

STATE OF INDIANA)
) IN THE MARION SUPERIOR COURT
) SS:
COUNTY OF MARION) CAUSE NO. 49D34-2102-MC-005479
)
)
IN RE THE APPOINTMENT OF)
A SPECIAL PROSECUTOR)

REPORT TO THE COURT OF THE SPECIAL PROSECUTING ATTORNEY

The Court having granted the *Verified Motion for Appointment of Special Prosecutor*, by its Order of February 22, 2021, and having appointed Chris Gaal as Special Prosecutor in this matter by its *Order Of Appointment* on March 1, 2021, and the Special Prosecutor having filed his *Acceptance, Affidavit for Designation as a Senior Prosecutor, and Appearance* in this matter on March 4, 2021, now reports to the Court that the investigation into this matter is complete, and the results of said investigation have been reviewed by the Special Prosecutor.

Indiana Code 33-39-10-2(f) further requires:

If the target of an investigation by the special prosecutor is a public servant (as defined in IC 35-32.5-2-261), the court shall order the special prosecutor to file a report of the investigation with the court at the conclusion of the investigation. A report filed under this subsection is a public record under IC 5-14-3.”

Under IC 35-31.5-2-261 a “public servant” means a person who:

(1) is authorized to perform an official function on behalf of, and is paid by, a governmental entity;

The incident at issue in this investigation was a police action shooting fatality that occurred on February 12, 2021. The police officer involved in the incident that is the target of this investigation was employed by the Speedway Police Department in Marion County, Indiana. The Special Prosecutor has determined that the target of the investigation was a public servant within the meaning of 35-31.5-2-261(1). Thus, the Special Prosecutor has prepared this *Report of Special Prosecuting Attorney* as required by IC 33-39-10-2(f) to be filed as a public record.

Initiation of the Investigation

Marion County Prosecuting Attorney Ryan Mears filed a *Verified Petition for Appointment of Special Prosecutor* on February 22, 2021 for the reason that “information has been presented to the Marion County Prosecutor’s Office regarding the police action fatality of De Aire J. Gray on February 12, 2021.”

According to the *Verified Petition for Appointment of Special Prosecutor*:

2. The law enforcement agency involved in the police action fatality was the Speedway Police Department, a small department in Marion County. The size of the Speedway Police Department necessitates a close working relationship between officers and employees of the Marion County Prosecutor’s Office.

3. In order to avoid an appearance of impropriety, it is thus necessary to appoint a Special Prosecutor to investigate such charges, as the special prosecutor statute contemplates.

Having been appointed by the Court as Special Prosecutor in this matter on March 1, 2021, and having filed his *Acceptance, Affidavit for Designation as a Senior Prosecutor, and Appearance* in this matter on March 4, 2021, the Special Prosecutor received contact information from the Marion County Prosecutor’s Office for Detective Lauren Roemke with the Speedway Police Department, Criminal Investigations Division, who could provide information gathered from her initial investigation of the incident at issue.

On March 4, 2021 the Special Prosecutor contacted Detective Roemke by email and then by telephone to request that all information related to her investigation be provided to the Special Prosecutor. The Special Prosecutor kept in touch with Detective Roemke regarding the status of her investigation, and to make arrangements for her to provide copies of all materials obtained from her initial investigation.

On Friday March 12, 2021 Detective Roemke provided the requested materials from her initial investigation. These materials consisted of body camera digital recordings from police officers involved in the incident, video recorded interview statements of officers and other witnesses, case information and property forms, coroner’s field duty report, forensic laboratory examination reports, audio recordings of radio traffic, and numerous photographs.

Independent Investigation

After a review of the initial investigation materials provided by Detective Roemke of the Speedway Police Department, the Special Prosecutor determined to proceed with an independent investigation. On March 19, 2021 the Special Prosecutor contacted the Indiana State Police (ISP) and requested their assistance. The Indiana State Police assigned Lieutenant Jeff Hearon to the investigation. Lieutenant Hearon convened a team of investigators with the Indiana State Police. The independent investigation reviewed all materials from the initial investigation. ISP investigators then re-interviewed witnesses, and located and interviewed additional witnesses. ISP transferred all physical evidence into their custody for re-examination. Investigators also obtained four search warrants to gather additional information, acquired three shopping center surveillance videos, and conducted aerial photography of the scene. Investigators then created a detailed reconstruction of the incident to corroborate the timeline and conduct a careful frame-by-frame analysis of all the available videos. The Special Prosecutor also conducted a site visit with investigators to examine the scene of the incident.

Scope of the Investigation

The scope of the investigation concerns the police action shooting fatality of De Aire Gray on February 12, 2021 by Officer Robby Harris of the Speedway Police Department. The Special Prosecutor reviewed whether the use of deadly force by Officer Harris in that incident warranted the filing of criminal charges.

Preliminary Facts

Based on a review of the evidence collected by the Indiana State Police independent investigation, the Special Prosecutor reports the following preliminary facts. This description of preliminary facts is intended as a summary of the evidence and not a complete record or transcript.

Initial Encounter

On February 8, 2021, a resident of the apartment building located at 5921 West 25th Street contacted the property manager to report a red Chevrolet car in the complex parking lot. The resident complained that a male associated with the vehicle was moving items to and from the car and “using the bathroom on the side of the car.” The resident stated that she was afraid and requested that the apartment manager address the issue. The apartment manager contacted Town of Speedway Code Enforcement officials. Joe Kramer, Speedway Code Enforcement, sent an email message to the Speedway Police Department requesting that road patrol be notified, stating; “There is a male living out of his car in the rear parking lot of the apartments located at 5911 W. 25th Street. Apparently the male is defecating in the parking lot next to the vehicle. The property management would like this person trespasses when he returns.” The email included a photo of the vehicle with the license plate number. The Speedway Police Department had a written anti-trespass agreement with the company that manages the apartment complex at 5911 and 5921 West 25th Street, giving officers the legal authority to allow or deny entry upon the property and to enforce the Indiana Code regarding Trespass.

On February 12, 2021 at approximately 11:30 pm Speedway Police Department Officer Officer Robby Harris arrived in uniform at the two-building apartment complex to attempt to locate the vehicle and the male associated with the vehicle. Officer Harris located a red Chevrolet Cavalier behind the building that matched the description of the vehicle and license plate provided in the Code Enforcement email. The tires, tire treads and wheel rims of the vehicle had been spray-painted all red. The vehicle was unoccupied. Officer Harris called Officer Scott Highland to assist with a search for the owner of the vehicle. Officer Harris took photographs that show clothing and numerous items inside the vehicle, obtained the VIN number, and inspected the area in the parking lot near the vehicle. Officers Harris and Highland then inspected the common areas inside the apartment building.

Officers Highland and Harris then spoke to a resident outside the building to gather

additional information about the person associated with the vehicle. The resident informed them she had seen a black male getting in and out of the vehicle earlier that evening. While speaking to the resident, officers noticed a black male wearing a navy-blue coat and a yellow winter cap walk over to the vehicle and open the passenger side door. Officers Highland and Harris walked up to the vehicle to speak with the unknown individual as he was shutting the passenger door to the vehicle. As officers walked up, the unknown individual began walking away toward a chain-link fence approximately four feet high that separates the apartment parking area from the back of a strip mall. Officer Harris noticed that the unknown individual was wearing a GPS monitor on this right ankle with a blinking red light on it, and announced “GPS” out loud, which is audible on the body camera footage. Officer Highland observed that the unknown individual was carrying what appeared to be a duffle bag and a backpack.

Body camera footage shows the officers walk toward the unknown individual and say “How are you doing big guy?” The individual then turns toward the officers and asks “Why are you walking up on me for?” An officer responds “Cause we are going to talk to you for a second.” During this conversation the individual can be observed turning and walking away from the officers and moving toward the chain link fence. An officer is audible saying “Is there any reason you are running away?” The individual responds saying, “I’m not running away. I’m getting away from you all.” The individual then jumps over the chain-link fence and runs. Officer Highland then jumps the fence and pursues the individual on foot. Officer Harris returns to his police vehicle and radios in a description of the individual as a black male wearing a yellow stocking cap.

Statement of Officer Highland

Officer Highland pursued the unknown individual on foot and came into physical contact with him just south of the intersection of W. 25th Street and Parkwood Drive, just north of the MCL Cafeteria. The body camera contains audio of the unknown individual saying “Calm down. Calm down.” Officer Highland says “Put your hands up. Put your hands up.” Officer Highland attempted to apprehend the individual by grabbing his arm. The individual

resisted Officer Highland. At that time, the blue backpack carried by the individual came off and fell to the ground, along with a cell phone. The individual leaned down and grabbed the backpack. Officer Highland attempted to re-engage with the individual while the individual attempted to pull away and resist. Officer Highland then attempted to deploy his taser towards the individual. Officer Highland stated the taser did not make a complete contact, and was thus ineffective. The individual then broke away from Officer Highland. Officer Highland continued to pursue the individual south on Parkwood Drive. Officer Highland observed that the individual still had the grey duffle bag with him as he ran away. Officer Highland recalled that the grey duffle bag was closed at the time he struggled with the individual. While pursuing the individual Officer Highland's taser detached from its holster and fell in the roadway. Officer O'Day is visible on Officer Highland's body camera running southbound after the unknown individual. Officer Highland contacted dispatch on the radio to inform them of the individual's current location, and to confirm the description. Officer Highland then turned back and attempted to locate his taser. Officer Highland then observed Officer Harris drive past him on Parkwood Drive in the direction where the individual had gone. Officer Highland also observed Captain Alexander drive past. Officer Highland stated he then heard three or four shots fired. Officer Highland heard over his police radio that the individual had a gun and that shots had been fired. These were the shots that were later determined to have been fired by Officer Harris.

Officer Highland ran south towards the location of Officers O'Day and Harris. At that time Officer Highland did not know who had fired the shots. Officer Highland had not seen the individual with a gun. Officer Highland approached Officers Harris and O'Day and saw that the unknown individual had been shot and was lying on the ground on his back with his right arm behind his back. Officer Highland observed Officer Harris in the process of moving from the driver's side door of his police vehicle to the area behind the passenger side door. Officer Highland took up a position behind the driver's side door. Officer Highland stated that he and other officers repeatedly commanded the individual to show his hands, and that the individual

failed to show his hands after continued commands to do so. Officer Highland recalled that he pointed his gun at the individual's head and told him not to move. Body camera footage contains audio of Officer Highland saying "I will put one in your dome. Don't you fucking move." Officer Highland recalled Captain Alexander say that the gun was between the individual's legs. Body Camera footage shows that Officer Highland had his gun pointed at the individual's head, and Officer Highland is audible saying "Somebody go get it. A gun on his head." Officer Highland then observed Officer Harris approach and kick the gun away with his foot. Officer Highland stated that the weapon that had been located between the individual's legs appeared to be a black pistol.

Officers Highland, Harris and O'Day then approached the individual to place him into custody. The subject can be heard on the body camera saying "My arm is broke" as Officer Highland handcuffs the subject. Officer Highland can be heard saying, "Do you think I give a crap about your arm?" Officers called for emergency medical assistance. Officer O'Day holds the subject's legs while Officer Highland puts on gloves and searches the individual's pockets. The subject is audible on the body camera saying "I'm in pain." Officer Highland can heard saying "I don't care. That's what happens when you pull a gun on the police, dummy." Officers repeatedly tell the subject to stop moving. Officer Highland located an identification card that listed the individual as De Aire Gray. Officer Highland stated that De Aire Gray who was taken into custody was the same individual he had initially encountered in the parking lot of the apartment complex and had been chasing. Officer Highland noticed that the grey duffle bag was open on the ground where De Aire Gray was taken into custody, and that a holster lay on the ground next to the bag.

The recorded interview statements from Officer Highland are consistent with the body camera footage.

Statement of Officer O'Day

Officer Madeline ("Maddie") O'Day stated that she was in route to the area of 5911 W. 25th Street to assist Officers Highland and Harris with checking on a vehicle in the parking lot.

As Officer O'Day arrived Officer Harris advised on the radio that she was no longer needed and could make herself available for other dispatched police calls. As Officer O'Day was preparing to leave the area, Officer Harris relayed over the police radio that a subject was running from him. Officer O'Day stated prior to Officer Harris's radio transmission she was unaware that Officer Harris had been dealing with anyone or the circumstances behind the encounter.

Officer O'Day did a U-turn at the intersection of W. 25th Street and Parkwood Drive and then drove southbound on Parkwood Drive. Officer O'Day stated that she saw Officer Highland engaged with an unknown individual in the middle of the street, and observed Officer Highland's ineffective attempt to deploy his taser on the individual. She observed the individual flee southbound on Parkwood Drive. Officer O'Day pursued the individual on foot. Officer O'Day got to the IndyGo bus stop on the east side of Parkwood Drive in the 2400 block and drew her taser. She gave the individual continued commands to stop or he would be tased. Officer O'Day is audible on body camera footage saying "Stop. Stop. Stop. I will tase you again." Officer O'Day stated the individual stopped running but continued to walk away from her. Officer O'Day observed that the individual was carrying a grey duffle bag. Officer O'Day observed that the individual was hunched over rummaging through the bag, and she was unable to see his hands. Officer O'Day was concerned that the individual might be looking for a weapon. She put away her taser and began to create a distance from the individual looking for an area with cover. Officer O'Day moved behind the bus shelter. Officer O'Day drew her gun and ordered the individual to show his hands. At that time Officer O'Day saw the individual withdraw a gun from the duffle bag he had been holding. Officer O'Day stated that she could see the handgun "as plain as day." Officer O'day stated that the individual began to wave the gun around. Officer O'Day stated that the individual held the gun in his hand, and that his hand was upright close to his chest area. The individual did not have his arm fully extended. Officer O'Day then observed Officer Harris drive past in his fully marked police car and come to a stop past her location in the middle of the southbound lane on Parkwood Drive, and slightly ahead of the location of the unknown individual. She saw the

individual walking in a westbound direction crossing the street. Officer O'Day recalled that she yelled repeatedly "He's got a gun. He's got a gun. He's got a gun." The body camera footage from Officer O'Day contains audio of Officer O'Day loudly shouting "He's got a gun" five times. Officer O'Day then says "He's got a gun" one more time. Officer O'Day observed the individual start to lower his arm and bring the gun down. At that moment she heard two gunshots. As the gunshots are heard on the body camera audio, Officer O'Day can be heard shouting "He's got a gun" three more times. Officer O'Day stated she saw Officer Harris fire his gun and shoot the individual. She saw the individual fall to the ground. Officer O'Day recalled immediately reporting "shots fired" on the radio. The body camera footage contains audio of Officer O'Day shouting "Shots fired. Shots fired."

Officer O'Day stated that Officers Highland and Captain Alexander then arrived at her location. Officers approached the individual. Officer O'Day stated that officers began to give commands for the individual to show his hands because they could not see his right hand. Body camera footage contains audio of Officer O'Day shouting "Let me see your hands. Let me see your fucking hands." Officer O'Day recalls that Captain Alexander saw that the gun was between the individual's legs, and gave the command to get the gun away from him. Officers then took the individual into custody. Officer O'Day recalls that officers requested a medic and began to render emergency medical aid. Officer O'Day recalls the individual saying that his arm was broken and that he was in pain. Once the ambulance left Captain Alexander directed Officer O'Day to go to Eskenazi Hospital and monitor the situation there. Officer O'day did not have any further contact with De Aire Gray at the hospital. Officer O'Day stated that the individual they took into custody was the same individual she observed struggling with Officer Highland. She maintained the individual in her observation from the time she first saw him with Officer Highland until he was taken into custody.

The recorded interview statements from Officer O'Day are consistent with the body camera footage.

Statement of Captain Alexander

Captain Alexander recalled that he was at the Speedway Police Department substation located just south of 25th Street when he heard on the police radio that officers had a subject running from them who had just jumped a fence. Captain Alexander got into his police car and pulled onto Parkwood Drive where he observed Officer Highland in the street. Captain Alexander observed Officer Highland point down the street in the direction where the subject was located. Captain Alexander saw another police vehicle just south of the four way stop on Parkwood Drive and continued to that location to assist. Captain Alexander stated that he had his car's siren on while driving, but did hear Officer O'Day say over the police radio that the subject had a gun. Captain Alexander did not hear gunshots over his siren, but learned that the subject had been shot when he arrived at the scene. Captain Alexander exited his vehicle and the subject was lying on the ground as other officers were giving commands for the subject to show his hands. Captain Alexander stated that from his position he could see the gun in between the subject's legs. On the body camera footage Captain Alexander is audible saying "Scott it's right between his legs. The gun is right between his legs." Officers Highland and Harris were located on Parkwood Drive just west of Captain Alexander's location. After Officer Highland took the subject into custody, Captain Alexander requested a medic on the radio. Captain Alexander learned that Officer Harris had discharged his duty weapon and shot the subject. Captain Alexander took command and secured the scene until evidence technicians arrived to process the scene. Captain Alexander took possession of Officer Harris's handgun and secured the weapon in the trunk of his car. Officer Harris's gun was collected into evidence as Item 13.

The recorded interview statements from Captain Alexander are consistent with the body camera footage.

Body Camera footage from Officer Harris

Body camera footage from Officer Harris shows the initial encounter with the individual at the apartment parking lot, and then shows Officer Harris traveling in his police vehicle to the

area where the individual had fled on Parkwood Drive. Officer Harris then stops his vehicle and steps out. The individual is visible walking in front of Officer Harris's vehicle as Officer Harris stands behind the driver's side door. Officer O'Day is audible on Officer Harris's body camera footage shouting "He's got a gun. He's got a gun. He's got a gun." After three shouts Officer O'Day's voice is drowned out by Officer Harris's own voice shouting, "You better drop it right now. Drop it. Drop it. Drop it. What is it? Drop it. I want to talk to you. Drop it right now. Drop the gun." The body camera then both shows and contains audio of Officer Harris firing four shots from his handgun held directly in front of him. The individual is also visible on Officer Harris's body camera as he takes a few steps and falls to the ground. Officer Harris shouts "Don't move. Get your hand where I can see it. Get your hand where I can see it. Show me your hands. I'm going to shoot you again. Show me your hands." Officer Harris then moves behind the police vehicle and forward on the other side to the area next to the passenger door. Another officer can be heard shouting "Show them now. Put your hands up." Officer Harris shouts "Let me see your hand. Let me see your hand. I will shoot you again. Show me your hand." The individual can be heard saying "I don't have a hand." Officer Harris says "Your right hand. Lift it where I can see it. Straight up." The individual says "I'm bleeding." Officer Harris says "I know you're bleeding. You're going to bleed some more if you don't show me your hands." Another Officer is audible saying "Show us your right hand." The individual then says "It's broke. It's broke." At that point, another officer is audible saying "Where is the gun?" Officer Harris replies "It's under him. I don't know if he's got it in his hand or not." The individual states "My arm is broke." Officer Highland is audible saying "I will put one in your dome. Don't you fucking move." Another officer can be heard saying "It's between his legs. The gun is right between his legs." Officer Harris can then be heard saying "It's between his legs?" Another officer can be heard saying "Don't you fucking move. Don't you fucking move." Officer Harris then approaches the individual and kicks a gun away from an area near the individual's legs. A gun can be seen and heard sliding across the pavement away from the individual. At that point officers take the individual into custody.

Later on in the the body camera footage, Officer Harris can be heard saying “It wasn’t me. Maddie saw the gun. And I was looking hard to make sure it was a gun. And it was.”

Interview of Officer Harris

Officer Harris was not interviewed in the initial investigation. An attorney for Officer Harris indicated that Officer Harris would cooperate with the Indiana State Police investigation and answer questions in an interview. Neither the Special Prosecutor nor Indiana State Police investigators made any agreement or proffer of immunity in order to obtain a statement from Officer Harris.

On May 26, 2021 Officer Harris met voluntarily with State Police investigators. Prior to the interview Officer Harris signed a written form acknowledging that his statement “...can be used as evidence against you in any future criminal proceeding.”

Officer Harris indicated that he had been a patrol officer with the Speedway Police Department since April of 2000. Harris had been a Field Training Officer and Physical Tactics instructor for much of that time, but did not currently serve in those roles.

Officer Harris confirmed that he had received an email about a red Chevrolet Cavalier which indicated that the apartment complex owner requested assistance from the code enforcement officer that the owner of the Chevrolet be identified and trespassed. The email included a photo of the vehicle and license plate and advised that the occupant of the vehicle typically arrived at around 16:00 to 16:30 and would remain on the property through the night and would leave the next morning. The email also advised that the occupant was defecating outside the vehicle. Officer Harris stated that he was aware of an agreement that allowed the Speedway Police Department to act on behalf of the apartment community to trespass an individual from the property.

Upon arrival, Officer Harris located the vehicle and checked to see if it was occupied. Harris determined the vehicle was not occupied, and observed a large number of items inside the vehicle that were consistent with someone living in the vehicle. Harris radioed dispatch to check the VIN and license plate numbers. At the same time, Harris looked around the parking

lot for anyone who might be associated with the vehicle. Harris was joined by Officer Highland, and they checked the common areas inside the apartment building. They then encountered a female resident outside the building, and engaged in a conversation with her regarding the vehicle. While speaking with her, Officer Highland noticed an individual by the vehicle. Harris described the subject as a thin black male with a yellow stocking cap and an ankle bracelet with a red light on it. Harris recognized the ankle bracelet as a GPS tracking device consistent with those used by the courts for monitoring people in criminal cases.

Harris and Highland both approached the subject and engaged in a dialogue consistent with what can be heard on the body cameras. The subject moved away and jumped over the chain link fence. Highland chased the subject on foot. Harris radioed in that they had a suspect running from them, and returned to his vehicle. Harris drove toward the area where the subject had fled. Harris observed that Highland was no longer with the subject, and Highland waved him onward. Harris continued south and located the subject walking along the roadway. Harris pulled past the subject's location and got out of his vehicle. Harris stated he had his taser out because the subject had already shown that he was uncooperative by running, and Harris was not sure how uncooperative he was going to be. As Harris opened the door to his vehicle, he heard Officer O'Day yelling repeatedly "He's got a gun." Harris immediately moved the taser to his other hand, drew his firearm, and began giving commands to drop the gun. Harris indicated that despite O'Day yelling gun, he needed to visually confirm what the subject had because it was dark outside, the subject was wearing dark clothing, and the object in hand was also dark in color. Harris then observed what appeared to be a gun in the subject's hand. Harris gave more verbal commands to drop the gun, but the subject did not comply. Harris stated that as the subject was crossing the street in front of his car the muzzle of the gun was pointed at Harris. Harris stated that he was then in fear for his life, and fired four shots to neutralize the threat. After firing the shots, the subject fell to the ground. Harris could no longer see the gun, and moved around to the passenger side of his vehicle to see if he could visually locate the gun.

In addition to the individual pointing what appeared to be a gun, Officer Harris further explained the totality of the circumstances that caused him to be in fear for his life. These factors included his training and experience with regard to delayed reaction time during a critical incident, that the subject was uncooperative, that the subject had a GPS tracking device consistent with involvement in some sort of criminal activity, that there was not an accurate address associated with the suspect's vehicle, the suspect's behavior in fleeing and subsequent eluding of Officer Highland during the foot pursuit, and that Officer Harris heard Officer O'Day yell "He's got a gun." Officer Harris believed that if the subject was unable to get away from officers by running, then he may be willing to use a gun to get away. This belief was supported by Officer Harris observing the subject pull out a gun.

Officer Harris stated that as a result of his training he targeted the subject's center mass area with his shots. After the subject fell to the ground, Officer Harris felt he was no longer in danger and moved to the rear of the vehicle to get a better vantage point in order to locate the subject's gun. After Captain Alexander stated that the gun was under the subject's legs, Officer Harris was able to approach and kick the gun away from the subject's reach. Other officers then took the subject into custody.

Officer Harris's interview statement was consistent with the body camera footage and other video.

Interview of Tanya Atkins

Tanya Atkins is the mother of De Aire Gray. Detective Lauren Roemke initially interviewed her, and then Lt. Hearon later re-interviewed her. Atkins resided in the 5900 block of W. 25th Street. For the previous week prior to February 12, 2021 her son De Aire Gray, daughter Robbin Sutton, and her mother had resided with her until their new place was ready. Atkins stated that on February 12, 2021 sometime after 11:00 pm, Gray asked his grandmother for ten dollars to go to the store. Atkins stated that Gray routinely walked to the gas station on foot, and she assumed that was where he was going. Atkins stated she heard a knock on the apartment window, believed it was Gray, and instructed Sutton to go outside and let Gray

inside. Atkins stated Sutton then returned to the apartment and informed her that the police were chasing Gray. Atkins stated she threw on some clothes and ran outside behind the apartment building but did not see Gray. Atkins was then directed by a neighbor toward Parkwood Drive. Atkins walked to the front of the building and down West 25th Street. As she rounded the corner at the intersection of W. 25th Street and Parkwood Drive she saw Gray further down the street running and being chased by police on foot and there was also a police car driving towards him. Atkins did not see Gray prior to seeing him running down Parkwood Drive. She then heard the noise of several gunshots - she believed more than three. At the time Atkins heard the gunshots, she believed Gray was by the bus stop just south of the eye-threading business. Atkins recognized Gray because of his bright red shoes. Atkins stopped for a moment and observed Gray fall to the ground near Goodyear. Atkins stated she did not see who shot Gray, but just knew that he had been shot. As Atkins got closer to the area, she could see that Gray had been shot. Atkins stated she could not see who had been shooting, or whether it was police officers or Gray. Atkins assumed that it was the police because there was no one else on the street in the area. Atkins could not describe any of the officers who were chasing Gray.

Atkins also stated that Gray had been previously diagnosed as schizophrenic, and had not taken his prescribed medications in approximately five years. Atkins had known Gray to carry a gun in the past, but she had not seen him with one recently. Since Gray had been staying with her, she would periodically check his belongings for weapons. She had not located any recently. Atkins advised that Gray routinely carried a duffle bag with him, but she had not looked through the bag that day.

Interview of Robbin Sutton

Robbin Sutton is De Aire Gray's sister. She had stayed at her mother Tonya Atkin's apartment for the previous couple of weeks. She remembered watching TV in the apartment and hearing a knock on the window. She went outside and saw that there were police in the area. She talked to a neighbor who informed her that police were investigating somebody

sleeping in a car. The neighbor told her police had attempted to talk to the man, that he had jumped a fence and run away, and that a police officer had run after him. She went back inside the apartment and told her mother what was going on. While standing outside the apartment she heard several gunshots. She went back into the apartment and stayed with her grandmother.

Other Video and Timeline Reconstruction

ISP investigators also obtained video footage from three security cameras in the shopping center, and conducted aerial photography of the scene. Investigators created a detailed reconstruction of the incident based on all the available video footage and evidence. This reconstruction was then used to corroborate the timeline and conduct a careful frame-by-frame analysis of events. The video clearly shows De Aire Gray digging through the duffel bag, pulling out a gun in a holster, dropping the holster on the ground, and then holding what appears to be a black pistol in his hand as he walks in front of Officer Harris's location. Enhanced photo stills from the video more clearly show what appears to be a black pistol in De Aire Gray's hand.

Physical Evidence Collected At The Scene

Marion County Crime Lab responded to process the scene and collect evidence. The Special Prosecutor reviewed all 199 photos taken of the scene. Photos 164 and 168 show a grey duffel bag and a light brown holster laying on the ground next to the bag. Both are close to the area where De Aire Gray was taken into custody. The grey bag is shown next to evidence marker 4. The holster is shown next to evidence marker 5. Photos 169 and 170 show close-up views of the holster. The grey duffel bag was collected into evidence as Item 4, and the holster was collected into evidence as Item 5. Photos 171, 172 and 173 show what appears to be a black handgun on the ground close to the area where De Aire Gray was taken into custody. Evidence marker 6 is visible next to the gun. This gun was collected into evidence as Item 6 and listed with the description "One (1) BB gun, brand T-D-P, model 45, caliber: 4.5 mm, serial number: 20H35558, black in color, unknown debris on one side." Item 6

appears to very closely resemble an actual handgun in shape, color, and size. In addition to viewing photographs, the Special Prosecutor also visually inspected the physical Item 6, and observed that there was nothing obvious to indicate that it was a BB gun rather than an actual gun, and that it appeared indistinguishable from an actual handgun even at close visual range.

Also depicted in the photos and taken into evidence were a blue backpack and keys that were located in the area where Officer Highland unsuccessfully attempted to apprehend De Aire Gray. Also near this location was taser wire, which was photographed and collected into evidence.

ISP investigators later obtained a search warrant for the backpack and grey duffle bag that Gray was carrying during the incident. The bags contained among other items several boxes of matches, multiple lighters, over one hundred pages of handwritten notes and journals, and yet another BB gun pistol that was painted all red.

The gun used by Officer Harris, a 9mm Glock, was collected into evidence as Item 13. In addition, four 9mm cartridge cases (Items 9, 10, 11, 12) were collected from the area where Officer Harris fired his gun. These cartridge casings were believed to have been ejected from the 9mm caliber Glock (Item 13) at the time Officer Harris fired the weapon.

Medical Evidence

An ambulance responded to the scene, began rendering medical aid, and then transported De Aire Gray to Eskenazi Hospital for treatment.

The Coroner Field Duty Report indicates that De Aire Gray was an inpatient at Eskenazi Hospital. The report stated that efforts to resuscitate were ultimately unsuccessful and that Gray was terminally weaned on 2/21/2021. The death was listed as homicide. The report indicates that Gray was involved in a police action shooting on 2/12/2021.

An autopsy was performed by forensic pathologist Gregory Schmunk. The cause of death was determined to be multiple gunshot wounds. The report listed three specific gunshot wounds to the abdomen, right buttock, and right upper arm. The manner of death was determined to be homicide.

Forensic Evidence

The Indianapolis-Marion County Forensic Services Agency Laboratory Examination Report (2/19/21) determined that four 9mm Luger caliber FEDERAL brand cartridge cases (Items 9, 10, 11, 12) were identified as having been fired from the 9mm Luger caliber GLOCK semiautomatic pistol (Item 13) based on agreement of class and individual characteristics. Item 13 was obtained from Officer Harris at the scene by Captain Alexander.

The Indiana State Police Laboratory performed an analysis of DNA swabs taken from the BB pistol (Agency Item 6). The swabs are identified as Lab Item 016A (swab of edges of base and the loading port) and Lab Item 018A (swab of trigger edges, trigger guard edges, magazine ejector button, grip knurling, and slide knurling.) When compared to Gray's known DNA profile (Lab Item 060A), DNA testing indicated "very strong support" for the inclusion of Lab Items 016A and 018A (at least 1 trillion times more likely if it originated from Gray than if it originated from an unknown, unrelated individual.)

Criminal/Mental Health History - De Aire Gray

At the time of the incident, De Aire Gray was facing criminal charges for seventeen felony counts of Arson that were filed in December of 2019. The charges resulted from an investigation by a task force comprised of Wayne Township, Indianapolis Metropolitan Police Department, and the Bureau of Alcohol, Tobacco, Firearms and Explosives. The task force was created to investigate a series of fires. A person was seen lighting a fire in a Southwest Indianapolis Mars Hill neighborhood. Investigators obtained videos of a person matching the description of De Aire Gray at eight fires over three months following the incident in Mars Hill. Those fires involved both vacant and occupied homes.

During the course of the criminal case for Arson, De Aire Gray was evaluated for competency to stand trial. Court-ordered competency evaluations were conducted by George F. Parker psychiatrist, and Stephanie Callaway psychologist. Both evaluations found that Gray

was not competent to stand trial, and recommended placement in an in-patient competency restoration program. Gray was instead placed in a new community-based competency restoration program. Gray had been in the community-based program for approximately four weeks before his encounter with the Speedway Police Department on April 12, 2021.

A review of records obtained from the Indiana Family Social Services Agency (FSSA) indicated that Gray met the criteria for Schizophrenia Spectrum Disorder with delusions, paranoia, and disorganization.

ISP investigators contacted Dr. George F. Parker psychiatrist to request that he review the available information and provide further opinions on Gray's mental state. Dr. Parker reviewed his August 2020 interview for the court-ordered competency evaluation, information provided by Mr. Gray's mother, and a review of mental health records and other information provided by ISP obtained in their investigation. Dr. Parker confirmed a diagnostic impression of schizophrenia based on a history of Gray experiencing auditory hallucinations, paranoid delusions, disorganized thinking and disorganized behavior, and negative symptoms for several years, dating back to approximately 2014. Dr. Parker also noted that Gray rejected his diagnosis, minimized symptoms of psychosis, and denied the need for treatment. Dr. Parker reviewed Gray's many writings that were found in the grey duffle bag, along with other writings that were obtained in the course of the investigation, and observed that they were consistent with the mental health diagnosis and history.

Applicable Legal Standards

Self-Defense

Indiana Code 35-41-3-3 describes the requirements for the justified use of deadly force by law enforcement, and also provides in subsection (f) that law enforcement officers are entitled to assert a claim of self-defense to what would otherwise be deemed a homicide.

IC 35-41-3-3 Use of force related to arrest or escape.

(f) Notwithstanding subsection (b), (d), or (e), a law enforcement officer who is a defendant in a criminal prosecution has the same right as a person who is not a law enforcement officer to assert self-defense under IC 35-41-3-2.

IC 35-31.5-2-185 Law enforcement officer.

- (a) "Law enforcement officer" means:
(1) a police officer...

The self-defense statute in relevant part is as follows:

IC 35-41-3-2 Legislative findings - Use of force to protect person or property - Qualified immunity from legal jeopardy - Use of force against public servant.

- (c) A person is justified in using reasonable force against any other person to protect the person or a third person from what the person reasonably believes to be the imminent use of unlawful force. However, a person:
(1) is justified in using deadly force; and
(2) does not have a duty to retreat;
if the person reasonably believes that force is necessary to prevent serious bodily injury to the person or a third person or the commission of a forcible felony. No person, employer, or estate of a person in this state shall be placed in legal jeopardy of any kind whatsoever for protecting the person or a third person by reasonable means necessary.

IC 35-31.5-2-85 Deadly force.

"Deadly force" means force that creates a substantial risk of serious bodily injury.

IC 35-31.5-2-292. Serious bodily injury.

"Serious bodily injury" means bodily injury that creates a substantial risk of death or that causes:

- (1) serious permanent disfigurement;
- (2) unconsciousness;
- (3) extreme pain;
- (4) permanent or protracted loss or impairment of the function of a bodily member or organ; or
- (5) loss of a fetus.

Under Indiana law, to raise a claim of self-defense a defendant must show three conditions: "Where one has taken the life of another human being, and thereafter contends that he did so in self-defense, he can only be successful in his contention if:

- (1) he acted without fault,
- (2) he was in a place where he had a right to be, and
- (3) he was in real danger of death or great bodily harm, or in such apparent danger as caused him in good faith to fear death or great bodily harm.

Davis v. State, 456 N.E.2d 405, 408 (Ind. 1983), citing *King v. State*, 234 N.E.2d 465, 468 (Ind. 1968); See also, *Spinks v. State*, 437 N.E.2d 963 (Ind. 1982); *McCraney v. State*, 447 N.E.2d 589 (Ind. 1983).

If a defendant is able to raise a claim of self-defense, the State is then required to disprove at least one of the conditions of self-defense beyond a reasonable doubt; “A defendant need only raise the issue of self-defense so that a reasonable doubt exists. The State then carries the burden of negating the presence of one or more of the necessary elements of self-defense.” *McCraney v. State*, 447 N.E.2d 589, 591 (Ind. 1983); see also *Davis v. State*, 456 N.E.2d 405, 408 (Ind. 1983); *Spinks v. State*, 437 N.E.2d 963 (Ind. 1982).

In order to justify the use of deadly force to protect one’s self, there must be an honest and reasonable belief of imminent serious bodily injury. Courts have referred to this analysis as a ‘dual inquiry’ involving both a subjective part (ie. what the actor perceives) and an objective part (ie. whether a reasonable person would find the perception reasonable); “Resolution of this question involves a dual inquiry: whether the defendant actually perceived the necessity to act as he did to defend himself from an imminent threat, and, whether such a perception is objectively reasonable under the circumstances.” *Harvey v. State*, 541 N.E.2d 556, 558 (Ind. Ct. App. 1989); citing *Whipple v. State* 523 N.E.2d 1363, 1366 (Ind. 1988).

A defendant may have an honest and reasonable belief that the use of deadly force is necessary to prevent serious bodily injury, that in fact turns out to be a mistaken belief. In order to be “objectively reasonable” a defendant’s belief need not be objectively true; “The language of the statute includes the concept of reasonable mistake as to the use or threat of force or the imminent danger of bodily injury. That concept is inherent within the words ‘reasonably believes’ which must be read together. The lay usage of the word ‘belief’ includes a margin of error for mistake. An assertion that one believes something is true is not a statement that it is in fact true. Inherent in the use of the very word “belief” is the concept of perception— how one perceives the data which forms the basis of the belief. Its coupling with the qualifying adjective ‘reasonable’ strengthens the concept of error inherent in a belief. If belief meant truth and did not include the possibility of error, the use of the word ‘reasonable’ would be superfluous because truth is absolute. There is no such thing as ‘reasonable’ truth. There is reasonable belief.” *Rose v. State*, 431 N.E.2d 521, 524-525 (Ind. Ct. App. 1982).

In summary, the issue is would a reasonable person in the actor's position, given all the same facts and circumstances, reasonably believe he is in imminent danger of serious bodily injury, and that deadly force is necessary to protect himself. The inquiry includes both the actor's subjective belief, and what a reasonable officer would believe under the same circumstances.

Standards for the charging decision

The Indiana Rules of Professional Conduct RULE 3.8 Special Responsibilities of a Prosecutor states as follows: "The prosecutor in a criminal case shall (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause." The Comments for RULE 3.8 further state "[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."

The American Bar Association Criminal Justice Standards For The Prosecutor Function Standard 3-4.3 Minimum Standards For Filing And Maintaining Criminal Charges states as follows "(a) A prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice."

Determinations of the Special Prosecutor

The Special Prosecutor, having reviewed the independent investigation conducted by the Indiana State Police, has determined that the investigation into this matter is now complete. The Special Prosecutor has made the following determinations:

1. Officer Harris was a law enforcement officer within the meaning of IC 35-31.5-2-185.
2. That on February 12, 2021 Officer Harris shot De Aire Gray, resulting in the death of De Aire Gray.
3. Officer Harris used deadly force within the meaning of IC 35-31.5-2-85.

4. That the shooting of De Aire Gray by Officer Harris was a homicide.
5. That De Aire Gray had a black pistol-shaped object in his hand that is visible on the body camera footage and on other video, and that was collected into evidence at the scene as Item 6.
6. That the black pistol-shaped object was a BB gun that visually appeared indistinguishable from an actual handgun.
7. That Officer Harris saw the black pistol-shaped object in De Aire Gray's hand and believed it to be an actual handgun.
8. That Officer Harris is entitled to raise a claim of self-defense.
9. That when Officer Harris shot De Aire Gray he acted in self-defense in accordance with IC 35-41-3-2(c) in that he had a reasonable belief that the use of deadly force was necessary to prevent serious bodily injury to himself, and such belief was reasonable under the circumstances. ¹

¹ The legal basis for the initial stop and/or attempted seizure/chase of De Aire Gray is technically a separate issue from whether Officer Harris acted properly in self-defense. Nonetheless, the issues are factually intertwined. Officers Harris and Highland articulated several reasons for the initial stop and attempted seizure/chase. While the initial investigation was for suspected trespass, the situation quickly developed further and included Officer Harris observing a GPS with a blinking red light and audibly calling out "GPS" while the suspect jumped a fence and ran. Regardless of whether the additional reasons articulated by the officers justified the attempted seizure/chase, or if Gray retained a right to resist an allegedly illegal arrest, such right did not extend to Gray threatening to use deadly force. IC 35-41-3-2(k) "A person is not justified in using deadly force against a public servant whom the person knows or reasonably should know is a public servant unless: (1) the person reasonably believes that the public servant is: (A) acting unlawfully; or (B) not engaged in the execution of the public servant's official duties; and (2) the force is reasonably necessary to prevent serious bodily injury to the person or a third person." See also, *Shoultz v. State*, 735 N.E.2d 818, 823 (Ind. Ct. App. 2000) ("The general rule in Indiana is that 'a private citizen may not use force in resisting a peaceful arrest by an individual who he knows, or has reason to know, is a police officer performing his duties regardless of whether the arrest in question is lawful or unlawful.'") The threat of deadly force by De Aire Gray was not justifiable as reasonably necessary under the circumstances. There is no indication that Officer Harris threatened deadly force prior to Gray pulling the gun out of the duffle bag, dropping the holster on the ground, and brandishing the weapon in Officer Harris's direction. Once Officer Harris observed the subject with what appeared to be an actual gun, Officer Harris had a reasonable belief that the use of deadly force was necessary to prevent serious bodily injury to himself. The reasonableness of this belief does not depend on the justification for the initial encounter, but rather on the circumstances at the moment Officer Harris perceived the threat of serious bodily injury to himself.

10. That the State cannot disprove the conditions for a claim of self-defense beyond a reasonable doubt, and that therefore the evidence is not sufficient to support a conviction for homicide. Furthermore, the evidence shows that Officer Harris did act in self-defense.

11. That Officer Harris should not be placed in legal jeopardy for protecting his person, and it is in the interests of justice that no criminal charges be filed.

Conclusion of the Special Prosecutor

The Special Prosecutor has determined that no criminal charges shall be filed, that the investigation into this matter should now be closed, and that no further action be taken.

Having discharged his duties in this cause, the Special Prosecutor now requests that his appointment in the matter of the investigation under this cause be concluded.

Respectfully submitted,



Christopher G. Gaal, 20130-53
Special Prosecuting Attorney

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CERTIFICATE OF SERVICE

I certify that a copy of this pleading was delivered to Ryan Mears, Prosecuting Attorney, 19th Judicial Circuit, Marion County Prosecutor's Office, 251 E. Ohio Street, Suite 160, Indianapolis, IN 46204, by means of electronic filing this 8th day of July, 2021.

/s/ Christopher Gaal

Christopher G. Gaal 20130-53
Senior Prosecuting Attorney