

***From The Desk of Special Prosecutor Frederick Franklin***

*October 26, 2020*

On Friday October 23, 2020, I received the Certificate of Death for Jake Gardner from Washington County Oregon. I had previously received reports from the Hillsboro Oregon Police Department detailing the death of Jake Gardner. Both the Certificate and the police reports specify suicide by gunshot as the cause of death. Consequently, I intend to file today a Motion To Dismiss the pending Indictment against him.

Given the community interest in this case and since there will not be a trial, I have decided to provide the statement below as my report of the of the evidence reviewed by my team and I. This statement should not be construed as a report of the Grand Jury.

**THE LEADUP TO THE SHOOTING**

The investigation conducted by the Omaha Police Department shows the following undisputed facts: Jake Gardner was a commercial tenant for a bar/dance business in the Old Market. The businesses went by the names “The Hive” and “Gatsby’s”. Because of the Corona Virus, both businesses were closed on the weekend of May 29<sup>th</sup>, and had been for a period of weeks, as were most bar and restaurant businesses in the Old Market.

On Friday May 29<sup>th</sup>, an Omaha protest against racial injustice and the police killing of George Floyd in Minneapolis occurred. The object of the protest was something to which Gardner was philosophically opposed. The protest did not move into the Old Market area that Friday night. However, Jake Gardner stated that he sat “outside” his Old Market businesses armed for 4 hours in anticipation of problems from those associated with the protest.

On Saturday May 30<sup>th</sup>, Gardner again returned to his closed business. This time, he was joined by his father, and two other men associated with the operation of the Hive/Gatsby’s. They had with them at least four firearms including three handguns and a shotgun. One of the four was also armed with a

tactical styled knife. Jake Gardner was not the only one of the four who had possession of a firearm.

As the protest moved from downtown Omaha east towards the Old Market, Gardner, this time from the inside of his business, monitored the movement of the protestors from what he texted was his “police scanner”. As the protestors came closer to Gardner’s businesses, he caused the inside lights of the business to be turned off, making the space appear to be unoccupied to someone on the outside. Additionally, though officers with the Omaha Police Department were literally seconds away and, on every corner surrounding his business, Gardner called Emergency 911 claiming that his business was being shot at. *(Omaha Police later concluded that there was no evidence that shots were fired in or around Gardner’s business Old Market that night by anyone other than Jake Gardner)*. On that 911 call, Gardner also stated in part to the 911 operator, “... that [he] just wanted to call in and make sure that (he) was on the record for this.” Gardner did not specify what the “this” was for which he wanted to be on record. *(It begs the question, was Gardner alerting the 911 operator that he wanted the “record” to document an anticipated need to return gunfire in self-defense, since he reported that his business was being shot at?)*

Gardner and those with him remained inside the Hive/Gatsby’s with the lights off for approximately 15 to 25 minutes. During this space of time, video evidence shows the absence of anyone entering or attempting to enter the business, though it does show approximately 9 individuals engaging in window breaking and acts of vandalism of The Hive/Gatsby’s. *(The County Attorney at his press conference announcing his decision to decline filing charges referenced earlier acts of vandalism engaged in by James Scurlock. He was correct, however, when he also stated at that same press conference that acts of vandalism by Scurlock were irrelevant in the proper assessment of possibly charging Jake Gardner)*.

Gardner certainly would have been free to argue that he was simply there to protect his property. Except, he didn’t protect it. He did not stand in front of the businesses, with or without his firearms, as a deterrent to looters or vandals. There is no evidence that he did anything to stop the vandalism that was occurring while he was inside his business with the lights off. He allowed the

vandalism to occur while awaiting the entry of looters, so as to use his firearms on them, at least that is one of the conclusions that could have been reasonably drawn from that evidence. And so as to be very clear, **no one associated with the protest, looters, vandals or any other person, ever entered or attempted to enter The Hive/Gatsby's.** No part of the confrontation between Gardner and Scurlock took place inside of Gardner's business. Nothing about the confrontation between Gardner and Scurlock involved Gardner engaged in the protection of his business.

From the front exterior of the business, a close review of the surveillance video from Gardner's business (*previously shown on news reports*), depicts an individual attempting to throw a traffic barricade into the window of the building on the southwest corner of 12<sup>th</sup> and Harney. That individual was being videotaped by an acquaintance. (*These two individuals were white males from Elkhorn Nebraska. The person doing the videotaping has been erroneously reported by some in the media as being a female.*) Jake Gardner's father observed that activity and confronted the individual doing the videotaping and assaulted him twice by pushing him. Another person, who did not know either Gardner's father or the person who was being pushed by him, crossed from the north side of Harney and stopped the assault by Gardner's father by pushing him down. The young man from Elkhorn being assaulted by Gardner's father was interviewed by a team member with the Office of The Special Prosecutor. He indicated that he was grateful for the person coming to his assistance and in fact shouted a "thank you" to that person before they both left the immediate area. The point is to illustrate that Gardner's father was NOT randomly and indiscriminately attacked, as has been suggested. He was pushed down by someone who had come to the aid of a young man videotaping and being assaulted by Gardner's father.

Jake Gardner did not see his father pushed down but was immediately alerted to that fact while his father was still on the ground by one of the individuals with whom he was inside his business. The surveillance video clearly depicts Gardner watching the person who had pushed down his father running away east on Harney street.

Another video clip from a citizen cell phone provided to the Omaha Police some 4-5 days after the County Attorney announced his decision, depicts the initial encounter between Jake Gardner and James Scurlock. This video depicts an area east of Gardner's business and importantly, out of the field of capture for the surveillance video for Gardner's business. Because Gardner saw the person who had pushed his father running away east on Harney, he well knew that the person with whom he was then engaged, James Scurlock, was not the individual responsible for his father being pushed.

The video clip is short, only 12-13 seconds. Nonetheless, it depicts Jake Gardner advancing towards James Scurlock who is engaged in a true retreat, walking backwards 7 or 8 steps, before Gardner can be heard at the end of the clip saying, "What the f\*uck are you going to do?" Scurlock's voice is not heard on the clip. The clip does not depict Gardner then brandishing his firearm. However, other evidence clearly demonstrates that he had the same 9 MM handgun inside his waistband during this initial encounter.

### **THE TERRORISTIC THREATS COUNT**

The Grand Jury Indictment includes a felony count of Terroristic Threats. When I announced the Grand Jury's decision, I specified that the Terroristic Threats count referenced the conduct by Jake Gardner in his threats of violence while brandishing and displaying his handgun. This conduct occurred prior to Gardner being jumped and prior to him having fired any shots. Yet, comments from supporters of Gardner persist in declaring justifiable "self-defense", as if the Terroristic Threat count was nonexistent. I am not suggesting that there was no defense that could have been asserted on Gardner's behalf as it relates to the Terroristic Threats count. I am strongly suggesting however, and solely for the sake of discussion, that to the extent that Gardner was justified in asserting self-defense in relation to his having been jumped, that justification would not have retrospectively applied to his earlier terroristic threats conduct. In other words, the claim that Gardner's conduct was justifiable self-defense would NOT have applied to his terroristic threats conduct. The evidence suggests that Gardner was threatening the use of deadly force and was doing so prior to having been jumped.

There came a point in the confrontation between Gardner and Scurlock when Gardner's father walked from in front of his son's bar business east towards where his son and James Scurlock were situated, and assaulted Scurlock by pushing him, the same as he had done earlier with the young man from Elkhorn. He then immediately walked away, while receiving a pat on the back from Jake Gardner.

Whatever was intended by Gardner's father pushing Scurlock, it is clear that the hostility was immediately escalated. At this point, Gardner is observed by witnesses to be in an agitated state and ready to pull and use his firearm. One such witness is a white male in a dark hoodie depicted in the surveillance video standing to Jake Gardner's immediate right. The video depicts him being pushed by James Scurlock. This individual was interviewed by my investigative team. He related that he did not know anyone involved in the conflict prior to that evening but that he had engaged in some discussion about the protest with Jake Gardner earlier that evening from across the street in front of another closed business.

The witness stated that he inserted himself into the conflict between Gardner and Scurlock in an effort to de-escalate it. He stated that when Scurlock pushed him, that he did not interpret Scurlock's actions as an attack or assault on him but rather as a statement from Scurlock to him to stay out of the fray. But importantly, he also stated that Gardner presented as agitated and eager to use his firearm and that he was very afraid that Gardner was about to pull his gun out again and use it. He was present and had observed Gardner when he initially displayed and then brandished his gun.

Another witness interviewed by my team includes a 20-year-old Hispanic female who initially jumped Jake Gardner from behind and took him to the ground. (*There have been erroneous reports that Gardner was initially jumped and taken to the ground by two people, including Scurlock*). The surveillance video from Gardner's business clearly shows Gardner being taken down from behind by a single person, not two. When asked why she intervened, she stated that she had been observing an agitated and erratic Gardner from behind, knew from the comments of other bystanders that he had a gun, and believed that he was about to pull and use it. This is essentially the same observation made by the white male in the hoodie.

### **THE 2<sup>ND</sup> SHOT ... ATTEMPTED FIRST DEGREE ASSAULT**

After Gardner was jumped and taken down by the 20-year-old woman, Gardner pulled his gun and fires a first shot which appears to have just missed the torso of the woman, traveling between her legs as she is attempting to get off of him. Just after that, Gardner can be seen turning towards a tall black male near his feet, tracking him with his firearm in hand, and discharging his weapon for a second time. Gardner missed the tall black male with this shot. This is the Attempted First-Degree Assault count in the Indictment.

### **GARDNER'S CLAIM OF FEARING FOR HIS LIFE BASED ON BEING IN A CHOKEHOLD**

As Jake Gardner brought himself off of the ground and turned towards the direction of the woman who had tackled him, he got off of the ground and in a position consistent with readying to shoot. Scurlock then broke away from engagement with Gardner's father and jumped on the back of Jake Gardner. Though the video evidence is not definitive, it generally shows Scurlock attempting to pin Gardner's arms against his body so as to prevent him from extending his right arm and hand, where he initially held his gun. Arguments can be made that Scurlock, in jumping on Gardner's back, was attempting to assault Gardner. Arguments can also be made that Scurlock was acting defensively to prevent Gardner from engaging in additional shooting.

The Omaha Police took Gardner directly to the Omaha Police station after the shooting. Gardner told the Omaha Police that Scurlock had him in a chokehold and was threatening to kill him. The police took frontal and side profile pictures of Gardner while at the station. The pictures show no marks or bruising Gardner's neck, chin, or shoulder area. Additionally, citizen cell phone video from a person standing directly across the street reveals only the voice of Gardner being heard. And Gardner's voice is loud and clear. He repeatedly and loudly yells at Scurlock to get off of him, something generally not able to be accomplished while being choked.

Under Nebraska's self-defense statute, Jake Gardner would have been required to prove both that his use of deadly force was in response to an

imminent threat of death or serious bodily injury AND that he was NOT the initial aggressor in the conflict. As noted earlier, the best evidence of who the initial aggressor was came from the citizen cell phone video depicting Gardner as the aggressor, while Scurlock took 7 or 8 steps backwards, retreating from Gardner. That incident, along with Gardner brandishing his gun, and Gardner's father assaulting Scurlock by pushing him, is a reason why Scurlock may have been confrontational with Gardner during the scene depicted on the video shown at a prior press conference. Prior to Gardner firing his first shot, Scurlock had not engaged in any act constituting a threat of death or serious bodily injury towards Gardner. The evidence suggests that Scurlock wanted to fistfight. Moreover, Scurlock was not on Gardner's property, but rather on a public sidewalk in front of a business adjacent to Gardner's, a place he had a lawful right to be.

After Scurlock was shot, Gardner, his father and the other two individuals with him immediately went back inside the bar, where surveillance video depicts Gardner having collected three of the four firearms present and giving them to his father. His father then hurriedly departed from the premises through the back door with the shotgun and two of the three handguns just prior to the arrival of the Omaha Police. Gardner's father is seen on video loading the guns into the rear of a vehicle and then driving off. The gun used to shoot Scurlock remained on the premises and was provided to the police before Jake Gardner was removed.

### **MY "AGENDA" AND THE DIFFERENCE BETWEEN THE GRAND JURY'S DECISION AND THAT OF THE COUNTY ATTORNEY**

I have been accused of having had an "agenda" concerning the presentation I made to the Grand Jury investigating the shooting of James Scurlock. I did have an agenda. My agenda was for my team and I to review the investigation including approximately 60 interviews conducted by the Homicide Unit of the Omaha Police Department, seek out the existence of any additional evidence, and to follow that evidence to assess whether any of it was consistent with potential violations of Nebraska Criminal Statutes. It took my team and I nearly two months to thoroughly review that evidence and determine what was relevant.

I did NOT have any agenda as to any outcome, understanding that fidelity to the process mandated that the relevant evidence be followed and presented, rather than to pursue a predetermined conclusion, based on an allegiance to a political party or racial affiliation, or especially on uncorroborated statements by Jake Gardner to the Omaha Police.

Once the evidence from the investigation was reviewed, relevant portions were presented to the Grand Jury for their consideration and ultimate determination as to whether to charge or not. To be clear on this point, it was the Grand Jury who had the authority to charge, not me as the Special Prosecutor. But more importantly, the Grand Jury was NOT deciding the guilt or innocence of Jake Gardner. The Grand Jury did not assess the likelihood of success at trial. They were only deciding if the evidence was sufficient for Gardner to be charged. Stated simply, the Grand Jury was not assessing the end game for this matter, something apparently done by the County Attorney given, his early and committed belief in a potential self-defense claim. Rather, the Grand Jury was only looking at whether there should be a beginning. In our system of criminal justice, criminally charging someone is NOT the same as determining one's guilt or innocence. Indeed, after the Grand Jury indicted Gardner, I announced that he was still presumed innocent.

That the accusation that I had an "agenda" (*suggesting a race-based motive*) came from someone I have long known and considered as a friendly acquaintance, is both tragic and insulting. People who know me, from any racial or ethnic background, know how absurd that suggestion is. The manifestations of how I have lived my life, conducted myself professionally, and as it relates to the people with whom I have associated, all belie any such suggestion. I believe the Douglas County Attorney knows that about me both personally and through our common professional acquaintances, but instead wrongly decided, with that comment, to pander to those who harbor those sorts of race-based prejudices and instincts. I know of no other way to take the accusation.

This entire sad episode is tragic and something that did not need to happen or lead to a loss of life. Regrettably, we live in a time where resolution of conflict by resort to the use of firearms towards fellow citizens is not only accepted but



encouraged. For my part, I find it a disheartening departure from a desire to live in a civilized society.