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May 25, 2021

Lieutenant Claude Little, KSP/CIRT  
Lieutenant Nick Owen, LMPD/ PIU  
Detective Jeremy Ruoff, LMPD/PIU

Re: PIU 20-042 Shooting death investigation of David McAtee, June 1, 2020

Dear Lieutenant Little and Detective Ruoff,

Thank you for meeting with Erwin Roberts and me on August 10, 2020 and again on April 20, 2021, as well as answering our questions over the last few months. We at the Office of the Commonwealth's Attorney greatly appreciate the timely and thorough review of the collaborative effort by the Kentucky State Police's (KSP) Critical Incident Response Team (CIRT), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) and the Louisville Metro Police Department's (LMPD) Public Integrity Unit (PIU).

We reviewed more than 1800 pages of the summary report, transcripts, videos and audio recordings of 179 civilian and law enforcement witnesses' statements, multiple camera videos both in and outside of YaYa's BBQ, body cams of LMPD officers, diagrams created by Lt. Hunter Martin (KSP), videos from pole cameras used by LMPD and surrounding businesses, the autopsy report for Mr. David McAtee (McAtee), evidence collected by the Crime Scene Unit (CSU), a video by Kris Smith, a video by the New York Times, still and enhanced photos from various videos, both the Kentucky National Guard (KyNG) and LMPD Use of Force Policies and the Kentucky self-protection statutes.

Considering the circumstances surrounding the death of Mr. McAtee, the applicable law of the Commonwealth, the use of force policies of LMPD and the Kentucky National Guard (KyNG) as they existed at the time of Mr. McAtee's death, it is our decision not to present this matter to the Jefferson County Grand Jury for review for any potential felony or misdemeanor charges as to the KyNG soldiers and LMPD officers who discharged their weapons on the early morning hours of June 1, 2020.

#### **FACTUAL SUMMARY**

On Saturday, May 30, 2020, following two days of both constitutionally protected protests as well as unlawful conduct in Louisville Metro, Mayor Greg Fischer issued Executive Order 2020-006 decreeing a curfew for Louisville Metro from 9:00 pm on May 30, 2020 until 6:30 am on June 1, 2020. All individuals were to "return to their residences and remain off all common areas including

but not limited to streets, parks, right of ways, and other common areas...”

On the same day, Governor Andy Beshear also activated the Kentucky National Guard (KyNG) pursuant to Executive Orders 2019-459 and 2019-462. Governor Beshear ordered “units of the Kentucky National Guard into state active duty for the purpose of protecting lives and property and enforcing the laws of the Commonwealth...”

Around midnight on Sunday, May 31 / Monday, June 1, 2020, LMPD received a report of a large crowd at Dino’s Food Mart (Dino’s) parking lot at 26th Street and Broadway (2601 West Broadway). LMPD command staff directed LMPD officers, supported by KyNG soldiers to go to the area. A contingency of KyNG soldiers and LMPD officers riding in five passenger vans was subsequently joined by three Light Medium Tactical Vehicles (LMTV) with 12 to 14 Ky NG soldiers.<sup>1</sup> Some members of the LMPD had previously cleared the lot on either the Friday or Saturday before this incident.

When the convoy arrived at Dino’s, shortly after midnight on June 1, 2020, the vans and LMTVs parked on Broadway. At least one LMTV actually blocked 26<sup>th</sup> Street at Broadway. The LMPD officers and KyNG soldiers were able to dismount from the vans, but the KyNG soldiers in the LMTVs were delayed in getting out as they were awaiting orders. As the officers and soldiers departed from the vans, they began clearing the parking lot at Dino’s and the surrounding streets. LMPD officers and KyNG soldiers walked down 26<sup>th</sup> Street attempting to push the crowd, some that were on foot, out of the area. Most civilians in the crowd were responsive and began to exit the area either walking away or driving off in their personal vehicles. (Clip 2) There was no visual evidence or statements from the LMPD officers or KyNG arriving at the scene that the crowd was engaged in any type of protesting or destructive behavior.

Some members of the crowd began to walk over to YaYa’s BBQ, 677 26<sup>th</sup> Street. The building itself is a nondescript gray building with a single door on the south side near the cooking area, and a single door with windows on either side of the door on the 26<sup>th</sup> Street side of the building. All the doors and windows were protected by security doors and windows. Mr. David McAtee (McAtee) was using outdoor grills and was moving between the cooking area and the interior of the building. (Clip 1)

LMPD Officer Katie Crews (Crews) (5140) fired at least one pepper ball into the street to disperse the crowd. Crews fired several more pepper ball shots toward YaYa’s where Machel McAttee was standing under a blue canopy near a side door of the building.

Shortly after that, a shot was fired by McAtee who had partially stepped out from the building. Crews and other LMPD officers and KyNG soldiers moved for cover. Some described seeing an arm appear, muzzle fire, and after a short pause, the arm appeared again, and additional muzzle fire. Crews returned fire with her service firearm but was uncertain as to how many times she discharged her weapon. Her body cam was not operating.

LMPD Officer Austin Allen (7349) stated he heard a single gunshot. Subsequently, Allen stated

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<sup>1</sup> There are accounts that only two LMTV’s were involved, but the majority of KyNG soldiers say there were three vehicles.

he heard multiple gunshots and saw Crews in the street returning fire toward YaYa's BBQ. Allen stated he could see rounds hitting off the ground and saw muzzle flashes from the south side of the building. Allen thought he was being fired upon, so he fired one round and tried to find cover. His body cam was not operating.

When the first shot was heard, KyNG soldiers armed their M-4 rifles as directed. KyNG soldiers Specialist Andrew Kroszkewicz and Staff Sergeant Matthew Roark, both of whom were standing near Crews, returned fire toward the doorway. Body cams are not issued to KyNG soldiers.

No other member of the KyNG, nor LMPD fired their service weapons. Some of them reported hearing shots being fired from another area, seeing a man pull a gun from his pants and fire into the air three times, a passenger firing from a vehicle, and someone setting off firecrackers.

When no additional shots were fired from the building, both the police and soldiers stopped firing. LMPD SWAT prepared to enter the building at approximately 12:22 AM.

McAtee, the owner of YaYa's BBQ was struck one time in the chest.

Paramedics arrived to provide first aid to McAtee. Unfortunately, he was already deceased by the time they entered into the building, so no medical assistance was provided. The Paramedics estimated the response time from when they heard shots fired and when they reached Mr. McAtee was approximately 2 to 5 minutes depending on their starting point.

## INVESTIGATION

### INTERVIEWS

The LMPD/PIU and KSP/CIRT interviewed almost 180 persons including KyNG soldiers, LMPD officers and civilians. Some interviews were transcribed, and others were preserved by audio recordings. All interviews are part of the KSP/LMPD investigative file. Due to the number of interviewees, a member of KSP/CIRT and a member of LMPD/PIU partnered together as they conducted interviews of KyNG soldiers and LMPD officers that were on the scene when the shooting occurred. The majority of the civilian, LMPD, and KyNG interviews were conducted between June 2 and June 18, 2020. In the summary report of KSP, Lt. Little summarizes the vast majority of those interviews. A few of those 180 interviews are cited below.

The decision to disperse the crowd at Dino's Food Mart was made by Lt. Colonel Joshua Judah (2427). He described 26<sup>th</sup> and Broadway as a problem area, even before the protests and riots in the business district of Metro Louisville.

"The First Division's, uh, No. 1, uh, I would say arguably No. 1, uh, violent crime issue is that is the intersection of 26<sup>th</sup> and Broadway, specifically Dino's. Um, we have dozens of shootings there every year, um, and it, it is very common that we have huge disorderly crowds that, uh, the First Division and sometimes other divisions are called in to disperse due to, uh, unlawful behavior, um, down there. So, that, that is very common that we would

have to disperse a crowd, uh, down there. That's nothing new. What, what is new, or what was different in this re, in this case is just, uh, the enormity of it, um, and in the context of what else was goin' on in the city and the intelligence we got. But, uh, Dino's has been a problem and, and just, I was a beat cop, uh, on that beat, and, um, it has been, uh, 15 years ago, we were having issues there, and, and to this day we do."

Lt. Colonel Judah directed Major Andy McClinton (2654), the First Division commander, to go from the staging area located at the Edison Building, 701 W. Ormsby Avenue, to 26<sup>th</sup> and Broadway. McClinton was aware there were reports of a large unruly crowd. McClinton drove to the area and observed "a very large unruly crowd, uh, a lot of cars, a lot of people" (statement to Lt. Little). McClinton did not feel comfortable sending his officers, onto Dino's lot to clear the area. He advised Lt. Colonel Judah that he would need some assistance clearing out the lot.

Thereafter, Col. Judah directed Major Paul Humphrey (7582) to gather other reserve units to go to assist McClinton who was in the area of 26<sup>th</sup> and Broadway. Subsequently, Judah directed Sergeant Jeffrey Lauder (7791) to guide a group of KyNG and LMPD officers from 9<sup>th</sup> and Broadway to the location of 26<sup>th</sup> and Broadway to assist McClinton. In turn, Humphrey contacted Lauder and advised his units were on the way and would be able to assist. Lauder arrived first, and while in route, Humphrey heard over the radio that shots had been fired.

Lt. Aaron Crowell (2564) was assigned to the First Division. His responsibilities included handling LMPD operations west of 9<sup>th</sup> Street. He also advised McClinton that there were insufficient members of LMPD to clear the lot at Dino's. He advised he had been monitoring the lot throughout the night. During his interview with Lt. Little, Crowell advised that on a Sunday night, it would not be out of the ordinary for LMPD to come in and move civilians off the lot at Dino's.

Crowell also advised he spoke with McAtee and the management of Dino's the night before<sup>2</sup>, to ensure that they knew the curfew was in effect, and that they also would be in violation if they were serving people after curfew, as no one was supposed to be on the street. In his statement to Lt. Little, Crowell advised he recommended that Dino's and YaYa's not keep their businesses open after 9 PM. Crowell was not aware, from previous contacts, of any issues directly involving misconduct by McAtee.

Finally, Crowell was responsible for maintaining integrity of the scene of the shooting until LMPD and KSP completed their investigations.

Sgt. Lauder described that the evening as getting quiet. Due to the lateness of the hour, he was preparing to take LMPD officers and about sixteen KyNG soldiers in five vans back to one of the staging areas located at the LMPD parking lot at 8<sup>th</sup> and Jefferson Street. Lauder met with National Guard command staff and they advised him that they also had two LMVTs with soldiers that they would like to be taken to the staging area. The plan was to take all the soldiers and the officers so that they were closer for a quicker response.

Lauder saw Col. Judah standing at the intersection of 9<sup>th</sup> Street and Broadway. That's when Judah

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<sup>2</sup> Security videos actually show Crowell, the Saturday evening before, giving McAtee a friendly hug. Other LMPD officers can be seen both inside and outside the establishment picking up food orders.

told Lauder to take the convoy to Dino's lot. As the convoy arrived, Lauder noticed that all the cars started "peeling off" and people started leaving without LMPD or the soldiers saying anything.

Lauder advised as he walked northbound, he heard a gunshot. As he started to get on the radio to call out shots fired, and direct people to spread out and take cover, he heard several more shots coming from the doorway on the southside of YaYa's. He saw muzzle flashes and then the officers and soldiers that were ducked behind vehicles, stood up and returned fire at that doorway. He immediately got on the radio, and called "shots fired." There was a recorded radio call at 12:17AM of "shots fired"

When asked to describe 26<sup>th</sup> and Broadway on a weekend night, Lauder said,

"I consider that probably the most dangerous intersection in the city of Louisville. Um, there's, um, a lot of shootings, uh, and, uh, aggravated assaults that occur in that area. Um, I mean, I've personally responded to at least several, I mean, of - of 'em - of them myself. Um, there was people everywhere, uh, in cars. The - the intersection was - seemed to be extremely busy when we were approaching it. Um, I - I - I'd consider it when it gets that crowded to be like a boiling pot."

"I can definitely understand why clearing that parking lot would have been a huge concern for our command staff. Um, we saw it over the last few nights, um, SWAT has been shot at at that location. Um, it's just a very dangerous area with a lot of crime."

KyNG SFC Alexander Luzama, like several other soldiers, advised he had been briefed on the rules of use of force. He and other KyNG were wearing OCP National Guard uniform<sup>3</sup> and riot gear. He knew the mission that night was to clear parking lots, secure areas, and provide backup for LMPD officers making arrests, per a briefing from an unknown LMPD Lieutenant. After exiting the first LMPD van, Luzama and other soldiers and LMPD officers ordered civilians to leave the area as there was a curfew. Civilians began to clear from the lot. After being out of the vehicle for about 30 seconds, he was near the middle of the lot and heard a noise that sounded like firecrackers. He then heard a second noise that he recognized as gunfire. He then took cover behind a vehicle in Dino's parking lot and heard additional multiple gunshots. He could not see from where the shots originated but could see smoke from the guns as he faced 26<sup>th</sup> Street.

LMPD Officer Esther Ragan (Ragan) (7343) had been transported to the scene in a LMPD van to help clear the lot at Dino's. Upon arrival, she heard pepper balls being fired and observed a female, later identified as Mabelle, standing in the doorway YaYa's 627 South 26<sup>th</sup> Street. Ragan believed she observed the female get struck with a pepper ball, possibly in the shoulder, as she was in the doorway. Ragan advised she then observed a hand, or arm of a black male, reach out the doorway. While she could not see a handgun or see a flash, she could hear the sound of a gun being fired came from that area. Ragan stated there was a short break in the gunfire following the first shot then she heard several more shots, but she could not distinguish from where all the sounds of shots came. Ragan did not believe the female in the doorway to be the person who fired the gun, but instead believed it was a different individual who had reached out. She believed the LMPD officer, later identified as Crews, and two KyNG soldiers returned fire after the second gunshot was heard.

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<sup>3</sup> Operational Camouflage Pattern (OCP) is a military camouflage pattern used by the United States Army.

Ragan had helped clear the lot at Dino's the previous evening. Her body cam was not activated until after the gunfire had ceased.

Numerous other LMPD Officers and KyNG soldiers gave similar details. The soldiers in the vans and first LMTV were able to get out of the vehicles and start clearing the lot. The soldiers in the other LMTV's were unable to leave the vehicles because they had stopped in the intersection of 26<sup>th</sup> and Broadway. Those who remained inside the vehicles heard the shot sequence of one shot, a pause, a second shot, and then a volley of shots. Those soldiers described seeing either flashes or hearing gunfire coming from the direction of YaYa's prior to LMPD officers or KyNG soldiers returning fire.

KyNG 1<sup>st</sup> Sgt. Kenneth Wininger arrived at 26<sup>th</sup> and Broadway in the first LMTV. He saw a black male in a white shirt, who he first thought was setting off a pack of firecrackers, by a blue canopy, behind a red brick building (Double Deuce Sports Bar and Grill, 2529 West Broadway). Then Wininger heard gunshots. LMPD and KyNG were moving in the direction of the building by the blue canopy. He saw an LMPD officer shooting a "paintball" gun. Sgt. Wininger was surprised that they were being deployed at Dino's lot as he thought they were going from the Edison Building to another staging area. He described the scene as chaotic. Other KyNG soldiers also recounted there was someone lighting what appeared to be firecrackers. A common recitation of some of the KyNG soldiers was they thought they were being transported to a staging area, and instead found themselves in the chaotic intersection of 26<sup>th</sup> and Broadway. While they heard shots from the area of YaYa's, they also heard shots from other areas.<sup>4</sup> The KyNG soldiers described hearing shots on both sides of the LMTV's, literally caught in a crossfire.

KyNG SPC Cicely Bingham arrived in one of the passenger vans. She reported hearing three gunshots. After the first gunshot, her attention was directed to the white door at YaYa's where she observed an arm sticking out. Then there were multiple rounds of shooting as LMPD and KyNG returned fire.

Multiple LMPD officers observed an arm coming out of the doorway and then a gunshot. Some described seeing a muzzle flash in an east to west direction toward Dino's. They would also describe hearing a single gunshot, a pause, and then several gunshots in rapid succession. Crews stated she was with a group of LMPD Officers and KyNG soldiers who arrived at 26<sup>th</sup> and Broadway. She and others began telling people to leave the area per the mayor's orders. Crews stated some people refused to leave or go inside, so she fired one round of non-lethal pepper ball into the ground. Crews saw a female, later identified as Machel, that wasn't complying with verbal commands, so she discharged more pepper balls in the woman's direction. (Clips 3 and 4)

The camera from Double Deuce Sports Bar and Grill shows a view looking toward the YaYa's BBQ grills and the blue canopy. Multiple pepper balls, fired by Crews, could be seen hitting the area around the door, the table under the canopy, and then something falling from the table. Machel could be seen standing in the doorway while pepper balls were hitting the wall and door beside her. Machel moved inside the building.

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<sup>4</sup> Det William Mayo (7137) approached from the north side of the scene, near 26th and Elliott or Madison and about 10 seconds after hearing the initial shots, he then observed someone fire a weapon three times from an older model soft top convertible traveling north on 26th. Mayo pursued the fleeing vehicle but was unable to locate it.

As Crews recounted to Det. Jeremy Ruoff (7596) and Sgt Gabe Welch (KSP),

“Um, and as we made our way closer there was a, um, there was a female, after giving her verbal commands still she refused to go inside. She was standing - I don’t wanna say in an aggressive manner, but as a manner that she was not gonna go inside. After giving verbal commands I did shoot more pepper balls in her direction. Um, even then I - I was still giving verbal commands for her to go inside - she, ah, she still refused. So, I did off more nonlethal pepper balls at her.”

After she fired a 3rd round of pepper balls at Mabelle who was standing in the doorway, Crews saw an arm pull Mabelle inside the building. Then she saw the muzzle flash from a gun as an arm reached out from the door at YaYa’s. Crews switched from her pepper ball gun to her service firearm. As Crews moved for cover, she saw the same black male with the T-shirt returned to the doorway and saw a second muzzle flash. Crews described what she observed:

“I see a Black male that had white on his shirt come out. And that’s whenever I started seeing the muzzle flash of a gun being shot at us. Um, that’s whenever I start - I retreated. Um, and at that time I had the nonlethal pepper gun in my right hand. So I had switched over and went to my duty weapon. And I w- I noticed also that I was in, um, in the open. And so I knew I needed to better cover. And I had seen that there was a car that was right there. And as I was making my way to get better cover that’s whenever the same male came back outside and started shooting again. It’s the same Black male with white on his shirt. And then, h- as he was shooting, I could see the muzzle flash. And in that instance in fear of my life and for everybody else behind me, that is whenever I started returning fire. I aimed at the center of mass of the silhouette with white on his shirt and the muzzle flash. I did not stop shooting until the threat was neutralized and I was stopped being shot at. And that’s whenever I was able to get cover.”

In short, Crews stated she was in fear for her life and the lives of others behind her and returned fire in the direction of the muzzle flash. Crews returned fire until the threat was neutralized. Crews was uncertain as to how many times she fired.

While Crews had a body cam<sup>5</sup>, she admitted she had taken it off and placed it in a pocket due to the problems of wearing a body cam with the riot armor.

LMPD officer Allen had helped clear the area on a previous evening, so he was familiar with both Dino’s lot as well as YaYa’s. Allen stated he never used his pepper ball gun, rather he drew his weapon trying to get a sight picture on the target. Allen thought he was being shot at, so he fired one round and tried to find cover. He also believed Crews was exposed to gun fire. Allen described the area he was aiming as the door on the south side of the building, where the blue canopy was located, because that is where the gunfire originated:

“Okay, um, so when I first started hearin’ the, you know, the - the second spurts of rounds, um, I saw Crews in the middle of the street. She was hunkered down. I could see she was, um, returning fire. I could see the rounds. It kinda happened so, you know, slow motion, I guess you could say. Um, and I can see the rounds hittin’ around her. And then I just looked over on the side of the building. On the south side of the building I could see, you know,

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<sup>5</sup> Body cam can be used integrable with Wearable Video System (WVS), the official designation in LMPD Standards

the orange glow from the, um, the muzzle flash. And at that point, I thought, you know, she's gonna get killed in the street, you know, she's takin' fire. I could see the, you know, the rounds sparkin', I guess you could say off the ground and the - the smoke that it gives off. Um, so I knew where the gu- exactly where the gunshots were comin' from due to the muzzle blasts. I know the muzzle blasts as in, I mean, that's right at the end of the barrel, so that's where the rounds were comin' from. But it's on the south side of the - the little barbecue place. I guess that's what it is - a little restaurant."

Allen stated after the incident ended, he heard additional gunfire from other areas around 26<sup>th</sup> and Broadway both north and south of YaYa's. Allen admitted his body cam was not operational that evening/early morning:

Welch: ... do you have any kind of, ah, audio or video recording devices at all on your person (unintelligible)?

Allen: Um, other than the body camera, we had, um, nothin' other than that.

Welch: Ah, tell me about your body camera.

Allen: Um, so I ha- I had it on the, ah, the collar mount, um, which I know this has been asked and brought up, um, about why they weren't recording. Um, due with our riot gear that we had put on - when I put on the, um, the plates, the shoulder strap was so wide that the mount that - that I was currently using it went over the camera. And then I don't have any other mounts that, um, we have the head mounts, but with the helmets they don't work. Um, those are the only two mounts that I had for the camera. So, it was me not ha...It - it wa- it was there - everything was plugged up on, um, everything was plugged up, you know, where it should be. It ha- I had it on, um, but due to the, ah, the vest - the vest...

Welch: Ah, did - di you ever try to activate it or - or I guess I'm gonna say is there any - do you - is there any footage produced from that?

Allen: Not from mine.

Many members of the LMPD contingency, like Crews and Allen, did not activate their Wearable Video Systems (WVS) or body cams. When interviewed, multiple reasons were given by various LMPD officers including, they forgot, the WVS became disconnected accidentally or intentionally, the WVS was blocked by the tactical gear, etc. No members of KyNG were assigned any type of body worn cameras.

However, other members of LMPD, who were on the scene when the rounds of gunfire began, did have their body cams turned on. Det Joshua Weyer (7271) who, as soon as he arrived, heard gunshots, and saw two individuals leaving YaYa's. He called SWAT to help clear the building. Weyer saw a girl come out and say someone was inside dying (still screen shots of his WVS showed times of 00:17:01, 00:17:36, 00:18:01, and 00:18:56). Det. Bradley Woolridge (6755) also heard gun shots as he arrived. There were gunshots heard from in front and later behind him. His body cam captured the LMPD Officers and KyNG soldiers moving toward the building after the shooting (WVS still screen shot 00:17:20, 00:17:50, and 00:20:55). Weyer and Woolridge had



been riding together that evening. Woolridge and Weyer said they both were wearing a protective vest.<sup>6</sup>

Officer Curt Flynn (7959) was across 26th street looking toward YaYa's. He also heard the rounds of gun shots. His body cam picked up an individual running from the building (still shot 00:17:52 recorded on his WVS). Flynn also heard gun shot after the initial rounds, but from a different direction than YaYa's. Flynn was wearing a protective vest.

Members of LMPD SWAT also had their body cams turned on and recorded their activities as they cleared YaYa's. However, because they routinely wear the heavier body armor, their uniforms have a special mount for the body cams.

Col. Judah explained that the "turtle gear" worn by officers assigned to the Special Response Team, is a thick foam armor worn over their regular body armor to protect officers from blunt force injuries. He said,

"It's very difficult with, uh, wearable video systems, that's what we call our body cameras, to affix those to it, uh, particularly the, most patrol officers are wearing the Axon Flex 2 model, uh, of body camera, which has a collar mount usually. A lot of 'em will wear it, uh, most of our officers on, in the field are wearing an exterior, uh, ballistic vest, uh, and they'll mount it on the shoulder of it, and it, when you throw the turtle gear over it, it, it basically makes it so mounting it is difficult."

In his statement to Lt. Little, Major Humphrey confirmed the problems with the new body armor. "...this turtle gear which actually goes on over top of their uniform, and so, um, the body camera woulda either been, woulda either been covered up or forgotten, ... by, uh, uh, the of, several officers at that point. Um, uh, I know they're used to wearing them in their patrol uniforms and stuff like that, but, uh, you put that gear on over top of your patrol uniform."

On June 2, 2020, 36 members of the KyNG were interviewed and asked to explain what they saw and did the morning of June 1, 2020. Many were still inside the LMTV's when the shooting started so they had no ability to see what was happening. Some outside of the LMTV's took cover and charged their issued M4 rifle with 5.56 ammunition and moved the switch from safe to semi (semi-automatic) when they heard gunfire. As described above, some actually saw muzzle fire from the south side of YaYa's barbeque building. Some inserted a magazine into their M4 rifles but never chambered a round. However, except for Kroszkewicz and Roark, no KyNG soldier discharged their M4 rifle at any time during the incident.

Depending on the unit, different members of the KyNG received different directives. Captain Holden Michael Reed, who was interviewed on June 1, 2020, stated he could hear gunfire coming

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<sup>6</sup> While all officers are issued similar protective gear (riot gear), not all of them wore it because they were assigned to different roles. However, there were two different WVS body cameras utilized. The involved officers, Allen and Crews, were beat officers and they are issued body cameras that attach to the collar/shoulder area of patrol uniform or worn on the side of their head with a head mount. Officers who were not in patrol typically have a different WVS body camera and mounting system that allows them to mount the camera on the exterior of their outer vest via a clip or strong magnet. Flynn, Woolridge and Weyer were assigned to units outside of patrol, so their WVS body camera attached to their outer vest via the clip or magnet.

from the area of YaYa's as soon as he departed from the van. He saw two LMPD officers discharging their weapons. SPC Devin Boone stated his commander, Captain Reed, advised him to "go to amber" and then once out of the LMTV to "go to red" following the gunfire, just in case gunfire was directed at them.<sup>7</sup>

KyNG 2nd Lieutenant Ryan Khosrofian stated he never gave a command for his soldiers to go to amber or red. Khosrofian stated he had informed his soldiers that when they're with a police officer, then the officers are their superiors for that mission. He advised the two soldiers that discharged their rifles fell under his command but were with LMPD officers when the shooting occurred. Khosrofian stated that in a situation where soldiers are met with gunfire, they "do what they have to do."

On June 4, 2020, Det. Ruoff and Sgt. Welch met with the two KyNG soldiers who fired their weapons along with their attorneys. During an unrecorded conversation, Major Nick Carter, who represented Roark, and Lieutenant Colonel Lance Daniels, who represented Kroszkewicz, advised neither soldier would agree to make any statements. LMPD and KSP subsequently offered alternatives to questioning, such as a written statement. Welch asked the two attorneys to seek further advice in reference to declining the interviews. Subsequently a copy of KRS. 38.480 was provided to the CIRT and PIU investigators as a justification for not giving a statement.<sup>8</sup>

When Mabelle was questioned at the scene on June 1, 2020, Sgt. Chad Tinnell (7742) (PIU) observed white powder on her left shoulder and left ear that she stated was from "whatever they shot in there." She said she had been hit but then her memory blanked out. A screen shot taken from LMPD Officer Brian Spencer's (5251) body cam shows the powder on Mabelle's left shoulder and also powder on her left ear. The powder appears to be consistent with residue from a pepper ball. Still photos from the videos also show smoke at the door above Mabelle's left shoulder and she seemed to be ducking as McAtee pushed past her. Mabelle did have smeared blood on the front of her right hip but was not bleeding anywhere and was not visibly injured. Mabelle said the blood on her pants was from her uncle's injuries. Mabelle was not fully cooperative at the time of the first interview. She asked if her uncle was alright. When Tinnell asked for her uncle's name, she refused to answer. When Tinnell advised she was a witness she responded she wasn't a witness to anything. However, her lack of cooperation may be attributed to the shock of seeing her Uncle David McAtee being shot. Video from inside YaYa's depicted Mabelle standing beside McAtee when he stepped outside and raised his gun. She was also seen closing the door after McAtee was shot. Finally, she could be seen pointing at McAtee's gun as it laid on the floor of YaYa's. LMPD Officer David Haight (2724) stated a female at the front door appeared to be in shock and didn't initially comply with verbal commands to go inside.

Subsequently, on August 11, 2020, Mabelle was interviewed by Lt. Jonathon Vaughn (KSP) and Det. Ruoff. Mabelle was accompanied by counsel during the interview as she provided additional information. She related that she was struck by some sort of objects on her shoulder and pelvis. As she explained, she could not see the officers who were shooting the pepper balls because the blue

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<sup>7</sup> Carrying a rifle in the amber referred to a loaded magazine in the weapon but no round in the chamber. Going to red meant a rifle being loaded with a magazine as well as a round of ammunition in the chamber.

<sup>8</sup> Upon the advice of legal counsel, citing KRS 38.480, neither KyNG soldiers Kroszkewicz or Roark ever gave statements even though after June 4, 2020, investigators with KSP and LMPD asked multiple times that the two KyNG soldiers be made available for questioning.

canopy and the cars on the street blocked her view. It is believed those were fragments from the pepper balls or a pepper ball fired by Crews. When asked if she had been injured by the pepper balls, she responded that her eyes started watering as she was led to the police car once removed from YaYa's BBQ.

Vaughn: Um, I know you said you were, you were hit with a pepper ball in the, in the left shoulder and the left, uh, pelvis area, did you ever feel in effects or discomfort from the, uh, the, the pepper ball?

Machelle: Um, this one I would actually, this one right here, it got me, once I got in the police car, I was like right here, my eyes got to burning.

Vaughn: Okay.

Machelle: And everything, and I'm like what's going on? Then when I realized, I'm like -

Vaughn: So, so you didn't feel the, any effects of it until after you were placed in the police car.

McAtee: This right here.

Vaughn: Okay.

Machelle: This one, but right here I felt that this right here, it was -

Vaughn: Okay, so you felt the impact initially on your shoulder and, but not initially on your, on your pelvis, is that correct?

Machelle: Mm hmm. (Indicative of "yes")

She also said she did not hear any shots either time when McAtee stepped outside the door. However, she did hear shots before he stepped out and after she closed the door, she could hear shots hitting the door. After McAtee collapsed to the floor, she saw a gun on the floor that she recognized as being similar to one that he carried. She did not recall anyone, including herself, saying anything more than "they're shooting" from the time individuals rushed through the door to the time her uncle collapsed on the floor.

Other civilians were interviewed, including [REDACTED], [REDACTED] and [REDACTED] who were in Dino's parking lot. They stated they saw muzzle flashes coming from the BBQ place. They described LMPD and KyNG as being respectful when they asked people to leave.

There were at least 14 persons inside YaYa's at the time of the incident. Those persons included David McAtee, Machelle McAtee, [REDACTED] ([REDACTED]), [REDACTED] ([REDACTED]), Marvin McAtee (Marvin)<sup>9</sup>, [REDACTED] ([REDACTED]), [REDACTED] ([REDACTED]), [REDACTED] ([REDACTED]), [REDACTED] ([REDACTED]), [REDACTED] and [REDACTED], [REDACTED] and [REDACTED] heard shots but didn't see anyone inside shooting. [REDACTED] stated he was carrying a Glock 19 and dropped it on the floor inside the YaYa's. Machelle stated in her August 11 statement that she saw a second gun on the floor and pushed it away from herself as she attended to her uncle. Others such as [REDACTED], [REDACTED], [REDACTED] and [REDACTED], stated they did not see anyone with a gun or hear any shots fired while they were inside YaYa's.

[REDACTED] went to the area around midnight with his half-brother, [REDACTED] to get something to eat. [REDACTED] got food at Dino's and his brother and father ([REDACTED]) went to YaYa's to get food. They

<sup>9</sup> Marvin McAtee was killed on September 19, 2020, in the 2600 Block of Broadway, near Dino's Food Mart.

all stayed together. It was [REDACTED]'s first time to the area. His story was consistent with several others that they were just in the area to get food. [REDACTED] also saw McAtee with a gun on his hip. He also acknowledged that [REDACTED] had a gun.

[REDACTED] who is related to the [REDACTED], was inside when the shooting took place. He remembered the police shooting but not who was shooting from inside. It was the first time he ever met McAtee. After McAtee was shot, he attempted to render first aid to McAtee. He would not agree to submitting to any DNA testing. He described the evening as WWII to explain how the police and National Guard arrived.

[REDACTED] advised that he was at YaYa's BBQ building when white vans and National Guard vehicles pulled up around 12:15 AM. [REDACTED] recalled after a short time, rubber bullets ("or whatever") started being fired and hitting the ground. A large number of people ran into the building. He observed McAtee in front of him, at the door, and his niece, Machel, outside the door. [REDACTED] recounted "They lit that whole door up with rubber bullets." They pulled Machel inside and they ran down into the basement. He heard several shots from the outside and then heard a shot come from the inside of the building. He ran back up-stairs and saw the McAtee lying on the floor. [REDACTED] attempted to perform CPR. [REDACTED] recalls hearing 4 close shots and 3 far-away shots; describing the close-up shots like a "big ass firework." He also recalled that the far away shots came first. [REDACTED] knew McAtee had a gun that evening and saw it on the floor after the shooting. There was a recorded 911 call, possibly made by [REDACTED] at 12:20 AM. He describes the chest injury suffered by McAtee and repeatedly tells "Ya" to hang on. He also tells the 911 dispatcher that "Ya" was shot by the National Guardsmen. [REDACTED] continued to apply pressure even as the SWAT entered the building.

Marvin, McAtee's nephew, stated that everything happened very fast. Marvin was there to pick up money from his uncle. Marvin said he turned off the music and told his uncle the marshals, or whoever they were, were outside. People ran over from Dino's lot and "bum rushed" McAtee's business. He estimated there were 50 people at Dino's lot and maybe another 50 around YaYa's place and the club next door. He and others ran downstairs prior to McAtee being shot. He saw his uncle pull Machel inside. He could smell what he described as tear gas. When he came back up, his uncle was dead, lying on the floor. Marvin estimated that the total time that lapsed from his arrival to his uncle being killed was 20 minutes. Marvin also expressed that while they were aware of the nine o'clock curfew, he believed the police let people at Dino's and YaYa's "do their thing." He believed they, he, his uncle, and the customers, were where they were supposed to be at YaYa's.

Marvin called 911 twice to ask for help, with the first call at 12:24:29. He asked the dispatcher to "tell them to stop shooting in here." He further said it was an accident because a kid set off fireworks. He claimed the marshals "shot for no reason." He claimed no one had a gun. The dispatcher advised EMS had been notified. She advised Marvin to stay inside the building and wait for officers to come inside. Marvin did not know the exact address for YaYa's which created a great deal of angst between him and the dispatcher.

[REDACTED] also inside YaYa's, stated all of a sudden a large group of people came running in. He could hear gunshots coming from outside of the business. [REDACTED] stated that he did not see anyone shooting nor did he see anyone with a firearm. [REDACTED] also stated although he owns a .40 caliber Taurus, but he didn't have it on him that night. [REDACTED] said he knew McAtee

carried a firearm in a holster, but he did not have one that evening.

Investigators noted that [REDACTED] was not being truthful. Not only had his son [REDACTED] and [REDACTED] stated he had a gun that evening, but interior videos showed [REDACTED] had a gun in his right hand immediately prior to Mr. McAtee going to the door with his gun. [REDACTED] is standing beside McAtee when he is firing his gun. After McAtee extends his arm a second time, he staggers back inside. Both he and [REDACTED] who had been standing beside him, move to the right on the screen. (Clips 7 and 8) Finally, when the premises were searched, CSU recovered a 40 caliber Taurus which unmistakably belonged to [REDACTED] (see below).

LMPD/PIU canvassed the immediate neighborhood. Most of the neighbors advised that they were awakened by the gunfire, so they did not see how things started. Officers spoke with Ms. [REDACTED] Ms. [REDACTED] watched from her front door as things unfolded. There was a helicopter overhead, then she saw LMPD officers. Then she saw the National Guard trucks arrive on Broadway. She stated she heard one shot then "a lot" maybe 20 to 30 gunshots. She did not see who fired first.

## SCENE INVESTIGATION

Members of the PIU team observed multiple bullet defects in the brick, the door, the door frame, and area surrounding the door under the blue canopy.

LMPD PIU Sergeant Anthony Wilder (2097) conducted the round counts of the two LMPD Officers on scene at the time of the shooting as well as the two KyNG soldiers. KyNG 2nd LT Ryan Khosrofian unloaded Kroszkewicz's weapon and removed the round of ammunition from the chamber, placing it in his pocket as well as secured the magazine and Kroszkewicz's rifle. Wilder determined that 2 rounds were missing from Allen's .40 caliber pistol.<sup>10</sup> Crews fired 8 rounds from her 9 mm pistol. KyNG SSG Roarke fired 6 rounds of 5.56 projectiles from his issued rifle and KyNG SPC Kroszkewicz fired 4 rounds of 5.56 projectiles from his issued rifle. None of the other officers or soldiers were missing any rounds from their weapons and therefore did not discharge their weapons during the incident.

The scene was processed by LMPD / PIU along with KSP / CIRT. The collected firearms evidence included nine spent cartridge cases (5.56 caliber rifle), one loaded cartridge (5.56 caliber rifle) and eight spent cartridge cases (9mm), and one spent cartridge case (.40 caliber). LMPD / CSU also collected two spent 9mm casings outside the door of YaYa's BBQ under the blue canopy.

## VIDEOS

Kris Smith (Smith)<sup>11</sup> contacted LMPD to advise he had posted live on Facebook a video of the David McAtee incident. Investigation revealed this Facebook Live video was used by the news media early on in the investigation. Although KSP's Electronic Crime Branch (ECB) had already obtained the video from YouTube, Smith was scheduled to be interviewed on August 28, 2020.

<sup>10</sup> Allen believed he only fired once. He wasn't sure he had a full mag (normally 14) and one in the chamber, which would account for the discrepancy.

<sup>11</sup> Kris Smith was shot and killed in the 200 block of North 26th on December 11, 2020.

Smith failed to appear for the interview.

KSP's ECB reviewed multiple videos from both YaYa's and surrounding businesses. Numerous still photos of single frames were isolated from the videos and were included in the summary report prepared by KSP Lt. Little. From the videos inside YaYa's the following still photos were reviewed:

1. As McAtee crosses in front of the camera, a firearm is visible on his right hip in a black holster.
2. McAtee is standing in the doorway with his right arm extended outward to the right. McAtee's arm appeared to be pointed almost level, before raising upwards (possibly from the recoil from a gunshot being fired).
3. Machelles can be seen possibly reacting to the sound of gunfire by flinching or slightly jumping.
4. The crowd of people in the room behind Mr. McAtee began moving out of the kitchen area, running towards the camera while the black female (black shirt and blue jeans by the doorway) remains behind the door.
5. McAtee is standing in the doorway with his right arm again extended a second time to the right.
6. McAtee's right arm is still extended as his body appears to fall slightly backwards into the door frame.
7. Puffs of smoke/dust can be seen outside the door. Most likely the smoke/dust is caused by bullets striking the outside of the building.
8. McAtee then turned and reentered the building.
9. As McAtee reentered the building, he appeared to be holding his chest with his empty right hand; a handgun is on the floor just inside the doorway. An empty holster can be seen on his right hip.
10. Behind McAtee, a cloud of debris can be seen possibly from gunshots striking the outside wall of the building.
11. McAtee moved to the right, passing out of the camera range.
12. McAtee on the floor on his right side with his head pointed toward the doorway.
13. Machelles, who was still positioned just inside the doorway, closed the door.
14. Machelles pointing at a handgun which is lying on the floor.

From the camera at the Double Deuce store next to YaYa's and from Camera 04 of YaYa's own recording system, LMPD officers and KyNG soldiers can be seen crossing the street from Dino's to YaYa's. An LMPD officer (later identified as Crews) began dispersing individuals by firing pepper balls at the ground, the fence and at a table under a blue canopy at the restaurant.<sup>12</sup>

Both cameras also depict LMPD officers and KyNG soldiers reacting to something that caused them to seek cover nearby. LMPD officer Crews who had been using the pepper ball gun is seen switching to her duty weapon and pointing it in the direction of YaYa's. Other personnel are seen taking cover and drawing their duty weapons.

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<sup>12</sup> Comparison of the two cameras time keeping systems show the camera from Double Deuce is approximately one hour behind actual time and that the camera system at YaYa's is about four hours ahead of actual time.

There is also video from Camera 02 of YaYa's that depicts the inside of the building looking at the kitchen area and toward the door leading to the grill area. These videos also show McAtee's activities. He is seen walking into and out of the restaurant while tending to food on the grills. In images from both inside and outside the restaurant, Mr. McAtee can be seen with an object that is consistent with a firearm in a holster on his right hip. From this camera various people are seen coming in and out of the restaurant during the evening. Several of the same people can be seen in the videos caught on cameras outside of the building.

As the LMPD officers and KyNG soldiers are dispersing individuals, some of the individuals can be seen moving into YaYa's BBQ.

As a large number of people came into YaYa's, McAtee can be seen approaching the door and reaching for a firearm in a holster on his right hip. He steps into the doorway and extends his right arm outside and then comes back inside.

Behind McAtee is a male, believed to be [REDACTED] in a white shirt and teal shorts holding an object consistent with a firearm in his right hand. Subsequently McAtee again steps into the doorway and raises his right arm. He stumbles back inside, clutching his chest then falling on the ground. There is a marking on his shirt on the upper left side of his chest.

The video also shows a female, later identified as Machel, in a black shirt and white pants standing behind the door and then closing the door, pointing at an object on the floor where McAtee was standing. The object was the Jimenez Arms 9mm identified as belonging to McAtee.

Per surveillance video analysis by KSP, from the time LMPD officers and KyNG soldiers begin exiting the white vans, until McAtee discharges his handgun the first time, approximately one minute and twenty seconds lapses. Analysis of the various videos by KSP indicates approximately 9 seconds elapsed between the first time and the second time McAtee fired his weapon.

As part of the investigation, Lt. Little received information that Officer Crews had posted on Face Book about an encounter she had with a protestor on May 28, 2020. The protestor is depicted handing a flower to Crews. Subsequently Crews posted that the protestor was doing more than handing her flowers. Crews took exception to the gesture and posted "I hope the pepper balls that she got lit up with a little later on hurt... Come back and get some more ole girl, I'll be on the line again tonight."

#### FIREARMS' [REDACTED]

There were seven firearms found inside YaYa's. DNA samples were taken from all the persons inside YaYa's except Machel and [REDACTED]. Each weapon was tested for possible "touch" DNA.<sup>13</sup>

1. The Jimenez Arms 9mm was found next to McAtee on the kitchen floor. ATF tracing

<sup>13</sup> All individuals (except Machel) inside the kitchen area at the time of the shooting were also tested for gunshot residue. Only [REDACTED] and [REDACTED] were negative for having 2 or more particles of lead, antimony, or barium on their hands.

- showed [REDACTED] The DNA profile of the swabs from the top/bottom of the ammunition magazine from the Jimenez Arms 9mm pistol was found to contain a mixture of at least two (2) individuals. The major male profile matched McAtee.<sup>14</sup> There were four live rounds in the magazine and one in the chamber of the Jimenez Arms.<sup>15</sup>
2. The Bond Arms INC .45 Texas Defender derringer was found on the desk in the office, and according to ATF tracing [REDACTED]. The DNA profile of the swabs from the trigger/trigger guard of the derringer was found to contain a mixture of at least two (2) individuals. Again, the major male profile matched McAtee.
  3. The Glock 19, 9mm semi-automatic handgun (possibly belonged to [REDACTED] based on his admission he dropped a Glock 19 at YaYa's). The firearm [REDACTED]. It was found under a couch cushion in the basement, on the South wall.
  4. The Mossberg, 600 AT, 12-gauge shotgun (serial number defaced), located in the office, had been purchased according to ATF tracing [REDACTED].
  5. The Smith & Wesson 9mm, semi-automatic handgun, found in the front room, which according to ATF tracing [REDACTED]. The DNA profile of the swabs from the trigger/trigger guard of the pistol was found to contain a mixture of at least three (3) individuals. All the tested individuals inside YaYa's were excluded as contributors to the DNA on the handgun.
  6. The Smith & Wesson .40 cal., semi-automatic handgun, found in the basement area was [REDACTED].
  7. The Taurus, PT140, .40 cal., semi-automatic handgun was found located in a drawer in the office. ATF tracing showed [REDACTED]. The DNA profile of the swabs from the front/rear sights, trigger/trigger guard, the grip area, and the top/bottom of the ammunition magazine from the Taurus .40 caliber pistol matched [REDACTED].

The Jimenez Arms 9mm handgun and 2 spent 9mm casings fired from the Jimenez Arms 9mm were sent to the ATF lab in Washington, DC. (See below)

The Colt Brand, M4A1 Carbine 5.56mm Select Fire Rifles, used by KyNG Spc. Kroszkewicz's and KyNG Sgt. Roark were both found to function properly, in both semi and full auto mode, when test fired at the KSP Crime Lab.

The Glock, Model 22 Gen 4 40 S&W Pistol, discharged by LMPD Officer Allen was found to function properly when test fired at the KSP Crime Lab. The Glock, Model 19 Gen 4 9mm Luge Pistol, fired by LMPD Officer Crews, was found to function properly when test fired at the KSP

<sup>14</sup> ATF Lab also found DNA on Jimenez Arms 9mm belonged to McAtee.

<sup>15</sup> Lt. Little determined that the Jimenez model JA 9 mm has a twelve (12) round capacity magazine. The magazine recovered from the weapon on scene, was loaded with five (5) live rounds of Tulammo 9mm ammunition. The magazine recovered from the holster during Mr. McAtee's autopsy was loaded with ten (10) live rounds of Tulammo 9mm ammunition.



Crime lab.

## AUTOPSY

On September 7, 2020 a copy of Mr. McAtee's completed autopsy (ME-20-0650) and toxicology reports were received by KSP. The autopsy had been performed by Dr. William Ralston on June 2, 2020. The report showed that there was a single gunshot wound to the left chest, upper sternal, involving the left lung and aortic arch. His ribs, clavicles, and manubrium had been fractured. The toxicology report showed Mr. McAtee had not ingested any drugs or alcohol.

Dr. Ralston had recovered four fragments of a projectile from the body of Mr. McAtee. Also collected at that time by LMPD/CSU were Mr. McAtee's clothing, a gun holster, and a magazine with several live rounds of ammunition.

Dr. Ralston opined that Mr. McAtee died from vascular and pulmonary trauma due to a gunshot wound to the chest. The wound, depicted in photos from the autopsy, was irregular in shape and was located in the left of center of McAtee's chest, above the nipple line and below his chin.

## FORENSIC FIREARMS EXAMINATION

The four fragments (three copper, one lead) recovered by Dr. Ralston were examined, to determine if they could be linked to any of the firearms discharged the morning of June 1, 2020. Two of these fragments lacked sufficient markings to compare to any of the weapons used by either the KyNG soldiers or the LMPD officers. The remaining two fragments displayed marks of value indicating they could have been fired from either of the KyNG Colt rifles. Green paint found on one of these fragments was similar to the green paint on the unfired Lake City 5.56mm NATO cartridges used by the KyNG.<sup>16</sup> However, the fragments were too damaged to be identified with a specific weapon. It was definitively found these two fragments had not been fired from the Glock, Model 22 pistol (Allen) and the Glock, Model 19 pistol (Crews).

Two TulAmmo Brand 9mm Luger Cartridge casing, found outside the door of YaYa's and under the blue canopy were forensically matched to the Jimenez Arms, Model J.A. Nine, 9mm Luger pistol, located near McAtee's body.<sup>17</sup>

The Kentucky Crime Lab found lead, antimony, and barium on the hands of Mr. McAtee.<sup>18</sup>

The DNA profile of the swabs from the front/rear sights, trigger/trigger guard and the top/bottom of the ammunition magazine from the Taurus .40 caliber pistol matches [REDACTED]

During review of the ballistic evidence collected at the scene, the following was documented by

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<sup>16</sup> Laboratory Supervisor Jack Reid wrote, "...complete testing could not be performed due to the limited sample size of the green paint in Item 135." Item 135 is listed as the four fragments (three copper, one lead).

<sup>17</sup> Jimenez Arms 9mm handgun and 2 spent 9mm casings fired from the Jimenez Arms 9mm were sent to the ATF lab in Washington, DC. The National Integrated Ballistic Information Network (NIBIN) confirmed the casings were fired from McAtee's gun.

<sup>18</sup> Gunshot residue can be deposited on the hands by discharging a firearm, handling an object with gunshot residue on it and/or being in the proximity of a discharging firearm. The examination itself cannot determine the relative likelihood of these listed actions.

the KSP Crime Lab:

1. Four spent cartridge casings collected at the scene which could be forensically matched to the Colt Brand, M4A1 Carbine 5.56mm Select Fire Rifle discharged by KyNG Spc. Kroszkewicz.
2. Six spent cartridge casings collected at the scene which could be forensically matched to the Colt Brand, M4A1 Carbine 5.56mm Select Fire Rifle discharged by KyNG SSgt. Roark
3. One spent casing collected on scene could be forensically matched to the Glock, Model 22 Gen 4 40S&W Pistol discharged by LMPD Officer Allen.
4. Eight spent casings collected on scene could be forensically matched to the Glock, Model 19 Gen 4 9mm Luge Pistol discharged by LMPD Officer Crews.

## LEGAL ANALYSIS

While the majority of the KyNG soldiers were cooperative and gave full statements, the two soldiers who discharged their weapons, refused to give statements, on the advice of counsel, relying on:

KRS 38.480 - Immunity for acts done in pursuance of duty - Immunity from arrest on civil process

(1) Officers, warrant officers, and enlisted men of the Kentucky National Guard or Kentucky active militia ordered into state active duty by the Governor, and when specifically directed by the Governor, shall be deemed peace officers as defined in KRS 61.310 and 446.010. They shall have all the powers and immunities of peace officers, and shall not be liable, civilly or criminally, for any act done by them in pursuance of duty in state active duty.

(2) No officer, warrant officer, or enlisted man of the Kentucky National Guard or Kentucky active militia shall be arrested, except in case of a felony, while going to, remaining at, or returning from a place where he is ordered to attend for state active duty.

Respectfully, this statute does not contemplate that a KyNG soldier can never be prosecuted criminally or be sued civilly. Otherwise, there would be no need for KRS 38.490 which provides for liability insurance for KyNG members on active state duty, or KRS 38.240 which allows for legal representation for KyNG soldiers who are faced with civil or criminal prosecutions. While they may enjoy qualified immunity, a refusal to answer questions or be interrogated is more likely to be invoked under the 5th Amendment of the Federal constitution or Section 11 of the Kentucky constitution, the right to remain silent.

LMPD has adopted the use of wearable, on-officer cameras,

“to further the mission of the department and enhance service to the community by accurately documenting events, actions, conditions and statements made during citizen encounters, traffic stops, arrests and other incidents in order to promote officer and public safety. The Wearable Video System (WVS) allows hands-free video and audio recording of important or critical incidents from the perspective of the user as they are occurring.

This allows the officer to record locations and activities that are not available to in-car recording equipment.” SOP Number 4.31 et. seq.

LMPD policy provides that “Officers shall utilize their WVS when assisting other law enforcement or governmental agencies that are engaged in any official law enforcement activities. When practical, officers shall activate their WVS in recording mode, prior to their arrival on-scene, for any call for service or engaging in any law enforcement activity or encounter.” (SOP 4.31.5).

LMPD supervisors are required to “verify that the WVS of officers under their command are operating properly.” This shall be included in the supervisor’s monthly personnel inspection.” (Emphasis added) (SOP 4.31.14)

“If an officer is involved in a critical incident, the commanding officer who responds to the scene will verbally inform the involved officer to turn off his/her WVS after the scene is safe and the incident is under control.” (Emphasis added) This command will be captured by the WVS prior to the WVS being turned off. (SOP 4.31.13)

The LMPD Use of Force policy, SOP Number 9.1.9, defines chemical agent as a departmentally approved less-lethal weapon, which consists of a chemical compound that irritates the eyes to cause tears, discomfort, and a temporary loss of visual capacity (e.g. pepper spray, Mace, Oleoresin Capsicum (OC) spray). Chemical agents may also be used:

- On actively aggressive persons who are combative and present a physical danger to themselves, the officer, or any other person.
- On prisoners who attempt to escape, cause physical injury to themselves, or attempt to damage the property of others.
- In defense of any person.

Pepper ball guns can be utilized for a dual purpose, both as a chemical agent dispersal system and as an impact weapon. Unlike Special Impact Munitions Systems (SIMS- e.g. 40mm launcher/sock round), the pepper ball guns, when used as an impact weapon, should not cause death, even when striking prohibited areas. However, the head, neck, and face should be avoided, unless exigent circumstances exist. (SOP 9.1.9) (Emphasis added).

In the LMPD Firearms policy, SOP Number 4.13.2, a pepper ball carbine launcher is listed as a non-lethal / less-lethal weapon.

The Use of Force policy, SOP Number 9.1.13 discusses the use of deadly force. LMPD Officers are authorized to discharge a firearm in defense of human life, including the officer’s life, or in defense of any person “when the officer reasonably believes, based on the facts and circumstances, that the person against whom the force is used poses an immediate threat of death or serious injury to the officer or to another person.” (Emphasis added)

Officers discharging a firearm are required to remain cognizant of the following:

- The direction in which the firearm is to be discharged.
- The danger of discharging a firearm while running or moving.

The role of the Kentucky National Guard is to support civil authorities such as law enforcement

agencies like the LMPD. However, the KyNG are not themselves a civilian law enforcement agency. The KyNG Use of Force policy states:

“KYNG personnel conducting this Mission have no greater right to use force than any other citizen under Kentucky law. What this means is that KYNG personnel have the right to use force up to and including deadly force to protect themselves or other persons (including fellow Servicemembers and law enforcement officers) from what they reasonably believe to be a threat of imminent death or serious physical injury. Deadly force may not be used if a lesser degree of force will suffice or if its use will disproportionately increase the risk to innocent persons. The term "Deadly Force" refers to the use of any force that is capable of causing death or serious bodily injury. The discharge of any firearm in an attempt to stop the actions of an individual is always considered use of deadly force.” (Emphasis added)

KyNG soldiers are directed to stay calm, stay in control, and not be drawn into a confrontation unless absolutely necessary. If force is necessary, they are required to use the least amount of force possible. In supporting civilian law enforcement, they are ordered to allow civilian law enforcement to take the lead.

Finally, the authority for a police officer to use non-deadly and deadly force in a response to resistance is covered in Kentucky Revised Statutes chapter 503.

KRS 503.040 provides any person, including a law enforcement official, is justified to use of physical force during execution of his public duty when:

- (1) Unless inconsistent with the ensuing sections of this code defining justifiable use of physical force or with some other provisions of law, conduct which would otherwise constitute an offense is justifiable when it is required or authorized by a provision of law imposing a public duty or by a judicial decree.
- (2) The justification afforded by subsection (1) applies when:
  - (a) The defendant believes his conduct to be required or authorized by the judgment or direction of a competent court or tribunal or in the lawful execution of legal process, notwithstanding lack of jurisdiction of the court or defect in the legal process; or
  - (b) The defendant believes his conduct to be required or authorized to assist a public officer in the performance of his duties, notwithstanding that the officer exceeded his legal authority.

KRS 503.050 provides any person, including a law enforcement official, is justified to use physical force or deadly physical force in self-protection when:

- (1) The use of physical force by a defendant upon another person is justifiable when the defendant believes that such force is necessary to protect himself against the use or imminent use of unlawful physical force by the other person.
- (2) The use of deadly physical force by a defendant upon another person is justifiable under subsection (1) only when the defendant believes that such force is necessary to protect himself against death, serious physical injury, kidnapping, sexual intercourse compelled by force or threat, felony involving the use of force, or under those circumstances permitted pursuant to KRS 503.055. against death, serious physical injury, kidnapping, or sexual intercourse compelled by force or threat (Emphasis added).

KRS 503.070 provides any person, including a law enforcement official, is justified to use physical force or deadly physical force in protection of another person when:

- (1) The use of physical force by a defendant upon another person is justifiable when:
  - (a) The defendant believes that such force is necessary to protect a third person against the use or imminent use of unlawful physical force by the other person; and
  - (b) Under the circumstances as the defendant believes them to be, the person whom he seeks to protect would himself have been justified under KRS 503.050 and 503.060 in using such protection.
- (2) The use of deadly physical force by a defendant upon another person is justifiable when:
  - (a) The defendant believes that such force is necessary to protect a third person against imminent death, serious physical injury, kidnapping, sexual intercourse compelled by force or threat, or other felony involving the use of force, or under those circumstances permitted pursuant to KRS 503.055; (Emphasis added) and
  - (b) Under the circumstances as they actually exist, the person whom he seeks to protect would himself have been justified under KRS 503.050 and 503.060 in using such protection.
- (3) A person does not have a duty to retreat if the person is in a place where he or she has a right to be.

## CONCLUSIONS

Both the Mayor of Louisville and the Governor of Kentucky believed that the Louisville Metro area had become so unsafe that a 9 PM to 6:30 AM curfew for all citizens in all of Jefferson County as well as the protection of the Kentucky National Guard were both necessary. Multiple instances of property damage and unruly crowds throughout the Metro area had been documented. To prevent further damage, only persons traveling to work, places of worship, or for medical treatment were exempt from the curfew. It should be noted that the curfew did not address businesses closing. This curfew was in effect on May 31-June 1, 2020.

Areas in the Metro central business area were cleared and brought under control on the late evening hours of May 31, 2020. Louisville Metro Police believed that other areas in Jefferson County could harbor additional disruptions and violence. Information had been received that a sizeable crowd had gathered at Dino's Food Mart at 26th and Broadway. The area had been described as a violent area even before the protests started in May 2020. Members of the LMPD command staff believed that the size of the crowd required additional forces beyond the normal staffing of the First Division. In accordance with the Governor's executive order, the KyNG was asked to assist.

As the KyNG and the LMPD officers deployed from the vans at 26th Street and Broadway onto Dino's parking lot, civilians were ordered to disperse and go home. All LMPD officers were in clearly marked uniforms and the KyNG soldiers were in military uniforms. Citizens were reminded of the curfew. From all indication the vast majority of the citizens did in fact walk or drive off the premises. Some left reluctantly or were slow to respond to the clearly stated commands. As they

left Dino's parking lot, some of those individuals walked over to YaYa's BBQ.

Several officers and soldiers believed that someone was setting off firecrackers near the area of YaYa's BBQ. Marvin McAtee confirmed in his 911 call that someone had set off firecrackers. This seemingly harmless prank heightened the sense of threat.

LMPD Officer Katie Crews fired her pepper ball gun several times to force a quicker retreat. She also fired toward Machelles McAtee who was clearly on the property surrounding YaYa's BBQ business. Crews also fired higher than ground level as by her own admission she struck items on top of a table. At least one of the pepper balls either actually struck Machelles, or struck near enough to Machelles to cause pepper spray to be deposited on her shoulder and neck. Whether the pepper ball ricocheted or struck directly is not clear. The blue canopy appears to sit low enough to preclude a direct hit.

Simultaneously, McAtee can be seen moving toward the door where Machelles is standing. He raises his right arm out the door. McAtee indiscriminately fired his weapon. The first time was shortly after numerous people, including his niece Machelles, sought refuge in the building. As previously described Crews had been firing pepper balls. When McAtee fired his weapon either at the approaching law enforcement officials or simply over their heads, the rules of engagement changed. Nine seconds later, when McAtee again stepped out the doorway to fire the second time, both LMPD and KyNG were prepared to meet lethal force with lethal force. McAtee again fired his weapon as he stepped across the threshold of the door. Immediately, Crews fired 8 times, Allen fired once, Kroszkewicz fired 4 times and Roark fired 6 times. McAtee was struck once. The projectile fragment that struck him was similar to those used by the KyNG.

McAtee was aware there was a 9 PM curfew. Lt. Crowell spoke with McAtee and the management of Dino's, the night before, to ensure that they knew the curfew was in effect. They were advised they would be in violation of the curfew if they were serving people after 9 PM as no one was supposed to be on the street.

McAtee was also aware that members of law enforcement were outside his establishment on the early morning hours of June 1. His nephew Marvin McAtee advised him that the marshals, "or whoever" were outside the business just moments before people began rushing inside. In fact, it would not be uncommon for law enforcement to be outside as they frequently visited his business and he fed them. Videos from the previous evening showed officers including Crowell coming and going onto the YaYa's BBQ property.

All four law enforcement officials aimed at the muzzle fire from the gun fired by the person standing in the doorway of YaYa's. They clearly had a target in sight. None of the shots fired by Crews or Allen struck McAtee or any other person. And while the projectile fragments found in McAtee's body matched the caliber of the projectiles used by the KyNG, the projectiles were too badly damaged to determine whether Kroszkewicz or Roark fired the shot that killed McAtee. The nature of the wound suggests that the projectile may have struck another object, such as the wall or door frame, splintered and the fragments entered into McAtee causing his death.

As described consistently, McAtee fired twice. The Jimenez Arms 9mm found near his body had his DNA on it. The magazine found on him contained ammunition that matched that used by the

Jimenez Arms 9mm. And the two spent shell casings found immediately outside the door were determined to have been fired from the same Jimenez Arms 9mm. Finally, tracing by ATF confirmed [REDACTED]

In conformance with LMPD SOP Number 9.1.13 the LMPD officers and the national guard soldiers by virtue of the KyNG use of force policy, were authorized to discharge their firearms in defense of human life, including their own, when they reasonably believed, based on the facts and circumstances, that the person against whom the force was used posed an immediate threat of death or serious injury to the officer or to another person. The actions of the LMPD officers and KyNG soldiers Kroszkewicz and Roark were further justified by KRS 503.040 to use physical force, and KRS 503.050 (2) and KRS 503.070 (2) to use deadly physical force in exchange for the deadly physical force used by McAtee against them.

Crews' decision to use the pepper ball gun against Machelles was in contradiction to LMPD's Use of Force policy, SOP Number 9.1.9. From the videos, Machelles' statement, and even Crews' statement, Machelles was on private property and posed no immediate threat to Crews or any other law enforcement officer. The Mayor's executive order did not mandate that citizens could not be outside after 9 PM as long as they were on private property. To charge Crews with Assault 4th degree would not be appropriate as to the pepper ball fired toward Machelles McAtee. The criminal definition of physical injury cannot be proven, based on Machelles' statement.<sup>19</sup>

The purpose of this review is to determine who was responsible for the death of David McAtee and whether or not criminal charges should be brought as to the officers and soldiers who discharged their weapons. While the pepper ball gun is a non-lethal weapon, not capable of causing death, Crews' failure to follow written policy cannot be ignored. Further, her post on Face Book about using pepper balls is of concern, suggesting she was predisposed to use the pepper balls as a first step to dispersing the crowd when verbal commands had already proven adequate. Her conduct, while not criminal, should be reviewed by LMPD's Professional Standards Unit (PSU) and the newly created Louisville Metro Civilian Review and Accountability Board. Likewise, officers who intentionally did not utilize their WVS or body cameras should also be further questioned. If the riot gear worn by the officers prevents attaching the body cams, alternative body cam mounts should be used.

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<sup>19</sup> Section 508.030 - Assault in the fourth degree

(1) A person is guilty of assault in the fourth degree when:

(a) He intentionally or wantonly causes physical injury to another person; or

(b) With recklessness he causes physical injury to another person by means of a deadly weapon or a dangerous instrument.

(2) Assault in the fourth degree is a Class A misdemeanor.

KRS 500.080 Definitions for Kentucky Penal Code.

(13) "Physical injury" means substantial physical pain or any impairment of physical condition

For all of the above stated reasons, the use of deadly physical force against David McAtee by the LMPD Officers Katie Crews and Austin Allen, as well as Kentucky National Guardsmen Specialist Andrew Kroszkewicz and Staff Sergeant Matthew Roark was justified. It is my opinion that this matter should not be presented to the Jefferson County Grand Jury for further review, or any criminal charges be pursued against any of the above four named officials.

Respectfully submitted,



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