty minutes. He was mad that the female friend had left. The female calling party said that Mr. Banuelos was acting crazy and she'd never seen this side of him before. She ran into her son's room and Mr. Banuelos followed her, cursing and grabbed her by the shoulders. She described that she went to the floor in the fetal position. She heard ringing in her ear and felt the brush of a gun being fired on the right side of her head. She believed she had been shot. She told Officer 1 she thought he was going to kill her. She called 911 and ran out of the house and hid.

Officer 1 noticed a bump with redness on the right side of W1's forehead. She told officer 1 that Mr. Banuelos had hit her during the incident. She received a phone call and Officer 1 heard her telling the caller "You're not going to die" and to come out with his hands up. She told Officer 1 that Mr. Banuelos had just told her he was going to kill himself.

Officer 2: Officer 2 was standing off of the residence at 524 N. Milstead when he heard yelling inside of the residence. Officer 2 heard the sound of someone racking the slide on a gun. A short time later a male exited the front door holding a black handgun in his right hand and stated, "Where in the fuck are you at?" Officer 2 shined a light on the male and yelled, "Wichita Police, drop the gun." The male ran back inside the residence closing the door and began turning off the lights inside the residence.

Officer 3: Officer 3 had contact with the female calling party who said she'd received a phone call from Mr. Banuelos. She relayed that she had begged Mr. Banuelos to come outside but he refused and instead hung up on her. A short time later, Mr. Banuelos called her again and she handed the phone to Officer 3.

Officer 3 described Mr. Banuelos as highly agitated and yelling at Officer 3. Mr. Banuelos made a comment "VLB for life" and expressed how he hated cops and wasn't going to turn himself in. Mr. Banuelos said he wasn't at the house anymore and for officers to come inside and find out. Officer 3 attempted to engage Mr. Banuelos in conversation but he responded by yelling before hanging up.

Officer 4: Officer 4 was a twenty year veteran of the Wichita Police Department and seven year member of the SWAT team at the time of incident. Officer 4 was wearing a vest with "POLICE" on the front and back during the incident. Officer 4 was interviewed by a Special Agent with the Kansas Bureau of Investigation and Wichita Police Department Detective.

Officer 4 was part of a team of SWAT officers that entered the basement area searching for Mr. Banuelos. The officers believed Mr. Banuelos was in a bedroom area of the basement. A K9 was deployed into the room. The officers located Mr. Banuelos in a closet. Mr. Banuelos began to yell for the officers to remove the dog or, he said he would kill it. Officer 4 heard another officer say that the suspect had a gun. Officer 4 and the rest of the team backed out of the basement and returned upstairs.

Officer 4 said negotiators attempted to contact Mr. Banuelos by using a throw phone that was placed into the room downstairs before they returned upstairs. Officer 4 said the power was shut off to the house and they believed Mr. Banuelos had access to the breaker in the basement and shut off the power.

Officer 4 said a gun was fired in the basement. Officer 4 said the SWAT team members discussed utilizing chemical munitions (gas canister). The team returned to the basement and Officer 4 intended to deploy the munition. As the officers approach the room where they believe Mr. Banuelos was located, they heard Mr. Banuelos, who sounded agitated. The door opened and Deputy 4 saw Mr. Banuelos starting to raise his hand. The officer believed Mr. Banuelos was bringing up a handgun. Officer 4 heard shots being fired, and believed Deputy 1 had fired. He was unsure if Mr. Banuelos fired. Officer 4 then fired one round of chemical munitions. He believed Mr. Banuelos intended to shoot him and Deputy 1 so he and the rest of the SWAT team backed out and returned upstairs. He then heard Mr. Banuelos yelling and believed he was about to come up the stairs. He heard additional gunshots coming from downstairs. Deputy 1 fired rounds downstairs to keep Mr. Banuelos from coming up the stairs.

Officer 4 and the other team members moved outside behind a SWAT vehicle in front of the residence. Officer 4 heard someone say that Mr. Banuelos was coming out of the residence. Officer 4 observed Deputy 2 discharge his rifle while standing behind a different SWAT vehicle. Officer 4 heard two nearly simultaneous gunshots. He then saw Mr. Banuelos lying in the garage. Mr. Banuelos was pulled from the garage. EMS and Fire Department personnel began rendering aid to Mr. Banuelos.

Officer 5: Officer 5 was a twenty year veteran of the Wichita Police Department and seven year member of the SWAT team at the time of incident. Officer 5 was interviewed by a Special Agent with the Kansas Bureau of Investigation and Wichita Police Department Detective.

Officer 5 responded to the scene as part of the SWAT team. He was briefed on what had occurred earlier then took up a position outside of the residence across the street with a SWAT-issued rifle. Officer 5 was told that that Mr. Banuelos had said he was either going to shoot it out with the police or force the police to shoot him.

Officer 5 heard negotiators tell Mr. Banuelos that he was under arrest. He heard radio traffic that negotiators had tried to make contact with Mr. Banuelos by phone. He heard radio traffic that SWAT members located Mr. Banuelos who they found armed with a gun and threatening to shoot a K9. He heard officers describe that Mr. Banuelos was holding the gun to his head. He heard an officer say a single gunshot was fired by Mr. Banuelos.

Officer 5 continued to maintain a position outside and monitor radio traffic. He heard discussions over the radio regarding the possible use of using chemical munitions (gas canister). Officer 4 heard two loud gunshots that sounded like a SWAT rifle. He heard one of the SWAT team members say Mr. Banuelos had presented a lethal threat to the officers and they fired at him.

Officer 5 heard more gunshots from inside the residence and then the SWAT team exited the residence. He was concerned at that point for the team's safety as well as his own safety. He heard officer's describe watching Mr. Banuelos picking up shell casings and

saying he had two rounds left and was going to finish this. Officer 4 then heard radio traffic that Banuelos was coming up the stairs. It sounded to Officer 4 as if Mr. Banuelos was in a hurry. He then heard radio traffic that Mr. Banuelos was coming to the front.

Officer 4 observed Banuelos coming into the garage. He said Banuelos was walking fast “*with a purpose.*” He observed something in Banuelos hand which he believed to be a gun. Mr. Banuelos continued walking fast through the garage. Officer 5 took one shot from his SWAT rifle. He described hearing another gun shot a split second later. Banuelos fell in the garage and did not move.

Deputy 1: Deputy 1 was a 13 year veteran of the Sedgwick County Sheriff’s Department and four year member of the SWAT team at the time of incident. He was interviewed by a Special Agent with the Kansas Bureau of Investigation and Detective with the Sedgwick County Sheriff’s Department.

Deputy 1 responded to the scene as part of the SWAT team. He was briefed as to what had occurred prior to his arrival. He was part of a team of SWAT officers that entered the basement where they believed Mr. Banuelos was hiding in a bedroom. Mr. Banuelos was located inside a closet sitting down. Deputy 1 gave verbal commands to show his hands. He described that Mr. Banuelos hands were empty and then he put them down to stand up. When Banuelos stood up Deputy 1 saw Mr. Banuelos had a handgun in his right hand and was yelling something at Deputy 1. Mr. Banuelos placed the handgun under his chin and made comments to “*get out.*” Mr. Banuelos threatened to shoot Deputy 1. Deputy 1 gave commands to Mr. Banuelos to put the gun down.

Deputy 1 said that rather than escalating the situation, the team backed out and went back upstairs at that point. Deputy 1 heard a loud noise from downstairs which he believed to have been a gunshot.

Deputy 1 said the decision was made to use chemical munitions. Deputy 1 went downstairs with a team to the bedroom area. As the team is preparing to deploy the chemical munitions, Mr. Banuelos emerged and made comment to the effect, “*I told you*

what was 'gonna happen," before raising a handgun towards him and Deputy 1. In response, Deputy 1 fired his duty-issued rifle at Banuelos who retreated out of sight. The team moved back out of the basement to the upstairs part of the residence. Deputy 1 heard gunshots as they were moving back upstairs and believed that Mr. Banuelos was shooting. After the team returned upstairs, Deputy 1 heard a gunshot and saw a muzzle flash coming from the basement. Deputy 1 saw a handgun and the top of Mr. Banuelos's head. Deputy 1 reacted by shooting into the basement where he believed Mr. Banuelos was located.

Deputy 1 said the team moved outside the residence. He took up a position behind a SWAT vehicle parked outside the front of the residence. Deputy 1 heard on the radio that Mr. Banuelos was coming outside. He heard two gunshots and then radio traffic that the suspect was down.

Deputy 2: Deputy 2 was a nine year veteran of the Sedgwick County Sheriff's Department and one year member of the SWAT team at the time of incident. Deputy 2 was interviewed by a Special Agent with the Kansas Bureau of Investigation and Detective with the Sedgwick County Sheriff's Department.

Deputy 2 responded to the scene as part of the SWAT team. He was briefed as to what had occurred earlier. He took up a position outside of the residence. He was initially armed with a less lethal beanbag shotgun.

Deputy 2 heard SWAT team members on the radio say Mr. Banuelos had a gun and was threatening to shoot the dog. He then heard the team members say Mr. Banuelos was pointing the gun at them over the radio. Deputy 2 transitioned to a rifle after hearing gunfire inside the residence. Deputy 2 heard officers inside the residence describe exchanging gunfire with Mr. Banuelos. The team members exited and took up a position behind another SWAT vehicle outside the residence.

Deputy 2 later heard radio traffic that officers could hear Mr. Banuelos say that he was down to two bullets and he was going to "*go get 'em.*" Deputy 2 heard on the radio that

the suspect was coming out the garage fast.

Deputy 2 was positioned on the corner of one of the SWAT vehicles north and west of the open garage. Deputy 2 knew that several SWAT team members were behind another SWAT vehicle and were not in a position where they could see Mr. Banuelos's approach. Deputy 2 saw that Mr. Banuelos was going toward the SWAT vehicle with the team members behind it. Deputy 2 said that based on Mr. Banuelos having exchanged gunfire earlier with other SWAT team members, coupled with the fact that he was heading directly toward officers, he was concerned for their safety and their lives.

Deputy 2 could see Mr. Banuelos's upper body but his arms and hands were at his side out of Deputy 2's line of sight. Deputy 2 relayed to investigators that he believed he needed to end the threat posed by Mr. Banuelos. Deputy 2 took one shot at Mr. Banuelos as Mr. Banuelos approached the west edge of the garage. Mr. Banuelos fell to the floor of the garage. Deputy 2 said a "*split second*" before he shot, he heard another shot from behind him, and believed it had been fired by another SWAT member.

CRIME SCENE INVESTIGATION

Crime Scene Investigators processed the scene of the shooting. Investigators located the following:

Firearms:

1 - Glock 19 9 mm handgun – found near a bag of soil in the garage next to Mr. Banuelos. The gun had been initially found by officers under Mr. Banuelos. They placed it at the bag of soil after moving Mr. Banuelos.

Cartridge casings:

6 – fired 9 mm cartridge casings (1 fired upstairs and 5 fired downstairs).

13 – Remington .223 caliber cartridge casings fired by Deputy 1 (7 fired upstairs and 6 downstairs)

1 – Remington .223 caliber cartridge casing – fired by Officer 5.

1 – Remington .223 caliber cartridge casing – fired by Deputy 2.



Still photo of Mr. Banuelos with firearm in the basement of 524 N. Milstead.



Still photo stairs leading to the basement of 524 N. Milstead.



Photo of the 9 mm handgun located next to Mr. Banuelos in the garage.

FORENSIC EVIDENCE & AUTOPSY RESULTS

An autopsy was performed on the body of Gregorio Banuelos May 26, 2022 at the Sedgwick County Regional Forensic Science Center. The report was issued November 2, 2022. The cause of death was a single gunshot wound that entered his “lateral upper neck” and exited “in front of the right ear.”

The toxicology report detected Benzoylcegonine – 0.5 mg/L in Mr. Banuelos’s Heart blood. Mr. Banuelos was negative for ethanol, and all other drugs (THC screen was “inconclusive due to “interfering substance.”)

Ballistics:

One bullet was located in the south wall of the garage. Subsequent ballistics analysis by the Kansas Bureau of Investigations determined it was consistent with having been fired by Deputy 2’s rifle.

Bullet fragments were found in the east wall. They were not of sufficient

comparative value to be definitively tied to a specific firearm. However, they were in the trajectory of the shot fired by Officer 5.

KANSAS LAW

In Kansas all persons, including law enforcement officers, are entitled to defend themselves and others against the use of unlawful force. K.S.A. 21-5220 states:

- (a) A person is justified in the use of force against another when and to the extent it appears to such person and such person reasonably believes that such force is necessary to defend such person or a third person against such other's imminent use of unlawful force.
- (b) A person is justified in the use of deadly force under circumstances described in subsection (a) if such person reasonably believes deadly force is necessary to prevent imminent death or great bodily harm to such person or a third person.
- (c) Nothing in this section shall require a person to retreat if such person is using force to protect such person or a third person.

The term “use of force” includes words or actions directed at or upon another person or thing that reasonably convey the threat of force, the presentation or display of the means of force or the application of physical force, including by a weapon. “Use of deadly force” means the application of any physical force which is likely to cause death or great bodily harm to a person.

The Kansas Supreme Court has made clear that the analysis of a self-defense claim presents a “two prong test”:

“The first is subjective and requires a showing that McCullough sincerely and honestly believed it was necessary to kill to defend herself or others. The second prong is an objective standard and requires a showing that a reasonable person in [the same] circumstances would have perceived the use of deadly force in self-defense as necessary.” *State v. McCullough*, 293 Kan. 970 (2012).

With respect to a law enforcement officer’s use of force, in *Graham v. Connor*, 490 U.S. 386, 396 (1989), the United States Supreme Court clarified that any assessment of objective reasonableness must take into account the contextual realities faced by the officer:

“The ‘reasonableness’ of a particular use of force must be judged from

the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”

“The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”

A. Immunity

In 2010, the Kansas Legislature enacted a series of statutes addressing the use of force, including the use of deadly force, in the defense of a person or property, including a person’s dwelling. See K.S.A. (2021 Supp.) 21-5220 et seq. The new statutes became effective on July 1, 2011, and are commonly known as this state’s “stand your ground law.” *State v. Barlow*, 303 Kan. 804 (2016); *State v. Younger*, unpublished opinion, No. 116, 441 (Feb. 16, 2018).

K.S.A. 21-5231 (2021 Supp.) **Immunity from Prosecution**, reads,

- (a) A person who uses force which is subject to the provisions of K.S.A. 21-5226, and amendments thereto, is justified pursuant to K.S.A. 21-5222, 21-5223 or 21-5225, and amendments thereto, is immune from criminal prosecution and civil action for the use of such force, unless the person against whom force was used is a law enforcement officer who was acting in the performance of such officer's official duties and the officer identified the officer's self in accordance with any applicable law or the person using force knew or reasonably should have known that the person was a law enforcement officer.

K.S.A. (2021 Supp.) 21-5222, **Defense of A Person, . . . no duty to Retreat**, reads,

- (a) A person is justified in the use of force against another when and to the extent it appears to such person and such person reasonably believes that such force is necessary to defend such person or a third person against such other’s imminent use of unlawful force.
- (b) A person is justified in the use of deadly force under circumstances described in subsection (a) if such person reasonably believes that such use of force is necessary to prevent imminent death or great bodily harm to such person or a third person.

K.S.A. (2021 Supp.) 21-5224, **Use of Force; presumptions**, reads,

- (a) . . . a person is presumed to have a reasonable belief that deadly

force is necessary to prevent imminent death or great bodily harm to such person or another person if:

- (1) The person against whom the force is used, at the time the force is used:
 - (A) Is unlawfully or forcefully entering or has unlawfully entered and is present within, the dwelling, place or work or occupied vehicle of the person using the force; or
 - (B) has removed or is attempting to remove another person against such person's will from the dwelling, place of work or occupied vehicle of the person using the force; and
- (2) The person using the force knows or has reason to believe that any of the conditions set forth in paragraph (1) is occurring or has occurred.

No such presumption of reasonableness exists if the person utilizing force does so against a law enforcement officer per K.S.A. 21-5224(b)(4):

- (b) The presumption set forth in subsection (a) does not apply if, at the time the force is used:

. . . (4) the person against whom the force is used is a law enforcement officer who has entered or is attempting to enter a dwelling, place of work or occupied vehicle in the lawful performance of such officer's lawful duties, and the person using force knows or reasonably should know that the person who has entered or is attempting to enter is a law enforcement officer.

K.S.A. 21-5230, addresses the **duty to retreat**,

“A person who is not engaged in an unlawful activity and who is attacked in a place where such person has a right to be has *no duty to retreat* and has the right to stand such person's ground and use any force which such person would be justified in using under article 32 of chapter 21 of the *Kansas Statutes Annotated*, . . . K.S.A. 2018 Supp. 21-5202 through 21-5208, 21-5210 through 21-5212, and 21-5220 through 21-5231, and amendments thereto.”

On March 10, 2017, in *State v. Hardy*, 305 Kan. 1001, 390 P.3d30 (2017), the Kansas Supreme Court recognized that immunity granted by K.S.A. 21-5231 is distinct from self-defense, citing with approval the dissent in *State v. Evans*, 51 Kan.App.2d 1043 (2015):

Self-defense and immunity are clearly distinct concepts. If immunity were the same as self-defense, there would have been no need to adopt a specific immunity statute because K.S.A. 2014 Supp. 21-5222 would have sufficed. Perhaps most importantly, because K.S.A. 2014 Supp. 21-5231 grants immunity from arrest and prosecution rather than a mere defense to liability, it is effectively lost if a case is erroneously permitted to go to trial.

[citation omitted] . . . [a] prosecutor must rebut a claim of statutory immunity before the case can go to trial. *Hardy*, 305 Kan. at 1009-1010.

In *State v. Dukes*, 59 Kan.App.3d 367 (2021), the Kansas Court of Appeals ruled that the district court had appropriately found Mr. Dukes was immune from prosecution under K.S.A. 21-5222. Mr. Dukes was approached by a man named Berryman who had sent him verbal threats in the past via Facebook (which Dukes testified he had not taken seriously). When Dukes saw Berryman approach, Dukes pointed a gun at Berryman. Berryman responded, "I got something for you," then ran back toward his car. The evidence was inconclusive as to whether Berryman held a weapon when he initially walked toward Dukes, but Mr. Dukes testified that he believed Berryman was going back to his car to get a gun given the statement, "I've got something for you." That is why Dukes said he shot and killed Berryman as he reached the car. Police later located a handgun on the floorboard of Berryman's car. The district court and the Court of Appeals ruled Dukes was immune from prosecution because the state's evidence could not overcome self-defense immunity:

After a defendant in a criminal case files a motion requesting immunity under K.S.A. 2020 Supp. 21-5231, the State must come forward with evidence establishing probable cause that the defendant's use of force was not statutorily justified. This generally means the State must show probable cause that (1) the defendant did not honestly believe the use of force was necessary or (2) a reasonable person would not believe the use of force was necessary under the circumstances. *Dukes*, 59 Kan.App.3d, at Syl. 2.

The *Dukes* Court also added the following quote from *State v. Phillips*, 312, Kan. 643 (2021):

The State may also overcome a defendant's request for immunity by demonstrating that the defendant was the initial aggressor as defined in K.S.A. 2020 Supp. 21-5226 and thus provoked the use of force. *Dukes*, 59 Kan.App.3d, at 372.

B. Use of Force During Arrest

K.S.A. 21-5227, Use of Force; law enforcement officer making an arrest, States:

“A law enforcement officer, or any person whom such law enforcement officer has summoned or directed to assist in making a lawful arrest need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. Such officer is justified in the use of any force which such officer reasonably believes to be necessary to effect the arrest and the use of any force which such officer reasonably believes to be necessary to defend the officer’s self or another from bodily harm while making the arrest. However, such officer is justified in using deadly force only when such officer reasonably believes that such force is necessary to prevent death or great bodily harm to such officer or another person, or when such officer reasonably believes that such force is necessary to prevent the arrest from being defeated by resistance or escape and such officer has probable cause to believe that the person to be arrested has committed or attempted to commit a felony involving death or great bodily harm or is attempting to escape by use of a deadly weapon, or otherwise indicates that such person will endanger human life or inflict great bodily harm unless arrested without delay.”

CONCLUSION

On May 25, 2022 an officer employed by the Wichita Police Department, Officer 5, and a deputy employed by the Sedgwick County Sheriff’s Office, Deputy 2, each utilized deadly force at nearly the exact moment. Though the single bullet that struck Mr. Banuelos also exited his body, the bullet located in the south wall of the garage in which Mr. Banuelos was standing was subsequently tested and found to have characteristics consistent with having been fired by the rifle utilized by Deputy 2. Given the angle from which Deputy 2 fired, and the presence of additional bullet fragments in the east wall that would account for the bullet fired by Officer 5, it is reasonable to conclude that the fatal shot was fired by Deputy 2.

Under K.S.A. 21-5222(b), a person may employ deadly force when the person reasonably believes that deadly force is necessary to prevent imminent risk of great bodily harm to himself or another.

Since 2011, under the Kansas "stand your ground" law, one who acts in defense of himself or to protect a third party is immune from prosecution. See K.S.A. 21-5231. Meaning, a person may not be charged or prosecuted unless the state can establish that the person who utilized deadly force was *not* acting reasonably under the circumstances. In *Graham v. Connor*, the United States Supreme Court made clear that assessment as to the

reasonableness of an officer's decision to utilize deadly force must be made within the context in which the officer found himself – not from the perspective of “20/20 hindsight.”

The investigation established that Mr. Banuelos had assaulted a family member within the residence. He retrieved a handgun, and fired the weapon so near the victim that she initially thought she had been shot. Officers responded and attempted to make contact with Mr. Banuelos. He refused to verbally engage with officers.

He had told family that he intended to kill himself and refused to turn himself in.

The SWAT team was deployed and attempted to make contact with Mr. Banuelos in the basement of the residence. He brandished a handgun, threatened the officers and ultimately fired the weapon a total of six more times inside the house.

He was heard by officers saying words to the effect that he was down to two bullets and wanted to “get” officers. He exited the house armed with the 9 mm handgun and moved at an accelerated pace through the garage toward the open bay door.

Two different law enforcement officers – Deputy 2 and Officer 5 – assessed the situation, determined that Mr. Banuelos posed a threat to law enforcement officers just outside the garage (based on his exhibited behavior as well as the earlier shots fired at officers inside the residence) and made the near-simultaneous decision to fire their respective weapons a “split second” apart. That the two officers made the same decision to shoot in the same moment without coordination or communication with one another in the moment, speaks to the reasonableness of their individual assessments and the reasonableness of the determination that a lethal risk was posed by Mr. Banuelos.

Under the totality of the circumstances, Officer 5 (who shot at Mr. Banuelos) and Deputy 2 (who fired the fatal shot at Mr. Banuelos) are immune from prosecution under Kansas law.

Under Kansas law and the facts of the case, I conclude that no criminal charges will be filed in this matter.

A handwritten signature in black ink, appearing to read "Marc Bennett". The signature is fluid and cursive, with a long horizontal stroke at the end.

District Attorney Marc Bennett
*18th Judicial District of
Kansas*