

ATTORNEY GENERAL'S REPORT ON OFFICER-INVOLVED SHOOTING INCIDENT IN WEARE, NH ON AUGUST 14, 2013

I. Introduction

The purpose of this report is to summarize the Attorney General's findings and conclusions with regard to the officer-involved deadly force incident that occurred in Weare, New Hampshire, on August 14, 2013. The findings and conclusions contained in this report are based on information gathered during the investigation, including viewing the scene of the incident, reviewing photographs and diagrams, reviewing documents, conducting and reviewing witness interviews, and speaking with investigators. In addition, relevant witnesses testified before the grand jury regarding the incident.

As provided in RSA 7:6, the Attorney General is the State's Chief Law Enforcement Officer. The Attorney General has the responsibility to ensure that whenever deadly force is used by law enforcement officers, it is done in conformity with the law. Following a full investigation of a deadly force incident, the Attorney General must determine whether the use of deadly force was justified and, if not, whether the involved officer should face criminal charges. With respect to the latter issue, the inquiry is whether the State can sustain its burden of proof in a criminal trial. In the context of an officer-involved shooting, the State would be required to prove the officer's guilt beyond a reasonable doubt, with the added burden of disproving any justification defense beyond a reasonable doubt. See RSA 626:7(a)¹, RSA 627:1.²

In this case, Weare PD (Weare PD) Sergeant Kenneth Cox (Cox) and Officer Nicholas Nadeau (Nadeau) both discharged their weapons, using deadly force against Alex Jose Cora deJesus (deJesus) following a drug investigation in the Town of Weare on the night of August 14, 2013. The two rounds fired from Cox's handgun imbedded in the passenger side of the vehicle driven by deJesus (the deJesus vehicle), but they did not cause any injury to deJesus or to his passenger, Tabitha Scott.³ One round from Nadeau's shotgun hit deJesus in the temple, causing his death. Both officers were cooperative with the investigation and provided audio-taped statements, with their counsel present, on multiple occasions. Each officer claimed that he had discharged his firearm under a belief that deadly force had been or was being used against himself and another officer, and thus, believed he was acting in self-defense and in defense of others. Since it has been determined that it was Nadeau's shotgun round that caused deJesus's death, it is his conduct and his beliefs that are the main focus of this report.

The Attorney General's Office and the New Hampshire State Police Major Crime Unit investigated Nadeau's rationale for using deadly force. His actions are not criminally chargeable unless the State can prove that it was unreasonable for him to believe that use of deadly force was necessary to defend himself or another against the imminent use of deadly force. A

¹ RSA 626:7(a) places the burden on the State to disprove any defense raised beyond a reasonable doubt.

² RSA 627:1 and 627:5 define Physical Force in Law Enforcement as a defense to any criminal charge.

³ The investigation determined that the two rounds fired by Cox did not cause any serious bodily injury or death. However, if Cox's gunshots had caused death or serious bodily injury, the circumstances indicate his actions likely would have been justified under the law.

mistaken belief, if reasonable, is sufficient under the law to justify the use of deadly force; whereas “[a] belief which is unreasonable, even though honest, will not support the defense.” *State v. Vassar*, 154 N.H. 370, 373-34 (2006). In other words, the focus of the investigation was (a) whether the use of deadly force was justified and (b) if it was not justified, whether the officer’s conduct is chargeable as a crime.

Despite a thorough investigation, the Attorney General is unable to determine whether or not Nadeau’s conduct was justified. As is explained in more detail in this report, the inability to reach a conclusion regarding justification is due to conflicting witness statements and a lack of sufficient corroborating evidence, both from witnesses and the physical evidence. Correspondingly, these circumstances lead to the conclusion that there is insufficient evidence to charge Nadeau with a crime for causing deJesus’s death. Nadeau initially told investigators that he believed that he fired his shotgun twice at the deJesus vehicle. At other times during the investigation, Nadeau said he was unsure of how many times he had fired his weapon and where he was when he did so. Regardless, the physical evidence reveals that he only fired his shotgun once, and the shot entered from either the rearmost passenger side window or the rear hatch window of the vehicle. It is unclear, however, exactly where Nadeau was standing in proximity to the deJesus vehicle when he fired that shot. In other words, Nadeau’s exact location in relation to the vehicle when he fired the fatal shot cannot be established, therefore, it cannot be determined whether or not his actions were justified.

However, the inquiry does not end there. Even if an officer’s use of force appears to be unjustified because he was mistaken as to the necessity of using deadly force, before a criminal charge is lodged, the State must have a reasonable belief that it can sustain its burden at trial—to disprove, beyond a reasonable doubt, the officer’s claim that his mistaken belief was reasonable. In this case, there is insufficient evidence to prove that Nadeau’s mistaken beliefs were unreasonable beyond a reasonable doubt. Accordingly, for the reasons explained in more detail in this report, Nadeau will not be charged with any crime arising from the August 14, 2013 shooting death of deJesus.

The length of time to complete this investigation

Whenever a homicide occurs, be it one involving a police officer or a private citizen, the Attorney General’s Office and the investigating law enforcement agency endeavor to complete the investigation as accurately and as quickly as possible. However, because each homicide is different, the time it takes to complete any particular investigation varies, depending on the circumstances.

In this case, the timeline for completing the investigation was extended by a variety of factors. First, this was a complicated case. Several of the involved officers, and several private citizens, were in a variety of different positions throughout the events. This meant that no one witness was able to give a complete overview of all of the events that led to the shooting. Second, there were significant conflicts between the accounts of the witnesses. In an attempt to resolve those conflicts, witnesses had to be re-interviewed on multiple occasions. Third, as is sometimes the case, there was no physical evidence that could definitively resolve the issues

raised by the shooting. Fourth, scheduling was difficult at times given the number of witnesses involved and the fact that each Weare police officer had counsel, whose schedules also had to be accommodated.⁴ Fifth, in order to thoroughly investigate this matter, the relevant witnesses were called before a grand jury in February and March. And finally, as with any homicide case resources were an issue. While significant resources were devoted to this investigation, other pre-existing investigations and the new ones that arose while this investigation was pending also required work. For all these reasons, this investigation took longer than the typical officer-involved deadly force investigation.

Summary of Facts

As stated earlier, the facts set forth in this report are derived from witness interviews, the crime scene documentation, the New Hampshire State Police Technical Accident Reconstruction Unit (TAR Team) analysis, and grand jury testimony. Since grand jury testimony is confidential, the details of that testimony cannot be disclosed or discussed in this report. However, the information obtained during the grand jury process was considered in reaching the conclusions detailed in this report.

In the weeks leading up to August 14, 2013, officers of the Weare PD were working with a confidential informant (CI#1) to purchase a quantity of heroin from CI# 1's supplier who lived in Manchester, New Hampshire. On August 14, 2013, CI#1 was directed by members of the Weare PD to drive from Weare to Manchester to pick up "its" source and return to Weare to sell a "finger" of heroin⁵ to a new customer, another CI (CI #2), working with the Weare PD. However, CI #1's source, later identified as Alex Cora deJesus, did not return to Weare with CI#1. CI#1 informed police that deJesus had recently used heroin and cocaine and because of that he did not want to make the trip. Instead, deJesus sent a woman to conduct the transaction. This woman, CI#3, was arrested in Weare when she sold CI #2 a finger of heroin for \$600. She then agreed to cooperate with the police and arranged another purchase of heroin from her source, whom she identified only as Alex, for that night in Weare, NH. CI #3 telephoned Alex, while supervised by the officers inside the police department. During their monitored, but unrecorded, phone conversation, deJesus agreed to meet CI#3 at the Dunkin Donuts parking lot on Route 114 in Weare, to collect the \$600 from the first transaction and to sell his new customer, CI #2, another finger of heroin.⁶

At around 10:00 pm, five officers from the Weare PD Sergeant Joseph Kelley (Kelley), Sergeant Kenneth Cox (Cox), Detective Frank Hebert⁷ (Hebert), Officer Brandon Montplaisir (Montplaisir), and Nadeau) along with CI #1 and CI #2, all drove from the Weare PD to Dunkin Donuts and parked in various locations throughout the Lanctot's Plaza parking lot. When deJesus arrived, CI#1 walked up to his driver's side door. When CI#1 moved away from

⁴ Former Weare police Sergeant Joseph Kelley arranged for every officer to be provided with a lawyer at town expense. This was unusual and unprecedented in cases like this.

⁵ A finger of heroin generally weighs approximately 10 grams (.35 ounces).

⁶ The facts are disputed as to whether deJesus agreed to make another sale of heroin or whether he only drove to Weare to collect the \$600 he was owed from the first sale. In either event, his act of driving to Weare was a continuation of his criminal conduct.

⁷ Detective Hebert has since been promoted to Detective Sergeant.

deJesus's vehicle the officer observing the interaction, Cox, gave the arrest signal, which was "go, go, go." The three unmarked cruisers then pulled in towards the deJesus's vehicle, one with lights and sirens activated, the other two with lights only.⁸

Despite being virtually boxed in by the unmarked cruisers and being commanded to stop at gun point by two uniformed police officers, deJesus did not get out of his vehicle. Instead, he drove his vehicle between two unmarked cruisers, turned sharply to the right, drove over the grass and then onto Route 114, southbound. A few hundred yards south of Lanctot's Plaza the deJesus's vehicle veered off Route 114 and into a grove of trees at Greaney's Farm Stand.

As deJesus was attempting to escape in his car, both Cox and Nadeau fired their weapons at his vehicle. Cox first fired two rounds at the passenger side of the deJesus's vehicle, aiming for deJesus's back. Cox said he fired his weapon because at that moment, he saw Kelley to the right of the vehicle and believed that the deJesus's vehicle was going to hit him. In fact, it was Nadeau he saw.

Nadeau jumped out of the path of the on-coming vehicle, however, without being hit. He thought that the exterior, passenger rear-view mirror may have lightly made contact with his stomach, although he was unsure. At some point he fired his shotgun. Over the course of several interviews, Nadeau offered three reasons for firing his shotgun. As he maneuvered out of the vehicle's path, he believed that Kelley, whom he thought had been behind him, was now in the vehicle's path. In addition, Nadeau stated that he believed that Cox may have already been hit by the vehicle as it made its way between the two cruisers and may have been caught and dragged under the vehicle as it headed towards Route 114. Nadeau also said that when he fired his weapon he believed that the deJesus's vehicle posed an imminent danger to other traffic on Route 114 and deadly force was necessary to effect deJesus's arrest due to his erratic operation in the parking lot and across the grass. Based upon all of these beliefs, Nadeau fired his shotgun as the vehicle passed by him, aiming at the back of the driver's side headrest.⁹ Nadeau initially reported that he fired his shotgun twice, once he believed was through the furthest back passenger side window and the second he believed was through the back window of the vehicle. However, in later interviews, Nadeau stated that he was not sure if he had fired once or twice.¹⁰ The one documented round that came from Nadeau's shotgun hit deJesus in the temple, traveling right to left, causing his death.

II. Facts

A. The Drug Investigation

Members of the Weare PD began a drug investigation with the cooperation of CI#1. CI#1 had agreed to cooperate with the police in exchange for consideration on "its" pending

⁸ Cox was in one cruiser, Montplaisir was driving the cruiser with Hebert in the passenger seat, and Kelley was driving the cruiser with Officer Nadeau as a passenger.

⁹ The location of the deJesus vehicle at the time Nadeau fired is not clearly established by the physical evidence and the witnesses' statements are conflicting on this point.

¹⁰ Based upon the number of spent and unspent rounds collected at the scene, the investigators believe that Nadeau probably fired only one time.

DWI and drug charges. CI#1 told police that “its” source lived in Manchester, New Hampshire. Rather than contacting the Manchester Police Department’s Special Investigation Unit to investigate an individual who was living in and selling drugs in Manchester, the Weare police continued to investigate on their own.¹¹ In the afternoon of August 14, 2013, the officers directed CI#1 to drive to Manchester to get “its” source and drive him back to Weare. To entice deJesus to travel to Weare, CI#1 used the pretext that “it” would introduce “its” source to a new customer who wanted to purchase a finger of heroin. The officers did not follow CI #1 to Manchester, nor was “it” equipped with a recording device for the officers to monitor or record CI#1’s conversation with deJesus.¹² On “its” return to Weare, CI#1 contacted Montplaisir by phone and advised that deJesus was not coming, but had sent someone in his place to sell the heroin. CI#1 advised the officers that “its” source had recently used heroin and cocaine and was too intoxicated to drive.

This sale of heroin took place at the Center Woods Elementary School in Weare. The police spent time in the parking lot of the school in advance of CI#1’s arrival, planning where to locate their vehicles to observe this drug transaction and how to converge on the suspect as soon as the sale was complete. Kelley was in charge of formulating the arrest plan and making the assignments. Nadeau was positioned in the bushes and was to give the arrest signal once he observed the money and drugs had been exchanged. The drug transaction took place according to plan and the police arrested the woman who sold the heroin to CI#2 without incident. She agreed to cooperate with the police and telephoned her source from the Weare PD. (She is hereinafter identified as CI#3). CI#3’s supplier, only identified as Alex at that time,¹³ was expecting CI#3 back in Manchester with his \$600 from the sale of heroin. At police direction, CI#3 convinced Alex to drive to Weare to pick up his money by telling him that CI#1 had consumed the heroin and was too high to drive. They planned to meet at the Dunkin Donuts in Lanctot’s Plaza.¹⁴

The police selected the Dunkin Donuts parking lot at Lanctot’s Plaza because it was an easy location for deJesus to find and because the businesses were closed at this time of night, approximately 10 pm. However, since deJesus was anxious to pick up CI#3 and his money, the officers had only his travel time from Manchester to formulate a strategic plan for this transaction and the arrest. According to all of the officers except Nadeau, no specific plan was discussed prior to their arrival at Dunkin Donuts.

¹¹ The Weare officers also did not request the assistance of the Attorney General’s Drug Task Force or the New Hampshire State Police Narcotics and Investigations Unit, which is the preferred process for smaller police departments to follow to ensure the safety of the officers involved by providing much needed manpower and expertise in the investigation.

¹² It is standard practice to follow and monitor a confidential informant during a drug investigation to ensure the integrity of the evidence collected and the safety of the officers and confidential informant.

¹³ CI#1 had provided a registration number for the vehicle “its” supplier drove, but it did not come back to an individual named Alex. Kelley told investigators that they had confirmed deJesus’s identity prior to the second drug transaction and they had a reasonable belief that deJesus was unarmed. This appears to be incorrect. Although CI#1 told investigators deJesus was not known to carry a weapon, CI#1 also told police that ‘it’ and deJesus had conversations about deJesus purchasing a weapon.

¹⁴ The witness statements are conflicting on whether deJesus agreed to bring another finger of heroin with him to Weare to sell to the new customer or whether he was driving to Weare only to pick up CI#3 and his \$600. The conversation between CI#3 and Alex was not recorded and most of it was in Spanish except for when deJesus’s girlfriend, Tabitha Scott, spoke with CI#3 and Montplaisir.

When they arrived at Dunkin Donuts, the two vehicles driven by the CIs parked in the parking spaces directly in front of the building. Cox parked to the North side of the building, in the parking spots adjacent to the drive thru lane. Montplaisir parked his vehicle behind the Dunkin Donuts building in sight of Cox's vehicle. Kelley parked his vehicle on the opposite side of the Lanctot's Plaza parking lot.

An unknown vehicle drove to the front of the Dunkin Donuts parking lot almost immediately and CI#1 approached the vehicle.¹⁵ When CI#1 walked away from this vehicle, Cox and Kelley believed a drug transaction had occurred and they drove their cruisers towards the unknown vehicle. Montplaisir, who was in contact with CI#1, informed them that this was not their suspect in the drug investigation and the individual was asked to leave the parking lot.¹⁶ Shortly after the officers re-positioned themselves, deJesus arrived at the Dunkin Donuts parking lot.

deJesus was driving a green Acura, MDX. He parked his car to the right of the CI vehicles, facing the building and at an angle towards the drive up lane. Cox could see the driver and noted that there was a female passenger in the vehicle. Cox watched CI#1 approach the driver's window of the vehicle and then walk away. Believing that a drug transaction had occurred, Cox gave the arrest signal. All three unmarked cruisers then drove at the deJesus vehicle to arrest the driver. Cox parked the front of his cruiser behind the deJesus vehicle. Montplaisir parked his cruiser at an angle, nose to nose with the deJesus vehicle. Kelley parked his cruiser behind one of the CI vehicles, in the middle of the parking lot.¹⁷

B. The Shooting

Cox recalls running from his cruiser towards the rear of the deJesus vehicle. Cox was in full uniform, he had his Glock .45 caliber semi-automatic handgun raised and was shouting commands to the driver and the passenger to stop. He also identified himself as a police officer. Before he could reach the driver's side of the vehicle, it began to back up or the reverse lights came on and Cox ran back towards the driver's side of his cruiser for protection.

At the same time, Hebert got out of the cruiser that Montplaisir was driving. He was also in detective clothing with his badge hanging on the outside of his police raid jacket. Hebert told investigators that he took only a few steps out of the cruiser, running towards the driver's window of the deJesus vehicle, when he noted that the driver was making movements with his right hand on the shifter and the car appeared to be rocking. Hebert said that he had not yet fully drawn his weapon, but was shouting commands to deJesus to stop and show his hands and that he was under arrest. The deJesus vehicle then started moving forward and Hebert jumped out of

¹⁵ The driver of this vehicle, since identified as Gene Propper, said he was parked at Dunkin Donuts when the two CI vehicles arrived.

¹⁶ The CI had not been outfitted with a body wire for the officers to monitor or record "its" conversations with this person or with the suspect in the drug investigation. Instead the CI communicated with Montplaisir via cellular telephone, delaying communication with the other officers at the scene.

¹⁷ The exact location of the police vehicles and the deJesus vehicle cannot be established from any physical evidence at the scene. The location of the CI vehicles was documented by the NHSP Major Crime Unit and the NHSP TAR team.

the way and back into the cruiser driven by Montplaisir. Montplaisir had not had enough time to put the cruiser in park and get out himself before Hebert dove back in.

The deJesus vehicle then drove forward between Cox's and Montplaisir's cruisers, accelerating rapidly. As deJesus rounded the rear of Cox's cruiser, he turned to the right toward Route 114. This was a sharp turn that took the vehicle along the curb of the parking lot and the grass, and then through the grass onto the dirt shoulder of Route 114, heading southbound. As the vehicle made this turn and headed toward Route 114, Cox was standing to the rear driver's side of his cruiser. He observed an officer behind him, to the right, in the grassy area abutting the paved parking lot. Given the vehicle's speed and erratic operation, Cox feared that the officer in the grassy area was in imminent danger of being hit by the deJesus vehicle so he fired his handgun twice at the deJesus vehicle. The bullets entered the vehicle through the rear passenger side door. One bullet lodged in the B pillar behind the front passenger door and the other lodged in the back of the front passenger seat. Neither the passenger nor deJesus suffered any injuries from these bullets.

Nadeau was in the grassy area between the front of the Dunkin Donuts parking lot and Route 114 as the deJesus vehicle left the parking lot and drove towards Route 114. Nadeau told investigators that the vehicle was moving "at full throttle" directly at him. Despite leveling his shotgun at the driver and shouting commands for him to stop, the car did not change course. Nadeau took a half step back to avoid being hit. As the vehicle passed him, the passenger side mirror almost or may have brushed his stomach. Nadeau initially told investigators that he fired his first round at the back window. Subsequently, he stated that he was unsure of how many rounds he fired and which window he fired through. Nadeau stated that he then regained his footing, pumped the shotgun to chamber another round, and fired again. He initially told investigators that he fired two shots in rapid succession, both aimed at the back of the driver's headrest. However, in his second interview he said that he aimed at "the front of the back of the driver's headrest," and the right side of deJesus's face. The autopsy revealed that one shotgun slug hit deJesus in the right temple, causing his death.

As discussed above, the physical evidence indicates that the shotgun actually only fired once. There was only one spent casing found at the scene, there were three live rounds recovered, and no spent rounds located in the weapon. There was no evidence of a second projectile passing through or lodging in the vehicle. The only possible fragment that damaged the vehicle came from the projectile that struck deJesus, and then struck the interior of the windshield. There was no damage to either of the rear driver's side windows and the driver's window was rolled down. There was also no damage to either the front or back passenger side window. The rear most passenger side window and the rear hatch window were both completely destroyed in the crash. While Nadeau cannot recount with certainty the number of rounds he loaded into the shotgun, the physical evidence indicates he loaded four rounds, and likely only fired one shot at the vehicle.

Nadeau told investigators that he had several concerns when he fired his weapon. First, he believed that Cox may have been injured as the deJesus vehicle maneuvered between the unmarked cruisers and that Cox may have been dragged by the deJesus vehicle. However, he did

not know where Cox was when he fired. He did not see or hear Cox being dragged by the vehicle. In fact, Cox was not struck by the deJesus vehicle.

Nadeau also told investigators that he believed that Kelley may have been behind him at the time he jumped out of the path of the vehicle, leaving Kelley directly in the path of the deJesus vehicle, and in danger of being struck and killed. However, he did not see or hear or otherwise sense that Kelley was in fact in front of the vehicle when he fired his weapon.

Finally, Nadeau also believed that deJesus was a danger to the public driving on the roadway given the reckless manner he was driving in the parking lot, his perception of traffic on the roadway, and the fact that deJesus was under the influence of drugs. However, the investigation reveals no evidence that there was traffic on Route 114 in the immediate area of Lanctot's plaza at the time of the shooting.

It is the reasonableness of all these beliefs that will be reviewed in the legal analysis section below.

First, a detailed account of each witness's statements will follow. However, no information provided to the grand jury will be recounted as that information is confidential. As stated above however, that information was evaluated in making the findings in this report.

1. Officer Nicolas Nadeau's Account

On August 28, 2013, Trooper William Bright and Sergeant Joseph Ebert interviewed Weare police Officer Nicholas Nadeau at his attorney's office, with his attorney present. On November 7, 2013, Trooper Nathan Hamilton interviewed Nadeau a second time with his attorney present. Two prosecutors from the Attorney General's Office were also present during these interviews.

Nadeau has been with the Weare PD as a full-time patrol officer since 2009. He worked part-time for a year in Mont Vernon prior to joining the Weare PD. Prior to police work, Nadeau served six years in the United States Marine Corps, Infantry Division. He served time overseas where he was injured. Nadeau was awarded the Purple Heart for his service overseas. He currently is assigned as the police department's firearms and tactics instructor. Nadeau is pursuing his Bachelor's degree in criminal psychology at New England College.

Nadeau told investigators that the day before the shooting he worked his normal duty shift from 5:00 pm until 3:00 am on August 14. After that, he slept at the Weare police station from 3:00 am to 7:30 am. On the day of the shooting, Nadeau worked a detail from 7:30 am until 4:00 pm, and then began his normal duty shift at 4:00 pm, an hour early. By the time of the shooting at 10:00 pm, Nadeau had been working 14 ½ hours, having had just 4 hours of sleep the night before, after a 10 hour shift.

At the time of the first drug transaction, Kelley directed Nadeau to take a position in the bushes facing directly at the location where CI#1 was instructed to park so that he could keep his eyes on the deJesus vehicle. Nadeau's role was to give the arrest signal to the other officers

when he observed that the transaction had been completed. He was wearing a Weare PD polo shirt and a black vest that said "POLICE" on the front and back. He was carrying his department issued Remington 870 pump-action, 12 gauge shotgun.

In his second interview, Nadeau told investigators that in the hours before the first arrest at the elementary school he believed that he fully loaded his shotgun and also "topped it off," meaning he manually inserted a round in the chamber. This shotgun typically holds five to six rounds, depending on the size of the ammunition and whether an extender is used that holds an additional 1-2 rounds. In the first interview, Nadeau did not recall what type or size of ammunition he loaded into the shotgun that day, so he was not certain how many rounds were in the weapon. The State Police Forensic Laboratory determined that the recovered live rounds and the spent casing were 2 ¾ inch shells, and that the shotgun could hold 6 of these shells, with five in the magazine and one in the chamber.

After this first transaction was completed, Nadeau was told that CI#3 had arranged another drug transaction and Kelley asked him to assist in the buy/bust arrest. Nadeau told investigators that his role was to ride in the unmarked cruiser with Kelley and to brandish the shotgun during the arrest if needed. He told investigators during his second interview that there was a quick briefing at the police department, during which Kelley directed Nadeau to go to the driver's side of the deJesus vehicle at the time of the arrest and Kelley would follow behind him. Cox was directed to take a position at the front passenger side of the deJesus vehicle for the arrest.

After arriving at the Lanctot's Plaza in an unmarked cruiser with Nadeau, Kelley parked at the opposite side of the lot from Dunkin Donuts, much further from the front entrance of the Dunkin Donuts than the other officers, next to another vehicle near a dumpster. Montplaisir and Hebert were parked in an unmarked cruiser adjacent to a building behind the Dunkin Donuts. Cox was parked in an unmarked Dodge Durango in a parking spot across from the drive thru of the Dunkin Donuts. The CI vehicles were parked in front of the Dunkin Donuts.

In the second interview, Nadeau told investigators that while they were in the car together Kelley advised him that he would take a position behind Nadeau at the time of the arrest. Almost immediately after arriving, they drove to the front of Dunkin Donuts, believing the drug transaction had already occurred. They discovered, however, that the individual parked in front of the building was not the suspect in the drug transaction and this person was told to leave. Nadeau told investigators during this inadvertent take down, Kelley took a position behind him, consistent with their earlier discussion.¹⁸

The officers then returned to their original positions and very soon thereafter, Nadeau saw the deJesus vehicle arrive at the plaza and park near the CI vehicles in front of the Dunkin Donuts. When Cox gave the "go" signal, Kelley had to weave the cruiser through the concrete islands in the parking lot to get to the front of the Dunkin Donuts. The unmarked cruiser had its blue lights activated. As they approached the Dunkin Donuts, Nadeau reported that he saw the deJesus vehicle reverse out of a parking spot and ram the front passenger side of Cox's Durango.

¹⁸ See summary of Gene Propper's interview below that contradicts this statement. See also the summary of Sgt. Kelley's interview that also contradicts this statement.

He told investigators that he heard the sound of plastic crunching and saw the deJesus vehicle pull in and then out of the parking spot and strike Cox's Durango a second time.

Using the momentum of the cruiser as it slowed down, Nadeau jumped out of the cruiser. He then heard the other officers yelling, "Stop police!" Nadeau told investigators that he expected to see Cox at the front passenger side of the deJesus vehicle based upon the operational plan formulated before they left the police department. However, he could not see Cox, but heard someone yelling, "no, stop, no." Based on his understanding of the plan and what he heard, Nadeau thought that Cox was either sandwiched between the deJesus vehicle and the unmarked cruiser, or that he had been run over.

Nadeau told investigators that the strategic plan for the arrest had him positioned at the driver's side of the deJesus vehicle. In the first interview, Nadeau said that he attempted to approach the driver's side of the vehicle as he had been instructed, but the car continued in reverse towards him and backed around the driver's side of the Durango. While the deJesus vehicle was backing up, Nadeau side stepped to his right to get out of the vehicle's path, which took him from the asphalt onto the grass. Nadeau is the only witness who describes the deJesus vehicle moving around the front and driver's side of Sgt. Cox's cruiser. During the second interview, Nadeau said he was not sure exactly how the vehicle maneuvered because it all happened so fast, but he still believed it forced him to traverse the parking lot onto the grass.

Nadeau said that after deJesus's vehicle reversed around the Durango it was facing him. He heard the engine "spooling up" followed by the tires spinning and gravel kicking up. The vehicle then sped towards him. He told investigators that at that time, he thought that Kelley was directly behind him because the plan was for Kelley to follow behind him when they exited their cruiser. However, Nadeau had not seen or perceived Kelley to actually have been behind him. As the vehicle accelerated toward Nadeau, he heard two gun shots, but could not determine where they came from.

As deJesus drove towards him, Nadeau yelled "Stop police" and held up his shotgun. He said in his first interview that he did not fire his weapon as the vehicle came at him because he did not know where the other officers or the CIs were located. Nadeau was concerned about the cross-fire, meaning that he might hit one of the officers or CIs if they were behind the vehicle if he fired in the direction of the vehicle. In the second interview, however, Nadeau said he may have fired his weapon while the vehicle was driving towards him. The physical evidence demonstrates that if he did so, no projectile struck the vehicle.

Despite the fact that Nadeau was standing with his shotgun aimed at the front of the deJesus vehicle, it did not stop. Fearing he would get hit, Nadeau took a step to the left and reported that the vehicle was "fairly close" to him as it went by. Nadeau recalls that the passenger side mirror almost brushed his stomach or may have brushed his stomach as it passed. Despite losing his balance as the deJesus vehicle drove by, Nadeau turned and took aim at the back of the driver's head rest either through the rear-most window on the passenger side or the rear hatch window and pulled the trigger. After firing once and seeing it had no effect, Nadeau corrected his footing, pumped the shotgun, which loaded a round, and fired a second time, still aiming at the rear of the driver's headrest.

In his second interview, Nadeau said he was initially aiming at the front of the back of the driver's headrest, and continued to aim at that spot both times that he fired his shotgun. Although he acknowledged that the vehicle was moving very fast as it passed by him, Nadeau said that he was still aiming at the front of the head rest when he fired, not at the headrest from behind. His explanation for this apparent contradiction, despite using the term the "back of the head rest," was that he meant the part of the head rest where the driver's head makes contact with the head rest. During this interview, he also said that he was no longer certain if he fired a second shot after he pumped the shotgun, chambering another round.

Nadeau explained to investigators that he fired as the vehicle was driving away because he also perceived that the vehicle was a danger to others. Nadeau told investigators in the first interview that after he fired, he saw headlights coming in both directions on Route 114. In the second interview, Nadeau told investigators that before he fired he saw the "glow of headlights" heading southbound on Route 114. Also, Nadeau reported that prior to arriving at Lanctot's Plaza, he was aware that deJesus had recently consumed drugs. Based upon this knowledge and his observations of the vehicle's erratic operation, he was concerned for the safety of the public on the roadway if deJesus had continued to drive to Manchester.

In addition, Nadeau explained that he fired his weapon because he was concerned for Kelley's safety, who he thought was directly behind him and was in the path of the vehicle. Nadeau was also concerned for the safety of the CIs, because he did not know where they were located. Finally, believing that the deJesus vehicle had hit Cox and that Cox might be trapped under the vehicle, Nadeau believed that deJesus had used and might be using deadly force against another officer at the time that he fired his shotgun.

Nadeau said that after he fired his weapon, the deJesus vehicle continued through the grass in front of Dunkin Donuts towards Route 114. As the vehicle approached Route 114, it drove in a manner which caused Nadeau to believe that it was either going to go north on Route 114 or turn around and come back at him. Instead, the deJesus vehicle made a sudden jerking motion to the right once it got onto Route 114 and continued south. The jerking was so sharp that he thought the vehicle was going to roll over.

Nadeau said that as the deJesus vehicle continued south on Route 114, he watched it travel in the middle of the road across the double yellow line and crash into a tree. From the moment he saw the vehicle coming at him to when it crashed, the vehicle never slowed and he never saw any brake lights. Nadeau ran after the vehicle as it traveled southbound on Route 114.

After the deJesus vehicle crashed into the tree, Nadeau's initial reaction was to go to the front of the Dunkin Donuts and look for Cox, who he thought was injured. As he turned to run towards the Dunkin Donuts, he heard a second crash and realized that Montplaisir and Hebert had crashed into a tree. Out of concern for their safety, Nadeau sprinted down to the crash site. When he arrived, Nadeau saw Hebert with a female from the passenger side of the deJesus's vehicle under arrest.

At the crash site, Nadeau frantically looked around for Kelley, believing that Kelley had been dragged under the deJesus vehicle. At some point, Nadeau ran back to towards Lanctot's

Plaza, where he found Kelley uninjured. The two went back to survey the scene and Nadeau gave Kelley the “gist” of what had happened. He recalled that they located one shotgun shell casing in the grass in front of Dunkin Donuts that they marked with evidence tape. However, he did not recall when he ejected the shotgun shell casing in relation to when he fired the second shot. Thus, the location of the shotgun shell casing does necessarily not provide a definitive marker for where Nadeau actually fired his shotgun. His shotgun and vest were taken from him and secured on scene.

2. Sergeant Kenneth Cox

On August 28, 2013, Trooper Bright and Sergeant Ebert interviewed Weare police Sergeant Kenneth Cox at the Attorney General’s Office. Cox was with counsel. Two prosecutors from the Attorney General’s Office were also present during this interview.

Cox told investigators that on August 14, 2013 he came into work early, around noontime, to meet with the acting Chief regarding a new hire. Later that afternoon, while Cox was doing schoolwork, he was informed that they were going to conduct an undercover drug purchase.

At the time of the first drug transaction at the Center Woods Elementary School, Cox’s role was to act as the takedown unit. Cox was wearing his standard short sleeve uniform which included his badge, as well as police pins and patches on both arms, and he was armed with his department issued .45 caliber Glock semi-automatic handgun.

After the first transaction was completed and CI#3 agreed to cooperate, a quick briefing occurred in the sally port at the Weare PD regarding the operational plan for the second takedown at Lanctot’s Plaza. The plan was not as detailed as the plan for the first transaction. The plan was essentially that the officers would take positions in the parking lot covering “all points of the compass.” After CI#1 approached the deJesus vehicle and an apparent transaction had taken place, the officers would converge on the deJesus vehicle. According to Sgt. Cox, no one was directed to a specific location for the arrest.

Cox drove an unmarked Dodge Durango to Lanctot’s Plaza. He backed into and parked on the North side of the building in the parking spots adjacent to the drive thru lane at the Dunkin Donuts. After he parked, Cox left the Durango running but turned the headlights off. Due to his close proximity to the transaction, Cox was the person with “eyes on” on the deJesus’s.

Shortly after the inadvertent takedown, the deJesus vehicle pulled into the Lanctot’s Plaza and parked in front of the Dunkin Donuts building at an angle to the right of the CI vehicles. Upon the vehicle’s arrival, Cox reclined his driver seat to conceal his presence and watched the interaction between the CI and deJesus at the driver’s side window. Cox could see a female in the front passenger seat in the deJesus’s vehicle looking around the parking lot.

As the CI walked away from the deJesus vehicle, Cox gave the “go, go, go” signal to the other officers. He drove forward and parked behind the rear of the deJesus vehicle in order to

block it in. Cox exited his vehicle, drew his handgun and went towards the driver's side door. He made it as far as the right rear quarter panel of the deJesus vehicle yelling, "Weare Police, let me see your hands, let me see your hands." At that time, the brake and reverse lights illuminated and the deJesus vehicle started backing up. To avoid being hit, Cox retreated back around the front of his vehicle and along the driver's side. During this time, Cox did not perceive that the deJesus vehicle struck his vehicle.

The deJesus vehicle then went forward and abruptly turned to the right and headed towards Cox, who had moved to the rear of the Durango. He had expected that vehicle was going to turn left and leave the lot behind Dunkin Donuts. When it turned sharply to the right instead, he feared that the vehicle would strike him. At that time, Cox perceived that someone was running in the grass to his right, parallel with him.¹⁹ He estimated that the person was about twenty to thirty feet from him. The deJesus's vehicle drove towards Cox and went by him. As it passed him, he saw the vehicle dip on the uneven ground. Due to the vehicle's erratic operation, he was concerned that it would strike the officer standing in the grass. He aimed his handgun at the vehicle's rear passenger side door and fired twice. He aimed low at the driver to avoid striking the female in the front passenger seat.

After firing, Cox lowered his weapon. He did not see the officer who he had seen before in the path of vehicle, nor did he look around to find him. Immediately, he turned around and got back into his Durango to pursue the deJesus vehicle. He drove through the parking lot of Dunkin Donuts over curbs and grass to the entrance of the Plaza. There, he saw Nadeau running down the side of Route 114. Cox yelled at him to get in the vehicle. Nadeau replied that "he's right there," pointing to the crash site at Greaney's Farm Stand.

Cox drove south on Route 114 towards the crash site and drove his vehicle at the deJesus vehicle, striking the driver's door with his front right quarter panel. When Cox saw the extensive damage to the other cruiser he became concerned about Kelley's whereabouts.²⁰ At some point, Kelley broadcast on the radio that he was ok and was back at Lanctot's plaza. While at the crash scene, Cox saw that deJesus had a head injury, but he could not reconcile how he had struck deJesus in the head because he had aimed his weapon low. Cox had not heard any additional gunshots and was not aware that anyone else had fired until Nadeau told him that he had also fired. After the crash, Cox was transported to the hospital to seek medical attention due to extremely high blood pressure.

Troopers Bright and Hamilton re-interviewed Cox on October 15, 2013, at the Attorney General's Office. His counsel was present for this interview as well. Two prosecutors from the Attorney General's Office were also present during this interview.

During this interview, Cox confirmed that immediately prior to the takedown at the Dunkin Donuts, there were no discussions regarding the specifics of the takedown of the each officer's specific responsibilities. For example, he said there was no discussion about who

¹⁹ Cox mistakenly believed this person he saw to his right in the grass was Kelley, but it has been determined that this person was Nadeau.

²⁰ Cox mistakenly believed that this cruiser was Kelley's. It has been determined that this cruiser was driven by Montplaisir with Hebert as a passenger.

would approach the passenger side of the vehicle versus the driver's side or that Kelley would back someone up. However, Cox believed that the other officers would have expected him to approach the driver's side of the deJesus vehicle because he was positioned closest it, and that was his role during the initial takedown at the Center Woods Elementary School.

Cox said he never saw the deJesus vehicle strike his Durango, nor did he hear any crunching or smashing sounds indicative of a collision. However, he noted that it would be impossible to determine whether there was any damage to the Durango from the deJesus's vehicle because that same area of the Durango was damaged when he deliberately drove into the driver's door of the deJesus vehicle.

Cox recalled that as the deJesus vehicle was "moving around" and he was retreating back around to the driver's side of his vehicle, he perceived the arrival of another cruiser behind him.²¹ Cox also clarified that the deJesus vehicle missed striking him by 8-10 feet when it went by him on the grass.

3. Sergeant Joseph Kelley²²

On August 28, 2013, Trooper Bright and Sergeant Ebert interviewed Weare police Sergeant Joseph Kelley at the Attorney General's Office. Kelley had counsel present for the interview. Two prosecutors from the Attorney General's Office were also present during this interview.

Kelley told investigators that on the afternoon of August 14, 2013, Montplaisir advised that he had arranged an undercover drug purchase with the assistance of a CI. Montplaisir provided him with background information on the suspect. From that information, Kelley believed that the suspect would not be armed. The Center Woods Elementary School was chosen as the location for the takedown. Kelley delivered the operational briefing in the parking lot of the school in advance of the operation. He was in full uniform which included his full duty belt, badges and pins.

Kelley said that prior to the takedown at Lanctot's Plaza, there was not a "big briefing" and due to time constraints, the plan was developed on the move. In preparation for that takedown, Kelley drove an unmarked cruiser to Lanctot's Plaza and parked near the southwest corner of the parking lot, a short distance from the Dunkin Donuts.²³ Nadeau was a passenger in the cruiser and was holding a shotgun. Kelley saw the deJesus vehicle pull into the plaza and park on the far side of CI#2's vehicle. From his position, he could not see if an exchange had taken place.

Kelley heard someone give a "go, go, go" signal and he weaved his cruiser through the concrete islands in the parking lot towards the front of Dunkin Donuts. By the time they arrived, and Montplaisir had already driven their cruisers into position to box deJesus in. Cox was out of

²¹ Presumably, this would be the unmarked cruiser carrying Kelley and Nadeau.

²² Since this incident Kelley has been terminated from his employment as a police officer with the Town of Weare.

²³ The TAR team estimates this distance as 382 feet.

his vehicle on foot. At that time, Kelley saw blue lights and heard a siren from one or both of the unmarked cruisers.

Kelley told investigators that he parked his cruiser next to CI#1's vehicle at an angle in front of Dunkin Donuts. Before the car was parked, Nadeau jumped out of the cruiser and broke to the right. Once parked, Kelley exited the vehicle to the left towards the direction of the entrance to the Dunkin Donuts. As he was getting out of the cruiser, he heard "no stop, no stop" and two gun shots. Upon hearing this, Kelley drew his gun and took cover while ducking down behind one of the CI vehicles. Kelley told investigators that as he looked out from around the vehicle, he saw the deJesus vehicle back up and heard something consistent with it striking Cox's Durango. Kelley thought that he saw an impact as well.

Kelley then heard Cox yell, "No, no, stop, stop" and saw the deJesus vehicle drive towards Cox, who was standing in front of it. The deJesus vehicle continued and drove straight towards Nadeau, who Kelley saw to his right in the grass. Kelley told investigators that he then heard two shotgun shots in close succession, but did not see them being fired.

Kelley believed that the deJesus vehicle went over the grass and onto Route 114 and Cox pursued it. Kelley then went back to his cruiser and quickly surveyed the scene to determine if anyone had been shot or run over. Moments later, he drove to the crash scene.

At the crash scene, he first had contact with Montplaisir. Kelley said he took Montplaisir back to the Dunkin Donuts to check on the safety of the CIs and to further survey and secure the scene. Kelley recalled that he did a quick walk through of the scene and saw two handgun shells near the CI vehicles and one shotgun shell in the grass in front of Dunkin Donuts. He did not physically mark the shells as evidence. Kelley assigned Hebert to stay with Nadeau.

After Hebert, Montplaisir, and Cox were sent to the hospital for medical assistance, Kelley put Nadeau in his cruiser. That evening, Nadeau told Kelley that he fired his weapon because the vehicle was coming directly at him. He told Kelley that he fired twice, and that he was in the grassy area in front of Dunkin Donuts when he fired.

Before Cox went to the hospital for medical assistance, he told Kelley that he was not sure if he struck deJesus because he fired at the passenger side rear door at a downward angle towards the suspect.

Kelley was re-interviewed on October 28, 2013 at the Attorney General's Office by Troopers Chris Decker and Nate Hamilton. Kelley had counsel present for this interview as well. Two prosecutors from the Attorney General's Office were also present during this interview.

During the second interview, Kelley repeatedly answered questions by stating that "he didn't recall," sometimes even before the question was completed.

Kelley confirmed that there was not a specific operational plan in advance of the takedown at Dunkin Donuts regarding each officer's individual responsibilities. Although his

understanding of Nadeau's role was that he was there to assist in the takedown, the plan did not include Kelley taking a position behind Nadeau. Kelley also denied taking a position behind Nadeau during the inadvertent takedown.

Kelley confirmed that he heard gunshots as he was getting out of his cruiser. Likewise, he confirmed that he saw the deJesus vehicle drive at Nadeau, but again said that when he heard the additional two gunshots, he did not see Nadeau fire his shotgun. At that same moment in time when he saw the deJesus vehicle driving at Nadeau, Kelley said he did not see any traffic on Route 114 in either direction.

When confronted with inconsistencies in his prior statement, specifically how he could have seen the deJesus vehicle back up and then drive at Cox after hearing gunshots when he got out of his cruiser, Kelley could not reconcile his observations and did not provide a concrete response. At one point, when asked specific questions about reconciling his observations, Kelley stated in substance that he was surprised at the suggestion that Cox fired at the deJesus vehicle from behind. However, later in the interview, Kelley volunteered that he had seen the bullet holes in the rear passenger door of the deJesus vehicle after the incident.²⁴

Similarly, Kelley claimed that he was surprised to learn that the deJesus vehicle traveled across the grass in front of the Dunkin Donuts onto Route 114 as he said that he saw the vehicle travel through the parking lot over curbs and out the entrance of the plaza onto Route 114. He then indicated that he was not at all sure what he saw that night.

Kelley said he believed that both Cox and Nadeau fired at the deJesus vehicle because it was coming at them and their lives were in danger. Kelley told investigators he understood that Nadeau fired at the deJesus vehicle as it came at him and that the round went through the windshield. Kelley said he saw the damage to the windshield of the deJesus's vehicle at the crash site.²⁵

4. Detective Sergeant Frank Hebert

On August 28, 2013, Trooper Bright and Sergeant Ebert interviewed Weare police Detective Sergeant Hebert at the Attorney General's Office. Hebert had counsel present for the interview. Two prosecutors from the Attorney General's Office were also present during this interview.

Hebert told investigators that on August 14, 2013, he was working his typical day shift. That afternoon, he learned that there was going to be an undercover drug transaction. Kelley was in charge of the operation. Hebert was wearing dress pants and a tie, a raid jacket with "POLICE" across the back, and his badge around his neck outside of his jacket.

²⁴ The trajectory of these bullet holes clearly indicate that the shooter fired at the door at an angle from behind the deJesus vehicle.

²⁵ The windshield of the deJesus vehicle sustained damage consisting of a defect surrounded by spidering. However, the damage was from the inside, not from the outside. It appears that the damage to the inside surface of the windshield was most likely due to a fragment from Officer Nadeau's shotgun round.

He recalled that prior to the first takedown at the elementary school, there was a briefing at the police department and then a walk-through at the school. However, after the first takedown, there was only a “short” discussion in advance of the second takedown at Lanctot’s Plaza.

Hebert arrived at Lanctot’s Plaza as a passenger in an unmarked cruiser driven by Montplaisir. They took a position behind a building adjacent to the Dunkin Donuts. When the other officers moved in for the inadvertent takedown, they did not move in because Montplaisir was on the phone with the CI who advised it was not the suspect in the drug investigation.

After the deJesus vehicle arrived, a verbal signal was given to initiate the takedown. Hebert saw Cox “break his spot” and “move in.” With the blue lights engaged, Montplaisir drove the cruiser forward through the drive thru area. As they came around the front corner of the Dunkin Donuts, Hebert saw the deJesus vehicle parked at an angle by the side of the building. Montplaisir positioned their cruiser at a 45 degree angle on the front driver’s side of the deJesus vehicle. Hebert observed Cox approaching the passenger side of the deJesus vehicle on foot.

Hebert approached the driver’s door of the deJesus vehicle while attempting to take his weapon out of his shoulder holster. He and Cox identified themselves as police officers and gave verbal commands to the suspect in the vehicle. At this time, Hebert’s focus was on the male driver of the vehicle, whose upper body was moving as if he was trying to get the vehicle into gear. Hebert did not see Kelley, Nadeau, or their cruiser at that time.

As Hebert approached the deJesus vehicle, it drove forward and went to the right between Cox’s Durango and their cruiser. Hebert retreated and jumped back into the cruiser with Montplaisir to avoid being struck. This happened before Hebert had time to unholster his weapon. As it moved forward, the deJesus vehicle was “very close” to striking their cruiser. Hebert indicated that the vehicle may have gone in reverse before driving forward, but he did not hear any noises consistent with the deJesus vehicle striking Cox’s vehicle.

Once Hebert was back in the vehicle, Montplaisir pursued the deJesus vehicle. Hebert said that he did not look up on Route 114 because his focus was on fastening his seatbelt, which was difficult because the cruiser was bouncing over curbs. By the time he was able to secure it and look up they were at the exit of Lanctot’s Plaza near Route 114. He saw Nadeau, who has holding a shotgun, to the left of the cruiser standing in the grass near the Lanctot’s Plaza sign. Hebert told Montplaisir to “look out” for Nadeau. At some point between getting back in the cruiser and seeing Nadeau near the Lanctot’s Plaza sign, Hebert heard two gun shots which he described as “close together,” but he did not see them being fired.

As they pursued the deJesus vehicle south on Route 114, it veered sharply to the right and crashed into a grove of trees at Greaney’s Farm Stand. Following closely behind, Montplaisir lost control on the sand and also crashed into a tree. After the crash, Hebert approached the deJesus vehicle and ordered the female passenger onto the ground. He could see that deJesus was critically wounded. Initially, Kelley could not be located which led Hebert to look for him under the vehicles and in the woods.

After other police agencies arrived to assist, Kelley assigned Hebert to be with Nadeau. While they were together, Nadeau was looking around in the grass area for his shotgun shell. Hebert told investigators that Nadeau repeatedly said that he was “scared for his life and thought that Alex was going to run him over.” Nadeau said that he fired his gun and said that “he was going to kill me.”

Hebert went to the hospital with Cox and Montplaisir, where he was treated for severe bruising to his knees from the collision. Hebert said that as the investigation continued into the next morning, CI#1 told him “that was crazy, you guys did what you had to do.”

Hebert was re-interviewed by Troopers Bright and Hamilton on October 15, 2013 at the Attorney General’s Office. His counsel was present for this interview as well. Two prosecutors from the Attorney General’s Office were also present during this interview.

During the second interview, Hebert indicated that he did not remember having a conversation before the takedown at Dunkin Donuts regarding each officer’s specific role. However, he knew going into the operation that Kelley and Nadeau would be approaching the deJesus’s vehicle from behind.

He told investigators that he was not sure if the deJesus vehicle moved back and forth as he was approaching it, but “he can’t testify to” any noise from the vehicle striking Cox’s Durango. Hebert said that he when heard the two gunshots he was back in the cruiser with Montplaisir and it was in motion. Hebert also recalled that when they were in pursuit of the deJesus vehicle he saw it swerving on Route 114 before it veered hard to the right and crashed.

With regard to his conversation with Nadeau after the incident, Hebert said that as Nadeau was looking for his shell casing in the grass area of the Lanctot’s sign, Nadeau told him that he was in that general vicinity when he fired. He also said that he fired his weapon out of fear for his personal safety and that he thought he was going to get run over. Hebert did not recall Nadeau saying that he fired out of fear that someone else might get run over.

Hebert indicated that at some point Kelley said he had a clear view and could see things occurring. Hebert assumed that Kelley meant that he saw Nadeau fire his shotgun, but he did not ask Kelley to clarify his statement.

When questioned about seeing the events unfold near Route 114, Hebert maintained that he did not see or hear Nadeau fire his shotgun because his focus was on fastening his seatbelt.

5. Officer Brandon Montplaisir

On August 28, 2103, Trooper Bright and Sergeant Ebert interviewed Weare police Officer Brandon Montplaisir at the Attorney General’s Office. Montplaisir had counsel present for the interview. Two prosecutors from the Attorney General’s Office were also present during this interview.

Montplaisir said that on August 14, 2013, he spoke with Kelley and Hebert about his plan to use CI#1 to purchase drugs from “its” source, who he knew as “Alex.” In preparation for the takedown at the school, the officers and CIs went to the Center Woods Elementary School and Kelley delivered a briefing regarding the operation. At that time, Montplaisir was wearing his full uniform which included his duty pants, vest, taser, and radio.

After CI#3 was arrested during the first takedown at the school, there was a discussion at the Weare PD about how the second takedown was going to occur. This discussion was not as in depth as the first briefing.

Montplaisir said that he drove to Lanctot’s Plaza in an unmarked cruiser with Hebert in the front passenger seat. Prior to the arrival of the deJesus vehicle, Montplaisir parked the cruiser adjacent to a structure behind the Dunkin Donuts. From that location, Montplaisir could not see the front of the Dunkin Donuts, but he was able to see Cox’s Durango. After Cox gave the “go” signal and descended upon the deJesus vehicle, Montplaisir activated his blue emergency lights and drove forward into the drive thru lane. When he pulled the cruiser around the corner of the Dunkin Donuts, he saw deJesus’s green Acura MDX, which was parked at an angle facing in their direction. Montplaisir positioned his cruiser almost directly head-on to the front driver side of the Acura in order to block it in.

Immediately before the cruiser came to rest, Hebert jumped out of the vehicle and approached the driver door of the Acura. At the same time, Montplaisir observed that Cox had positioned his Durango behind the deJesus vehicle and was approaching the front passenger door of the deJesus vehicle on foot. Montplaisir heard Hebert and Cox identify themselves as members of the Weare Police and give verbal commands to the driver to stop the vehicle. Montplaisir reported that he made eye contact with deJesus, but did not recall seeing a passenger because he was focused on deJesus. At that time, Montplaisir did not know where Kelley and Nadeau were.

As Cox and Hebert approached the deJesus vehicle, it “rocked a little bit” and then deJesus “punched it” forward, driving so close to them that it appeared as if the vehicle was going hit them. As the vehicle was approaching, Hebert dove out of the way and jumped back into the cruiser with Montplaisir. The deJesus vehicle came close to striking their cruiser and then made an abrupt right turn to the right and headed towards Cox.

Once Hebert was back in the cruiser, Montplaisir heard two gun shots. At the time, he was not sure who fired the shots, but later learned they were fired by Cox. Montplaisir reported that he saw the deJesus vehicle “rip up” the grass in front of the Dunkin Donuts and head towards Route 114. At that time, Montplaisir turned his attention to Hebert and told him “let’s go, let’s go” and drove their cruiser towards the exit of Lanctot’s Plaza, while going over two curbs, to pursue the vehicle on Route 114.

Once they approached the entrance of the plaza, Hebert told Montplaisir to “watch out for Nadeau.” Montplaisir then saw Nadeau in the vicinity of the Lanctot’s Plaza sign running south on the shoulder of Route 114 in pursuit of the deJesus vehicle. Prior to that, Montplaisir had not seen either Nadeau or Kelley.

Montplaisir reported that they followed the suspect vehicle a very short distance south on Route 114 and he saw the tail lights of the deJesus's vehicle abruptly veer off the road to the right. Montplaisir then applied the brakes and lost control of his cruiser and struck a tree behind the deJesus's vehicle.

After crashing, Hebert got out of the vehicle and approached the deJesus vehicle to make contact with a female passenger who was on the ground. Montplaisir started to go to the driver's door of the deJesus vehicle but Cox's Durango drove into it. Montplaisir could see that deJesus had suffered a head injury but did not know that deJesus had been shot. He thought that deJesus had sustained his injuries in the crash.

After the crash, there was confusion about Kelley's whereabouts. However, Kelley appeared at the crash site and asked Montplaisir to return to Lanctot's Plaza with him to check on the CIs.

When Montplaisir learned that Nadeau had fired his weapon, he took Nadeau's shotgun from him and "racked out the rounds" in the rear of a Weare cruiser.²⁶ Montplaisir recalled that Nadeau told him that he fired twice and that the vehicle drove right at him. Montplaisir reported that Kelley found two handgun shells in the parking lot of the Dunkin Donuts in the vicinity of where Cox was standing.

Montplaisir estimated that the total time from the "takedown" to the crash was no more than 20 seconds. He indicated that he did not hear any gunshots in addition to the two fired by Cox.

Montplaisir was re-interviewed at the Attorney General's Office on October 15, 2013 by Troopers Bright and Hamilton. He was present with counsel. Two prosecutors from the Attorney General's Office were also present during this interview.

During the interview, Montplaisir's memory of the incident appeared to have significantly diminished from his first interview. In explaining why he had not had any conversations with anyone since the event, Montplaisir said in substance that it was best for him to distance himself from the episode and to "not ask questions."

Montplaisir told the investigators that he did not remember seeing the deJesus vehicle strike Cox's Durango or hear any noises consistent with such a collision. When he saw Nadeau running down Route 114, Nadeau he was holding a shotgun facing down and there was no traffic on Route 114. Montplaisir did not see the events unfold in the grassy area near Route 114 because he was paying attention to Hebert as he fastened his seatbelt. Like Hebert, Montplaisir did not see or hear Nadeau's shotgun shots.

²⁶ "Racking" rounds is terminology for clearing a weapon of ammunition.

6. Passenger Tabitha Scott

On August 15, 2013, Trooper Bright interviewed Tabitha Scott (Scott) at the Catholic Medical Center at 7:00 am, while she was being treated in the Emergency Room. Scott said that her boyfriend, Alex Cora deJesus, wanted her to go with him to Weare the night of August 14, 2013. Scott said she did not want to go with him because he was high and she did not want to drive with him while he was high. However, she was familiar with Weare and knew where the meeting was going to be. Scott knew that CI#3 wanted deJesus to go to Weare to pick her up and to get the money from the earlier sale of the finger of heroin. Scott insisted that deJesus not bring any drugs with him and he agreed. Scott said that they just went to Weare to get CI#3. According to Tabitha, CI#1 was told during their phone conversation that deJesus would not bring another finger of heroin.

When they arrived, deJesus met with CI#1 who said that CI#3 was out back and would be right there. deJesus asked for the \$600 for the finger CI#3 sold to CI#2 earlier. CI#1 gave deJesus the \$600. Within a minute police cars came towards them with the blue lights on. She saw two officers get out of the same vehicle. They were yelling, "Police, stop." deJesus took off right away. Scott said that deJesus was on parole and she thought that he fled because he probably did not want to go back to prison.

Scott told deJesus to stop, but he did not. Instead, he pulled between the two cruisers, going about 20-30 mph. The officers were saying "stop the car, stop the car." Scott said that the officers did not have to move to avoid the car, but they started shooting. She recalls hearing two shots hit the car, but there could have been more. deJesus was going fast as he left the parking lot and even faster on the road.

As deJesus pulled between the cruisers, she crouched down in the passenger seat and onto the floor. She heard the gun fire, but did not see the officers fire their weapons. She was not sure when deJesus was struck by the bullet, but knows that she eventually put her hand on the brake and tried to shift it in park. Even as she was pressing on the brake, the car would not slow down and it hit the tree very hard. She also had her hand on the wheel when the vehicle crashed. Afterwards, Scott unlocked the door and got out. The police yelled at her to get down or they would put a bullet in her head.

Multiple attempts were made to re-interview Tabitha Scott. Initially, those attempts were unsuccessful. Eventually, she was contacted and re-interviewed.

7. CI #1

On August 15, 2013, Trooper Bright interviewed CI#1 at the Weare PD at 2:16 am. During that interview, CI#1 acknowledged that "it" cooperated with the Weare police in the undercover drug operation for consideration on DWI and drug possession charges. CI#1 hoped to either have "its" charges or sentences reduced or both.

CI#1 said that "it" arrived at Lanctot's plaza in "its" own vehicle and parked on the left side of CI#2's vehicle in the front of the Dunkin Donuts. deJesus arrived in his vehicle and

parked to the right of CI# 2's vehicle. CI#1 approached the driver's side door of the vehicle and spoke with deJesus, who was driving. CI#1 gave deJesus the \$600 buy money from the earlier sale of heroin to CI#2, and said that CI#3 was out back behind the buildings.

The police cars, with blue lights activated, then "swarmed out" around deJesus's vehicle. CI#1 saw an officer get out of a Dodge Durango and approach the vehicle with a gun drawn while yelling, "Freeze, don't move." CI#1 reported that two officers got out of another police car behind the deJesus vehicle. CI#1 indicated that all the officers identified themselves as police officers, including either having a badge or clothing which indicated "POLICE."

When the officers "swarmed" the vehicle, deJesus started the car and initially it went in reverse. CI#1 believed that the vehicle backed into the police car behind it. deJesus then "punched it" forward, drove "wicked fast" and cut the wheel to the right. deJesus's vehicle barely missed striking the officer from the Durango. CI#1 saw that officer move out of the way and fire a handgun twice at the vehicle. The shots were "quick" in succession.

After hearing two gunshots, CI#1 took cover behind "its" vehicle near the front of the Dunkin Donuts. CI#1 saw the deJesus vehicle cut across the grass in the front of the Dunkin Donuts and drive to the right. The police cars pursued the vehicle. About ten seconds after the initial two shots, CI#1 heard a third gunshot but did not see it and was not sure who fired it.

On September 3, 2013, CI#1 was interviewed a second time by Troopers William Bright and Nathan Zipf. During this interview, CI#1 was confronted with a statement from Officer Frank Jones,²⁷ who said that after the events on August 14, 2013 when he drove CI#1 home "it" told him that "it" "said what had to be said" because "it" "didn't want "its" deal screwed up" and that the officer was not in danger of being run over, meaning Cox. CI#1 did not acknowledge making this statement to Officer Jones, but explained that the more "it" has thought about that night, the more "it" thinks that the officer could have gotten out of the way.

8. CI#2

On August 15, 2013, Sergeant Joseph Ebert interviewed CI#2 at the Weare PD at 2:35 am. CI#2 said that "it" was asked by Montplaisir if "it" would help in an undercover drug transaction. CI#2 had worked as an informant with the Weare Police in the past. CI#2 agreed to assist because "it" was hoping to be paid for "its" involvement.²⁸

During the first takedown at the Center Woods Elementary School, when CI#3 arrived on scene, CI#2 remained in "its" vehicle and gave money to CI#1, who acted as an intermediary for the drug transaction. In exchange for the money, CI#1 provided CI#2 with a finger of heroin.

In preparation for the second takedown, CI#2 reported that "it" arrived at Lanctot's Plaza in "its" own vehicle and parked to the right of CI#1's vehicle in front of the Dunkin Donuts. As CI#2 was seated in "its" vehicle, the deJesus vehicle arrived and parked to the right of CI#2's

²⁷ Officer Frank Jones has since resigned from the Weare Police Department.

²⁸ There is also some belief that CI#2 may have agreed to assist the Weare Police in this operation in exchange for consideration on pending charges from another agency.

vehicle near the drive thru of the Dunkin Donuts. CI#2 reported that a male was driving the deJesus vehicle. CI#2 reported that CI#1 exited “its” vehicle and walked over to the driver’s door of the deJesus vehicle. After it appeared that a transaction had taken place, the Dodge Durango came towards the deJesus vehicle. Next, other police cars swarmed in the scene. CI#2 reported that the male driver put the deJesus vehicle in reverse as a car was approaching it from behind. Then it went forward and tried to run over the officer from the Dodge Durango. The officer was yelling, “Stop! Police!” The deJesus vehicle then went abruptly to the right, squealing the tires, and went towards the grass in front of Dunkin Donuts. CI#2 reported that when the vehicle made it onto the grass from the parking lot, “it” heard gunshots consistent with a handgun coming from somewhere behind “its” vehicle.

Upon hearing gunshots, CI#2 tried to get down and hide in “its” vehicle. CI#2 heard a third gun shot once the deJesus vehicle was all the way onto Route 114 heading south towards Goffstown. CI#2 said that “it” saw dirt and dust and the police cars followed the deJesus vehicle onto Route 114.

CI#2 was re-interviewed on October 16, 2013 by Troopers Bright and Hamilton at the Major Crime Unit headquarters. “It” reported that when the officers descended on the deJesus vehicle, “it” heard deJesus say “oh no, oh shit,” and then deJesus began to back up, but was stopped by a cruiser. As the deJesus vehicle was backing up, another cruiser arrived at the scene. CI#2 said that the deJesus vehicle then went forward and “it” heard a smashing noise as the deJesus’s vehicle turned.

After hearing the initial gunfire, which “it” described as pistol shots, CI#2 hid on the floor boards of “its” truck. After hearing tires squealing, “it” looked out the back of the truck to see what was going on and saw the deJesus vehicle in the dirt shoulder of Route 114. CI#2 said that when the deJesus vehicle was on Route 114, “it” heard another gunshot, which was different than the prior gunshots because it was “softer.” CI#2 told the investigators that “it” did not see a police officer at the time of the second gunshot when “it” saw the deJesus vehicle on the shoulder of Route 114.

CI#2 indicated that the deJesus vehicle was out of control by time it passed the entrance of Lanctot’s Plaza. CI#2 surmised that deJesus had already been shot at that point.

9. CI#3

On August 15, 2013, Sergeant Joseph Ebert interviewed CI#3 at the Weare PD at 5:40 am. CI#3 explained that on August 14, 2013, “it” was at Alex Cora deJesus’s residence in Manchester with deJesus and his girlfriend, Tabitha Scott. CI#1 arrived and asked deJesus to sell a finger of heroin to “its” friend. CI#3 said that Alex was “too cracked up” from smoking crack and doing heroin to go to the deal so he asked CI#3 to go in his place. After deJesus promised CI#3 a gram of heroin, CI#3 reluctantly agreed to go with CI#1 for the sale. deJesus gave CI#3 a finger of heroin and instructed “it” not to give it up until “it” was paid \$600.00.

CI#1 drove CI#3 to a parking lot in Weare where the transaction with CI#1’s friend was scheduled to take place. CI#1 acted as an intermediary and facilitated the sale of the finger of

heroin for \$600.00. After the transaction was complete, CI#3 said that police officers descended and they were all arrested.

CI#3 was taken back to the Weare PD where “it” was questioned. The officers asked CI#3 if “it” could get deJesus to come up to Weare to sell another finger of heroin. CI#3 agreed to cooperate and called deJesus, told him that CI#1 was “too doped up” to drive, and said “it” needed deJesus to come to Weare to drive “it” back to Manchester. Additionally, CI#3 told deJesus that CI#1’s friend wanted to buy another finger of heroin. deJesus agreed to drive to Weare to get “it” and, more importantly, his \$600.00 from the prior transaction. However, according to CI#3, deJesus said he would not bring another finger of heroin to sell because “it was fishy.” CI#3 then gave Scott directions to a Mobil gas station off Route 114 in Weare where they could meet up.

CI#3 was not present for any the events at Lanctot’s Plaza and did not have any information about how they unfolded. When CI#3 learned that deJesus was shot and killed, CI#3 stated that deJesus does not own a gun and “it” had never seen deJesus with a gun.

10. Officer Kim McSweeney

On October 25, 2013, Trooper William Bright interviewed Officer Kim McSweeney (McSweeney) of the Weare PD at the New Hampshire State Police Troop B Barracks. McSweeney was present with counsel.

McSweeney said that on the evening of August 14, 2013, she was off duty, at home. After the incident she responded to Lanctot’s Plaza, where Kelley assigned her to be with Nadeau. Nadeau did not talk about the incident.

Knowing that Cox, Hebert and Montplaisir were transported via ambulance to the Concord Hospital, McSweeney offered to pick them up. She drove them back to the Weare PD in her cruiser. During the transport, McSweeney reported that there was no discussion about the incident with deJesus.

11. Officer Robert Bifsha

On October 25, 2013, Trooper William Bright and Sgt. Scott Gilbert interviewed Officer Robert Bifsha (Bifsha) of the Weare PD at the New Hampshire State Police Troop B Barracks. Bifsha was present with counsel.

Bifsha told investigators that he arrived at work on August 14, 2013, around 9:30 pm. He was not involved in the undercover drug operation earlier that day at the Center Woods Elementary School.

After arriving for work, Bifsha responded to a report of a single car accident in the vicinity of Rolling Hill Road.²⁹ After that, he was informed that another undercover drug arrest was going to be occurring momentarily at Lanctot's Plaza. Bifsha was told to wait on Colby Road³⁰ until the "go" signal and then to converge on the Plaza for assistance.

Upon hearing the "go" signal on the radio, Bifsha drove down Colby Road heading towards Stark Highway, also known as Route 114. At that time, Bifsha heard "shots fired" broadcast on the radio and then he heard one "small pop" sound, which he assumed was a gunshot.³¹ He proceeded down Colby Road and took a left onto South Stark Highway (Route 114). While he turned, he saw what he believed were the rear lights of the unmarked Durango jump a curb in the parking lot of the plaza and continue south down Stark Highway.

As he drove towards the scene, Bifsha saw the deJesus vehicle crash off the road, followed by Montplaisir's cruiser. Bifsha drove to the crash site and saw that Hebert had a woman in custody on the ground.

A few minutes later, Bifsha saw Nadeau at the crash site. Bifsha believed that Nadeau told him that "he tried to run us over." Bifsha stayed at the crash site and saw Nadeau give his shotgun to Montplaisir. Bifsha opened the trunk of his cruiser and believes that Montplaisir cleared the shells from the shotgun into Bifsha's trunk.

12. Officer Barry Charest

On November 1, 2013, Trooper Nathan Hamilton interviewed Officer Barry Charest (Charest) of the Weare PD at the Troop B barracks. He was present with counsel.

Charest said that on August 14, 2013, he arrived at work between approximately 5 and 6 pm. Montplaisir told him that they were going to be doing an undercover drug buy that evening with a CI. They went over the operational plan at the police department. They all then went to the Center Woods Elementary School where they reviewed everyone's specific responsibilities. Charest did not remember the exact details of the plan. Since he was a relatively new officer, Charest's primary role was to observe the takedown. He was assigned to approach behind Kelley.

Before the first takedown, Charest was parked in a marked cruiser behind the school, immediately behind Kelley's unmarked cruiser. After the "go" signal was given, he followed Kelley to the deJesus's vehicle.

After the first takedown, Charest remained at the Weare PD with CI#3 while everyone else went to Lanctot's Plaza to conduct the second takedown. At some point, he turned on his radio and heard a broadcast for an "officer involved shooting." He remained at the station while other agencies arrived at the scene to assist.

²⁹ Rolling Hill Road, Weare is approximately 1 mile from the Dunkin Donuts at Lanctot's Plaza.

³⁰ Colby Road, Weare connects Rolling Hill Road and Stark Highway (Route 114) in Weare.

³¹ The windows in Officer Bifsha's cruiser were up.

13. New Boston Officer Watson

New Boston Officer Jen Watson (Watson) was interviewed by Trooper Pat Hennessey on September 10, 2013 at the New Boston Police Department. Watson was the first responding law enforcement officer to arrive following the incident with deJesus.

Watson said that on August 14, 2013, at approximately 10:00 pm, she heard a call on the radio from Weare for “shots fired” and “officer down.” She responded and went to the scene of the crash. She asked what she could do to help and was told by Kelley to secure the crime scene up the road at the Dunkin Donuts.

Watson drove up the street to the parking lot of Lanctot’s Plaza. There she interacted with the CIs and directed them away from the Dunkin Donuts. By that time, Kelley had also returned to the area. Before she began to tape off the perimeter of the crime scene in an effort to preserve its integrity, she saw Nadeau approach Kelley. Kelley instructed Watson to walk away so she could not overhear their conversation, essentially so she did not become a witness in the investigation.

After conversing with Nadeau, Kelley approached Watson and discussed trying to locate the shell casings and rounds. Kelley asked her if she had any “cones”³² because they were planning on marking evidence. Watson advised that she did not. With the assistance of an officer from Goffstown, she taped off the perimeter of the crime scene. When she finished, Watson recalled seeing small pieces of caution tape on the ground in the area in front of the Dunkin Donuts. She did not know who placed them there as neither she nor the officer from Goffstown marked any evidence.

14. Gene Propper

On November 14, 2013, Troopers William Bright and Nathan Hamilton interviewed Gene Propper. Propper was the subject of the inadvertent takedown at Dunkin Donuts which occurred minutes before deJesus’s arrival.

Propper told investigators that on August 14, 2013, at approximately 9:45 pm, he was parked in front of the Dunkin Donuts at Lanctot’s Plaza. At the time, his was the only vehicle there. He was there using the free Wi-Fi to upload documents from his computer for work. At approximately 9:56 pm, two other vehicles arrived at the plaza and parked on either side of his vehicle in front of Dunkin Donuts. Propper indicated that a person dressed in “normal clothes” approached his vehicle, tapped on the driver’s window and told him to leave.³³ When he put his car into reverse to leave, Propper said that a car pulled in behind him. At the same time, Propper saw a car to his left and another car “off in the distance.” Propper told investigators that the cars did not have police markings and there were no blue lights illuminated but nevertheless, he thought they were police. In addition to the person that told him to leave, Propper saw three people on foot dressed in police uniforms: one at the rear of his car, one at the front of his car,

³² A “cone” is terminology for a specific type of evidence marker.

³³ Propper provided a detailed description of this person. It is believed that this was CI#1.

and another to the left about 30-40 feet away who was holding a shotgun or a rifle and was yelling at him to “put his hands up.” After the confusion, Propper left the scene.

15. Philip Houten

On August 30, 2013, Trooper Pat Hennessey interviewed Philip Houten. Houten was driving on Route 114 near the time of and in the vicinity of the incident at Lanctot’s Plaza.

Houten said that on the night of August 14, 2013, he was traveling north on Route 114 with his sister. As he approached a curve in the road south of Lanctot’s Plaza, he heard what sounded like an exploding firework. A few seconds later, he heard two additional firework sounds. Houten continued north on Rt. 114 and completed the turn. After which, when he was facing towards the plaza, he saw a dark colored SUV pull onto the road near the Dunkin Donuts and then travel into his lane of travel. Fearing that the vehicle was going to strike him, Houten pulled over to the right to let the vehicle pass. At the last second, the dark colored SUV went back into its lane of travel and continued south. Houten then saw a cruiser with its blue lights illuminated pull out of the Lanctot’s Plaza entrance, in the vicinity of the gas pumps, and follow the dark SUV. Additionally, he saw an officer running south on Rt. 114 on foot. The officer was wearing a vest and carrying a weapon, which Houten believed was a pistol.

Houten was re-interviewed by Trooper Hennessey on September 27, 2013. The purpose of the interview, which took place in Hennessey’s cruiser on Rt. 114, was to approximate Houten’s location when he heard the “fireworks.” Houten indicated he heard the first “firework” sound when he was still in the straight portion of Rt. 114, approaching the turn, and there was a car traveling in the opposite direction directly in front of him. Hennessey noted that Houten would have been traveling past 362 South Stark Highway (Route 114) at the time. Houten said that before he made the turn, he heard two additional “firework” sounds. Based on this information it was determined that Houten was in the vicinity of 371 South Stark Highway. Both of these locations are south of Gould Road, which is just south of Greaney’s Farm Stand. The headlights from Houten’s vehicle going northbound would not have been visible at the Dunkin Donuts parking lot from these locations at the time of the shooting.

16. Megan Houten

On August 29, 2013, Trooper Pat Hennessey interviewed Megan Houten. Houten reported that on August 14, 2013 at approximately 10:00 pm, she was a passenger in a vehicle heading north on Rt. 114 which her brother, Philip, was driving. As they came around a corner, which was south of Lanctot’s Plaza, she saw a dark colored SUV pull out from the vicinity of Lanctot’s Plaza and swerve into their lane of traffic. She did not hear anything prior to coming around the corner. As the SUV approached them, they pulled over to the right to avoid being struck. At the last minute, the SUV swerved back into its lane and continued past them. Houten then saw a police cruiser approach the exit of Lanctot’s Plaza and an officer next to the driver’s side of the police cruiser, on foot running south on Rt. 114. The officer was wearing a police vest and was carrying a long gun. The cruiser turned right and pursued the dark SUV south on Rt. 114.

C. Physical Evidence at the Shooting Scene

The New Hampshire State Police Major Crime Unit crime scene personnel, along with the State Police TAR Team, documented the shooting scene at Dunkin Donuts. The Major Crime Unit also documented the scene at the crash site. The shooting scene was initially secured by New Boston Police Officer Watson who arrived while Kelley and Nadeau were walking through the parking lot and grassy area adjacent to Dunkin Donuts.

The investigators located and documented the position of the following items of evidentiary value. Two discharged handgun cartridge casings were located in the parking lot of Dunkin Donuts. One discharged shotgun shell was located on the grassy area adjacent to the parking lot. Tire marks were documented in the area where it had been reported that deJesus initially parked his vehicle. Tire marks were documented going from the parking area onto the curb and grassy area as described by the witnesses. A set of tire marks were photographed in the grass leading from the curb of the parking lot to the dirt shoulder of Route 114. Two tire marks were detected and photographed on Route 114 that document the path of travel of the deJesus vehicle headed southbound on Route 114.

A report was prepared by Trooper First Class Michael Pellitier of the NHSP TAR team that includes diagrams prepared to scale of the Dunkin Donut's parking lot and the adjacent grassy area leading onto Route 114.

The State Police Major Crime Unit also took possession of Nadeau and Cox's weapons, and their uniforms. Cox's handgun, a .45 caliber Glock semi-automatic pistol, was found to have two rounds missing from it. Nadeau's shotgun was provided to the State Police in an unloaded condition. Montplaisir had emptied the shotgun into the trunk of Bifsha's cruiser at the scene and secured it there. The State Police located three live shotgun rounds in the trunk of the cruiser. Those rounds consisted of one rifled slug round and two buckshot rounds. All the shells were 2 ¾ inches in length. The shotgun was determined to be an 870 Remington pump action shotgun. The State Police Forensic Laboratory determined that the shotgun could load six 2 ¾ inch shotgun shells, with five in the magazine and one in the chamber. An extender was not attached to it or located in the trunk of the cruiser. Cox's pistol and Nadeau's shotgun were examined at the lab and determined to be operating properly.

deJesus's vehicle was searched and examined by members of the New Hampshire State Police Major Crime Unit. Two bullets were found imbedded in the passenger side of the vehicle. One bullet was located in the B pillar and one in the back of the front passenger seat. The bullets entered the vehicle through the rear passenger door at a 45 degree, downward angle. The bullets recovered were consistent with .45 caliber ammunition that would have been fired by Cox.

There was no damage to the front or rear passenger side windows or to the driver's side rear window. The driver's window was down. The windshield had a defect on the inside, which is believed to have been caused by a fragment of the shotgun shell that killed deJesus. However, no fragments have been located in the vehicle. The rear most passenger side window and the rear hatch window were completely broken apart. There is no evidence of the entry of the fatal shotgun slug into or through the vehicle. Thus, it appears that the shotgun slug entered the

vehicle through the one of the rear windows, and then fragmented as it traveled through deJesus. These windows were broken apart at the time of the crash. Some fragments may have exited out the open driver's window or into the windshield of the vehicle. However, no fragments were located in the vehicle or on the roadway.

D. Autopsy Results

An autopsy was performed on deJesus's body by the Deputy Chief Medical Examiner, Dr. Jennie V. Duval. The cause of deJesus's death was a gunshot wound to his head. There was an entrance wound on deJesus's right forehead and an exit wound on the left forehead. The size of the wound is indicative of a shotgun wound, although no fragments were located for comparison. Dr. Duval determined the manner of deJesus's death to be a homicide, in that his death was caused by another person. Toxicology tests revealed that deJesus had several drugs in his system, including levels of cocaine and heroin, which suggest recent ingestion of the drugs prior to his death and substantial impairment at the time of the shooting.

E. Background of Alex Cora DeJesus

deJesus had prior convictions for cocaine sales in Nashua. He was convicted on three counts of sale of a narcotic drug in 2010 and served 4 months at the Hillsborough County House of Corrections. In 2011, he was found in violation of probation and sentenced to 1½ to 3 years at the State Prison. He was also convicted of additional drug sales and sentenced to a consecutive suspended state prison sentence of 2 to 4 years. This suspended sentence was still subject to imposition on August 14, 2013. At the time of the incident deJesus was also on probation with the Hillsborough County Department of Corrections. As a result, deJesus likely fled from the police that night because he knew that his suspended state prison sentences could have been imposed if he had been arrested again, which would have been in addition to the sentence imposed on any new charges stemming from the drug transaction that night.

deJesus also had one prior conviction for resisting arrest in 2008, and another conviction for resisting arrest in 2009, for which he served 30 days in the House of Corrections. He also had one conviction for simple assault in 2009, for which he was sentenced to serve 4 months in the House of Corrections.

In previous contacts with the police, deJesus had reported that he was a high school graduate from Puerto Rico and had no problems reading and writing English. However, he had also reported on one occasion that he sometimes had trouble verbally understanding English.

F. Investigation into Potential Lies by Witnesses and Obstruction.

Early in the investigation, the State Police were contacted by Officer Frank Jones (Jones) who reported that CI#1 had spoken him the night of the incident and recanted "its" original statements to Trooper Bright. Specifically, Jones reported that the CI#1 said that "its" statement to Trooper Bright that deJesus's vehicle had almost hit one or more of the Weare police officers was not true. CI#1 reportedly told Jones that none of the officers at the shooting scene were ever

in danger of being hit by the vehicle. When Jones asked why CI#1 did not report this to the State Police, CI#1 said “it” wanted to assure that “its” charges were dropped. Jones also reported that CI#1 said Cox told “it” that “as long as no one changes the story, we will be okay.”

Once this information was conveyed to the Attorney General’s Office and the State Police, steps were taken to determine whether CI#1 had lied in “its” original statement to the police and whether any of the involved police officers may have agreed to modify their accounts of the shooting incident to match each other, or to otherwise obstruct the investigation. Some of those steps are detailed as follows.

CI #1 was re-interviewed by members of the major crime unit. CI #1 did not acknowledge telling Jones that none of the officers were in danger, but did say that “it” had reconsidered this opinion the more “it” thought about the events. In the end CI#1 said that “it” believed the officer could have gotten out of the path of the vehicle.

Approval was granted by the Attorney General’s Office for Jones to secretly record conversations with Cox about the shooting incident and Cox’s statements to the investigators. However, Cox refused to speak with Jones about the shooting incident during two recorded conversations and no evidence of any lies or obstruction was obtained.

Although caution is always used when evaluating witness statements in criminal cases, the witness statements in this case were subjected to the highest level of scrutiny. Inconsistencies were carefully examined and compared to what other witnesses said and to the physical evidence. Even after those efforts, significant inconsistencies remained amongst the witness statements. While inconsistencies among witness accounts are not uncommon, particularly in cases involving stressful and potentially life threatening occurrences, the nature and extent of the inconsistencies present in this case are troubling.

In the end, despite an exhaustive effort, including offering several officers the opportunity to take a polygraph test, which they declined, and using the grand jury process, no definitive evidence of any lies or obstruction of the investigation was uncovered on the part of any civilian or police officer involved in this case.

III. LEGAL ANALYSIS

1. The Legal Standard that Applies to the Statutes.

Under the circumstances of this case, the Attorney General must consider whether Nadeau’s use of deadly force was justified and, if not whether he should be criminally charged. In New Hampshire, a criminal charge can only be brought against a person when there is probable cause to believe that a crime has been committed by that person. Then, in order to obtain a conviction for that crime in court, there must be sufficient admissible evidence available to establish the defendant’s guilt beyond a reasonable doubt and to disprove any defenses that may be raised. For the reasons set forth below, the State cannot meet this standard in this case.

A. The Justification Defense

In the event criminal charges were filed against Nadeau stemming from deJesus's death, he would be entitled to pursue the "justification" defense ("Physical Force in Law Enforcement") under RSA 627:5. The relevant portions of that statute are as follows:

II. A law enforcement officer is justified in using deadly force only when he reasonably believes such force is necessary:

- a. To defend himself or a third person from what he reasonably believes is the imminent use of deadly force.

II. A law enforcement officer is justified in using deadly force only when he reasonably believes such force is necessary:

- b. To effect an arrest or to prevent the escape from custody of a person whom he *reasonably believes*
1. has committed or is committing a felony involving the use of force or violence, is using a deadly weapon in attempting to escape **or** otherwise indicates that he is likely to seriously endanger human life or inflict serious bodily injury unless apprehended without delay; *and*
 2. he has made reasonable efforts to advise the person that he is a law enforcement officer attempting to effect an arrest and has reasonable grounds to believe that the person is aware of these facts.

(emphasis added).

Both of these provisions require officers who use deadly force to act reasonably under the circumstances. What is "reasonable" under the circumstances "is determined by an objective standard." *State v. Leaf*, 137 N.H. 97, 99 (1993); *see also State v. Cunningham*, 159 N.H. 103, 107 (2009). All the circumstances surrounding the incident should be considered in reaching this decision. *See Leaf*, 137 N.H. at 99. When examining the conduct of a person who has used deadly force, that conduct should be viewed "under 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, the inquiry must focus on the situation from the standpoint of a reasonable law enforcement officer facing the same situation, with the same knowledge as the officer who used the deadly force. That examination cannot be made with the benefit of hindsight, which is afforded by one viewing the circumstances after the fact. Two cases illustrate this standard of review.

In *Graham v. Connor*, 490 U.S. 386 (1989), the United States Supreme Court discussed the standards by which a police officer's conduct would be judged when excessive force claims were brought against him. The Court confirmed 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 Court went on to explain how to determine what is "reasonable" in situations where police officers use force:

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*, 132 S. Ct. 987, 992 (2012).

As another Court put it, determining what is "reasonable" in situations faced by police officers requires the following analysis:

[U]nder *Graham*, we must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes "reasonable" action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.

Smith v. Freeland, 954 F.2d 343, 347 (6th Cir. 1992).

The reasonableness standard also applies in a situation where a police officer or private citizen who uses deadly force is mistaken about the situation or the necessity of using deadly force. Under our law, a person "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). Thus, a person may be justified in using deadly force if he reasonably believed that he or another person was in imminent danger of the use of deadly force, even if, in fact, they were not. However, "[a] belief which is unreasonable, even though honest, will not support the defense." *State v. Vassar*, 154 N.H. 370, 374 (2006). As the Court has said, "we must sash our way through the fact bound morass of reasonableness" to make this determination. *Scott v. Harris*, 550 U.S. 372, 383 (2007).

Finally, at any trial where the defendant—whether a police officer or a civilian defendant—raises justification/self-defense, the State would have to disprove that defendant was justified under the above-discussed criteria, beyond a reasonable doubt. RSA 627:1; RSA 626:7(a); *See State v. McMinn*, 141 N.H. 636, 645 (1997). The burden is not on the person who used deadly force to prove that their conduct meets the requirements of the law or that it was reasonable. *State v. Wallace*, 136 N.H. 267, 271 (1992) ("when a defendant introduces evidence regarding a defense to a criminal offense, the State must disprove that defense beyond a reasonable doubt."); *State v. Etienne*, 163 N.H. 57, 87 (2011) ("the legislature determined that

self-defense and defense of others are pure defenses, and, thus, negating such a defense becomes an element of the offense that the State must prove beyond a reasonable doubt.”). In short, where there is some evidence to support a claim of self-defense/justification, the law creates a presumption that the claim is valid until the State proves otherwise.

2. Application of RSA 627:5, II (a)

Section II (a) of RSA 627:5 provides that a police officer is “justified in using deadly force only when he reasonably believes such force is necessary [t]o defend himself or a third person from what he reasonably believes is the imminent use of deadly force.” Thus, with respect to Nadeau, his use of deadly force would be justified under the law if he reasonably believed deJesus was imminently going to use deadly force against him or a third party and it was necessary to use of deadly force to defend himself or that a third party.

Nadeau told investigators that he believed that it was necessary to use deadly force for two reasons. First, he needed to protect Kelley from getting hit by deJesus’s vehicle. A vehicle can be considered a deadly weapon, depending on the manner in which it is used. *See State v. Hull*, 149 N.H. 706, 715 (2003) (affirming that a car can be used as a deadly weapon). Second, at the time he used deadly force, Nadeau believed that deJesus had committed a felony involving the use of force or violence against Cox by striking him with his car, and Nadeau feared that Cox might have been caught under the car as it was fleeing the scene. These two circumstances would constitute both the use of deadly force by deJesus and the imminent use of deadly force by deJesus on another. Finally, Nadeau made numerous statements at the scene that he believed the car was going to run him over and that is why he shot the driver, although this was not the primary justification he gave during the interviews for firing his weapon.

In defense of Kelley

Nadeau’s first justification for using deadly force was his belief that Kelley was in the path of the vehicle after it narrowly missed him. When an officer justifies “his use of deadly force against a driver of an on-coming vehicle by claiming that he was trying to prevent the vehicle from running someone over, the position of the person relative to the path of the vehicle is important.” *Waterman v. Batton*, 393 F.3d 471, 479 (4th Circuit 2005). In this case, Nadeau believed that Kelley may have been directly in the path of the vehicle. Stopping an accelerating vehicle moving in the general direction of an individual on foot is justification for the use of deadly force. *Id.* The critical question in this analysis is whether Nadeau’s belief was reasonable, and if not, could the State prove beyond a reasonable doubt that his belief was unreasonable.

Nadeau’s belief that Kelley was or could have been in the path of the vehicle was premised on Nadeau’s belief that Kelley was behind him from the time they got out of the cruiser. Nadeau based that belief on the alleged operational plan and the fact that Kelly had acted in accordance with that plan during the inadvertent takedown. Although Nadeau told investigators that he was uncertain of Kelley’s location at the time he jumped out of the path of the deJesus’s vehicle, he also told investigators he believed that Kelley was behind him in the

parking lot from the time that they got out of the unmarked cruiser. Nadeau did not see Kelley behind him or perceive him to be there, he only believed this because that was the plan. However, no other officer told the investigators that there was a plan in place for their positioning at the time of the arrest at the Dunkin Donuts. Moreover, Kelley told investigators there was no plan for him to be behind Nadeau for the arrest and that he was not behind Nadeau at the time of the inadvertent take-down. Kelley stated that he went towards the front of the Dunkin Donuts as soon as he jumped out of the cruiser, and never took a position behind Nadeau. Finally, Mr. Propper told investigators that the three officers surrounding his vehicle during this inadvertent take down came at him from different positions, and none were stacked one behind the other.

Based on all the evidence, it is clear that when Nadeau used deadly force, he was mistaken as to Kelley's position and as to his belief that Kelley was in imminent danger. The reasonableness of this belief is unsupported by the statements of the other witnesses. However, even though Nadeau was mistaken, given all the facts and circumstances of this investigation, and given the conflicting witness statements and lack of physical evidence, there is insufficient evidence to establish that Nadeau's mistaken belief was unreasonable beyond a reasonable doubt. Accordingly, even though Nadeau was mistaken in his beliefs as to Kelley, those mistaken beliefs will not support a criminal charge as a result.

In defense of Cox

Nadeau's second reason for firing his weapon was that he perceived that deJesus had backed his vehicle into Cox's Durango, damaging it and possibly injuring Cox by pinning him between the vehicles. Nadeau based his belief, in part, on the alleged operational plan that required Cox to go to the passenger side of the deJesus vehicle car during the takedown, which would have placed him between the vehicles. As noted above, none of the other officers confirmed that such a plan was in place.

If Nadeau's belief about deJesus's actions was accurate, those actions would have constituted the use of deadly force to evade arrest. Kelley and CI#1 partially corroborated Nadeau. They also told investigators that they perceived the deJesus vehicle hit Cox's Durango. However, neither one said he believed Cox had been hit by the vehicle. And, there is no physical evidence to support that belief.

Furthermore, Cox does not put himself between the vehicles and did not report that his cruiser was struck by deJesus vehicle. He told investigators that when he pulled toward the deJesus's vehicle to make the arrest, he got out of his driver's door and ran to the rear of the deJesus's vehicle. As soon as he got there, the deJesus vehicle began to rock back or the reverse lights went on. He reacted by running back to the driver's side of the Durango and then positioning himself at its rear. Cox's recollection of the events, however, is contradicted by the statements of Montplaisir, Hebert, and Scott, all of whom told investigators that Cox was at the front, passenger side of the vehicle for the initial takedown.

An additional challenge to finding this justification reasonable is that it appears the timing of the events would have prohibited Nadeau from observing the deJesus vehicle back up

toward the Durango and drive forward between the two vehicles. The TAR team determined that Kelley's cruiser was parked approximately 382 feet away from the front of Dunkin Donuts. They also estimated it would have taken him 8.64 seconds to reach the takedown location, if he traveled at 59 mph, taking into account the barriers in the parking lot. Thus, it took Kelley much longer to drive his cruiser to its parked position behind the CI vehicles, than it took Cox to position his cruiser and approach the deJesus vehicle. Similarly, it took Kelley more time to drive his cruiser to the front of Dunkin Donuts than it took Montplaisir to drive to the deJesus vehicle and for Hebert to jump out of the cruiser, towards the driver's side of the deJesus vehicle, and then jump back into the cruiser. Given the distance that Kelley had to drive to arrive in front of the Dunkin Donuts building, and the speed at which these events unfolded, it appears likely that Nadeau could not have been in the parking lot behind the deJesus vehicle before it moved forward between the unmarked cruisers.³⁴

In addition, Kelley stated that he heard handgun fire as soon as he jumped out of the cruiser, which was immediately after Nadeau jumped out of the cruiser. Since Cox did not fire his weapon until he saw Nadeau on the grass in the possible path of the deJesus vehicle and Kelley heard gunfire as soon as he got out of the cruiser, it is reasonable to conclude that Nadeau traveled directly to the grassy area to head off deJesus's vehicle as soon as he jumped out of the cruiser. Even given the speed at which these events took place, there was little to no time for Nadeau to make the observations of deJesus vehicle backing into Cox's cruiser or backing around Cox's cruiser before Kelley heard the gunshots. Reconciling the difference in these reported events cannot be done given the lack of physical evidence available to precisely place people and vehicles at particular moments in time as the events unfolded.

However, all of the witnesses agree that when the deJesus vehicle accelerated forward, it almost struck Hebert and, as it turned sharply right behind the Durango, it placed Cox at risk of serious bodily injury or death. This reckless driving alone by deJesus, even without evidence that deJesus's vehicle actually hit Cox, constituted a felony offense of reckless conduct under RSA 631:3, II (deJesus used his vehicle as a deadly weapon and placed others at risk of serious bodily injury or death).

It appears more likely, viewing the totality of the evidence, that Nadeau made his observations of the deJesus vehicle from inside Kelley's cruiser and that the deJesus vehicle had pulled forward and around the back of Cox's vehicle before Nadeau jumped out. However, given the speed at which these events occurred, and the varying perceptions of the officers during this event, there is insufficient evidence to disprove, beyond a reasonable doubt, Nadeau's belief that deadly force had been and was being used against Cox by deJesus.

In self-defense

Although Nadeau did not tell investigators during the initial interview that he fired under the belief that deJesus was a threat to him, he did say that to all of the officers at the scene and to

³⁴ It is difficult to recreate the timing of events with any accuracy given the varying speeds that each cruiser traveled and the inability to determine their exact position when they stopped. We do know, however, that it took approximately one minute from the arrest signal to the notification that shots had been fired as documented in the police department's dispatch log.

investigators during his second interview. In his first interview Nadeau told investigators that he did not fire as the vehicle came towards him due to his concerns about hitting other officers or the informants who may have been in the cross-fire. However, in his second interview Nadeau contradicted this statement when he said he took aim at the back of the driver's headrest as the vehicle drove at him and may have fired as the vehicle came towards him. This contradiction is problematic. Moreover, the physical evidence disproves any claim that Nadeau fired at the front of the vehicle.

However, Nadeau's statements at the scene have indicia of credibility. Statements made to others under the stress of excitement caused by a startling event are considered inherently reliable and as such, are admissible at trial as an exception to the hearsay rule. N.H. R. Ev. 803(2). Therefore, were a charge to be brought against Nadeau for killing deJesus, it is likely that one defense to that charge would be self-defense, based on the statements Nadeau made at the scene that night. Accordingly, this potential defense must be analyzed as well.

The critical inquiry is where was the vehicle in relation to Nadeau when he fired--was it coming at him, passing him, immediately past him, or well past him. In other words, was Nadeau in imminent danger or the immediate aftermath, or had the danger passed?

As noted above, Nadeau's own statements are contradictory on this point. It was clear from his accounts that he was placed in imminent danger of deadly force. He was attempting to stop a fleeing individual he believed had committed a felony drug sale, had failed to heed commands to stop by uniformed and armed officers, and may have hit one of those officers during a reckless maneuver with his vehicle that he was operating at an unreasonable speed. Nadeau was easily identifiable as a police officer with his clearly marked vest, and he was pointing a shotgun at the driver as the vehicle approached. As Nadeau jumped out of the vehicle's path, the passenger-side mirror nearly or slightly grazed him. In those seconds, Nadeau decided to fire his shotgun. In order to fire Nadeau would have had to back away from the passing car to give himself enough room to fire his shotgun. Based on the damage to vehicle, any shot that Nadeau fired would have entered through the rear-most passenger side window or the rear hatch window. This would also be consistent with the damage to the windshield and the trajectory of the wound sustained by deJesus, traveling from the right side of his forehead towards the left. Based upon the trajectory of the wound discovered at autopsy, it is believed that deJesus was looking behind the vehicle, with his head turned to the right when he was shot. Nadeau told investigators that the vehicle was still on the grass when he fired at it. After he fired, the vehicle drove onto Route 114, perpendicular to the travel lanes, then suddenly jerked to the right and traveled south on Route 114. CI#2 told investigators that deJesus's vehicle was on Route 114 before he heard the shotgun fire and that the vehicle traveled a distance southbound before it lost control. However, CI#2 did not know how close Nadeau was to the vehicle when he fired his shotgun. CI#2 said that "it" did not see anyone at the time "it" observed the vehicle and heard the gunshot. The other officers at the scene told investigators that they did not see Nadeau fire his weapon, nor did they see where either the deJesus vehicle or Nadeau was at the time. All of the officers stated that they did not hear the shotgun fire.

The physical evidence partially corroborates Nadeau's description of the vehicle's path of travel. Evidence collected from the scene documented portions of the path of deJesus's vehicle

on the grassy area and its path of travel onto Route 114. The tire marks documented in the shoulder of Route 114, that appear to be contiguous with tire marks from the pavement to the grass and then to the roadway, enter the roadway going southbound, not perpendicular to the travel lanes. The physical evidence also does not corroborate Nadeau's description of deJesus's vehicle making a sudden motion going southbound, almost tipping over the car. There were no tire marks in the middle of the roadway consistent with such a maneuver, which would be expected if it was done at a high rate of speed.

The police recovered a spent shotgun shell casing out at the scene. However, its location was not necessarily indicative of Nadeau's position when he fired because his shotgun did not automatically eject the spent casing after the shotgun was fired. Nadeau was unsure of his exact location when he ejected the spent round.

In short, the damage to the car and the shell's trajectory establishes that the vehicle was passing or had passed Nadeau by the time he fired, but there is no physical evidence to establish where he was in relation to the car when he pulled the trigger.

The witnesses' difficulty in determining their exact locations and that of others during the incident is likely due, in part, to the rapidity with which events unfolded. For example, the TAR team estimated that the deJesus vehicle could have accelerated to 32 mph as deJesus drove across the grass. At that speed, it would have only taken the deJesus vehicle 7.20 seconds to travel the 177 feet from its parked location in front of Dunkin Donuts to where the tire marks were found on the shoulder of Route 114.³⁵ While this time is a rough extrapolation, the shooting itself took far less time than that, likely only a second or two.

The prosecutors reviewed cases from other jurisdictions where police officers used deadly force against a fleeing motor vehicle for guidance in its analysis.³⁶ Those cases confirm that the critical determination as to an officer's civil liability is the reasonableness of the officer's actions, given the totality of the circumstances. In *Scott v. Harris*, 550 U.S. 372 (2007) the United States Supreme Court found that an officer's decision to force a motorist off the road who had engaged in a "Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury," was a reasonable use of deadly force. *Id.* at 380. However, as noted by the court in *Lytle v. Bexar County Tex.*, 560 F.3d 404 (5th Cir. 2009), "the Court's decision in *Scott* did not declare open season on suspects fleeing in motor vehicles. As Justice Ginsburg pointed out in her concurrence, *Scott* did not articulate a mechanical *per se* rule." *Id.* at 414-415.

In *Hathaway v. Bazany*, 507 F.3d 312, 322 (5th Cir. 2007) the court found an officer's decision to shoot at a fleeing vehicle was reasonable when the officer shot immediately after the

³⁵ This is a rough estimation of speed as set forth in the TAR team report. However this estimate helps to illustrate how quickly these events unfolded.

³⁶ Cases from other jurisdictions were reviewed since no New Hampshire cases were on point. It is important to note that the cases from other jurisdictions are civil cases and not criminal cases. Liability in a civil case requires proof by a preponderance of the evidence, not the much higher standard of proof beyond a reasonable doubt that is required in a criminal case. Regardless, the federal, out-of-state cases still provide some useful guidance in analyzing this case.

vehicle struck him. The *Hathaway* court reasoned that this happened in such a brief period of time that the officer fired his weapon before he had sufficient time to perceive that the threat had passed by him and to process that information. Therefore his conduct was reasonable.

In contrast, the *Lytle* court found that the officer's decision to shoot at a fleeing vehicle *might* have been unreasonable because the vehicle had enough time to go from a full stop to a distance of three or four houses down the block in approximately three to ten seconds. *Lytle*, 560 F.3d at 414. The court reversed an order granting summary judgment for the officer and remanded the case for a civil jury to determine if the officer's actions were reasonable.

In *Waterman v. Batton*, 303 F.3d 471 (4th Cir. 2005) police were engaged in a pursuit with a speeding vehicle during which it attempted to run a cruiser off the road. The driver also made a gesture suggesting he might be armed during the pursuit. As the vehicle approached a toll booth it slowed down, but refused to stop when several officers on foot ordered it to stop at gun point. The officers then fired several times. The court found that their actions were justified, even though the vehicle was not driving directly at them at the time they fired. However, the fatal shot was fired after the vehicle had passed by the officers and the threat no longer existed. The court held that the shots fired at the vehicle after it had passed by the officers, may not have been justified, under the state of the law at the time of the court's decision. However, since the law was unclear at the time of the incident, the court ruled the shooting a reasonable use of deadly force.

If Nadeau's first statements to officers at the scene are credited as the most reliable evidence of his state of mind when he fired at the deJesus vehicle, then he did so in response to his perception of an actual threat of deadly force against himself. Given the speed of the vehicle, which limited Nadeau's reaction time, it is possible that he could have been justified when he used deadly force in defense of himself.³⁷ Similar to the facts discussed in the *Hathaway* and *Waterman* cases cited above, Nadeau may have fired when he was still responding to the threat against him as the vehicle moved quickly by him. However, as discussed earlier, this cannot be determined with any certainty since it is unclear exactly when Nadeau fired and his proximity to the vehicle.

The officer's location in relation to the vehicle when he fired his shotgun is a critical fact in the analysis described in the cases outlined above. Specifically, in the *Lytle* case, the officer was engaged in a high speed motor vehicle chase with a vehicle suspected of being stolen by a driver who was on bond for felony theft and unlawfully carrying a weapon. During the chase the vehicle collided with oncoming traffic and the officer stopped approximately 12-15 feet behind the accident. After the officer got out of his cruiser the vehicle backed up towards the cruiser, and the officer fired twice at the rear of the vehicle, killing the passenger in the back seat. The vehicle then fled the accident scene and was pursued until it crashed again. After a foot pursuit the officer arrested the driver. During the trial, the parties disputed where the officer was standing when he fired. The officer said that he fired as or immediately after the vehicle backed up toward him, but the complainant contended that the vehicle was 3-4 houses down the block when he fired. The court found that if the officer fired as the vehicle was backing up at him, it

³⁷ Again, as previously stated, Nadeau initially stated that he believed that he fired twice. He later told investigators that he was unsure of how many times he fired.

would have been a reasonable use of force under the court's analysis in *Hathaway*. However, the court posited if the vehicle was several car lengths away from the officer when he fired, the use of force may not have been reasonable to protect the officer from deadly force.

Definitive evidence of Nadeau's location in relation to the deJesus vehicle is lacking. The evidence that does exist is conflicting and difficult to reconcile. While it is not uncommon for people in stressful situations to misperceive events or not perceive them at all, the fact that none of the officers at the scene claim to have seen Nadeau fire his shotgun has proven difficult to explain. For example, Cox told investigators that he fired his weapon at the driver of the deJesus's vehicle to protect Nadeau, and yet he did not watch to be sure Nadeau was safe as the vehicle passed by him. Instead, after using deadly force in defense of another, Cox said he jumped back into his cruiser in pursuit of deJesus, rather than ensuring that his fellow officer was unharmed. Montplaisir and Hebert claimed they did not see Nadeau fire because they were occupied with fastening Hebert's seatbelt, even after Cox fired his weapon. Montplaisir and Hebert told investigators that they did not know Nadeau's location until they saw him running along the grass near the entrance to Lanctot's Plaza. Finally, Kelley initially told investigators that he saw Nadeau in the path of a fleeing vehicle, but he looked away and did not see what happened. Kelley could not explain why he looked away while his junior officer was about to be hit by a fleeing vehicle.

Given the contradictions in the witness statements, the lack of physical evidence, the lack of eye witness testimony, and the speed at which these events unfolded, the State could not prove beyond a reasonable doubt that Nadeau's action in firing at deJesus was unreasonable because Nadeau's exact position cannot be established in relation to the vehicle at the time that he fired the fatal shot.

The lack of evidence in this matter can be contrasted to the evidence presented in other criminal cases in which the New Hampshire Supreme Court has found that there was sufficient evidence presented by the State to negate a claim of self-defense. In *State v. MacInnes*, 151 N.H. 732, 736 (2005), to negate the defendant's claim of self-defense, the State introduced evidence that the defendant "attacked the victim, that he failed to retreat when he could safely do so and that he used an unreasonable degree of force." In *State v. Santamaria*, 145 N.H. 138, 141 (2000), there was conflicting evidence from witnesses about whether or not the defendant was the initial aggressor which was critical to determining if the defendant was justified in using deadly force. In such a case where there is a clear conflict between witnesses, a jury can evaluate and resolve these conflicts finding then that the State either did or did not prove its case. *Id.* In *Santamaria*, the jury found the witness who testified that the defendant was the initial aggressor credible, and returned a guilty verdict, finding he did not act in self-defense. *Id.* These cases reflect circumstances different from those in this case. Here, the evidence needed to confirm or disprove Nadeau's claim of self-defense, is his exact position at the moment he fired his shotgun in relation to the moving deJesus vehicle. None of the witnesses in this case could provide that information.

To conclude, considering the facts of this case and examining them as the law requires, it cannot be determined if Nadeau's actions were justified pursuant to RSA 627:5, II (a). Given that, and considering all of the evidence and the applicable law, including the State's burden to

disprove justification/self-defense, the State cannot meet its burden to prove a criminal charge against Nadeau for causing deJesus's death, beyond a reasonable doubt.

2. Application of RSA 627:5, II (b)

An additional provision under the justification/self-defense law to consider is often referred to as the "fleeing felon" provision.³⁸ Although Nadeau did not specifically state that he justified his actions under this provision of the law, looking at the facts as they developed in the investigation, it is likely that Nadeau may use this as a defense if charged with a crime for the death of deJesus. Under this provision, Nadeau's use of deadly force would be justified if:

- (1) *he reasonably believed such force was necessary to effect an arrest of a person whom he reasonably believed...*

has committed or is committing a felony involving the use of force or violence

is using a deadly weapon in attempting to escape, or

otherwise indicates that he is likely to seriously endanger human life or inflict serious bodily injury unless apprehended without delay; and,

he had made reasonable efforts to advise the person that he is a law enforcement officer attempting to effect an arrest and has reasonable grounds to believe that the person is aware of these facts.

(emphasis added).

Nadeau told the investigators that he believed that deadly force was necessary to effect deJesus's arrest because he believed that deJesus was likely to seriously endanger human life or inflict serious bodily injury driving away from the scene unless apprehended without delay. Nadeau believed that deJesus had committed a felony using force or violence and was using a

³⁸ Similarly, RSA 627:5, VIII states that, "[d]eadly force shall be deemed reasonably necessary under this section whenever the arresting law enforcement officer reasonably believes that the arrest is lawful and there is apparently no other possible means of effecting the arrest." This provision, however, is unconstitutional under the United States Supreme Court decision in *Tennessee v. Garner* unless it justifies deadly force as necessary only when a law enforcement officer reasonably believes that an arrest is lawful, there is no apparent alternative means of effecting arrest, it is necessary to prevent the escape **and** the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. In *Tennessee v. Garner*, 471 U.S. 1 (1985) a Tennessee statute authorized a police officer, after giving notice of an attempt to arrest a fleeing or forcibly resisting criminal suspect, to "use all necessary means to effect the arrest." The U.S. Supreme Court held the statute to be unconstitutional to the extent it authorized the use of deadly force against an apparently unarmed, non-dangerous fleeing suspect. This analysis is consistent with the New Hampshire Supreme Court rulings requiring that the use of deadly force be "reasonably necessary" and "proportional" to the force one is defending against. *See, State v. Etienne*, 163 N.H. 57, 78 (2011); *State v. Warren*, 147 N.H. 567, 569 (2002). In reading in the requirements from *Tennessee v. Garner* to this provision of the statute, it presents the same analysis as reviewed under paragraph II(b).

deadly weapon in his escape, based upon his perception that deJesus had already struck Cox and that Kelley was in the path of the vehicle. Nadeau also believed that deJesus was likely to seriously endanger other motorists on Route 114 because he had ingested and was under the influence of illegal drugs, combined with his overall reckless driving in the parking lot. Even assuming it was reasonable for Nadeau to have believed that deJesus had committed a felony involving the use of force or violence and that he was likely to endanger others on the road, it must also have been reasonable for him to conclude that the use of deadly force was necessary to effect deJesus's arrest to justify the use of deadly force. That evidence is not present here.

At the time of the incident, the Weare police knew where deJesus lived in Manchester, they had identified him at scene of the shooting, and had the registration to his vehicle. Once deJesus fled from the scene, the officers could have pursued deJesus back to Manchester. deJesus could have been stopped and arrested along the way or upon his return to Manchester. This was not a case where there had been a lengthy motor vehicle chase such that there was concern about deJesus putting others in danger on the road. There was also no indication that deJesus was armed or likely to be armed at the time of the incident, according to the officers involved in the drug investigation. While there was evidence that deJesus was under the influence of heroin and cocaine, the police knew that fact when they arranged for him to drive from Manchester to Weare. This fact cannot now be used to justify killing deJesus to protect the public from his driving under the influence.

There is conflicting evidence about whether there was any traffic on the roadway at or about the time of the shooting that might have been in immediate danger from the potential erratic operation of deJesus's vehicle. Nadeau told investigators that he perceived vehicle lights going both northbound and southbound as these events unfolded. However, Philip Houten said that as he heard the sound of gun fire, a motor vehicle passed him going southbound. He then heard a motor vehicle crash before he turned the corner south of the farm stand on Route 114. Nadeau would not have seen Houten's headlights traveling northbound at the time he fired his weapon. None of the other officers saw any traffic on the roadway as they exited the Lanctot's plaza. Neither of the CIs reported seeing any traffic during this incident. Thus, the State concludes that Nadeau's belief that there was other traffic on the roadway was mistaken. Even if there had been traffic on the roadway, that fact alone would not have justified Nadeau's use of deadly force. This conclusion is consistent with cases from other jurisdictions.

In the *Lytte* case discussed above, the court expressed concern that the shooting could not be justified based on an ongoing threat to the public. The *Lytte* court looked to the analysis set forth in *Scott*, to determine if shooting at a suspect's fleeing motor vehicle was justified.

"The inquiry described by the Court is situation specific. Among relevant considerations: Were the lives and well-being of others (motorists, pedestrian, police officers) at risk? Was there a safer way, given the time, place, and circumstances, to stop the fleeing vehicle?" *Lytte*, 560 F.3d at 415.

In the numerous examples cited by the *Lytte* court, the findings were consistent. If there was a chase in which the suspect actually put others in danger, by colliding or nearly colliding with traffic, by knocking over an officer, or placing pedestrians in danger, the use of deadly force was justified. *Id.* at 416. However, in cases of low speed motor vehicle pursuits by individuals

only suspected of motor vehicle violations, the deadly force was not necessary and not proportional. *Id.* at 416-17. Under New Hampshire law, the use of deadly force must be necessary and proportional to the threat of deadly force perceived. *Etienne*, 163 N.H. at 70-71.

To conclude, considering the facts of this case and examining them as the law requires, Nadeau's actions cannot be justified pursuant to RSA 627:5, II (b). Under this subsection of the statute, Nadeau's actions were neither necessary nor proportional, and therefore, would not have been justified to effect deJesus's arrest.

IV. CONCLUSION

The Attorney General's investigation focused on whether Officer Nadeau's use of deadly force that resulted in Alex Jose Cora deJesus's death was justified under the law, and if not, could a criminal charge be proven against Nadeau as a result. Given the evidence and the applicable law, the Attorney General cannot determine whether Nadeau's actions that led to deJesus's death were justified under the law. The inability to reach a conclusion regarding justification is due to conflicting witness statements and a lack of sufficient corroborating evidence, both from witnesses and the physical evidence. Correspondingly, these circumstances lead to the conclusion that there is insufficient evidence to charge Nadeau with a crime for causing deJesus's death because it cannot be proven beyond a reasonable doubt that Nadeau's actions were not in complete accord with the law set forth in RSA 627:5.

There were several contributing factors that partially explain why the evidence supporting a finding and a criminal charge in this case is so lacking in some respects, and contradictory in many other respects. Witnesses, both civilian and police officers, were under stress during the incident and at times in fear for their life. The lighting conditions made it difficult for all the witnesses to see all the events that night given the darkness and flashing police lights. Witnesses were also in different locations with different vantage points, and sometimes quickly changed their positions during the incident, negatively impacting their ability to see all of the events that occurred. These factors routinely account for conflicting eye witness testimony. However, in this case, witness recollections were at times wholly inconsistent and had significant gaps. The officers' poor recollection of events at the scene was also difficult to reconcile.

Taken together, the gaps in the evidence surrounding the shooting incident deprived the prosecutors of all the information needed to make a determination, beyond a reasonable doubt, as to criminal liability in this case. Therefore, considering all the evidence and the burdens of proof placed on the State in a criminal prosecution, including the State's burden to prove the elements of a charge and to disprove a justification/self-defense claim beyond a reasonable doubt, the State cannot meet its burden here to prove a criminal charge against Nadeau. Accordingly, no criminal charges will be brought against Officer Nadeau for causing Alex Jose Cora deJesus's death.

The determination that Nadeau cannot be successfully prosecuted for a crime in connection with deJesus's death is not an endorsement of the police conduct that led to deJesus's death. On the contrary, many aspects of the Weare PD's drug investigation and the implementation of the plan to capture deJesus were ill-conceived and obviously placed many

police officers and private citizens at unnecessary risk. While there is no doubt that deJesus was engaged in criminal conduct that night, there was nothing about the situation that demanded the rash and poorly-planned response that ensued. Instead, the ranking officer that night, Sergeant Kelley, should have sought the assistance of other agencies. His decision to pursue a drug investigation and high-risk arrest without proper planning, training or manpower, led to the chain of events that resulted in the death of one man and placed five others at risk of serious bodily injury or death.

As the State's Chief Law Enforcement Officer, the Attorney General has been and will continue to communicate with the Weare PD's new police chief, John Velleca, to take steps to try to avoid another incident like this one. In addition, the Attorney General will recommend that Chief Velleca carefully examine Officer Nadeau's conduct, as well as the other officers present at the scene of the shooting, to determine whether their actions comported with department training, policy, and procedures. Finally, the Attorney General's Office will take actions to reach out to the law enforcement community to consider whether new training, policies, or procedures should be implemented for similar future drug investigations in Weare, and other cities and towns, like the one that led to deJesus's death.

This is a 3-D perspective diagram of the location of the vehicles at the beginning of the drug transaction at Lanctot's plaza, prepared by the NH State Police TAR Team. The confidential informants parked their vehicles in front of the Dunkin Donuts and the location of their vehicles was documented at the crime scene. The deJesus vehicle and the officers' unmarked cruisers are positioned in their approximate locations as described by the officers in their statements to investigators.

