



For Immediate Release
November 8, 2012

District Attorney Nola Tedesco Foulston announces completion of the review of the law enforcement use of deadly force resulting in the death of Marquez Smart occurring on March 10, 2012, at 215 N. Mosley in Wichita, Sedgwick County, Kansas.

As required by protocol, the Office of the District Attorney has reviewed the results of the investigation conducted by the Kansas Bureau of Investigation, Wichita Police Department, and Investigators from the District Attorney's Office, and has compiled the following facts.

SUMMARY OF EVENTS

On Saturday, March 10, 2012 at approximately 2:00 A.M., Wichita Police officers were engaged in crowd control in the 200 block of North Mosley. Several nightclubs had begun closing for the night and officers were attempting to clear the crowd from the area. Several off-duty officers hired by the Old Town Association had called in on-duty officers for assistance due to the size of the crowd which was estimated at approximately 200-500. As the officers were moving the crowd south on Mosley, officers and several civilians heard shots being fired from the area of the moving crowd. Officers observed a black male wearing a bright yellow shirt holding a gun extended in front of him. One officer saw the male fire the gun, then observed the male stop shooting and begin running north along the front of the parking garage on the west side of the street. Two officers gave chase and reported the suspect did not respond to verbal commands to drop the gun. Both officers fired shots at the suspect as he ran into the walkway on the north side of the garage and headed west. The suspect fell to the ground after being shot and was taken into custody. Four other bystanders were struck with bullets or bullet fragments. Several EMS units responded. The suspect, who was later identified as Marquez Smart, was transported to Via Christi on St. Francis Hospital via EMS where he was later pronounced deceased. Three bystanders were transported to Via Christi on St. Francis as well and all were treated and released for various gunshot type wounds. A fourth civilian went to Wesley Hospital later in the morning with a gunshot wound to her side, where she was treated and later released.

STATEMENT OF INVESTIGATION

The two Wichita Police officers involved in the shooting death of Marquez Smart were immediately removed from the area and their weapons were secured. Crime Scene Investigators from the Wichita Police Department processed the scene. The body of Marquez Smart was transported from the hospital to the Sedgwick County Regional Forensic Science Center for autopsy. All recovered firearms, bullets and shell casings were submitted to the Forensic Science Center for examination.

Immediately following the shooting, numerous individuals with information concerning the events of the evening were identified and taken to Wichita Police Headquarters for interviews. The officers directly involved in the incident gave voluntary, recorded statements to investigators, as did several civilian witnesses who had knowledge of some of the events of the evening.

STATEMENT OF FACTS

The following facts are compiled from the statements of individuals involved in the incident, physical evidence recovered, and the results of forensic testing. The details of the use of deadly force by the officers are compiled from statements given by the officers, civilian eyewitnesses to the shooting, physical evidence at the scene, evidence recovered from the area hospitals, and the results of the autopsy of Marquez Smart. As is generally the case, there are expected to be differences among witnesses in their perception of what they may have seen or heard from their different vantage points. The statements taken from the involved officers are consistent with the physical evidence developed during the investigation. When all of the statements are taken in concert with the totality of the evidence gathered during the investigation, a clear set of facts emerge that are consistent with the officers' description of events.

CIVILIAN WITNESS STATEMENTS

Investigators and officers interviewed several witnesses on scene and at police headquarters. Much of the crowd had scattered when the shots were fired and had left the area by the time the scene was secured. Investigators also spoke with the four injured bystanders. Many of the civilians who were interviewed only heard the gunshots, and didn't report seeing the shooter or the shooting that followed. One civilian witness (identified as "A.J." for the purpose of this report) did see the events and gave a recorded statement to investigators. A.J. reported that he was standing in the street among the crowd when he heard two gunshots. He said the crowd began running in all directions and others bent down for cover. A.J. said he began to duck and looked towards the direction of the shots. He said he saw a black male wearing a yellow shirt holding a large black gun. He said the male began running north in front of the parking garage, still holding the gun. A.J. said he saw a uniformed police officer begin to chase after the male with the gun as he ran through the crowd. He said the police officer began shooting at the suspect as the suspect entered the walkway along the north side of the parking structure, and the suspect fell to the ground. He said several other officers moved into the area and began clearing everyone out. A.J. told investigators that he believed the officer may have saved lives due to the suspect's actions of shooting into the crowd and running around with the gun.

The four injured bystanders were interviewed by investigators. Bystander 1, a 30 year old male, told investigators he was walking in the crowd on Mosley after leaving Old Chicago and was in the area along the north entrance to the parking garage when he heard one gunshot fired fairly close by so he began running. He said as he was running into the parking lot, he heard a second shot fired and felt pain in his right leg. He said he hobbled through the parking garage and exited the other side. He stopped on First Street and found he had an injury to his right calf area. He was transported to Via Christi on St. Francis via EMS and it was determined

he had suffered a gunshot wound to the calf. The bullet had exited the front of his lower leg and was not recovered. He was treated and later released.

Bystander 2, a 20 year old female, told investigators she had been at a rap concert at Doc Howards and left with the crowd at closing time. She reported walking from the club with her male cousin and was in the street east of the parking garage when a disturbance broke out and her cousin became involved. Bystander 2 would not provide any details of who else was involved but told investigators that someone pulled a gun and was going to shoot her cousin, so she pushed the cousin out of the way and was shot. She had a gunshot wound to the front of her right shoulder and, after being shot, ran into the parking garage. A Wichita Police officer saw her bleeding and assisted her until EMS transported her to the hospital. She said she could not describe the person who shot and denied knowing any other details. She said she had no idea what started the altercation or any of the other people involved. She did provide investigators with the name of the male she said was her cousin. That male was later located but denied any knowledge of a fight or shooting. The male said he only learned of the shooting after the fact. Both Bystander 2 and the cousin were not fully cooperative during the investigation. However, later Bystander 2 told a police lieutenant, "The guy who shot me is dead". Medical staff who treated Bystander 2 determined that the best course of action was to leave the bullet that was lodged in her upper chest area in place rather than remove it.

Bystander 3, a 17 year old female, told investigators she had been at a rap concert at America's Pub in Old Town and had left at closing with several friends. She described being amongst a large crowd on Mosley street. She said she was walking along Mosley and was in front of the north entrance to the parking garage when she heard two gunshots. She didn't know who fired the shots or where the shooter was so she ran into the garage and was heading up the ramp to the second floor when she reported hearing several more rapid gunshots and saw someone fall to the ground in the walkway north of the garage. She said she stopped running when one of her friends told her she was bleeding. Bystander 3 said she then felt pain and saw blood coming from her boot. She found an injury to her left calf area. Bystander 3 told investigators she was unsure of exactly when she was injured and did not know if it happened during the initial two shots or after the second volley of shots. Medical examination revealed an entry wound to the back of her left calf with no exit. An x-ray of the area showed what appeared to be an intact bullet. Doctors who treated her left the bullet in place.

Bystander 4, an 18 year old female, was interviewed by investigators after showing up at Wesley Hospital via private vehicle at approximately 3:40 A.M. She said that she had been with friends at a rap concert at Doc Howards club and had left when the club began closing. She said she and her friends were in the crowd that was moving south along Mosley. Bystander 4 said she and several other people were walking west in the walkway along the north side of the parking garage when she heard gunshots. She said she started to run, felt like she got pushed, and fell to the ground. She said she got up after the shots stopped and walked to the west where she met her friends at their car. Bystander 4 said she lost her shoes when she fell and, upon getting up, she felt a stinging sensation around her right side. She said she and her friends stopped at a convenience store after leaving Old Town and then she was dropped off at a family member's home where she noticed the bleeding area on her side.

She was driven to Wesley where it was determined she had a gunshot wound. Doctors located a bullet fragment under the skin on her side and removed the fragment. She was later released from the hospital.

LAW ENFORCEMENT WITNESS STATEMENTS

The two officers who fired on Marquez Smart both gave recorded, voluntary statements after the incident. Both officers' firearms were collected as evidence.

The first officer to engage Smart was a 14 month veteran of the Wichita Police Department at the time of the incident, and will be referred to as Officer 1 for the purpose of this report. Officer 1 had served as a police officer in another jurisdiction for approximately 3 years prior to being hired by WPD. Officer 1 was on-duty working patrol, armed with a city issued 9mm Smith and Wesson handgun on the morning of the shooting, and was dispatched to assist other officers with crowd control in Old Town. When Officer 1 arrived, he was assigned to block the far north driveway into the parking garage with his marked patrol car. The entrance is blocked off to keep vehicles from entering the garage and stopping to socialize with pedestrians, which causes issues in the garage. Officer 1 blocked the drive and then went on foot to assist with crowd control.

Officer 1 reported he was helping disperse the large crowd that had gathered along Mosley Street. While doing so, Officer 1 observed a group of individuals on the east side of the street begin yelling at each other and believed that a fight was about to start. Officer 1 said he began to monitor the area of the disturbance. As he was walking, he heard someone yell something to his right and, upon looking, saw some of the crowd had stopped along the east side of the garage in the area between the north and south entrances. Officer 1 said that as soon as he looked towards the area of the yell, he heard a gunshot fired in that area and immediately saw a black male wearing a yellow shirt with a gun. He described the male holding the gun extended in front of him and Officer 1 saw the male fire again with the gun aimed towards the crowd of people in the street area. Officer 1 said the crowd began panicking and people began running and screaming. Officer 1 said the male then turned and began running north along the front of the garage with the gun in his hand. Officer 1 told investigators that he believed someone had to have been hit with the gunfire due to the densely packed crowd and also believed the suspect may fire more shots as he was running with the gun. Officer 1 described advancing towards the suspect's path, drawing his duty weapon, and moving towards the armed male. Officer 1 said as he got along the side of his patrol car parked in the driveway of the garage, the suspect ran behind the car, still running north. Officer 1 said he extended his gun towards the suspect and fired what he believed was one shot at the suspect. The suspect continued to run north with the gun in his hand. Officer 1 said that he chased the male towards the walkway north of the parking garage and was still in fear that the suspect may fire additional shots. He said that as he was chasing the suspect, the male began manipulating the gun by bending his arm and moving the gun up towards his own body. The officer said he wasn't sure what the male was doing with the gun, but was still fearful for the lives of the bystanders. Officer 1 said he fired two or three more shots at the suspect as the male started to turn into the walkway towards the west. Officer 1 said he immediately heard additional shots fired to his right, and saw the suspect fall to the ground in the walkway. Officer 1 said as the

male fell, the gun came out of the suspect's hands and landed on the ground west of where the suspect fell. Officer 1 said he then assisted in covering the suspect as additional officers arrived to assist. Officer 1 said during his interview that he was unsure if he yelled any verbal commands to the suspect to stop. He said the scene was extremely chaotic with people screaming and running in all directions, and he kept his full attention on the suspect with the gun. Officer 1 described the lighting as being good in the area of the parking garage. He said due to the garage and street lighting, he had no problems seeing without additional lighting. Officer 1 said that he believed the suspect had probably shot people in the crowd and the suspect was a threat to every person in the crowded area. Officer 1 said he used deadly force in an attempt to stop the threat.

The second officer involved in the shooting also provided a recorded, voluntary statement. Officer 2 is a 6 year veteran of the Wichita Police Department and is currently assigned to the Gang Unit. Officer 2, armed with a city issued 9mm Smith and Wesson hand gun, was riding with a second officer assigned to the Gang unit and they initially went to the Old Town area due to the two rap concerts that were being held. Officers were expecting a large crowd in the area due to the concerts. When Officer 2 and his partner initially arrived at Doc Howards Club, they noted a line of people still trying to get in the club and groups of people in the street around the area of the club. While in the area, Officer 2 and his partner observed several known gang members gathering along the street south of Doc Howards. The officers contacted the group and began urging them to move on from the area.

The two clubs in that area, Doc Howards and Liquid, began closing down around that time and a large number of individuals from both clubs began leaving and moving into the street. Officer 2 estimated the crowd was much larger than the normal closing time crowd due to the concerts. Officer 2 was assisting the other officers trying to keep the crowd from loitering. He took a position on an elevated curb area along the east side of Mosley just north of the parking garage so he could see more of the area. As he was monitoring the area, he saw a group of people begin to scatter in the street area, followed by what he believed were four to five gunshots. Officer 2 said his focus was drawn to a black male wearing a yellow shirt and the male was holding a handgun with his arm extended as if he'd either fired or was going to fire the gun. The male then turned and began running through the crowd still armed with the handgun. Officer 2 began moving from his position towards the west maintaining a view of the male suspect and in an attempt to intercept him. As Officer 2 was moving, he saw Officer 1 moving towards the suspect by the patrol car parked at the north entrance to the garage. Officer 2 then heard two to three additional shots, but he was unsure if the shots came from Officer 1 or from the suspect. He heard Officer 1 yelling, "drop the gun," at least twice. Officer 2 saw the suspect run past the garage and begin to turn west into the walkway north of the garage. Officer 2 said there were bystanders still in the area and he believed the suspect was a threat to everyone in the area. Officer 2 said he got within 7 to 10 feet from the suspect when the suspect turned to run west down the walkway. Officer 2 said he gave the suspect a command to drop his gun, but the male didn't comply. Officer 2 said he then fired three or four shots at the suspect and the suspect fell to the ground. He said the suspect's gun fell from his hand onto the walkway. Officer 2 said several other officers arrived quickly to secure the area. Officer 2 said he and two other officers began back tracking the suspect's route to look for shooting victims. He said he and the other officers found a partially loaded pistol magazine on

the ground in the area where he originally observed the suspect firing the handgun. Officers also began to locate and secure shell casings in the area and began finding the other injured bystanders.

A third officer did not fire but witnessed the events and gave a recorded statement to investigators. Officer 3 is a Detective assigned to the Gang Unit and was working the area in an off-duty capacity. Officer 3 works the part time, off-duty assignment regularly. He said that due to the larger than normal crowd, multiple on-duty police units were sent to assist with the crowd. He told investigators he assisted with moving the crowd along Mosley towards the south and, from his vantage point, didn't see any disturbances or fights starting. Officer 3 said he suddenly heard a single gunshot which sounded as if it came from the area in front of the parking garage. He estimated that, at the time of the first gunshot going off, the crowd in the general area of the street and garage was two to three hundred in size and the area was "shoulder to shoulder" with bystanders. Officer 3 said the first shot was followed shortly by two rapid shots. He said he began scanning the crowd trying to find out who was shooting. He said he couldn't see anyone with a gun initially, but then saw a uniformed WPD officer with his gun drawn running north just south of the walkway north of the garage. He told investigators he saw a black male with a yellow shirt running in front of the officer and believed the black male was running from the officer. He said he then saw the officer fire shots at the black male as the male rounded the corner into the walkway. He saw the black male go to the ground on his stomach and saw several officers run up to secure the suspect and area. Officer 3 said once that area was secured, he assisted in searching for evidence. He said he saw officers locate shell casings in the area where he heard the first several shots come from and also saw a magazine for a handgun lying on the ground in the same area.

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 two .45 caliber cartridge casings (referred to as C1 and C2 for the purposes of this report) from an area just east of the parking garage along the sidewalk. Also found in the same area was a partially loaded magazine with .45 caliber ammunition in the magazine. Investigators noted that the live round at the top of the magazine was in backward. In the area where the magazine was located, investigators also recovered a broken pair of eyeglasses. Based on information provided by Marquez Smart's mother, it is believed that the broken glasses belonged to Smart. There is no physical evidence or witness statement indicating how the glasses were broken or ended up on the ground. The only facial or head injury noted to Smart was a small abrasion by his lower lip.

CSI documented and collected two 9 millimeter caliber cartridge casings (C3 and C4) from the ground in front of the north entrance to the parking garage. Two additional groups of cartridge casings were located at the mouth of the walkway along the north side of the parking garage. The first group consisted of three 9mm casings (C5, C6, and C7) and, just north of those casings, were four more 9mm casings (C8, C9, C10 and C11). CSI documented a blood stain

on the walkway to the west of the casings and also documented and recovered a Smith and Wesson .45 caliber pistol. The magazine was missing from this gun when it was recovered.

The investigation also revealed that the Smith and Wesson firearm used by Smart had been reported stolen from a local business in 2009. There were no known suspects at the time of the theft.

Officers who assisted at the scene of the incident contacted multiple individuals during a canvass for witnesses. A majority of the crowd had dispersed immediately after the shootings and many were out of the area by the time the area was secured. Officers were able to speak to a number of bystanders, most denied having witnessed any of the events or having any knowledge of what had sparked the initial shooting. A Detective assigned to the Gang Unit, who is an expert witness in local street gangs, reviewed the reports of the canvassing and noted several active gang members were in the Old Town area at the time of the incident. The detective noted that many were from rival gangs and indicated the area would have been a dangerous mix of feuding gangs among other club patrons. Marquez Smart was not listed in the Wichita Police Department Gang database.



Photo looking north towards parked patrol car at garage entrance. Smith and Wesson .45 magazine visible on ground by planter.



View of walkway along north side of parking garage. View looking to the west. Yellow markers indicating recovered 9mm cartridge casings.



Smith and Wesson .45 caliber handgun which Smart was carrying when he was shot.

FORENSIC EVIDENCE AND AUTOPSY RESULTS

The firearms evidence collected from the scene of the shooting was examined at the Sedgwick County Regional Forensic Science Center. The examination confirmed that Officer 1 fired five shots and Officer 2 fired four shots. The evidence indicates Officer 1 initially fired two shots at Smart as he ran past the garage entrance and then three more shots as Smart turned and ran west into the walkway. Officer 2 fired the four shots at the entrance to the walkway.

The two .45 caliber cartridge casings recovered from the area of the initial shots were compared to the recovered Smith and Wesson Model SW99 .45 caliber pistol recovered after being dropped by Smart when he was shot. The results of the examination confirmed the casings had been fired and ejected from the Smith and Wesson .45 pistol.

Comparisons were done on several bullet fragments recovered from the ground in various areas of the walkway north of the garage. The bullet fragments were all identified as having been fired from Officer 1's 9mm handgun.

At around the approximate time of the shooting, a resident reported their house being struck by gunfire in the 2100 block of South Santa Fe. Officers responded to that report and recovered a bullet that had struck the home. Laboratory examination of that bullet revealed the bullet shared discernable class characteristics with the Smith and Wesson .45 dropped by Smart, but the examiner was unable to make an exact match. The bullet was eliminated as being fired from the 9mm handguns of Officer 1 and Officer 2.

An autopsy was performed on the body of Marquez Smart on March 10, 2012, at the Sedgwick County Regional Forensic Science Center. The autopsy determined that Smart was shot five times during the incident. Smart's wounds consisted of a gunshot wound to the right hip with exit, a gunshot wound of the right elbow area with exit, a gunshot wound to the left lower back with the bullet recovered, a second gunshot wound to the left lower back with exit, and a gunshot wound to the right back area with bullet recovery. The recovered bullets were compared to the firearms used by Officer 1 and Officer 2. Both bullets were determined to have been fired from the officers' firearms-one to each firearm. The trajectory of each of the five shots were determined to be back to front, as well as gunshot residue on the shirt of the deceased, and all were consistent with the physical placements described by the two officers.

Toxicology testing was performed on Marquez Smart. Results of that testing showed Smart's blood alcohol level was .09% and 0.15% in his urine. He also tested positive for the presence of Tetrahydrocannabinol, which is the active ingredient in Marijuana.

The autopsy determined the cause of Smart's death was multiple gunshot wounds, and the manner of his death was Homicide.

KANSAS LAW

In Kansas all persons including law enforcement officers are entitled to defend themselves and others against the use of unlawful force. The law provides that a person is justified in the use of force against an aggressor when and to the extent it appears to him and he reasonably believes that such conduct is necessary to defend himself or another against such aggressor's imminent use of unlawful force.

"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.

A law enforcement officer is justified in using force likely to cause death or great bodily harm only and to the extent that it appears to him and he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another person, or when such officer reasonably believes that such force is necessary to prevent an arrest from being defeated by resistance or escape and such officer has probable cause to believe 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.

The use of deadly force in defending a person is judged on a “case by case” basis. Only such force reasonably needed to defend against another’s imminent use of unlawful force will be legally permissible.

CONCLUSION

The use of deadly force by Officers 1 and 2 was lawful and justified.

The investigation established that Marquez Smart fired two shots from a large caliber handgun at an unknown target. One of his shots struck a female in the crowd. The actions of Marquez Smart firing a .45 caliber handgun in this crowded public area was clearly an application of force likely to cause death and did, in fact, cause great bodily harm to one or more persons, who were bystanders. Although there were undoubtedly individuals in the area who could answer as to what may have led to Smart’s actions, no one has come forward. Nevertheless, the investigation clearly shows that after firing the shots, Smart ran through the crowd, still armed with the handgun. Officers 1 and 2 both reasonably believed that Smart had committed a felony involving great bodily harm or death and continued to be an imminent lethal threat to everyone in the area. The officers, in an attempt to stop Smart and effect an arrest, gave verbal commands for Smart to drop his weapon. He did not respond to their commands and was escaping the area. The officers both fired at Smart to stop his escape from the commission of a forcible felony and to stop the continuing threat to human life.

District Attorney Nola Tedesco Foulston
18th Judicial District of Kansas