



**For Immediate Release**  
**March 31, 2017**

District Attorney Marc Bennett announces completion of the review of the law enforcement use of deadly force resulting in the death of Nicholas J. Garner, a 26 year old white male. The incident occurred on August 22nd, 2015, in the 6100 block of West Kellogg in Wichita, Sedgwick County, Kansas.

The Office of the District Attorney has reviewed the results of the investigation conducted by the Kansas Bureau of Investigation, the Wichita Police Department and Investigators from the District Attorney's Office

**SCOPE OF REPORT**

This report details the findings and conclusions related solely to the criminal investigation into the death of Nicholas Garner. The only question addressed by this report is whether sufficient evidence exists to establish beyond a reasonable doubt that the criminal laws of the State of Kansas were violated.

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 officer(s) or citizen(s) had behaved differently in the moments leading up to the fatal use-of-force are not properly addressed in a criminal investigation.

## FACTUAL SUMMARY

On Saturday, August 22<sup>nd</sup>, 2015, at approximately 10:10 p.m., an officer with the Wichita Police Department conducted a traffic stop in the parking lot east of the McDonalds restaurant located at 6350 W. Kellogg Drive. The officer had observed a silver Toyota Prius merge across three lanes of traffic and exit off of Kellogg onto the westbound frontage road at the Dugan exit. The officer also observed a defective equipment violation.

The officer followed the Prius onto the frontage road and activated the emergency lights on his marked Wichita Police Department patrol car. The Prius pulled into a parking lot just north of the frontage road, and stopped in the south end of the Sam's Club parking lot, west of the fuel station.

The officer made contact with the sole occupant, the driver, later identified as Nicholas Garner, via the driver's door window. The officer notified the driver of the violations, and requested to see Mr. Garner's driver's license. Mr. Garner began feeling his pockets and looking around the car. He told the officer that he didn't have his license with him. The officer observed a bottle of wine on the front passenger floorboard area and asked the driver if the wine bottle was open. Mr. Garner reached over and picked up the bottle, showing the officer that the bottle was sealed and had not been opened.

Mr. Garner continued to look for his identification. Mr. Garner then opened the driver's door slightly while looking down between the door and the driver's seat. The officer stepped back slightly and saw a blue Crown Royal bag on the floor between the door and the seat. The officer then asked Mr. Garner to provide his name, at which time Mr. Garner reached for the bag with his left hand, while also reaching between the driver's seat and center console with his right. The officer stepped forward and reached into the car, grabbing both of Mr. Garner's arms in an effort to prevent Mr. Garner from accessing either area. Mr. Garner pulled his arm free and accelerated the vehicle with the officer hanging on to him. Mr. Garner made several high speed circles around the gas pumps in the southern portion of the Sam's lot, just northeast of the location of the car stop. Witnesses estimated the speed of Mr. Garner's Prius to be between 40 and 50 miles per hour. The officer's upper torso was inside the vehicle, with his lower legs and feet hung outside of the car. Mr. Garner began striking the officer with his hand. The Prius struck portions of the gas pumps with his vehicle in an apparent attempt to knock the officer out the car. Mr. Garner struck the parked police vehicle, made another loop around the gas pumps, "jumped" a curb into the McDonald's parking lot west of the gas pumps and struck a second occupied car, a Honda, in the McDonalds driveway.

After multiple loops around the fuel area, Mr. Garner drove south onto the westbound frontage road and began driving eastbound against oncoming traffic. Mr. Garner then drove east up the westbound Kellogg exit ramp with the officer still partially inside of the car. The officer realized that Mr. Garner was heading onto Kellogg against traffic, and saw a head on collision with another vehicle was imminent. The officer then retrieved his service handgun and, as Mr. Garner's Prius struck an oncoming (westbound) vehicle head on, the officer fired at Mr. Garner. Mr. Garner was struck by the gunfire. The officer fell from the vehicle during the collision.

Mr. Garner was pronounced dead at the scene. The officer was transported by EMS to a local hospital in serious condition.

## REVIEW OF THE INVESTIGATION

The officer involved in the shooting death of Nicholas Garner was transported to a local hospital for treatment of multiple injuries. Civilian witnesses to the event were identified and interviewed. Crime Scene Investigators from the Wichita Police Department processed the scene. The body of Nicholas Garner was transported from the scene to the Sedgwick County Regional Forensic Science Center for autopsy. All recovered bullets and shell casings were submitted to the Forensic Science Center for examination.

The officer involved in the incident gave a voluntary, recorded statement to investigators, as did multiple civilian witnesses.

Video was collected from several different surveillance cameras in the area. Transcripts of interviews, reports of officers and detectives involved in the investigation, reports of the examination of the scene, physical evidence recovered, the results of the forensic testing and the autopsy report were all reviewed.

## WITNESS STATEMENTS

**Wichita Police Department Officer.** The Wichita Police officer involved in the shooting is a seven year veteran of the Wichita Police Department. He was driving a marked Wichita Police Department patrol unit and was dressed in authorized Wichita Police Department-issued uniform.

The officer told investigators that while on patrol that evening, he observed a silver Toyota Prius travelling west on Kellogg in the area of the I-235 interchange with a defective taillight. The officer also witnessed the driver of the Prius make a multiple lane change and from the inside lane to the far outside lane, and exit at the Dugan Road exit. The officer pulled behind the Prius and activated his emergency lights and siren to initiate a traffic stop. The officer noted that the Prius had a temporary license plate.

The Prius turned into the parking lot of the Walmart then drove into the east parking lot of the McDonalds at 6350 W. Kellogg Drive.

The officer notified dispatch of the stop then made contact with the driver, later identified as Nicholas J. Garner. The officer explained the reason for the stop to Mr. Garner and asked him for his driver's license and proof of insurance. The officer said Mr. Garner began patting his own pockets-as if feeling for a wallet. He then told the officer he did not have his license with him. The officer noticed a wine bottle on the passenger side floorboard and asked the driver about it. The driver showed the officer that the bottle of wine was unopened and said that the Prius he was driving belonged to a female cousin.

The officer noticed that the driver was acting nervous and that the driver looked down several times at the space between the driver's door and the driver's seat.

As the officer began to obtain the driver's name and other personal information, he noted that the subject continued to glance to the area between the seat and driver's door. The officer further described that the door began to open. As the door opened the officer observed a bag that was in the space between the now open door and the driver's seat. The officer described the bag as a "Crown Royal" type bag. The officer told investigators that the driver quickly reached down towards the bag.

The officer said he reacted by moving into the open door area and then grabbing the driver's left arm to prevent him from accessing the bag which the officer feared could contain a weapon.

The officer said the driver then began to struggle and also began reaching between the seat and console with his right hand. The officer then grabbed the driver's right arm and continued struggling to keep the male from obtaining any hidden weapons. The officer said he told the driver to stop struggling and "relax." The officer said he was in a partial kneeling position on the edge of the driver's seat and as he struggled with the driver, he felt the car begin to move. The officer said he and Mr. Garner began struggling for control of the steering wheel and the driver began accelerating. The car made several circles around the gas pump island in the south end of the Sam's lot. The officer reported that Mr. Garner began striking him in the head as they drove. The officer said his own feet, which were hanging out of the car, began to bounce off of the pavement at times. He described yelling at Mr. Garner to "just stop" and to "let me out," as he was afraid if he let go he would either be drug by or drug underneath the Prius. A civilian witness located in the McDonald's parking lot heard the officer yell "stop" or "just stop" and heard another voice respond, "fuck you."

The officer also told investigators that in the struggle, he attempted to find a gear shift lever so that he could attempt to put the car into park, however he couldn't find one around the steering column. The officer reported striking Mr. Garner in the head and face area in an attempt to get him to stop the car, without success.

The officer told investigators he felt several impacts during the incident and saw Mr. Garner strike the police car during one of the laps around the gas pump island. Mr. Garner also struck an occupied car which had stopped in the lot of the McDonalds. The officer reported that during the event, the open driver's door would swing wildly and smashed against his lower legs and back area several times.

Mr. Garner drove the Prius south out of the Sam's Club parking lot and began driving east, the wrong way on the Dugan exit from Kellogg. The officer described attempting to gain some control over the steering in an attempt to steer the car into the retaining wall along the exit ramp to stop the car from entering Kellogg against the traffic flow. The officer said that Mr. Garner was accelerating up the exit ramp and that he believed that when the car got onto Kellogg, a head on accident at highway speeds would occur. The officer reported pulling his duty pistol from his holster and was yelling "stop"

multiple times. The officer said he saw headlights coming down the exit ramp and realized that a head on collision was about to occur so he began firing at Mr. Garner in an attempt to stop the path and speed of the Prius. The officer reported falling backwards (north) out of the still-open driver's door as or just before the Prius collided head on into a car that had just exited off of Kellogg.

Numerous citizens who witnessed portions of the altercation assisted with the injured officer and suspect. The officer called in that he was injured and lying in the roadway after the shooting. A responding citizen used the officer's portable radio to contact 911.

Sedgwick County EMS responded and transported the officer to a local hospital in serious condition. The suspect, Nicholas J. Garner, was pronounced dead at the scene.

Two civilians who were in a vehicle which was struck head on by Garner were also examined by EMS at the scene.

## **CRIME SCENE INVESTIGATION**

Wichita Police Department Crime Scene Investigators processed the scene of the shooting. The scene was photographed and diagrammed.

Scene Investigators located, photographed and collected multiple items of physical evidence. Investigators documented and collected cartridge casings from the scene, as well as the Crown Royal bag that Garner was attempting to grab during the traffic stop. The bag contained a substance later tested and confirmed to be Methamphetamine.



Crown Royal bag recovered at scene containing methamphetamine.



Blue Honda struck in McDonald's parking lot.





The damaged Wichita Police patrol vehicle at the location of initial traffic stop. In the background, the gas pumps of the Sam's Club are visible. Out of view to the left (west) is the McDonald's restaurant.



A close-up of the damaged Wichita Police Department patrol vehicle after being struck by Mr. Garner's Prius. The McDonald's restaurant is visible to the left (west).



Damage to the eastbound Prius driven by Mr. Garner after the collision with the civilian vehicle, a Chrysler Pacifica. The Pacifica is out of the photo to the left (east). Some damage may also be attributable to earlier impact with the officer's patrol vehicle and the second impact with the blue civilian vehicle in the McDonald's parking lot.



Looking west onto Kellogg Drive in the off-ramp from Kellogg onto Dugan. The Chrysler Pacifica driven by a civilian that was struck by Mr. Garner's Prius is in the foreground. Mr. Garner's damaged Prius is visible west of the Pacifica. The McDonald's restaurant is visible further west.



Aerial photo of west Kellogg, east of Ridge Road. The location of the initial car stop is identified by a small, green rectangle in the southwest corner of the Sam's Club gas pumps – east of the McDonalds. The approximate location of the collision between Mr. Garner's Prius and the civilian Chrysler pacific is identified by two additional green rectangles located in the west bound off-ramp exiting westbound Kellogg. This drawing is for demonstrative purposes and is not to scale.



The officer's boots showing significant wear to right heel above the sole.

## FORENSIC EVIDENCE AND AUTOPSY RESULTS

An autopsy was performed on the body of Nicholas J. Garner on August 24<sup>th</sup>, 2015 at the Sedgwick County Regional Forensic Science Center.

The autopsy revealed Mr. Garner had been shot three times. Gunshot wound 1 was a graze wound to the left cheek area with gunpowder stippling (soot) was observed in the area of the wound indicating that the shot was fired in close proximity to the wound.

Gunshot wound 2 and gunshot wound 3 were to the left side of the head. Both penetrated the brain. Both projectiles were recovered.

The autopsy report also noted blunt force injuries to Garner's left ear, left side of the bridge of the nose, and an abrasion to his mouth.

Toxicology analysis showed the presence of Methamphetamine and Tetrahydrocannabinol in Garner's blood.

## KANSAS LAW

In Kansas all persons including law enforcement officers are entitled to defend themselves and others against the use of unlawful force. **Kansas Statutes Annotated** 21-5220 (formerly 21-3211) 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).

### A. Immunity

**Kansas Statutes Annotated** 21-5231 (formerly 21-3219), enacted in 2006, states that a person who is justified in the use of force in self-defense “is immune from criminal prosecution.”

On March 10, 2017, in State v. Hardy, \_\_\_ P.3d \_\_\_(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]’”

The Hardy Court further observed, “[b]y its plain language, the statutory presumption of reasonableness is implicated if [the person against whom force was applied] had ‘unlawfully or forcefully entered, and [was] present within, the [dwelling, place of work or] occupied vehicle of the person using force.’” K.S.A. 2016 Supp. 21–5224(a)(1)(A). 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. Use of Force During Arrest

**Kansas Statutes Annotated** 21-5227 (formerly 21-3215), 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.”



### C. Application of Kansas Law

A person's use of deadly force in self-defense is judged on a "case by case" basis. Only such force reasonably needed to defend against another's imminent use of unlawful force is legally permissible under Kansas law.

## CONCLUSION

On August 22, 2015 in the 6100 block of West Kellogg, the Wichita Police Department Officer exercised deadly force, resulting in three gunshot injuries to the driver of a Silver Prius, Nicholas J. Garner. The evidence uncovered during the course of the investigation revealed no evidence that the officer's use of force in self-defense was unreasonable under the circumstances he encountered.

As the officer stood at Mr. Garner's driver's door, Mr. Garner abruptly reached between the driver's seat and console. Fearing that Mr. Garner was reaching for a weapon, the officer reacted by reaching to stop the driver's movement. Mr. Garner reached between the driver's seat and console and, again, the officer reacted by reaching to stop the movement. Mr. Garner accelerated the vehicle with the officer stuck halfway in and halfway out of the driver's door. The two men struggled and exchanged blows in a fight for control of the vehicle. Mr. Garner drove in circles around the Sam's Club gas pumps; struck the officer's parked patrol unit and a separate parked car in the parking lot of the McDonald's restaurant. He then accelerated the wrong way up the westbound Kellogg off-ramp into oncoming traffic. He struck a Chrysler Pacifica driven by a civilian, exiting west bound Kellogg. These acts constituted an application of force likely to cause great bodily harm or death to the officer and/or occupants of oncoming/westbound traffic on Kellogg.

The officer acted in an objectively reasonable manner in defending himself and/or occupants of vehicles in westbound Kellogg traffic. Under Kansas law and the facts of the case, I conclude that no criminal charges will be filed against the officer.

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*18<sup>th</sup> Judicial District of Kansas*