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**St. Joseph County
Prosecutor's Office**

Press Release

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235-9919

**Prosecuting Attorney Cotter Files Report in Special Prosecutor Investigation,
Determines No Criminal Charges Will Be Filed Under Indiana Self-Defense Statutes**

St. Joseph County – Today, Kenneth P. Cotter, the Prosecuting Attorney for the 60th Judicial Circuit (St. Joseph County), will file the attached report in the July 29, 2017, police action fatality of Aaron Bailey. In this written report, Prosecuting Attorney Cotter advises the Court that he has completed his investigation. The report also sets forth evidence gathered during the investigation and a legal analysis of the claim of self-defense. In the conclusion, it states “based upon the results of the investigation as outlined above, there is insufficient evidence to refute either the officer’s claim of subjective fear or the objective reasonableness of that fear.” The report finishes by saying that, after applying Indiana self-defense statutes to the results of this investigation, Prosecutor Cotter determined that no criminal charges shall be filed against the two police officers.

This decision was not taken lightly and was made after extensively reviewing the investigatory materials, re-interviewing witnesses, and assigning an investigator within his Office to conduct a supplemental investigation (full details of the steps taken are included in the attached document). Prosecutor Cotter also met with family members of Mr. Bailey and their attorney before filing this report.

Prosecuting Attorney Cotter was appointed to serve as Special Prosecutor in this matter on August 23, 2017, after Terry Curry, Prosecuting Attorney for the 19th Judicial Circuit (Marion County), filed paperwork requesting the appointment of Prosecutor Cotter as Special Prosecutor in this case. As noted in the Verified Motion for Appointment of Special Prosecutor previously filed, it is the duty of the Special Prosecutor to “determine if criminal charges are warranted and to prosecute the matter to resolution should charges be filed, or an indictment returned.” As Prosecutor Cotter completed his investigation and determined that no criminal charges will be filed, he also requested that the Court terminate his appointment as Special Prosecutor in this matter.

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

IN THE MARION SUPERIOR COURT

CAUSE NO. 49 G 14 1708 MC 30844

IN RE THE APPOINTMENT OF)
A SPECIAL PROSECUTOR

Whenever a special prosecutor is appointed to investigate a criminal matter, the special prosecutor must file a Report to the Court. IC 33-39-10-2(f) The statute further requires that the Report be a written, public report when a “public servant” is the subject of the investigation. The subjects of this investigation are two (2) Indianapolis Metropolitan Police Officers. Both are statutorily defined as “public servants”. The State of Indiana, by Special Prosecutor Kenneth P. Cotter, therefore files this Written Report to the Court, and advises the Court that:

1. On August 23, 2017, this Court Appointed me as Special Prosecutor;
2. Pursuant to that Order, this Court Ordered my appointment “for the purpose of completing the investigation regarding the police action fatality of Aaron Bailey on June 29, 2017, and any prosecution that might arise therefrom;”
3. I assigned my Chief Investigator David Newton to assist me in investigating this shooting;
4. Prior to this appointment, the Marion County Prosecutor’s Office had begun investigating this matter;
5. Pursuant to that Order, the Marion County Prosecutor’s office turned their investigation over to me;
6. The information from the Marion County Prosecutor’s Office included an investigation by the “Robbery-Homicide” Division of the Indianapolis Metropolitan Police Department;

7. After reviewing the previous investigation, this Office conducted its own investigation, including:
 - a. A review of the previous investigation, including all photographs, video tape evidence, ballistic examinations, forensic examinations, autopsy report, dispatch logs and computer logs;
 - b. A review of all witness statements, including the responding officers, the passenger of the Cadillac and neighbors;
 - c. An examination of the scene of the police action shooting;
 - d. Re-interviewing all witnesses;
 - e. Investigating the training of IMPD Officers;
 - f. Investigating the history of the officers involved in the shooting;
 - g. Statements from the officers involved in the shooting.
8. On October 26, 2017, this Office completed its investigation.

PRELIMINARY FACTS

On June 29, 2017, Officer Carlton Howard was working the midnight shift (beginning on June 28th and ending in the morning hours of June 29th) for the Indianapolis Metropolitan Police Department (IMPD). His area of patrol that evening included the area of 16th and Tremont Streets.

Officer Michael Dinnsen was also working for the Indianapolis Metropolitan Police Department (IMPD) that evening. His area of patrol that evening was adjacent to Officer Howard's.

Initial Stop

On June 29, 2017, at approximately 1:30 am, Officer Howard was patrolling his assigned area when he observed a white Cadillac at the Phillips 66 gas station (in the area of 16th and

Tremont Streets). The Cadillac was at the pumps with all four (4) doors open and no occupants around (During the subsequent investigation, detectives were able to obtain video from that Station that verified these facts). He did not investigate.

At 1:42 am, Officer Howard was approximately one (1) block from the Phillips 66 gas station and again approaching that gas station. He observed the same Cadillac at the exit for the parking lot. He noted the Cadillac did not pull out in front of him, although Officer Howard believed the Cadillac had ample room to do so. Instead, the Cadillac waited for Officer Howard to pass before pulling out onto 16th Street.

Officer Howard pulled into a parking lot and allowed the Cadillac to pass in front of him. Officer Howard was able to observe the license plate of the Cadillac. He further observed the Cadillac then change lanes (into the turn lane for Riverside Drive) without activating a turn signal. Ultimately, the Cadillac turned left (north) onto Riverside Drive.

Officer Howard “ran” the license plate for the vehicle. This occurred at 1:43 am. The registered owner was listed as Aaron Bailey. According to his in car computer, Aaron Bailey was listed as “suspended”.

Officer Howard then caught up with the Cadillac and activated his overhead lights. The Cadillac pulled over near the intersection of Riverside Drive and Burdsal Parkway.

Officer Howard called out his location via his radio at 1:45 am. He then approached the Cadillac. There were two (2) occupants of the vehicle. Officer Howard asked the driver for his driver’s license. The driver advised Officer Howard that he did not have a driver’s license and that he was suspended. Officer Howard advised the driver that it was “no big deal” (later confirmed by the passenger) and asked for the driver’s ID. The driver gave Officer Howard an Indiana Identification Card, listing him as “Aaron Bailey”.

Officer Howard asked the passenger for her identification. She gave Officer Howard her Indiana Identification Card, listing her as “Shiwanda Ward”.

According to Officer Howard, the driver (hereafter identified as Aaron Bailey) began asking Officer Howard to “give him a break”. Officer Howard again advised Mr. Bailey that the driving while suspended was not a “big deal” and that we will “deal with it”. According to Officer Howard, instead of calming down, Mr. Bailey became more nervous. It was Officer Howard’s belief that Mr. Bailey was acting more nervous than the traffic stop warranted. Officer Howard noted that Mr. Bailey’s hands began to shake and he began to talk rapidly. The passenger (hereafter identified as Shiwanda Ward) told Mr. Bailey to “calm down” (again, confirmed later by Ms. Ward).

Officer Howard noted that instead of calming down, Mr. Bailey continued to remain agitated. Officer Howard again told Mr. Bailey that it was “no big deal”. Officer Howard then returned to his own squad car.

Officer Howard entered Mr. Bailey’s information into his computer, running an IDACS/NCIC and IMPD’s RMS Interact check on Mr. Bailey. This occurred at 1:47 am.

The IDACS/NCIC is a national database that alerts law enforcement of the criminal history (convictions and arrests) of individuals.

IMPD Interact is an Indianapolis law enforcement database that advises officers of not only convictions and arrests, but whether a person is a suspect in any criminal activity and whether there were any active (local) warrants on a person.

The databases alerted Officer Howard to the fact that Mr. Bailey had a number of convictions and that he was a suspect in multiple robberies.

When Officer Howard entered Ms. Ward into the databases (at 1:48 am), he was advised that Ms. Ward was “being monitored” for a homicide. The database advised Officer Howard to contact a particular detective and to detain her. The database did not advise whether Ms. Ward was a suspect in that homicide. Officer Howard asked the radio operator to page the homicide detective.

At that point, Officer Dinnsen arrived in his own squad car. Officer Howard then returned to the Cadillac. Because he was suspended, Mr. Bailey was asked to get out of the car. Mr. Bailey asked why he had to get out. Officer Howard again ordered Mr. Bailey to get out of the vehicle. Mr. Bailey refused and started rolling up his window. Officer Howard yelled at Mr. Bailey to again get out. The Cadillac then took off eastbound on Burdsal Parkway. Traveling at a higher than normal speed.

Pursuit

Officers Howard and Dinnsen gave chase, with activated overhead lights and sirens. Officer Howard was in front of Officer Dinnsen. Officer Dinnsen called out to dispatch the pursuit and continued to update dispatch as the Cadillac turned south (right) on Koehne Street, and then east (left) on 23rd Street. The Cadillac continued east on 23rd Street and did not stop for the stop sign for Harding Street. Instead, the Cadillac continued east on 23rd Street.

23rd Street ends at Aqueduct Street. The only direction a vehicle may travel is north (left).

The Cadillac did not make the turn at Aqueduct. Instead, it crashed into a tree at the corner of Aqueduct and 23rd Street.

Officer Howard pulled behind and to the left of the crashed Cadillac. Officer Howard radioed dispatch of the crash at 1:58 am. Officer Dinnsen pulled next to Officer Howard (behind

the Cadillac). Officer Dinnsen also radioed dispatch. 18 seconds later, Officer Dinnsen radioed dispatch that there was a police action shooting.

IMPD uses the term “police action shooting” when a law enforcement officer discharges a weapon in the direction of another person.

RADIO/COMPUTER LOG

A review of the dispatch and computer log verified the following facts:

1:43 am: Officer Howard ran the plate for the Cadillac.

1:45 am: Officer Howard called out the traffic stop.

1:47 am: Officer Howard ran Aaron Bailey for warrants (NCIC and Interact).

1:48 am: Officer Howard ran Shimeka Ward for warrants (NCIC and Interact).

1:50 am: Officer Dinnsen called out that he was assisting Officer Howard (and had arrived).

1:54 am: Officer Dinnsen called out a pursuit.

Between 1:54 am and 1:58 am, Officer Dinnsen advised dispatch of the route of the pursuit.

1:58 am: Officer Howard called out that the Cadillac had crashed.

1:58 am: Officer Dinnsen advised other responding officer that the crash occurred at the corner of 23rd Street and Aqueduct.

1:58 am: (18 seconds later) Officer Dinnsen called out that there had been a police action shooting.

You can hear a voice yelling “hands” during this dispatch.

SHOOTING

Statement of Officer Howard

According to Officer Howard, immediately after arriving at the crash, he pulled up to the driver’s side (and slightly behind) the Cadillac. He opened his door and stood in the doorwell of his squad car. He pulled his handgun and looked inside the Cadillac. He noted that the airbags had

deployed. He saw Mr. Bailey turn toward the center console and “rummage” in that area. Mr. Bailey’s back was to Officer Howard. He could not see Mr. Bailey’s hands, because Mr. Bailey’s body was in between Officer Howard and the center console.

Based upon all of the circumstances, Officer Howard believed Mr. Bailey was reaching for a weapon

Officer Howard raised his handgun and pointed it at Mr. Bailey. He advised that he then yelled out numerous times to “show me your hands”. Ms. Ward then raised her hands. Mr. Bailey did not. Instead, Mr. Bailey continued to “rummage” in the area of the center console.

He noted that Officer Dinnsen pulled up next to him and got out of his own squad car, standing directly behind the Cadillac. Officer Howard yelled to Officer Dinnsen that Mr. Bailey was “digging” (“Digging is a term used by IMPD to indicate that a person is searching for a weapon).

Officer Howard continued to yell “show me your hands”. Instead, Mr. Bailey turned toward Officer Howard. Officer Howard was convinced that Mr. Bailey had obtained a firearm and was turning to shoot. Officer Howard then fired his handgun through the back passenger window area six (6) times toward Mr. Bailey.

Statement of Officer Dinnsen

According to Officer Dinnsen, he pulled up next to Officer Howard’s squad car, behind the Cadillac. He got out of his squad car and pulled his handgun, pointing it at Mr. Bailey and Ms. Ward. He heard Officer Howard yelling for them to “show me your hands”. He (Officer Dinnsen) also began to yell for them to show their hands.

Ms. Ward raised up her hands. Mr. Bailey did not. Instead, he saw Mr. Bailey open the center console. He then saw Mr. Bailey reach into the center console and began to “frantically” go into the console. Officer Dinnsen believed that Mr. Bailey was searching for a weapon.

Officer Dinnsen stated that he and Officer Howard continued to yell for Mr. Bailey to “get your hands up”. Mr. Bailey ignored those commands and continued to search inside the console. He heard Officer Howard yell “he’s digging”.

Officer Dinnsen stated that he told Mr. Bailey to raise his hands approximately 7-10 times.

Mr. Bailey then turned toward Officer Howard. Believing that Mr. Bailey was turning to shoot Officer Howard, Officer Dinnsen then fired his handgun five (5) times through the back windshield area.

Statement of Shimeka Ward

Shimeka Ward advised that she and Mr. Bailey were living in the Cadillac. She stated that earlier that evening, they purchased Vodka and had consumed about a half pint prior to the shooting. She further stated that they had stopped at the Phillips 66 for her to use the restroom. While there, Mr. Bailey told her that he wanted to “make some money”. He (Mr. Bailey) obtained some bar soap from the gas station and cut it up, placing these soap shavings in little baggies. It was Mr. Bailey’s plan to sell these baggies as “cocaine” to others.

She stated that later, while traveling north on Riverside, they got “pulled over”. Initially, Mr. Bailey did not want to pull over as the officer initiated the traffic stop. However, she convinced him to do so. She advised that Mr. Bailey believed they were being pulled over because the battery to his GPS ankle bracelet had lost its charge and was no longer working. She told my investigator that Mr. Bailey thought he was in violation and did not want to go back to jail.

Ms. Ward stated that when the officer approached the Cadillac, he did not explain why they were stopped. The officer obtained both of their identifications. Later, Mr. Bailey was asked to get out of the vehicle. He refused. Because Mr. Bailey thought he was going to jail for violating his GPS monitoring device, he rolled up his window and fled the stop.

Ms. Ward advised us that during the flight from the officers, she begged Mr. Bailey to stop. Mr. Bailey did not. At the sharp turn from 23rd Street to Aqueduct Street, they crashed into a tree. She had been wearing a seatbelt. Mr. Bailey had not.

Ms. Ward advised my investigator that the airbags deployed and she became “stunned,” so that she could not see or hear.

A short time later, she heard gunshots and realized they (she and Mr. Bailey) were being shot at by the police. She did not hear any commands by the officers.

She remembers hearing three (3) shots. After the 1st shot, she believes there was a 1 ½ second delay, during which Mr. Bailey turned to her and said “they shot me baby”. At that point, she reached toward Mr. Bailey. She remembers hearing the officers yell “get your hands up” and shot two (2) more times.

Ms. Ward advised us that Mr. Bailey did not open the center console. It was her belief that the force of the impact and airbag deployment opened the center console.

Neighbors

Investigators attempted to contact every home in a 3 block radius of the crash.

One neighbor was outside at the time of the shooting, getting a personal item from his own car, parked in the driveway. This neighbor heard a vehicle racing past him. He then saw the lights of the police go past. He heard the crash. While his home is only a short distance away, a tree blocked his view and he was unable to observe what occurred. However, after the crash he heard yelling (from the officers), and then four (4) gunshots.

A second neighbor only heard the shots. He did not hear the crash, nor did he hear any yelling.

No other neighbor heard or saw anything associated with this shooting.

Forensic Examination

Autopsy

The autopsy found that Mr. Bailey suffered four (4) gunshot wounds.

One projectile entered his back (left side), traveling back to front, right to left and upward.

No projectile was recovered because it exited his neck area (on his left side).

A second projectile entered his back (left side and lower than the first mentioned projectile) and lodged near his right collar-bone. The trajectory was back to front, left to right and upward. A projectile was recovered.

A third projectile struck his back on the right side and lodged just after penetrating the skin. That projectile was recovered.

A fourth projectile entered his back, below the left arm. The trajectory is back to front, left to right and upward. It traveled through his back, chest cavity, lung and heart before lodging in his upper chest area. That projectile was recovered. The area around this entrance wound suffered “pseudo-stippling”, consistent with glass injury.

No other injuries were noted.

The forensic pathologist determined the cause of death to be multiple gunshot wounds and the manner of death to be homicide.

Physical Evidence/Responding Officers: Post Shooting

Responding officers arrived three (3) minutes after the dispatch of the police action shooting. Three (3) officers arrived immediately, and saw Officers’ Howard and Dinnsen with weapons drawn. The passenger (Ms. Ward) was ordered out of the vehicle. She complied.

The driver (Mr. Bailey) was ordered out of the vehicle. He did not respond. One responding officer entered from the passenger side. Responding officers noted Mr. Bailey slumped over the center console, with his hands over the console on the passenger seat side.

Officers pulled him toward the driver's door in order to assess his injuries. He was unresponsive. Medical personnel then arrived and attempted to administer aid. He was transported to the hospital and declared dead.

Physical Evidence: Center Console, Post Shooting

According to all of the witnesses (responding officers and Ms. Ward), the center console lid was up and the tray was down. One officer remembers seeing a cigar in the tray. Photographs confirmed these observations.

One bullet hole was located in the center console lid. No projectile was recovered from that perforation.

According to an ACTAR accredited Reconstructionist, the forces in this crash could have caused the lid to become unlatched. However, those forces could NOT have raised the lid to an upright position. A person had to have raised the lid to a perpendicular position for it to have remained upright.

Physical Evidence/Photographs: Projectiles

A number of photographs were taken at the scene, and later of the interior of the Cadillac.

The driver's side rear window was shattered. Three (3) bullet holes were located just below the driver's side rear window (in the door).

The rear window was shattered. Four (4) bullet holes were located just below the rear window.

Six (6) projectiles were recovered in the vehicle, consistent with the bullet holes.

Three (3) projectiles were recovered from Mr. Bailey's body.

No other bullet holes were located.

In all, nine (9) projectiles were recovered.

A review of the handguns of Officers Howard and Dinnsen indicated that they fired eleven (11) times. Two (2) projectiles, therefore, were not recovered.

No weapon was recovered from the Cadillac.

The baggies of soap were recovered.

A bottle of vodka was recovered.

GPS Monitoring Device

At the time of the shooting, Aaron Bailey was on probation for a prior theft. As a condition of his probation, he was affixed with a GPS Monitoring Device. At Approximately 4:00 pm on June 28th, the probation department noted that the GPS device was not responding properly. A violation was noted. However, the violation report was not presented to a judge that day. No warrant was active at the time of Mr. Bailey's death.

Neither officer knew of Mr. Bailey's GPS device malfunctioning.

Training

IMPD has a separate and independent police training academy and trains its own officers, exclusive of the Indiana State Police Training Academy. According to training instructors, all officers (including Officer's Howard and Dinnsen) attend the IMPD Academy Firearms Training. IMPD bases their principles of using lethal force upon *Graham v. Connor*, 490 US 386 (1989). IMPD interprets that case to mean that the officer's individual perception is the basis to determine what force is necessary. A large portion of their training is based on the mental aspect of decision-making during stressful situations. The officers go through incidents (including situational

awareness) to be critiqued and analyzed by trainers. Officers are told that they must be able to articulate each use of force taken.

Officers are trained to use deadly force if they are in fear of bodily harm or death for themselves or others. They are trained to focus on threatening behaviors of an individual and use those indicators/behaviors for the possible application of force.

Officers are specifically trained to be aware of “digging”, being told that a person digging is actively looking for a weapon to harm an officer.

Officers are trained to take all of the behavior together (collectively) in determining the appropriate level of force necessary. Behaviors such as noncooperation, physical displays of nervousness, fleeing from officers and prior acts of violence are all major factors in assessing threats.

Officers are training to base their actions upon what a “reasonable officer” would do.

According to their instructors, officers have been trained in the law, threat assessment, use of force and critical thinking for the appropriate level of force necessary.

LEGAL DEFINITIONS

Homicide

Based upon the evidence presented to me, Officers Howard and Dinnsen killed Aaron Bailey.

Self-Defense/Defense of Others

Conduct that would otherwise be criminal is considered legally justified when a person has legal authority to engage in that conduct (IC 35-41-3-1). Indiana law specifically provides legal authority to use force – including deadly force – only in certain circumstances. Those specific

situations are legislatively defined at IC 35-41-3. Self-defense (and defense of others) is one of those situations. For purposes of this investigation, the relevant code section reads as follows:

“[A] person:

(1) is justified in using deadly force; and

(2) does not have a duty to retreat;

If the person **reasonably believes** that that force is necessary

to prevent serious bodily injury to the person or a third person”

(IC 35-41-3-2(c)) (emphasis added)

To justify using deadly force to protect one’s self, there must be an honest and reasonable belief of imminent death or great bodily injury. “Deadly force” is force that creates a substantial risk of serious bodily injury. Indiana courts have further defined this defense. According to Indiana law, the appropriate inquiry has both a subjective part (i.e. what the actor perceives) and an objective part (whether a reasonable person would find the perception reasonable). Thus, the analysis requires two separate but related considerations:

(1) whether the person **honestly** perceived a necessity to act as he did, and

(2) whether the perceptions were **objectively reasonable**.

In other words, would an ordinary, reasonable person (in the actor’s position), given all the same facts and circumstances, reasonably believe that he is in imminent danger of losing his life or receiving great bodily harm, and that force was necessary to protect themselves or another person.

Wilson v. State (2002) In. 770 NE2d 799,800

Jordan v. State (1995) Ind. 656 NE2d 816, 817

Davis v. State (1983) 456 NE2d 405

Johnson v. State (1996) Ind.App. 671 NE2d 1203, 1209

Whipple v. State (1988) Ind. 523 NE2d 1363, 1366-67

McCraney v. State (1983) Ind. 447 NE2d 589, 591

Spinks v. State (1982) Ind. 437 NE2d 963, 965

Harvey v. State (1989) Ind.App. 541 Ne2d 556, 557-58

The State must disprove a claim of self-defense, beyond a reasonable doubt.

A law enforcement officer has the same right as a person who is not a law enforcement officer to assert self-defense. IC 35-41-3-3(f).

FACTS ASSOCIATED WITH SELF-DEFENSE

The investigation revealed the following facts relevant to evaluating the officer's perception of events:

1. Mr. Bailey's unwillingness to cooperate with the original traffic stop (to get out of the vehicle), though the original purpose of the stop was simply a traffic violation and driving while suspended;
2. Mr. Bailey's physical display of nervousness at the original stop, to the point where even his passenger (Ms. Ward) advised him to settle down;
3. Mr. Bailey's felonious flight at high speed from the lawful traffic stop;
4. Mr. Bailey's flight was terminated not by his own choice to acquiesce to the police encounter, but by his crash into a tree;
5. The Officer's knowledge that Mr. Bailey had been a suspect in prior robberies;
6. The Officer's knowledge that the passenger (Ms. Ward) was wanted in association with a homicide. The officers did not know whether Ms. Ward was a suspect in the homicide, associated with the perpetrator of a homicide, or a witness to the homicide;
7. Mr. Bailey decision to turn – after the crash – toward the center console;
8. Mr. Bailey's decision to open the center console;
9. Mr. Bailey's placing his hands out of sight of the officers (on, in or around the center console), disregarding the officers' continued instructions to show his hands;

10. Ms. Ward's decision to raise her hands is consistent with the officer's statements that they were yelling that command;

11. Mr. Bailey's act of turning away from the open center console instead of showing his hands;

CONCLUSION

To refute a claim of self-defense, the State must prove, beyond a reasonable doubt, either that the officers' fear of imminent serious bodily injury or death by Mr. Bailey was objectively unreasonable or insincere. Based upon the results of the investigation as outlined above, there is insufficient evidence to refute either the officer's claim of subjective fear or the objective reasonableness of that fear. Therefore, applying Indiana self-defense statutes to the results of this investigation, I conclude that no criminal charges shall be filed.

WHEREFORE, Special Prosecutor Kenneth P. Cotter files this Report with the Court, pursuant to IC 33-39-10 et.al and advises the Court that the Investigation has been completed and that no charges will be forthcoming. Special Prosecutor Kenneth P. Cotter respectfully requests that this Court terminate the Appointment of Special Prosecutor, and all other relief just and proper.



KENNETH P. COTTER
SPECIAL PROSECUTOR