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To: Members of the Media

From: District Attorney Ben David

Re: Shooting Death of Alexander Clukey

Prosecutors are often charged with analyzing the actions of individuals who, in many instances, wish they could roll back the hands of time to the moments before a serious injury or death occurred. Despite the tragic circumstances of these incidents, our duty is to determine if a crime took place, identify the corresponding law that supports a criminal prosecution, and evaluate the likelihood of conviction of such a charge at trial. These guiding principals have been applied to my assessment of the shooting death of fifteen-year-old Alexander Clukey by his father, John Clukey.

Over the last ten days since being assigned this case, my prosecutors and I have reviewed the complete investigative file of the Onslow County Sheriff's Office and have carefully considered all relevant evidence. At no time has my office solicited or received the opinions of Onslow County District Attorney Ernie Lee, Chief Michael Yaniero of the Jacksonville Police Department, Sheriff Hans Miller of the Onslow County Sheriff's Office, or anyone in any of their offices about how this case should be resolved. I have arrived at the legal conclusions set forth below relying solely upon the input of my senior ADAs who have over a century of combined experience in prosecuting violent crime in this region. These officials are hearing this decision at the same time as members of the public.

It should be noted at the outset that in the more than seventeen years that I served as the elected DA for New Hanover and Pender Counties, my office has always put our children first and we have taken a very hard line on prosecuting anyone who would do them harm. We have established precedent and procedures to put our most vulnerable citizens first by making it clear that: (1) prosecuting violent crime is our top priority; (2) a pattern of reckless behavior is tantamount to intentional conduct; and (3) parents and caregivers owe a special obligation to the children in their care. Yet it is equally true that a prosecutor's role is to do justice, not to convict at all costs. Sometimes justice lies in not pursuing a charge at all, despite the fact that a life has been tragically cut short.

The law in North Carolina allows for the possibility of there being such things as accidents leading to death for which no criminal liability attaches and for which no criminal prosecution is appropriate. There have been instances in which a parent feeds their child food they mistakenly believe to be healthy, when in fact the food is tainted, with lethal result. There have been instances in which a tenant shoots and kills someone they mistakenly believe to be an intruder threatening their life, when in

fact the person who has been shot is a roommate who has come in through a window after losing their keys.

Of course, in either type of case law enforcement is never satisfied with simply taking the word of the parent or of the shooter but must undertake a thorough investigation to see if the totality of the evidence—including surrounding circumstances and past history—indicate beyond a reasonable doubt that what has happened is something other than an accident. Still, the principle remains that unless the State can disprove an accidental killing, then no crime can be held to have occurred. I will now summarize the facts of this case. (See attached case summary.)

When first considering the law, my prosecutors and I are guided by the words of the North Carolina Pattern Jury Instructions which judges use in a trial to explain the law to the jurors who decide a case. "A killing is accidental if it is unintentional, occurs during the course of lawful conduct, and does not involve culpable negligence." N.C.P.I. Crim. 307.10. The burden, as always, is on the State to prove that a killing is either intentional, occurred in the course of unlawful conduct, or involved culpable negligence before any criminal charges can be brought.

My senior prosecutors and I therefore carefully considered: 1) whether there was any evidence of this killing being intentional, 2) the lawfulness or unlawfulness of the surrounding course of conduct, and 3) the presence or absence of culpable negligence.

There is no evidence that John Clukey intended the death or injury of Alexander Clukey. This possibility was, again, the subject of thorough investigation to be as certain as possible as to what happened. However, no substantiated evidence of any domestic abuse or threats of abuse, or of any homicidal ideation or planning have been discovered. Everything about this incident shows a father who did not intend for this to happen.

But of course, saying that a killing was not meant to have happened is not the end of the inquiry. In a very different set of circumstances, a father who knowingly drives recklessly and greatly in excess of the speed limit under dangerous road conditions and who crashes his vehicle can and should be held criminally liable if his child, who is a passenger, is killed, even if the death was not meant to have happened. That is because the killing cannot be considered accidental if it occurs in the course of otherwise unlawful conduct, such as reckless driving.

However, there is no evidence that this killing occurred during the course of unlawful conduct. It is not unlawful to participate in a consensual Airsoft game with one's child. It is a crime, specifically a Class A1 Misdemeanor, to knowingly point a firearm at anyone "either in fun or otherwise, whether such a gun or pistol be loaded or not loaded." North Carolina General Statute §14-34. An Airsoft gun is not a firearm, nor is it a deadly weapon. For this reason, there have been many times when individuals have been charged criminally for a shooting death in which they pointed what they knew to be firearm at someone but believed the firearm was unloaded. Again (and this is a key finding of the investigation to which our analysis returned again and again), the totality of the evidence shows that Clukey mistakenly believed he was pointing a toy and not a firearm at Alexander Clukey.

Even if a killing was unintentional, and even if the killing was in the course of otherwise lawful conduct, the killing would not be deemed accidental if it were done with a mindset of culpable negligence

(also known as criminal negligence—the two terms are synonymous). An action taken with culpable negligence proximately resulting in another's death qualifies as involuntary manslaughter.

Again, we turn to the North Carolina Pattern Jury Instructions to define culpable negligence: "Culpable negligence is more than mere carelessness. An act is culpably negligent if, judged by reasonable foresight, it was done with such gross recklessness or carelessness as amounts to a heedless indifference to the rights and safety of others." N.C.P.I Crim. 206.50. As appellate courts in North Carolina have consistently held, "as it relates to involuntary manslaughter, intent is not an issue. The crux of that crime is whether an accused unintentionally killed his victim by a wanton, reckless, culpable use of a firearm or other deadly weapon." State v. Brown, 64 N.C. App. 578, 579 (citing North Carolina Supreme Court cases).

A preventable death caused when someone exercises less care than they should does not, by itself, constitute involuntary manslaughter. Clukey should have been more careful than to have played an Airsoft game while wearing a holster with a real firearm. But the state of mind required to make this conduct a crime—and specifically the crime of involuntary manslaughter—is conscious, heedless indifference to the safety of another. This is qualitatively different than simply being less careful than one ought to be; criminal negligence is instead on a spectrum that includes the state of mind called implied malice, when a person knows that what they are doing is likely to seriously injure another, and yet does it anyway, thereby making them liable for second degree murder if a death foreseeably ensues. Courts have held that criminal negligence and implied malice—these two states of mind that involve conscious, anti-social disregard of known risks to the safety of others—differ only in degree and are neither to be confused with simple negligence.

Two recent involuntary manslaughter cases in North Carolina illustrate the sort of "heedless indifference to the rights and safety of others" that stands in marked contrast to mere carelessness. In State v. Metcalf, 2021 N.C. App. LEXIS 641(2021), the defendant, when fleeing her burning home, failed to take the three-year-old nephew of her boyfriend with her, knowing that the three-year-old was inside, and several times told others—including the first firefighters on the scene—that there was no one inside. She later admitted that she could have removed the child from the burning house when she exited.

In State v. Fisher, 228 N.C. 463 (2013), the defendant became angry at the victim during the defendant's party and "kicked or stomped" his face, leaving the victim semiconscious. The defendant was irritated that he had to take the victim to meet the victim's parents at a church. Instead of taking the victim to the church, the defendant drove him to an isolated parking area and again beat him. The defendant abandoned the victim outside knowing that the temperature was in the 20s and that the victim had been beaten, was intoxicated, and was not wearing a shirt. The defendant realized his actions put the victim in jeopardy, and even after being directly informed by his father that the victim was missing and that officers were concerned about him, the defendant lied about where he had last seen the victim. This hindered efforts to find and obtain medical assistance for the victim.

Set alongside these two recent examples that appellate courts in our State have upheld as meeting the definition of culpable negligence, it is clear that Clukey's actions do not display the sort of heedless indifference to another's safety that would make his actions a crime. This is not a case of Clukey mistakenly reaching for his service weapon while in the performance of his duties. See State. v. Potter, Minn. (December 2021) (Officer who shot and killed suspect Daunte Wright at a traffic stop when firing

a weapon that she mistook for a Taser was convicted of first degree manslaughter). Rather, this is an accidental shooting that occurred while a father and son were engaged in horseplay.

In State v. J.C.D., 598 So. 304 (Fl. 1992), a juvenile, referred to as "J.A." accidentally engaged the trigger of a gun he thought was unloaded. He was charged and convicted of involuntary manslaughter under a culpable negligence theory. In reversing the conviction, the appellate court cited numerous examples of cases that, "may be the product of simple or gross negligence by the accused but cannot rise to the level of culpable negligence so as to constitute a criminal manslaughter." Id. at 304-305. In dismissing the case, the court held that:

> The totality of the evidence in this case establishes that J.A. accidentally shot and killed his friend while carelessly handling a loaded rifle in the deceased's presence… J.A. was not engaged in an argument or physical combat with the deceased or anyone else; there was not the slightest bit of animosity between J.A. and the deceased as, indeed, the two were friends, and J.A. was extremely remorseful after the incident; moreover J.A. was not under the influence of drugs of alcohol.

It is debatable whether an involuntary manslaughter charge against Clukey would survive a motion to dismiss. See State v. Griffin, 273 N.C. 333 (1968) (Court reversing the involuntary manslaughter conviction of a defendant who accidentally shot his wife in the chest while twirling a pistol); State v. Crisp, 64 N.C. App. 493, 497(1983) (Defendant killed friend when rifle they struggled over went off; conviction reversed since it was not a "wanton, reckless, culpable use of a firearm."); State v. Hall, 60 N.C. App. 450, 452 (1983) (Hunter who accidentally shot man when he saw rustling bushes; conviction reversed since "there must be negligence of a gross and flagrant character, evincing reckless disregard for human life.").

What is beyond any serious discussion, however, is that it would be virtually impossible to secure a unanimous verdict of guilt against Clukey in the death of his son should this case proceed to trial. My office has long been guided by the standard that we do not proceed to trial on cases where there is not a realistic likelihood of conviction.

There is no question that the death of Alexander Clukey is a tragedy: By any objective measure, this is one of the most heartbreaking losses imaginable. If we punished merely on the basis of emotion, many of us would want criminal sanctions to be swift and severe. Yet in the present instance there is insufficient proof that John Clukey acted in a culpably negligent manner. Accidents do happen, and not every tragedy is a crime.

After thoroughly reviewing the facts and analyzing the applicable law, I, together with my senior prosecutors, have determined that no one will face criminal prosecution in the death of Alexander Clukey.

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SUMMARY

1. On December 27, 2021 Jacksonville Police Department Detective John Clukey, left his home in Beulaville, NC to retrieve his department-issued vehicle from the Jacksonville Police Department.
2. As is department policy, Clukey was wearing his department issued firearm, a Glock handgun, in a holster on his side because he was going to be driving his vehicle.
3. Clukey was dressed in civilian clothing.
4. When he returned home, Clukey was greeted by his 15-year-old son, Alexander, in the front yard.
5. Alexander had three Airsoft guns, which were Christmas gifts, and asked his dad to play with him.
6. Clukey took two of the Airsoft guns, both were pistol style.
7. Alexander armed himself with an AR-15 style Airsoft.
8. Clukey placed one pistol in the waistband of his pants and armed himself with the other Airsoft pistol.
9. Clukey also armed himself with a shield, a discarded DirecTV satellite dish.
10. Clukey and Alexander engaged in an Airsoft battle in the yard to the side of their residence.
11. This side yard is outside the view of the Clukey residence doorbell camera and there were no neighbors outside at this time.
12. When the pistol in his hand was emptied, Clukey discarded it.
13. Clukey reached for the pistol in his pants waistband; however, instead of grabbing the Airsoft pistol he grabbed his duty weapon, which was still holstered on his waist.
14. Clukey discharged one round from his duty weapon.
15. Consistent with the loose grip that he would have been using with an Airsoft gun and not a real firearm, the Glock malfunctioned, causing a stovepipe that prevented the shell casing from fully ejecting from the Glock.
16. The jammed Glock caught Clukey's attention, and only then did he realize that he had fired the Glock and not the Airsoft gun.
17. The round struck his son.
18. Upon seeing Alexander injured, Clukey ran to his son and called 911.
19. An Onslow County 911 dispatcher asked Clukey the address of the emergency, which Clukey provided and said, "my son was playing fake guns and someone shot with a real gun."
20. Clukey remained on the phone with the 911 dispatcher for over eleven minutes awaiting the arrival of emergency personnel.

21. The 911 dispatcher asked Clukey to ensure Alexander was flat on his back, but Clukey replied that he was not able to turn Alexander from his side onto his back because he was bleeding from the nose and mouth.
22. Clukey reported that Alexander was turning purple.
23. Alexander was heard on the 911 call breathing.
24. The 911 dispatcher asked Clukey where Alexander was shot and he replied that it appeared that he was shot in the head.
25. The 911 dispatcher asked Clukey to apply pressure to the wound.
26. As Clukey applied pressure to the wound Alexander's breathing became more labored and he could be heard moaning on the call.
27. Clukey made efforts to calm Alexander, apologizing to him and asking him to remain still.
28. On several occasions throughout the call, Clukey made several statements expressing remorse, such as, "I deserve everything I have coming to me," "take me instead," "stay with me," and "I'm so sorry."
29. At one point during the call, one of the other Clukey children exited the residence, at which point Clukey told the child to go back inside the house.
30. Later in the call other adults are heard on scene, bringing towels to help tend to the wound.
31. The 911 call concluded after 11 minutes when emergency personnel arrived on scene.
32. Clukey told a neighbor who had shown up to assist that he shot his son mistaking the Glock for the Airsoft gun.
33. Emergency responders transported Alexander to Naval Medical Center in Jacksonville.
34. Due to the extent of his injuries, Alexander was later transported to Vidant Medical Center in Greenville.
35. The Clukey residence is in Onslow County, and the Onslow County Sheriff's Office conducted the investigation into this incident.
36. The Onslow County Sheriff's Office detectives were unable to identify any eyewitness to this incident and it was outside the view of any cameras on houses in the area.
37. One neighbor reported hearing the gunshot but did not view the incident.
38. Onslow County Department of Social Services employees interviewed the other Clukey children, who reported no previous maltreatment of, or ill will, towards Alexander.
39. Detectives inquired with officials at Alexander's school about any maltreatment or ill will and found that the Clukeys' was a loving home and that there was no animosity on the part of John Clukey toward Alexander.
40. Every member of the Onslow County Sheriff's Office who came into contact with Clukey reported no signs of impairment.
41. Clukey denied any drug use or alcohol use. This was corroborated by his wife, Wendy, who was separately interviewed by detectives and DSS investigators.
42. Clukey was cooperative with the investigation of this incident from the start, submitting to detectives' questions and separate questioning by DSS investigators.
43. Alexander remained at Vidant Medical Center through January 3, 2022, at which time he succumbed to his injuries.
44. The Onslow County Sheriff's Office presented their findings to the Onslow County District Attorney's Office on January 7, 2022.
45. At that time, Onslow County District Attorney Ernie Lee reached out to District Attorney Ben David of the New Hanover and Pender County District Attorney's Office for outside assistance.

46. On January 8, 2022, DA Lee and DA David spoke about the incident and DA David agreed to evaluate whether criminal activity took place and to prosecute the matter if charges should arise.
47. Pursuant to North Carolina General Statute 7A-64, a district attorney may apply to the Director of the Administrative Office of the Courts to temporarily assign an outside prosecutor to assist in the prosecution of a case if there is an actual or apparent conflict in handling a case.
48. Such conflict can include where the district routinely works with a person who is the subject of a criminal investigation.
49. Clukey is a veteran detective of the Jacksonville Police Department and is the lead investigator on several pending felony and homicide cases with the Onslow County District Attorney's Office.
50. DA Lee made the formal request for assistance to Administrative Office of the Courts' Assistant Director David Hoke on Monday, January 10, and the request for temporary assignment to DA David was made that same day.
51. The Onslow County Sheriff's Office delivered the findings of their ongoing investigation of this incident to DA David on January 10 and January 12, 2022.
52. DA David convened a Critical Case Review of this incident on January 13, giving senior prosecutors from his office the opportunity to review the facts of the case and decide if criminal charges were appropriate in this matter.
53. Follow up investigation stemming from the Critical Case Review was conducted by the Onslow County Sheriff's Office and delivered to DA David on January 19, 2022.


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COLT 1911 TARGET


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COLT 1911 TARGET