

**ATTORNEY GENERAL OFFICE'S REPORT REGARDING THE  
MAY 13, 2022, FATAL SHOOTING INCIDENT IN NEW BOSTON, NEW HAMPSHIRE**

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**I. INTRODUCTION**

Attorney General John M. Formella announces the completion of the investigation into a fatal shooting incident that occurred in New Boston, New Hampshire, on May 13, 2022. During this incident, New Boston Police Officer Shane Morton and Contracted Security Member Peter White used deadly force against Michael Foley (age 33), by shooting at him with firearms. As a result, Mr. Foley was wounded one time and died.

The purpose of this report is to summarize the Attorney General's factual findings and legal conclusions regarding the use of deadly force that resulted in Mr. Foley's death. The findings and conclusions in this report are based upon information gathered during the investigation, including viewing the scene of the incident, as well as photographs of the scene, viewing physical evidence from the shooting incident, interviewing witnesses, and reviewing video footage.

As provided in RSA 7:6, RSA 21-M:3-b, and RSA 21-M:8, II(a), the Attorney General is the State's Chief Law Enforcement Officer and has the authority to investigate and prosecute major crimes, including instances where a crime punishable by up to life imprisonment is committed. In addition, the Attorney General has the responsibility to ensure that whenever a law enforcement officer uses deadly force, it is done in conformity with the law.

When reviewing the use of deadly force by law enforcement officers, the Attorney General does not investigate or opine on the procedures or tactics used by the officers. Instead, the Attorney General's review of officer-involved use of deadly force incidents consists of a criminal investigation, which is limited to determining whether officers complied with the

applicable law. Similarly, the Attorney General’s review of deadly force by a private citizen also is a criminal investigation limited to determining whether the private citizen complied with the legal provisions on justifiable use of force that apply with respect to private citizen conduct.

Based on the investigation of this deadly force incident, Attorney General John M. Formella finds that the use of deadly force against Michael Foley by New Boston Police Officer Shane Morton was legally justified. Further, Attorney General Formella finds that the subsequent use of deadly force by Contracted Security Member Peter White was also legally justified.

## **II. SUMMARY OF THE FACTS**

The incident took place at the New Boston Space Force Station (NBSFS), which is a division of the Air Force. The Station is located at 317 Chestnut Hill Road in New Boston.



*Image 1: Map overview showing the entrance to the New Boston Space Force Station. The red line just off Chestnut Hill Road marks the location where the road transitions from state property to federal land. The yellow circle marks the location of the entrance gate and gatehouse.*

The Station is a secured access, federal facility with armed security personnel in the form of contracted security members employed by Lockwood Hills Federal, a private company based in Portsmouth. The main gate consists of a center gatehouse with a gated inbound/entrance lane and a gated outbound/exit lane. The gatehouse is occupied by armed, contracted security

members, and monitored by two cameras. One camera is located to record vehicles entering the facility while the other is located to record vehicles as they depart. On the night of this incident, the main gate was manned by Contracted Security Member Jeffrey Lynn.

On Friday, May 13, 2022, at approximately 11:33 p.m., Michael Foley drove his purple-colored, 1995 Chevrolet Prism automobile towards the main gate of the New Boston Space Force Station. He was driving slowly, and the car's headlights were not on. Mr. Foley stopped his car short of the gatehouse, got out, and stood next to the driver's door. At the time that he got out of the car, Mr. Foley was holding a large knife and what appeared to be a handgun.<sup>1</sup>

At 11:34 p.m., Goffstown Police Dispatch received a call from the NBSFS requesting assistance because of an armed individual at the entrance to the facility. At the time of the call, Security Member Jeffrey Riley and Security Member Peter White were responding to the front gate to assess the situation.<sup>2</sup> Local police units were dispatched from surrounding jurisdictions including New Boston, Amherst, and Bedford.

While local law enforcement officers were enroute to the Station, Security Member Riley used his assigned patrol vehicle to block the exit/outbound lane of the main gate while Security Member White used his assigned patrol vehicle to block the entrance/inbound lane of the main gate. Security Member Riley took up a position on the exit/outbound side of the gatehouse. Security Member White took up a position near a sign to the far left of the gatehouse.

Security Member White asked Mr. Foley why he was there and what he wanted but Mr. Foley would not audibly respond. Security Member White could see that Mr. Foley was holding a knife in his right hand but could not see Mr. Foley's left hand. Mr. Foley was standing next to his car and continuously looking towards the main road. Security Member White asked if Mr.

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<sup>1</sup> After the incident, it was determined that Mr. Foley's handgun, which looked like a black semi-automatic pistol, was a Crosman model 1088 air-powered BB/Pellet pistol.

<sup>2</sup> The security members were armed with firearms, including rifles.

Foley was okay and Mr. Foley gave a thumbs down sign with his right hand in which he was holding the knife. Security Member White asked Mr. Foley to put the knife down and Mr. Foley again gave a thumbs down sign with his right hand. Security Member White then said, “how about stay where you are and I’ll stay where I am,” to which Mr. Foley gave a thumbs up gesture. Next, Security Member White observed Mr. Foley taking traffic cones from the road and placing them behind his car.

At that time, New Boston Police Officer Shane Morton arrived on scene.<sup>3</sup> When Officer Morton arrived, he observed Mr. Foley standing outside of his car armed with a pistol. Officer Morton immediately radioed other local law enforcement units to advise that they were dealing with an armed person and commanded Mr. Foley to put down the gun.<sup>4</sup> At the arrival of Officer Morton, Mr. Foley began to pace more actively around his car. Officer Morton ordered Mr. Foley several times to drop the gun and speak to officers. Mr. Foley did not respond to those repeated commands. Instead, Mr. Foley extended both of his arms out from his sides and pointed his weapons in the direction of both Officer Morton and Security Member White. Security Member Riley observed that Officer Morton and Security Member White were potentially in each other’s crossfire and advised Security Member White to change positions. Security Member White then moved from his position near the sign to a position on the inbound/entrance side of the gatehouse.

After not responding to Officer Morton for several minutes, Mr. Foley responded to a question about what he wanted by saying, “FBI.” Mr. Foley refused to give his name or identify himself or the reason that he wished to speak with the FBI. Mr. Foley also continued to refuse to

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<sup>3</sup> Officer Morton was armed with a pistol and a rifle.

<sup>4</sup> NBSFS security officers do not communicate over the same radio channel that local law enforcement officers use. As a result, local law enforcement officers and NBSFS units did not directly communicate with each other using their radios during the incident. There is a channel that New Boston Police and NBSFS can use to speak directly to one another, however use of the channel necessarily cuts off communication with their own agency.

drop his weapons. As time went on, Mr. Foley became increasingly agitated. At one point, he stated, “FBI or your life means nothing to me.” Less than a minute later, Mr. Foley walked from his car in the direction of Officer Morton and raised his left hand, pointing his pistol at Officer Morton. Security Member White also saw Mr. Foley raise his left hand and move aggressively towards Officer Morton, who then fired his rifle two times at Mr. Foley, missing him each time.<sup>5</sup> Security Member White heard the shots and believed that Mr. Foley had fired at Officer Morton and that Officer Morton had fired back. Security Member White then saw Mr. Foley on the passenger side of his vehicle, crouching and kneeling. Believing that Mr. Foley was armed and a threat to officer safety and base security, Security Member White fired one shot at Mr. Foley from his rifle. Mr. Foley was struck by that gunshot and fell to the road.

Officers from the Amherst and Bedford Police Departments arrived on scene as shots were being fired and did not witness the incident. After the incident, the New Hampshire Attorney General’s Office and the New Hampshire State Police Major Crime Unit were notified. The investigation into the incident began that night.

### **III. THE INVESTIGATION**

During the investigation, the scene was examined, physical evidence was collected and reviewed, and reports and records were reviewed. In addition, numerous individuals were interviewed. The information and evidence gathered during the investigation is summarized below.

#### **A. New Boston Space Force Station dispatch log**

A copy of the Station’s dispatch log was reviewed. The most relevant entries, which were documented by Operator Tyler Brace are as follows:

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<sup>5</sup> Officer Morton only recalled firing one round from his rifle. However, two discharged cartridge casings from his rifle were recovered in and on his vehicle, which is consistent with Officer Morton having fired two shots, not one.

<u>Entry #</u>	<u>Time:</u>	<u>Incident or Message and Action Taken:</u>
14	2333	Gate notified this office and related a vehicle had stopped adjacent to the first hedgehog by Commercial Lane. <sup>6</sup> The driver exited the vehicle brandishing a handgun and a knife. Units White and Riley were briefed and dispatched. This office made contact with Mutual Aid who dispatched New Boston PD, Amherst PD, and Bedford PD who were briefed and dispatched. Units White and Riley arrived on scene and set up an over watch position. White initiated a challenge of the subject which met with negative results.
	2340	New Boston PD arrived on scene and assisted with the challenge of the subject. The subject refused to drop the handgun and knife.
	2351	Shots were fired between the subject, New Boston PD, and White. The subject was hit by the gunfire and fell to the ground. Units White and Riley approached the vehicle along with local law enforcement. A check of the vehicle was conducted by local law enforcement, and it was determined the vehicle had gasoline and Propane tanks in the vehicle possibly an IED. NH State Police Bomb Squad was contacted and responded, and a cordon of the area was established. The NH State Police Bomb Squad checked the scene and determined the gas can was empty and the propane tanks had no devices or wires attached to the tanks that would indicate an IED. A thorough check of the vehicle was conducted with no IEDs attached or inside the vehicle.

## **B. Digital Evidence**

Investigators obtained and reviewed video footage of the incident from the inbound/entrance gate video at the Station and body worn camera (BWC) video from New Boston Police Officer Shane Morton.

Investigators also recovered audio and video from a Nest camera located at a private home down the road from the Station. That camera was capable of recording both audio and video. However, since the home was about two thousand feet from the scene, it did not capture any video of the incident. It did capture audio of what sounded like three gunshots fired in quick

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<sup>6</sup> A hedgehog or “Czech hedgehog” is an obstacle made of metal angle beams or I-beams that is used to keep vehicles from penetrating an area where they are deployed.

succession. Based on that audio, approximately two seconds elapsed from the time the first shot was fired until the last shot was fired.

The relevant content of the other two videos is described below. As is often the case with multiple sources of video, the timing between them does not appear to be synchronized.

### **1. The Station's inbound/entrance gate video**

The NBSFS's camera recorded poor quality video only, which means that no fine details can be seen. Regardless, the video does corroborate some of the information provided by those present during the incident. The most relevant portions are summarized below:

<u>Time</u>	<u>Action observed</u>
11:33:28 p.m.	Mr. Foley's car approached the gate. There were no lights on in the interior or exterior of the car. The car stopped, and the driver's side door immediately opened. Mr. Foley exited the car and stood at the driver's side door. For much of the video, Mr. Foley can be seen pacing in the road.
11:40:40 p.m.	New Boston Police Officer Shane Morton arrived at the area with his lights activated. A small portion of his cruiser was initially visible in the video, but then disappeared as Officer Morton backed up and went out of the video camera's view.
11:45:40 p.m.	Mr. Foley appeared to drag an object from the road, possibly a traffic cone to the rear of his car. He appeared to repeat this with a second object.
11:50:33 p.m.	Mr. Foley opened the rear driver's side door of his car and left it open.
11:50:40 p.m.	Mr. Foley resumed pacing at the rear of his car between the median and the jersey barriers. He then walked behind his car and towards the location of Officer Morton.
11:51:05 p.m.	Mr. Foley fell to the road on the passenger side of his car.
11:51:31 p.m.	A security member began moving into view toward Mr. Foley's car. Other officers eventually moved up as well.

### **2. Officer Morton's BWC Video**

Officer Morton activated his assigned Axon BWC at 11:34 p.m. while enroute to the NBSFS. Upon activation, this camera backs up and records for 30 seconds of video only; as

such, the first 30 seconds have no sound. Given the placement of Officer Morton's BWC device on the center of his chest, the camera was often blocked by his hand and his firearm's movements. A summary of the relevant footage is below:

<u>Time</u>	<u>Action observed</u>
11:35:04 p.m.	Officer Morton came to a stop and announced over the radio "105, we got a gun, we got a gun." Officer Morton immediately exited his vehicle, raised his pistol, and loudly called out, "Sir, drop the gun, drop the gun." Officer Morton then walked backwards to the rear of his vehicle.
11:35:31 p.m.	Officer Morton opened his trunk and removed his rifle. He took position on the rear passenger side of his vehicle, raised his rifle, and again loudly called out, "Sir, drop the gun, drop the gun, drop the gun, put the gun down, sir!" He then stated three times, "put down the gun, sir and we can talk."

Over the course of several minutes, Officer Morton loudly told Mr. Foley multiple times to put down the gun or talk to him with no audible response from Mr. Foley. Officer Morton also repeatedly asked Mr. Foley for his name, tried to get Mr. Foley to talk to him about what was going on with him, and told Mr. Foley they could work something out, but received no response. At times, Mr. Foley and his car are barely visible on the video. Also, due to the distance, lighting, and Officer Morton's position, no significant details can be seen on the video.

<u>Time</u>	<u>Action observed</u>
11:41:46 p.m.	Officer Morton reported that Mr. Foley was pacing back and forth.
11:43:08 p.m.	Officer Morton returned to the rear passenger side of his vehicle and again asked Mr. Foley, "What do you want, sir?" At this time, Mr. Foley stated "FBI." Officer Morton responded "Okay, put down the kni, put down the gun then." Mr. Foley said, "if you don't get the FBI on the phone, we're all going to be here for a fucking while." Officer Morton asked, "Why do you want the FBI for?" Mr. Foley angrily yelled back "They know why, they know why!"



<u>Time</u>	<u>Action observed</u>
11:43:27 p.m.	Officer Morton said, “We need to know, what’s your name.” Mr. Foley responded, “my fucking license plate is right there.” Officer Morton stated, “I can’t read it from back here,” at which time Mr. Foley said, “you got bright fucking lights.” Officer Morton again asked, “What do you want?” Mr. Foley angrily said, “FBI, the woman I fucking talked to two fucking nights ago!” Officer Morton asked, “Why do you need the FBI?” Mr. Foley responded, “ <b>FBI or your life means nothing to me!</b> ”
11:43:50 p.m.	Officer Morton again asked for Mr. Foley’s name. Mr. Foley responded, “license plate is right there.” Officer Morton stated that he couldn’t read it and then that “I just can’t call the FBI and say I got a guy, what’s your name?”
11:44:59 p.m.	Two gunshots are heard in quick succession. Then about a second later, a third gunshot was heard off in the distance. Officer Morton immediately called out on his radio to dispatch, “Shots fired, shots fired!” He then radioed dispatch, “Shots fired, shots fired, shots fired, guy down, guy down!”
11:45:30 p.m.	Officer Morton stated to responding Amherst and Bedford police officers, “he pointed a gun at me, he pointed the gun.” The officer asked, “did he shoot?” and Officer Morton responded, “no, he just fucking pointed the gun at me.” Officer Morton can be heard breathing deeply on the video.
11:46:40 p.m.	Police Officers and Security Members start to approach Mr. Foley’s vehicle to check on his condition.
11:46:44 p.m.	Dispatch announced that they are “toning out rescue now.”
11:47:22 p.m.	An officer announced, “Hey, I’ve got a propane tank in the back seat.” A short time later, an officer is heard announcing the presence of a gas tank and propane tank and that Mr. Foley is deceased.
11:48:12 p.m.	An officer announced, “Be advised, possible explosive device in the back seat, you’re going to have to notify state.”

### C. Physical Evidence

Investigators conducted a search of the scene where the incident occurred, the vehicle in which Mr. Foley arrived, and Mr. Foley’s cellular phone.

## **1. Scene**

The New Hampshire State Police Major Crimes Unit searched, processed, and documented the area at and around the main gate of the NBSFS, including the area where Mr. Foley was located, and where Officer Morton and Security Member White had been situated.

After the incident, Mr. Foley was found lying face down on the road on the passenger side of his purple 1995 Chevrolet Prism automobile. Mr. Foley suffered a single gunshot wound to the head. A wallet was recovered from Mr. Foley's left front pants pocket, which included, among other items, his Massachusetts issued driver's license. In addition, he was found to be wearing a head lamp.

That evening, the New Hampshire State Police Bomb Squad conducted a limited search of Mr. Foley's car to determine whether it contained an explosive device. This search was conducted after officers on scene observed a propane tank and a gas can in the car. The bomb squad utilized a robot to conduct an initial assessment of the vehicle and found no wires or devices. A bomb technician then approached the vehicle and located two propane tanks and a gasoline can in the back seat of the car. The technician was able to determine that there was no explosive device.

Significant physical items that were recovered on the pavement at the rear of Mr. Foley's car included a black Crosman 1088 BB/Pellet pistol (MSL-9), the right-side plastic cover of the pistol's grip (MSL-8), the left-side plastic cover of the pistol's grip (MSL-10), and a large, serrated knife (MSL-11).<sup>7</sup>

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<sup>7</sup> The two plastic pieces covering each side of the pistol's grip apparently separated from the grip when Mr. Foley's pistol hit the pavement.



*Images 2-3: Photographs showing Crosman pistol and knife recovered from behind Mr. Foley's car.*

The Crosman 1088 BB/Pellet pistol has an eight-shot magazine, which was empty. It resembles a Ruger model P345, .45 caliber semi-automatic pistol and would likely be indistinguishable from a real firearm when intact and viewed at a distance.



*Images 3-4: Photographs showing the recovered Crosman 1088 BB/Pellet pistol and a Ruger P345 .45 caliber pistol.*

During the search of the scene, investigators recovered a total of three discharged cartridge casings.<sup>8</sup> These casings were consistent with the number of shots heard on recovered video, recounted by witnesses, and appearing to have been fired from the two examined rifles. Two discharged cartridge casings that were apparently from Officer Morton's rifle were recovered from the area in and around his patrol vehicle. Specifically, a casing identified as

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<sup>8</sup> A firearm cartridge casing holds the gunpowder used to expel the bullet. The reference in this report to discharged cartridge casings means that the bullet has been fired out of a gun and the casing left behind. Both rifles used by Officer Morton and Security Member White ejected cartridge casings when they were fired. On the other hand, Mr. Foley's BB/Pellet pistol used projectiles that had no cartridge casings.

MSL-1 was recovered from the top of the center console area inside of the New Boston patrol vehicle, and a casing identified as MSL-2 was recovered from the exterior windshield well on the passenger side of the patrol vehicle.

One discharged cartridge casing that was apparently from Security Member White's rifle was recovered from the area near the gatehouse. Specifically, a casing identified as MSL-4 was recovered from a rock bed behind the main gate house on the inbound/entrance side.

## **2. Mr. Foley's Car**

After obtaining consent from Mr. Foley's family members, his car was searched. Based on the condition and contents of the car, it appeared that Mr. Foley may have been living inside his car prior to the incident. The car contained trash, non-perishable food items, camping supplies and clothing. In the front seat, investigators recovered a cellular phone, a pill bottle containing doxycycline and cyclobenzaprine pills, a pill bottle containing kratom pills, a pocketknife, and a folding knife.<sup>9</sup> A sheath for a large knife was recovered from the center console. In the backseat of the car, investigators found two propane tanks, a gasoline container, and an AirMag M50 Air Soft rifle with magazine.

## **3. Cellular Phone**

With the consent of Mr. Foley's family members, a forensic examination was conducted of Mr. Foley's cellular phone. A review of the phone's content uncovered text messages between Mr. Foley's phone and a contact identified as "Katie" on April 18, 2022, including messages stating, "I'm just letting u know I want to die. I can't take it anymore. Everything is

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<sup>9</sup> According to WebMD, doxycycline is an antibiotic, cyclobenzaprine is a muscle relaxant, and Kratom is a type of tree, the leaves of which contain a chemical that works in a manner like opioids. Kratom can have pain relieving effects and is sometimes used for drug withdrawal symptoms or for depression or anxiety. The United States Food and Drug Administration warns that Kratom is unsafe. <https://www.webmd.com/vitamins/ai/ingredientmono-1513/kratom>

just crumbling.”<sup>10</sup> On April 28, 2022, the web history for the phone showed multiple contacts with suicide prevention websites and hotlines. On May 13, 2022, the day of the incident, Mr. Foley had conducted a search for military bases in New England and then visited the Wikipedia page for the NBSFS. Mr. Foley also used Google Maps to locate and obtain directions to the NBSFS from a location at or near River Road in Weare.

**D. Interviews with the personnel who discharged their firearms**

New Boston Police Officer Shane Morton and Contracted Security Member Peter White discharged their firearms at Michael Foley during the incident. They were each interviewed as part of the investigation, and their interviews are summarized below.

**1. Officer Shane Morton**

On May 24, 2022, New Boston Police Officer Shane Morton was interviewed by members of the Office of the Attorney General. Officer Morton has served as a police officer since 2017. He began his career with the Sanborton Police Department and joined the New Boston Police Department on April 4, 2022.<sup>11</sup> While employed with the Sanborton Police Department, Officer Morton served as a member of the Belknap County SWAT team. In addition, he has been trained as a Taser Instructor and a field training officer.

On May 13, 2022, Officer Morton was on uniformed patrol and driving a marked patrol vehicle. Officer Morton was armed with a Glock .40 caliber pistol and a Rock River Arms 5.56 caliber semi-automatic rifle. He is trained and qualified on these weapons. Officer Morton’s equipment also included an Axon BWC (body worn camera), which he was wearing on the outside of his uniform, in the center of his chest.

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<sup>10</sup> “Katie” is believed to be Katie Sparanga who was interviewed during this investigation.

<sup>11</sup> Officer Morton has since left the New Boston Police Department and works for another police department in New Hampshire.

At approximately 11:34 p.m., Officer Morton was dispatched to the NBSFS for a report of a male armed with a knife and a handgun. On his arrival at the Station, Officer Morton saw a car parked on Galaxy Way about ten yards from the main gate. He stated that the car's driver's door was open and a man, later identified as Mr. Foley, was pacing back and forth near the car. Mr. Foley had a knife in his right hand and a gun in his left hand. Officer Morton drew his pistol and gave commands to Mr. Foley, telling him drop the gun, drop the knife, and let's talk. Officer Morton then switched to his rifle, which he obtained from the trunk of his patrol vehicle. Officer Morton asked Mr. Foley to drop his gun numerous times, but he did not. He asked Mr. Foley what his name was and why he was at the NBSFS, but Mr. Foley gave him a thumbs down gesture and did not verbally respond.

Officer Morton continued to try to get Mr. Foley to communicate with him but received no audible response. Eventually, Mr. Foley said that he wanted the FBI on the phone. Officer Morton understood from Mr. Foley's statements that he had been in contact with someone at the FBI and wanted to speak with them again. Officer Morton attempted to find out who Mr. Foley was by asking for his name, however Mr. Foley would not provide it. Mr. Foley did say that he wanted Officer Morton to get the FBI on the phone or his [Officer Morton's] life was not going to matter to him. Officer Morton continued to tell Mr. Foley to drop the gun and drop the knife, which Mr. Foley did not do. Instead, Mr. Foley squared his body at Officer Morton and pointed the gun at him. At that time, Officer Morton was in fear for his life and felt that if he did not act, his life and the lives of the NBSFS security officers as well as back-up officers were in immediate danger. He believed that Mr. Foley was going to shoot him. Officer Morton pulled the trigger of his rifle and recalled firing one shot at Mr. Foley. At the time that Officer Morton fired, Mr. Foley was still holding both of his weapons. Officer Morton described that after

shooting at Mr. Foley, Mr. Foley jumped and turned around to face the NBSFS security officer with the gun and knife still in his hand. Officer Morton then heard a shot and Mr. Foley fell to the road. The shot Officer Morton heard after Mr. Foley turned and faced the security officer was not from Officer Morton's rifle.

## **2. Contracted Security Member Peter White**

On May 19, 2022, members of the Office of the Attorney General conducted an interview of Contracted Security Member Peter White. Security Member White has been employed with Lockwood Hills Federal since 2016, and currently holds the rank of patrol officer and part-time supervisor. He receives annual training through the Department of Defense and participates in monthly in-service training. His training includes shoot/don't shoot scenarios using a firearms training simulator. Security Member White has extensive military experience and training.

While on duty, Security Member White carries a 9mm Beretta pistol and a Colt Defense M4 semi-automatic 5.56 caliber rifle. He is trained and qualified on both weapons.

Security Member White stated that on May 13, 2022, he was serving as shift supervisor. He was dressed in full uniform and driving in a marked Lockwood Hills vehicle equipped with emergency lights. At approximately 11:30 p.m., Security Member White received a call from NBSFS BDOC indicating that there was an armed man, later identified as Michael Foley, at the main gate. He requested mutual aid from the New Boston Police Department and initiated a response to the main gate. The response consisted of his vehicle and a vehicle operated by Security Member Jeffrey Riley. On arrival to the gate, Security Member White blocked the inbound/entrance gate with his vehicle while Security Member Riley blocked the outbound/exit gate with his vehicle.

Security Member White stated that the armed man, Mr. Foley, was standing next to his car, and wearing a camping style head lamp while holding an object in his right hand. Security Member White was later able to identify the object in Mr. Foley's right hand as a knife. Initially, he could not see Mr. Foley's left hand. Security Member White asked Mr. Foley "Why are you here and tell us what you want." He then asked, "are you okay," at which time Mr. Foley gestured thumbs down with his right hand. Security Member White asked Mr. Foley to put down the knife and Mr. Foley again gestured thumbs down. Security Member White then told Mr. Foley to stay where he was, and Mr. Foley gave a thumbs up.

Security Member White explained that he had several tactical concerns related to Mr. Foley's presence at the NBSFS main gate including whether his presence was a distraction for some other event, whether there were other individuals present, and whether there was any type of explosive device. His concern increased when Mr. Foley began moving orange traffic cones from the road to a position at the rear of his car. Security Member White described Mr. Foley's movements in taking this action as methodical. Security Member White believed that Mr. Foley might also be seeking "suicide by cop," because it appeared that Mr. Foley was waiting for other law enforcement to arrive. Specifically, he described that Mr. Foley kept looking over his shoulder towards the main road.

Security Member White stated that he observed the New Boston patrol vehicle arrive and the officer attempted to contact Mr. Foley. When the New Boston officer asked Mr. Foley to drop his weapons, Security Member White saw that Mr. Foley was holding a pistol in his left hand. At that time, Mr. Foley's demeanor changed, he became increasingly agitated, and began moving around his car while pointing his pistol alternatively at Security Member White and the New Boston patrol officer. Security Member White said that based on his training, once Mr.



Foley pointed the pistol at him, he was authorized to use lethal force. Security Member White also said that he thought that Mr. Foley could be using an air gun to prompt a “suicide by cop” situation. Regardless, Security Member White said that he was “in fear,” that his life was in jeopardy, and thought that he might get shot that night. Security Member White’s partner yelled at him that he needed to “get out of there,” because he could see that White was in the direct line of potential fire from the direction of the New Boston patrol officer.

Due to the risk of being hit by gunfire, Security Member White moved to the corner of the gatehouse to gain physical cover. As he did that, he could hear the New Boston officer “challenging” Mr. Foley, who remained “noncompliant” and “wasn’t doing what they wanted.” Mr. Foley then “abruptly” and “in an angry kind of gesture,” went to the rear of his car and opened the door and presented “it to law enforcement.” Security Member White could not see into the car, but right after that happened, he stated that he recalled receiving a message that there was “a device,” there was a liquid propane tank and gas can in the rear of Mr. Foley’s car. At that point, Security Member White said they had to treat what Mr. Foley was displaying as a “car bomb.”<sup>12</sup> Security Member White said that Mr. Foley wanted “them to see that for some reason.”

After that Mr. Foley started screaming at the New Boston officer to call the FBI, saying they knew who he was and to call the woman at the FBI. The New Boston officer was ordering Mr. Foley to drop the weapon, but he did not. Instead, Mr. Foley pointed it at the officer and at them. Security Member White described what occurred as an elevation/escalation in Mr. Foley’s level of aggression and emotion. Mr. Foley went from silent and sullen to “being like fully engaged with the cops in kind of an argumentative, high conflict kind of thing.” Mr. Foley then

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<sup>12</sup> Based on his prior experience, Security Member White was aware of the explosive and destructive capabilities of a liquid propane container like Mr. Foley had in his car.

raised his left arm and pointed his pistol at the New Boston patrol officer while advancing aggressively. Security Member White then heard what he believed was a single gunshot from a pistol, which he perceived as Mr. Foley firing at the New Boston officer.<sup>13</sup> Security Member White then heard at least one return rifle shot, which he believed had been fired by the New Boston officer. Security Member White deduced that there had been an exchange of gunfire between Mr. Foley and the New Boston officer because the officer was in fear for his life to the point that he had fired at Mr. Foley. Security Member White called in, “shots fired, shots fired,” over his radio.

After hearing what he believed was an exchange of gunfire, Security Member White saw Mr. Foley kneeling next to his car, taking cover on Security Member White’s side. Security Member White said at that time, he did not hear the New Boston officer, which made him worried that the “cops were dead.” Security Member White said he felt fear for the Station, himself, the other officers with him, and the police officers. He could not see what was in Mr. Foley’s hands but believed that he was still armed with the knife and the pistol. Security Member White then fired one shot with his rifle at Mr. Foley, who immediately fell to the road and stopped moving.

Security Member White also said that he fired at Mr. Foley because he could not allow Mr. Foley to get into his car because he believed that he had a bomb. Further, Security Member White believed that Mr. Foley could have a “long gun” in his car, or that Mr. Foley might “reengage” the officers on the other side of the car who Security Member White believed may be hurt, or that Mr. Foley was “coiling himself up” to make one final charge at Security Member

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<sup>13</sup> Security Member White’s belief that Mr. Foley had fired a shot from his pistol is consistent with Security Member Jeffrey Riley’s belief that Mr. Foley had fired as well.

White and his fellow security members. For all those reasons, Security Member White said he felt that he had to use deadly force against Mr. Foley.

**E. Interviews with others who were present when the incident occurred**

The Base Defense Operation Controller (BDOC), Operator Tyler Brace, was located inside of the NBSFS control room at the time of the incident. Operator Brace was not an eyewitness to the incident but was in radio communication with the other contracted security members during the incident. Further, two additional contracted security members assigned to the NBSFS were present during the shooting. Contracted Security Member Jeffrey Lynn was inside of the main gate's gatehouse and Contracted Security Member Jeffrey Riley was positioned on the outbound/exit lane side of the main gate, opposite from Security Member White who was positioned at the inbound/entrance lane side of the main gate. Both security members were present when the incident occurred, however they did not discharge their firearms during the incident. The interviews with these individuals are summarized below.

**1. Operator Tyler Brace**

On May 25, 2022, members of the New Hampshire State Police Major Crime Unit interviewed NBSFS BDOC Operator Tyler Brace. Operator Brace stated that he was assigned to his normal post inside of the NBSFS control center when he received a call from the gate guard, identified as Jeffrey Lynn, at 11:33 p.m. Security Member Lynn advised that a male subject, who would later be identified as Mr. Foley, arrived on base, and had a gun in one hand and a knife in the other. Upon being notified of the armed subject at the gate, Operator Brace called Goffstown Police Dispatch to obtain local law enforcement assistance.

Operator Brace noted that the incident was captured on camera, but that he could not tell what was happening over the monitor due to the video quality. He indicated that without

listening to the radio communications from the contracted security members he was not able to personally determine what was happening. Operator Brace did not have radio communications with local law enforcement or local dispatch.

Over the video surveillance, Operator Brace could see that Mr. Foley was moving around and based on what he observed, he believed that it appeared something was wrong. Operator Brace could see that Mr. Foley was raising, extending, and lowering his arms. According to Operator Brace, the incident was essentially a stand-off from the time of Mr. Foley's arrival with security members attempting to speak with him and question him. At 11:51 p.m., Operator Brace was notified that shots had been fired. He requested EMS support. Shortly thereafter, at 11:54 p.m., he was notified that propane tanks were found in the subject's vehicle and requested that the bomb squad respond to the location as well.

## **2. Contracted Security Member Jeffrey Lynn**

On May 17, 2022, members of the New Hampshire State Police Major Crime Unit interviewed Contracted Security Member Jeffrey Lynn. Security Member Lynn stated that on the night of the incident, he was assigned as the main gate guard and was in position inside of the gatehouse. In this assignment, Security Member Lynn was armed with an M4 rifle and pistol.

Security Member Lynn advised that on the night of the incident, close to 11:15 p.m., he observed a small size, sedan style car with no lights on, driving slowly towards his position at the main gate. He described the approach of the vehicle as unusual and noted that there were no scheduled visits for that time of the night. Security Member Lynn stood up to better observe the vehicle, at which time the vehicle stopped, and the male driver, later identified as Michael Foley immediately stepped out onto the road. Mr. Foley was holding a knife in his right hand. Security Member Lynn called to let the dispatcher know what was happening; he noted that

while he was equipped with a radio it was not working properly that evening. While making the call, he noticed that in addition to the knife in his right hand, Mr. Foley was holding a firearm in his left hand.

Following the call, Security Member Lynn saw Security Member White arrive at the inbound/entrance side of the gatehouse, block that gate with his vehicle, and then exit his vehicle to take up a position on the same side. Further, he saw Security Member Riley arrive at the outbound/exit side of the gatehouse, block that gate with his vehicle and then exit his vehicle to take up a position on that same side. Security Member Lynn advised both men that Mr. Foley had a gun.

Security Member Lynn saw Mr. Foley pacing outside of the vehicle, but indicated that he did not move too far from the vehicle in any direction. After a period of time, Security Member Lynn observed a New Boston Police Member arrive on scene with the emergency lights on his vehicle activated. As the New Boston Police vehicle drove towards him, Mr. Foley raised both of his arms and then pointed his left hand with the gun at the police vehicle. At the same time, Mr. Foley extended his right hand with the knife towards the NBSFS gate. Mr. Foley subsequently moved some orange safety cones from the road to a location behind his vehicle. Security Member Lynn could not hear any conversations outside of the gatehouse, but knew that Mr. Foley was speaking with someone because he was making hand gestures such as thumbs up or thumbs down with his right hand. Mr. Foley then opened the rear driver's side door of his vehicle. Mr. Foley later moved to the rear of his vehicle and was pacing around his vehicle. At all times, Mr. Foley kept the gun in his left hand and the knife in his right hand.

Security Member Lynn stated that he looked down at his phone and then heard a gunshot. After hearing the gunshot, he looked up and saw that Mr. Foley was ducking down on the

passenger side of his vehicle. He heard a second gunshot but was not certain who was firing. He then heard a third gunshot and saw a tracer round from the location where Security Member White was located. The first round in each Security Member's weapon is a tracer round and this allowed Security Member Lynn to recognize that the third shot that was fired had come from Security Member White's weapon.<sup>14</sup> Security Member Lynn advised that this third shot struck Mr. Foley, causing him to collapse on the passenger side of his vehicle.

### **3. Contracted Security Member Jeffrey Riley**

On May 17, 2022, members of the New Hampshire State Police Major Crime Unit interviewed Contracted Security Member Jeffrey Riley. Security Member Riley stated that on the night of the incident he was assigned a "roaming post" to cover the interior perimeter of the NBSFS. He stated that at approximately 11:33 p.m., he was directed to respond to the main gate for an armed person. Security Member Riley indicated that he arrived at the gate at almost the same time as Security Member White. On arrival, he placed his vehicle in the outbound/exit lane and then observed a vehicle parked in the middle of the entrance lane. He saw a male, later identified as Michael Foley, standing outside of the vehicle holding a knife over his head.

Security Member Riley indicated that Security Member White handled all the commands so that Mr. Foley would not be confused with multiple people talking to him. He indicated that he did not know how long it was, but that a New Boston patrol officer arrived on scene fairly quickly. Security Member Riley noticed that Security Member White was positioned directly down range from the New Boston patrol officer and directed Security Member White to move. At that time, the New Boston patrol officer tried to communicate with Mr. Foley. When the New Boston patrol officer arrived on scene, Security Member White saw Mr. Foley display a handgun

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<sup>14</sup> A "tracer round" is a bullet that is equipped with a chemical on its base that allows the bullet's path of travel to be visible after it is fired from a gun.

that he was holding in his left hand. Mr. Foley was initially pointing the knife towards the security members and the handgun towards the New Boston patrol officer, but he began turning in a circle pointing the gun at the New Boston patrol officer and then at the NBSFS security members.

Security Member Riley stated that the New Boston patrol officer was asking Mr. Foley repeatedly what he wanted, and that Mr. Foley replied that he wanted to speak with the FBI. Mr. Foley then opened the driver's side rear door to his car. Security Member Riley observed Mr. Foley remove traffic cones from the roadway and stack them up around his car. Mr. Foley's demeanor changed, he was no longer calm, and he started pacing. Security Member Riley saw Mr. Foley point his handgun towards the New Boston patrol officer and believed that Mr. Foley fired a shot at the officer. Security Member Riley stated that he saw a little flash from Mr. Foley's gun and saw smoke.<sup>15</sup> The New Boston patrol officer then fired a shot and Security Member White fired a shot. Following the three gunshots, Mr. Foley fell to the road on the passenger side of his vehicle. After Mr. Foley fell to the road, Security Member Riley and Security Member White approached him and his vehicle. On approaching the vehicle, he observed propane tanks and a gasoline tank in plain view in the open rear driver's side door of the vehicle.

**F. Interviews with people who knew Michael Foley**

The State Police interviewed several people who knew Mr. Foley. Their interviews are summarized below.

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<sup>15</sup> Upon firing, a BB/Pellet pistol like Mr. Foley's can emit a puff of vapor from the barrel that looks similar to gun smoke. That could account for the "smoke" Security Member Riley saw from Mr. Foley's pistol.

## **1. Katie Sparagna**

On May 23, 2022, Ms. Sparagna was interviewed over the phone. Investigators had received information that Ms. Sparagna had contacted the Concord Police Department to request a welfare check on Mr. Foley due to concerns that he was suicidal.

Ms. Sparagna reported that she had known Mr. Foley and been his close friend since they were teenagers. She indicated that Mr. Foley had a history of suicidal ideation. Of import to this investigation, Ms. Sparagna advised that on April 29, 2022, Mr. Foley had sent her a text message that seemed “off” to her. She called him to talk about it and he expressed that he had taken a bunch of pills as a suicide attempt. She stated that Mr. Foley expressed trying to call a suicide hotline. She was able to determine that Mr. Foley was in Concord at the time of this conversation and contacted the police. This interaction was the last time she spoke with him. Ms. Sparagna advised that Mr. Foley was not a fan of the police and was angry and depressed. Further, she stated that she believed Mr. Foley provoked the officers to shoot him.

## **2. Jamie Bradshaw – Michael Foley’s sister.<sup>16</sup>**

On May 24, 2022, Ms. Bradshaw was interviewed over the phone. She stated that her family had not been in contact with Mr. Foley for three or four years following a time where Mr. Foley was asked to leave because of a family incident. Ms. Bradshaw told investigators that Mr. Foley had “literally walked away from everybody.” Ms. Bradshaw told investigators that Mr. Foley had been suffering from mental health issues for most of his life but did not know if he had received any treatment after his eighteenth birthday.<sup>17</sup> Further, she advised that Mr. Foley did not have a good relationship with law enforcement due to multiple prior interactions with police. She said that, “he wanted to end his life, but I don’t think he could bring himself to do it.” Ms.

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<sup>16</sup> Mr. Foley’s mother was also present for part of the phone interview and provided information as well.

<sup>17</sup> Mr. Foley’s mother said that he had been hospitalized as a juvenile for depression.



Bradshaw stated that she believed that Mr. Foley chose the time and location where the incident took place because he did not want anyone else to get hurt.

**G. Autopsy Results**

On May 15, 2022, Deputy Chief Medical Examiner Dr. Mitchell L. Weinberg conducted an autopsy on Mr. Foley. During his examination, Dr. Weinberg documented a single gunshot wound to Mr. Foley’s right forehead. There was no evidence that the gunshot was fired from close range.

Mr. Foley also had superficial blunt force injuries on his face, which were consistent with him falling to the road after being shot. Toxicology testing was conducted and found only the presence of caffeine in Mr. Foley’s blood.

Dr. Weinberg concluded that Mr. Foley’s cause of death was a gunshot wound to the head, and that his manner of death was homicide. As used by the Office of the Chief Medical Examiner, homicide is defined as the killing of one person by another.

**H. Incidents involving Michael Foley prior to May 13, 2022**

Mr. Foley’s prior interactions with law enforcement were reviewed in order to gain information relevant to his actions, motives, and state of mind at the time of the incident. Those contacts included several recent calls related to suicidal ideation and/or criminal threatening:

<u>Date/time</u>	<u>Facts</u>
May 11, 2022, 9:02 p.m.	Mr. Foley called the FBI National Threat Operations Tip Line and stated that he had “terroristic thoughts.” He said he wanted the FBI to “put a bullet in his head.” He said that he had committed a terrorist attack in 2012, but the FBI let him get away. He said he needed psychiatric help which he described as a bullet in the head.

Date/time	Facts
May 11, 2022, 8:54 p.m.	The FBI National Threat Operations Tip Line contacted the Palmer, Massachusetts Police Department reporting that Mr. Foley called the tip line making statements suggesting suicide by law enforcement. <sup>18</sup> Mr. Foley's parents were contacted and advised they hadn't been in contact with him for four years. Mr. Foley's cellular phone was pinged and determined to be near Peterborough, New Hampshire. Palmer Police Department notified the Peterborough Police Department and New Hampshire State Police.
May 11, 2022, 8:33 p.m.	Mr. Foley called the FBI National Threat Operations Tip Line and requested mental health services. He indicated that he wanted to do something terrorist to others or himself. Mr. Foley discussed being a veteran and having stolen a Humvee while in the Army National Guard in 2012. He blamed the FBI for failing him. Mr. Foley said he was bi-polar and threatened to commit an act of violence.
May 11, 2022, 4:22 p.m.	Concord Police Department was notified by the mobile crisis line that Mr. Foley had called and stated that he intended to blow up Riverbend. <sup>19</sup> Mr. Foley advised the crisis line operator that he was going to get shot in the head before the end of the night and hoped that the police had their bullets with them. The Watch Commander called Mr. Foley's mother, Lisa Foley, who said she had not had contact with her son for three years. Lisa said that Mr. Foley had struggled with mental health, was in the army before, but left and went to jail for something. She did not know where he was or what he was driving for a car. The Watch Commander called Mr. Foley, who said he was sorry for what he had said earlier and was not going to hurt anyone. Mr. Foley declined to say where he was located. He said he believed that the Watch Commander wanted to shoot him. The Watch Commander said that Mr. Foley exhibited mood swings during his two calls with him. An attempt was made to locate Mr. Foley's phone, which was determined to be around Weare, New Hampshire. A BOLO was put out to check on Mr. Foley and to use caution around him. <sup>20</sup> The Weare Police called Concord PD and said that they were familiar with Mr. Foley and had dealt with similar issues recently. They also said that he was known to live in his car near a storage shed he rented. Mr. Foley later called the crisis line again and stated he was going to

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<sup>18</sup> Mr. Foley's cellular phone was registered to an address in Palmer, MA.

<sup>19</sup> Riverbend Community Mental Health has a location on Pleasant Street in Concord, NH.

<sup>20</sup> "BOLO" stands for "be on the lookout." It is used by police departments to notify other agencies of events or people of interest, and for officer safety purposes.

<u>Date/time</u>	<u>Facts</u>
	Manchester to commit a lot of crimes and hurt people. Another attempt was made to locate Mr. Foley's phone, which showed a location in Winchendon, Massachusetts. The Manchester Police Department was notified, and the BOLO was updated with information about Mr. Foley's car that was provided by Weare PD.
May 4, 2022, 9:25 p.m.	The Rapid Response suicide hotline contacted the Palmer, Massachusetts Police Department, reporting that Mr. Foley had expressed suicidal ideation.
April 29, 2022, 7:24 p.m.	The Goffstown Police Department received a call from Mr. Foley's friends that Mr. Foley had threatened to kill himself by overdosing on pills. The caller reported that Mr. Foley had tried to kill himself the night before and was surprised that he woke up. The caller further noted that he is not friendly towards law enforcement and can be aggressive. Mr. Foley was located by tracking his cell phone and he said that he was fine. He told the officer that he was not going to harm himself and had plans for the future. Mr. Foley said that he respected law enforcement but did not trust them. He told the officers that he had a job but lived in his car. Mr. Foley denied being depressed but was put in contact with River Bend community counseling.

**I. Additional Follow-up**

On August 23, 2022, the Office of the Attorney General received an email communication reported to be from a woman named Olivia Sullivan; the message contained no additional contact or identifying information. The email communication stated in part that “[a]fter the shooting, [Contracted Security Member Peter] White told numerous people to include security guards, that when he shot the man that night, the man was on his knees with his arms and hands outstretched to the sky somewhat moaning as he looked up in the air towards the sky, with no gun in his hand. He then shot him, unarmed. The gun was in the backseat of the car at the time.” The author then named several security employees by last name only to include Hamel, Brace, Kohler, and Heck as having information related to these reported statements.

The e-mail communication contained information concerning details of the scene, including the presence of gas cans in the back seat of Mr. Foley's vehicle. However, this information was made public in the publication of the Air Force Review Board report on August 9, 2022. Further, the e-mail indicated that Mr. Foley's gun was in the backseat of his car, instead of outside, on the ground, where it was found. While the video surveillance footage is grainy, no officers could be seen approaching the interior of Mr. Foley's car or removing any items from it.

To further investigate Ms. Sullivan's claims, investigators from the Office of the Attorney General contacted her over the email address she provided but received no response. Further, investigators attempted to identify Ms. Sullivan, but were unable to do so.

Despite the inconsistencies in Ms. Sullivan's claims, on September 8, 2022, investigators conducted follow-up interviews with the contracted security members identified as Chris Hamel, Tyler Brace, Jeffrey Koehler, and Andrew Heck. Those interviews did not substantiate Ms. Sullivan's claims.

#### **IV. APPLICABLE LAW AND LEGAL STANDARDS**

New Hampshire's laws regarding self-defense, defense of others, and the use of physical force by law enforcement are set forth in RSA Chapter 627.

Pursuant to RSA 627:4, II(a), and RSA 627:5, II(a), a private citizen and a law enforcement officer are justified in using deadly force when they reasonably believe that such force is necessary to defend themselves or a third person from what they reasonably believe to be the imminent use of deadly force. Under RSA 627:9, II, "deadly force" is defined as "any assault . . . which the actor commits with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily injury." "Purposely firing a firearm capable of

causing serious bodily injury or death in the direction of another person . . . constitutes deadly force.” RSA 627:9, II.

The phrase “reasonably believes” means that the actor “need not have been confronted with actual deadly peril, as long as he could reasonably believe the danger to be real.” *State v. Gorham*, 120 N.H. 162, 163-64 (1980). Therefore, a mistaken belief that deadly force was necessary may still be justified if that mistaken belief was reasonable. The term “reasonable” is “determined by an objective standard.” *State v. Leaf*, 137 N.H. 97, 99 (1993). Further, all of the circumstances surrounding the incident should be considered in determining whether the actor had a reasonable belief that deadly force was necessary to defend himself or another. When reviewing a deadly force incident, the actor’s conduct should be viewed considering “the circumstances as they were presented to him at the time, and not necessarily as they appear upon detached reflection.” *N.H. Criminal Jury Instructions*, 3.10. In other words, when analyzing the reasonableness of an actor’s use of deadly force, the inquiry must focus on the situation from the standpoint of a reasonable person facing the same situation. That examination cannot be made with the benefit of hindsight. The amount of deadly force used by the actor to protect himself or another must be reasonable, and not excessive. *See State v. Etienne*, 163 N.H. 57, 70 (2011).

The reasonableness standard also applies in a situation where a person who uses deadly force is mistaken about the situation or the necessity of using deadly force. Thus, either a private citizen or a police officer may still be justified in using deadly force if he reasonably believed that he was in imminent danger from the use of deadly force by another, even if, in fact, he was not, so long as the actor’s belief was objectionably reasonable.

Federal cases, while largely addressing the civil standards that apply to federal civil rights lawsuits, provide some discussion of the “reasonableness” standard for the use of force by police

officers that is useful in analyzing officer-involved use of force cases in this state. In *Graham v. Connor*, 490 U.S. 386 (1989), the United States Supreme Court stated that “[t]he ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” *Id.* at 396. The Supreme Court continued:

The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation. *Id.* at 396-97; *see also Ryburn v. Huff*, 565 U.S. 469, 477 (2012) (same).

The Eleventh Federal Circuit has noted that:

The Supreme Court has emphasized that there is no precise test or ‘magical on/off switch’ to determine when an officer is justified in using excessive or deadly force. Nor must every situation satisfy certain preconditions before deadly force can be used. Rather, the particular facts of each case must be analyzed to determine whether the force used was justified under the totality of the circumstances. *Garczynski v. Bradshaw*, 573 F.3d 1158, 1166 (11th Cir. 2009) (citations omitted).

That is because “the law does not require perfection – it requires objective reasonableness.” *Phillips v. Bradshaw*, No. 11-80002-CIV, 2013 WL 1296331, at \*17 (S.D. Fl. Mar. 28, 2013). The law must account for the fact that dangerous situations often unfold quickly, and law enforcement officers sometimes need to make quick decisions under less-than-ideal circumstances. *See Huff*, 565 U.S. at 477 (finding that appeals court panel “did not heed the District Court’s wise admonition that judges should be cautious about second-guessing a police officer’s assessment, made on the scene, of the danger presented by a particular situation”).

These are the legal standards that help guide the Attorney General’s review of the use of deadly force by a private citizen and a law enforcement officer in New Hampshire.

## V. ANALYSIS AND CONCLUSION

Based on all the facts and circumstances of this case, the Attorney General has concluded that New Boston Police Officer Shane Morton and Contracted Security Member Peter White were legally justified when they used deadly force against Michael Foley.

At the time that he was shot, Mr. Foley was armed with two deadly weapons, a knife and what Officer Morton and Security Member White believed was a firearm in the form of a pistol. After Mr. Foley was shot, investigators learned that the pistol he was carrying was not a firearm but was, instead, a CO2-cartridge-powered BB/Pellet pistol.<sup>21</sup> However, since neither Officer Morton, nor Security Member White knew that Mr. Foley was brandishing a BB/Pellet pistol, the pertinent analysis is whether their mistaken belief that he was armed with a firearm and presented an imminent risk of deadly force was reasonable under the circumstances.

Officer Morton and Security Member White's belief that Mr. Foley was armed with a firearm was reasonable under the circumstances. Mr. Foley's BB/Pellet pistol looked like a firearm to both men because it was similar in color, overall size, and general appearance to an actual operable firearm, especially at the distance it was viewed at night. The belief that Mr. Foley's BB/Pellet pistol was an actual firearm was bolstered by the fact that his pistol did not have any clear, visible indicators that would have suggested that it was not an actual firearm, such as an orange or brightly colored barrel tip. In addition, Mr. Foley wielded his pistol as if it was an actual firearm, by pointing it at Officer Morton and Security Member White in a threatening manner. The fact that Security Members Jeffrey Lynn and Jeffrey Riley also believed that Mr. Foley was armed with a firearm further supports the reasonableness of Officer Morton and Security Member White's conclusion that Mr. Foley's pistol was a firearm.

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<sup>21</sup> In other jurisdictions, courts have held that using or even just brandishing an air gun can constitute the use of deadly force under appropriate circumstances. *See, e.g., State v. Hardy*, 896 A.2d 755, 761-764 (Conn. 2006) (citing cases).

The fact that Officer Morton and Security Member White believed that Mr. Foley was armed with a firearm also supports their conclusion that Mr. Foley presented an imminent risk of deadly force. According to Officer Morton, he fired at Mr. Foley because he believed that Mr. Foley was about to fire at him. Just prior to Officer Morton firing his rifle, Mr. Foley had moved towards him, squared off, and pointed his pistol at Officer Morton. That conduct, coupled with Mr. Foley's prior erratic and aggressive behavior, and his repeated refusal to drop his weapons, created a reasonable belief that Mr. Foley posed an imminent threat of deadly force.

Security Member White also described Mr. Foley's erratic and aggressive behavior prior to shots being fired, as well as Mr. Foley's repeated refusal to drop his weapons. Just prior to the shots being fired, Security Member White saw Mr. Foley move towards Officer Morton and point his pistol at him. Security Member White then heard what he believed was a gunshot from Mr. Foley firing a pistol at Officer Morton. After that, Security Member White heard at least one return rifle shot, which he believed had been fired by Officer Morton. Security Member White deduced that there had been an exchange of gunfire between Mr. Foley and Officer Morton because the officer was in fear for his life, to the point that he had fired at Mr. Foley.

After hearing what he believed was an exchange of gunfire, Security Member White saw Mr. Foley taking cover next to his car. Security Member White said at that time, he did not hear Officer Morton, which made him worried that the "cops were dead." Security Member White said he felt fear for himself, the other officers with him, and the police officers. He could not see what was in Mr. Foley's hands but believed that he was still armed with the knife and the pistol. Security Member White then fired one shot with his rifle at Mr. Foley, who immediately fell to the road and stopped moving.



Based on where Mr. Foley's pistol and knife were later found, it is possible that he dropped them after Officer Morton fired at him. However, Security Member White did not see that happen. Further, even if the sound Security Member White heard was not a pistol shot from Mr. Foley, but was, in fact, Officer Morton's first rifle shot, those potential mistakes were reasonable. Security Member White's belief that Mr. Foley had, in fact, fired his pistol at Officer Morton was reasonable, given the way Mr. Foley had wielded his pistol, he had never dropped the pistol or firearm prior to shots being fired, and the sound of gunfire Security Member White heard when Mr. Foley pointed his pistol at Officer Morton. The reasonableness of Security Member White's belief that Mr. Foley had fired a shot from his pistol is bolstered by the fact that Security Member Jeffrey Riley also believed that Mr. Foley had fired his pistol. That, coupled with Mr. Foley's prior erratic and aggressive behavior, and the fact Security Member White saw no signs of surrender from Mr. Foley created a reasonable belief that Mr. Foley posed an imminent threat of deadly force.

Security Member White's decision to fire at Mr. Foley must also be evaluated in light of the fact that the law regarding self-defense recognizes that dangerous situations often unfold quickly, and that law enforcement officers sometimes need to make quick decisions under less-than-ideal circumstances. Based on the video evidence, it is apparent that the stand-off with Mr. Foley was a dangerous situation and that things moved quickly once Mr. Foley pointed his pistol at Officer Morton. Based on those circumstances, and the rapidity of events that followed the first shot, Security Member White's decision to fire was reasonable under the circumstances, even if some of his beliefs about the circumstances were mistaken.

Officer Morton and Security Member White's use of deadly force was also reasonable because it was not excessive and occurred after a prolonged attempt to bring about a peaceful

resolution to the standoff with Mr. Foley. Even though Mr. Foley was armed with two deadly weapons during the incident, and never complied with orders to drop them, Officer Morton and Security Member White did not immediately resort to deadly force. Instead, they attempted to diffuse the situation by talking to Mr. Foley. Despite those efforts, Mr. Foley became increasingly agitated and escalated the threat he posed by pointing his gun at others.

Accordingly, based on a review of all the evidence, and considering all the facts and circumstances known to Officer Morton and Security Member White at the time, it was objectively reasonable for them to conclude that Mr. Foley constituted an imminent threat of deadly force on May 13, 2022, when he was shot and killed. Therefore, Officer Morton and Security Member White were legally justified in using deadly force against Mr. Foley, and no criminal charges will be filed for the use of deadly force against him.

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