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FOR IMMEDIATE RELEASE

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***Prosecutor Finds May 7, 2020
Muncie Police Action Shooting Legally Justified***

Muncie Indiana - The Indiana State Police (ISP) has concluded its investigation into the events and circumstances surrounding the May 7, 2020 police action shooting involving a Muncie Police Department Officer. The investigation was submitted to the Delaware County Prosecutor's Office for review. That review is now complete. This review included statements from civilian witnesses, statements made by Davey Gibson, statements made by the officers involved, police reports, police body camera footage, photos, videos, diagrams, forensic analysis, physical evidence, and aerial photography.

Ordinarily, when no charges are filed in police action shooting cases, the practice of this Office has been to release a factually detailed report containing photos and diagrams as well as a legal analysis as to why formal charges are not filed. This is done in the interest of transparency in the process. However, in cases such as this, where a person is ultimately charged, the Indiana Rules of Professional Responsibility prohibit a prosecuting attorney from publicly releasing certain information. An arrest and the filing of a formal charge are merely an allegation. The person is presumed to be innocent unless and until the State proves him/her guilty beyond a reasonable doubt.

The Officer involved in the shooting is identified as Officer # 2. When criminal charges are not filed against a person, the practice of this Office has been to not publically name the person. Similarly, it is the practice of this Office not to refer to civilian witnesses by name.

FACTUAL FINDINGS

On April 28, 2020, at approximately 11:17 p.m. Muncie Police Officers were called to the Village Pantry located at 2501 S. Macedonia Ave. The nature of the call was an armed robbery. Upon arrival, witnesses stated that Davey S. Gibson (a white male age 41) was in the parking lot with a large knife threatening people. Gibson was lunging toward multiple subjects with a knife. Gibson had fled the

scene prior to the arrival of the officers. Based upon the witness statements, officers developed probable cause to arrest Gibson for Intimidation, a Level 5 Felony. An Affidavit of Probable Cause for Arrest was drafted in the event officers could locate Gibson.

On May 7, 2020, Muncie Police Officer # 1 was off duty and traveling in his personal vehicle on Memorial Street when he observed Gibson near the intersection of Madison Street and Memorial Avenue riding a bicycle west bound on Memorial. Officer # 1 is familiar with Gibson and knew that the Muncie Police Department had probable cause to arrest him for the April 28, 2020 intimidation.

Officer # 1 followed Gibson and as he did so he contacted Muncie Police Officer # 2 to inform him that he had located Gibson who was wanted on the intimidation case. Gibson was riding a bicycle. Officer # 2 was aware that the Muncie Police Department had probable cause to arrest him for the April 28, 2020 Intimidation. Gibson stopped in the 400 block of W. Memorial Drive. Officers # 1 and # 2 exited their respective vehicles. The officers gave Gibson verbal commands which were ignored. Gibson dropped his bicycle and climbed a chain-link fence on the west side of a used car lot near the railroad tracks. Officer # 2 and his K-9 partner pursued Gibson. Officer # 2 found Gibson hiding on the front porch of a nearby residence. Officer # 2 gave Gibson repeated verbal commands to "come out" and "show me your hands." While on the porch, Gibson threatened to stab Officer # 2's K-9 partner. Later, officers located a set of brass knuckles in the exact area where Gibson was hiding. Instead of following the officer's lawful commands, Gibson jumped off the porch and over a fence into a back yard. Gibson came out into the front yard area of 403 W. Memorial.

Civilian Witness A had been performing some work in the front yard area of said address. There were several tools in the yard, including an axe. This was a full sized axe measuring 37 inches in length with a wooden handle and steel blade on top. Witness A observed Gibson in the front yard area pick up the axe. Civilian Witness B observed Gibson pick up the axe from a pile of tools that was laying in the yard of 403 W. Memorial. Officer # 2 and his K-9 partner ran from the rear of 403 W. Memorial in pursuit of Gibson. Officer # 2's body worn camera footage depicts the area. There is a narrow walkway connecting the back of the residence to the front. The residence is located on Officer # 2's left and a fence was on Officer # 2's right side. Gibson was standing at the north end of the narrow walkway holding the axe. Officer # 1 described that he saw Gibson "pop out" from between houses and he was then holding a full size axe like a baseball bat. Witness A observed Gibson raise the axe over his shoulder with both hands. This can also be seen in Officer # 2's body camera footage as the officer is running toward Gibson to effectuate an arrest. As Officer # 2 approached Gibson at the end of the narrow walkway, Gibson raised the axe over his shoulder as if to swing it. Witness B reported that he/she saw Gibson raise the axe and walked to confront the officer (Officer # 2) who was pursuing him.

Gibson, refused to drop the axe. Instead, Gibson, axe in hand, turned and ran up the front steps of 403 W. Memorial as if to enter the residence. Gibson still refused to drop the axe. Officer # 2 fired his duty weapon one time at Gibson. Gibson was struck in the left shoulder with one round. EMS was immediately called and an ambulance arrived on scene to treat Gibson and take him to IU Health Ball Memorial Hospital.

The Indiana State Police conducted a very thorough investigation into the shooting. With Gibson's bicycle investigators found and recovered a knife and some sort of home-made weapon that appeared to be a metal rod with sharp metal or steel points on the end. Officer # 2's duty weapon and the spent shell casing from the single fired shot were taken into custody by the Indiana State Police and were tested by the Indiana State Police Crime Laboratory. A forensic firearms analyst was able to determine that Officer # 2's duty weapon fired the single spent shell casing that was found at the scene.

LEGAL ANALYSIS

Use of force during arrest

Indiana Code § 35-41-3-3(b) provides in pertinent part that:

a law enforcement officer is justified in using reasonable force if the officer reasonably believes that the force is necessary to effect a lawful arrest. An officer is justified in using deadly force¹ only if the officer:

- (1) has probable cause to believe that that deadly force is necessary:
 - (A) to prevent the commission of a forcible felony²; or
 - (B) to effect an arrest of a person who the officer has probable cause to believe poses a threat of serious bodily injury³ to the officer or a third person; and
- (2) has given a warning, if feasible, to the person against whom the deadly force is to be used.

¹ "Deadly force" means force that creates a substantial risk of serious bodily injury. I.C. § 35-31.5-2-85.

² "Forcible felony" means a felony that involves the use or threat of force against a human being, or in which there is imminent danger of bodily injury to a human being. I.C § 35-31.5-2-138.

³ "Serious bodily injury" means bodily injury that creates a substantial risk of death or that causes serious permanent disfigurement, unconsciousness, extreme pain, permanent or protracted loss or impairment of the function of a bodily member or organ, or loss of a fetus. IC § 35-31.5-2-291.

First, the facts of the case clearly indicate that Officer # 2 reasonably believed that the force used was necessary to effect a lawful arrest. MPD had probable cause to arrest him on a felony intimidation case. Officers attempted to make a peaceful arrest. However, Gibson chose to physically resist and then flee the scene. As he fled, he made various threats including to stab a law enforcement K-9. Gibson then obtained a deadly weapon, a full sized axe, took an aggressive stance and essentially laid in wait for Officer # 2. When confronted by Officer # 2, Gibson held the axe and appeared as if he was making entry into 403 W. Memorial which could have resulted in any number of crimes and harm.

Second, Officer # 2 had probable cause that deadly force was necessary to prevent the commission of a forcible felony. Gibson's actions with the axe involve the use or threat of force against a human being, or in which there is imminent danger of bodily injury to a human being. Moreover, Officer # 2 had probable cause to believe that deadly force was necessary to effect Gibson's arrest. Officer # 2 had probable cause to believe that Gibson posed a threat of serious bodily injury to the officer or a third person. Finally, Officer # 2 gave Gibson warning that deadly force was going to be used. Consequently, the force used by Officer # 2 was reasonable, lawful, and justifiable.

Self Defense

Separate and distinct from the right of an officer to use force to effectuate an arrest, Indiana law "recognizes the right of every citizen [in Indiana] to reasonably defend himself against unwarranted attack." *Banks v. State*, 536, 276 N.E.2d 155, 158 (1971). Indiana Code § 35-41-3-2(c) provides that:

A person is justified in using reasonable force against any other person to protect the person or a third person from what the person reasonably believes to be the imminent use of unlawful force.

However, a person:

- (1) is justified in using deadly force; and
- (2) does not have a duty to retreat;

if the person reasonably believes that that force is necessary to prevent serious bodily injury⁴ to the person, or a third person, or the commission of a forcible felony.

⁴ Serious bodily injury is defined by statute as bodily injury that creates a substantial risk of death or that causes (1) serious permanent disfigurement; (2) unconsciousness; (3) extreme pain; (4) permanent or protracted loss or impairment of the function of a bodily member or organ; or (5) loss of a fetus. I.C. § 35-31.5-2-292.

No person in this state shall be placed in legal jeopardy of any kind whatsoever for protecting the person or a third person by reasonable means necessary.

Indiana Court of Appeals has recently said:

Self-defense is a legal justification for what would otherwise be a criminal act. A person is justified in using “reasonable force” against another to protect himself from what he reasonably believes to be the imminent use of unlawful force. To prevail on a claim of self-defense, the defendant must present evidence that he: (1) was in a place he had a right to be, (2) did not provoke, instigate, or participate willingly in the violence, and (3) had a reasonable fear of death or great bodily harm.

Tharpe v. State, 955 N.E.2d 836, 844-45 (Ind. Ct. App. 2011). The amount of force which is reasonably necessary to defend oneself is determined from the standpoint of the accused in light of the surrounding circumstances. *Geralds v. State*, 647 N.E.2d 369, 373 (Ind. Ct. App. 1995). The jury looks from a defendant's viewpoint when considering facts relevant to self-defense. *Zachary v. State*, 888 N.E.2d 343, 347 (Ind. Ct. App. 2008); *Williams v. State*, 262 Ind. 382, 384, 316 N.E.2d 354, 355 (1974).

When considering cases of self-defense, Indiana law is clear. Indiana Code § 35-35-41-3-2(c) provides in no uncertain terms that “No person in this state shall be placed in legal jeopardy of any kind whatsoever for protecting the person or a third person by reasonable means necessary.”

First, Officer # 2 was in a place where they had the right to be. Gibson was wanted for a felony intimidation charge and resisted officers when they attempted to effectuate an arrest in a public place. Second, the officer did not provoke, instigate, or participate willingly in the violence. Finally, Officer # 2 had a reasonable fear of death or great bodily harm. This fear was both subjectively and objectively reasonable in light of the totality of the facts and circumstances. Additionally, the amount of force used by the officers was reasonable. Officer # 2 fired a total of one shot. The officer opened fire only after Gibson very quickly armed himself with a deadly weapon taking an aggressive stance. The officer was confined within a relatively small area. Consequently, it is clear that Officer # 2 acted in self-defense and the force used by Officer # 2 was reasonable, lawful, and justifiable.

Defense of third parties

Indiana Code § 35-41-3-2(c) provides as follows:

A person is justified in using reasonable force against any other person to protect the person or a third person from what the person reasonably believes to be the imminent use of unlawful force. However, a person:

- (1) is justified in using deadly force; and
- (2) does not have a duty to retreat;

if the person reasonably believes that that force is necessary to prevent serious bodily injury to the person or a third person or the commission of a forcible felony. No person, employer, or estate of a person in this state shall be placed in legal jeopardy of any kind whatsoever for protecting the person or a third person by reasonable means necessary.

The facts of the investigation demonstrates that Officer # 2 was justified in using force to terminate what appeared to be an attempted unlawful entry into a residential dwelling. When confronted by Officer # 2, Gibson was armed with a deadly weapon and chose to run up two steps in an apparent attempt to gain entry into the residence located at 403 W. Memorial. Officer # 2 was protecting whomever may have been inside that residence from Gibson and his axe. Consequently, it is clear that Officer # 2 acted in self-defense and the force used by Officer # 2 was reasonable, lawful, and justifiable.

CONCLUSION

One of the many facts that stand out in this investigation is that when Gibson was in the front yard of 403 W. Memorial, he was free and clear of any police officers and could have very easily escaped. Instead, he specifically chose to arm himself with a deadly weapon, an axe, and stand in the front yard for almost a full minute in what can only be described as lying in wait and preparing himself to physically attack police officers with the axe. The evidence demonstrates unquestionably and without a doubt that Officer # 2 fired his duty weapon in self-defense. Thus, the shooting was justified under the law and criminal charges are not warranted. The investigation into the shooting of Davey S. Gibson is now officially closed. Police officers face clear and present dangers each and every day. They put their life on the line so that we may live in a civilized society. Law enforcement officers have the absolute right to defend their own lives and go home at the end of their shift. If you choose to pull a deadly weapon, such as an axe, on a police officer, you do so at your own peril.

I want to thank the Indiana State Police for their very thorough investigation of this matter.

Davey S. Gibson has been formally charged by the Prosecutor's Office with the following criminal offenses:

- Count 1: Attempted Battery by Means of a Deadly Weapon, a Level 5 Felony.
- Count 2: Resisting Law Enforcement, a Level 6 Felony.
- Count 3: Criminal Recklessness, a Level 6 Felony.
- Count 4: Theft, a Level 6 Felony.
- Count 5: Disorderly Conduct, a Class B Misdemeanor.

The State has also filed a Notice of Intent to Seek Habitual Offender Status which alleges that Gibson has accumulated at least three (3) prior unrelated felony convictions. The charges are currently pending in the Delaware Circuit Court No. 4 under Cause Number 18C04-2005-F5-70. An initial hearing has held on May 27, 2020. A jury trial has been set for August 31, 2020.

It is important to remember that an arrest and/or the filing of a criminal charge is simply an allegation and is not evidence of guilt. All suspects are presumed innocent unless and until proven guilty beyond a reasonable doubt at trial. The ethical rules for prosecutors in Indiana prohibit further comment on this matter. At this time, there will be no further comment.

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