

GARRETT FOSTER CASE

Detective alleges he was muzzled

Friction between DA, police starts to emerge

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When a veteran Austin homicide detective met with prosecutors to discuss his upcoming grand jury testimony in the shooting of an armed Black Lives Matter protester, he documented in the case file his dismay at a request of prosecutors.

Detective David Fugitt, according to newly filed court documents, said they instructed **Perry** him to dramatically scale down his presentation of his evidence in the case involving Daniel Perry, who says he acted in self-defense when he shot and killed Garrett Foster a year ago in downtown Austin.

The documents, filed by Perry's Dallas attorney Clinton Broden, accuse



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Travis County District Attorney José Garza speaks during a press conference about the indictment of former Army Sgt. Daniel Scott Perry on a murder charge in the shooting death of Garrett Foster. RICARDO B.

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Detective

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prosecutors of manipulating the grand jury system to get three indictments against Perry, including a murder charge, and make the bold claim that prosecutors committed witness tampering by interfering with Fugitt's planned testimony.

Some — though not all — of the evidence omitted focuses on Foster's character and other protesters' actions.

In their 44-page response, Travis County District Attorney José Garza and other prosecutors sharply deny that they did anything improper. Perry was given a fair grand jury presentation, they said. Fugitt only knows what he presented to the grand jury — not any evidence presented outside his testimony, prosecutors said.

"The state made a thorough and balanced presentation of evidence to the grand jury in keeping with its obligations under the law, and the defendant's assertions about the state's presentation of evidence are based on uninformed assumptions," Garza and Assistant District Attorney Guillermo Gonzalez wrote.

Tension between Austin police and Travis County prosecutors

Because grand jury proceedings are confidential by law, what happened in the high-profile case will likely remain unclear — unless a judge orders a hearing or the release of transcripts of grand jury testimony.

But such strong and unusual assertions based on the report of a senior police investigator — Fugitt wrote that he asked prosecutors what "ramifications" he would face if he didn't comply — again highlight brewing tension between Austin police and Travis County prosecutors at a time of shifting dynamics between the two agencies.

Notably, Fugitt had determined that the shooting, for which Perry also faces charges of aggravated assault and deadly conduct, was a justifiable homicide, according to the filing.

Historically, the Police Department and prosecutors have worked closely on



Garrett Foster was marching in downtown Austin on July 25 with his fiancée, Whitney Mitchell, when he was fatally shot by Army Sgt. Daniel Perry, who says he fired on Foster, an Air Force veteran who was also armed, in self-defense. COURTESY OF ANNA MAYO



Austin police Detective David Fugitt.
RICARDO BRAZZIELL/AMERICAN-STATESMAN

such high-profile cases. In this instance, however, Fugitt's documentation of his interactions with prosecutors is being used by Broden to bolster its efforts to get the case against his client dismissed.

Much of the ongoing friction rests on Garza's efforts to prioritize different crimes than his predecessors did and to increase police accountability through indictments of several officers recently.

The encounter between Foster and Perry began July 25 when Perry, who was driving for Uber at the time, turned right onto Congress Avenue and drove

through a crowd of protesters, according to people at the scene. He did not hit anyone, but protesters said they were alarmed by the action.

Questions about report in Garrett Foster case

Several protesters — including Foster, who was legally carrying an assault-style rifle — approached Perry's car, police have said. Perry told investigators Foster raised his weapon at him and that's when Perry fired.

Perry drove away and then called police. Officers released him after questioning him.

Foster, a U.S. Air Force veteran, had been participating in Black Lives Matter protests for weeks with his fiancée, a quadruple amputee. Foster was discharged to be her full-time caretaker.

Perry is an active-duty sergeant in the U.S. Army.

Broden, is seeking an evidence hearing in state District Judge Clifford Brown's courtroom in support of a motion to dismiss Perry's indictment, and prosecutors asked Brown to deny such a hearing.

Much of Broden's motion relies on notes from Fugitt's report about what he says prosecutors told him not to say.

According to the filing, prosecutors asked Fugitt not to share evidence that called statements from several witnesses into question. Those witnesses said Foster did not begin to raise his AK-47 assault rifle toward Perry — a key issue in the case. But, according to Broden's recent filing, the police investigation found they were not in a position to see Foster's actions at the time.

In addition, some of the slides that prosecutors told Fugitt to remove from his PowerPoint presentation pertained to statements that a woman made to police on the aggravated assault charge. According to Fugitt, the woman never suggested that Perry threatened her by driving a vehicle in her direction, as the grand jury concluded. The woman told police that Perry stopped his car so that people would not be run over, the court filing states.

Fugitt's full report is not publicly available.

"The system clearly broke down, and that directly led to Sgt. Perry's indict-

ment," Broden said in a statement.

In the prosecutors' response to Broden's filing, they noted that they are not able to counter some of Broden's allegations because it would cause them to disclose grand jury information. However, Garza said, it is not the job of grand jury witnesses, such as Fugitt, to present all information they think is relevant.

"Assuming — as defendant has asserted — Det. Fugitt was a witness in the grand jury proceeding, he was called to appear before the grand jury to give testimony and not to present any and all demonstrative exhibits or information that he desired," Garza wrote.

Additionally, Travis County prosecutors have voluntarily authored an order that, if a judge signs it, will grant Perry access to all grand jury transcripts and exhibits.

"The state fully expects the full set of transcripts and exhibits to alleviate any concerns about the fair and balanced nature of the grand jury presentation," Garza said.

He also said that prosecutors did not coerce Fugitt's testimony in any way and that Broden has not "presented evidence beyond bare assertions."

The case is at least the second high-profile investigation recently that exposed a fissure between police and prosecutors.

Some officers, including interim Chief Joe Chacon, expressed frustration in June over prosecutors' decision to drop an assault with a deadly weapons charge against a 17-year-old both prosecutors and police initially believed should be arrested in a Sixth Street shooting that killed a New York tourist and injured 13 others.

Prosecutors said they dropped those charges after the investigation determined that he didn't fire shots, as they originally believed.

Police, however, said they still thought the older teen should face charges because he had a gun and possibly drew it during the melee. Detectives, however, have not submitted new charges for prosecutors to consider.

Prosecutors said they have not ruled out charging the teen in the future, but want to focus their efforts on the more significant murder case against the alleged gunman.