

**ATTORNEY GENERAL OFFICE’S REPORT REGARDING THE JUNE
28, 2024, OFFICER-INVOLVED SHOOTING INCIDENT IN
MANCHESTER, NEW HAMPSHIRE**

I. INTRODUCTION

New Hampshire Attorney General John M. Formella announces the completion of the investigation into a police officer use of deadly force incident that occurred in Manchester, New Hampshire on June 28, 2024. During that incident, Manchester Police Sergeant Daniel Whelan shot and killed Andrew E. Smith (age 56). The purpose of this report is to summarize the Attorney General’s factual findings and legal conclusions regarding the use of deadly force against Mr. Smith. The findings and conclusions in this report are based upon information gathered during the investigation, including review of recorded interviews of witnesses, photographs of the scene of the incident, official police reports associated with this incident, and video recordings—including body-worn camera footage collected from the officers who were on scene.

As provided in RSA 7:6, RSA 21-M:3-b, and RSA 21-M:8, II(a), the Attorney General is the State’s Chief Law Enforcement Officer. Accordingly, the Attorney General has the responsibility to ensure that whenever law enforcement officers use deadly force, it is done in conformity with the law. When reviewing the use of deadly force by law enforcement officers, the Attorney General does not investigate or opine on particular procedures or tactics used by law enforcement officers. Instead, the Attorney General’s review of officer-involved use of deadly force incidents consists of a criminal investigation, which is limited to determining whether officers complied with the applicable law. Thus, the Attorney General’s review focuses on whether, under New Hampshire law, the use of force was justified because the officer

reasonably believed that such force was necessary to defend himself or herself or a third party from what the officer reasonably believed was the imminent use of deadly force.

Based on the investigation of this deadly force incident, Attorney General John M. Formella finds that the use of deadly force by Sergeant Whelan against Mr. Smith on June 28, 2024, was legally justified.

II. SUMMARY OF FACTS

Shortly after 9:30 a.m. on June 28, 2024, Sergeant Whelan was driving south on Beech Street in Manchester in his marked police cruiser when he observed Mr. Smith, who was walking on the sidewalk. As he drove by, he saw Mr. Smith extend his arm and gesture with his hand as if he was shooting a gun at Sergeant Whelan. Sergeant Whelan circled the block and eventually parked his cruiser on the north side of Bridge Street a few minutes later.

Sergeant Whelan exited his vehicle at 9:38:34 a.m. As he crossed Bridge Street to the sidewalk on the south side of the street, Sergeant Whelan met with Mr. Smith walking eastbound on the sidewalk in front of the apartment building of 195 Bridge Street. Sergeant Whelan asked Mr. Smith multiple times if he could speak with him. Mr. Smith eventually stopped after being told by Sergeant Whelan that he was being detained.

As Sergeant Whelan was speaking with Mr. Smith, he asked him to remove his right hand from his vest pocket. Initially, Mr. Smith complied with Sergeant Whelan's request. Sergeant Whelan then asked Mr. Smith if he was armed, and Mr. Smith stated that he was. Sergeant Whelan again instructed Mr. Smith to keep his hand visible, however, Mr. Smith responded by reaching his right hand back into his vest pocket. At this time, Sergeant Whelan body locked Mr. Smith to stop him from being able to pull out any object by wrapping his arms around Mr. Smith's waist. A nearby private citizen saw Sergeant Whelan trying to control Mr. Smith's

movements, and asked Sergeant Whelan if he needed help. Approximately five seconds after Sergeant Whelan tried to stop Mr. Smith from pulling anything out of his pocket, Mr. Smith fired a single shot in the general direction of Sergeant Whelan from a pistol concealed inside his right vest pocket. Sergeant Whelan responded immediately by drawing his weapon and firing four shots at Mr. Smith causing fatal injuries. Later investigation revealed that after Mr. Smith fired his first shot, his pistol jammed, preventing the gun from firing further shots at Sergeant Whelan.

Sergeant Whelan called for backup after discharging his firearm and began rendering medical aid until paramedics arrived and transported Mr. Smith to the Elliot Hospital, where he was ultimately declared deceased.

After the incident, the New Hampshire Attorney General's Office and the New Hampshire State Police were notified. The investigation into the incident began that morning.

III. THE INVESTIGATION

The New Hampshire Attorney General's Office with the assistance of the New Hampshire State Police Major Crime Unit ("MCU") conducted the use of force investigation regarding Sergeant Whelan's use of deadly force—specifically, the discharge of his service pistol— at Mr. Smith. Investigators examined the scene, collected and reviewed physical and video evidence, reviewed reports and records, and spoke with witnesses, including witnesses who were present at the time Sergeant Whelan discharged his service pistol. The information and evidence gathered during the investigation is summarized below.

A. Witness Accounts

Investigators interviewed a number of witnesses who were present at the time of the incident. Those key interviews are summarized below.

1. Sergeant Daniel Whelan

Sergeant Whelan was interviewed on July 11, 2024, in the presence of his legal counsel, by members of the Office of the Attorney General and the New Hampshire State Police. Sergeant Whelan indicated that he had not reviewed his body worn camera video (BWC) or any other footage before sitting down for the interview. Sergeant Whelan's recall and description of events were corroborated by the various videos and physical evidence collected by investigators.

Sergeant Whelan has served as a police officer since March 2006, beginning his career as a patrol officer with the Litchfield Police Department from March 2006 to May 2010 before joining the Manchester Police Department ("MPD") in May 2010. Sergeant Whelan was promoted to the rank of sergeant in November 2020 and was assigned as a patrol supervisor at the time of this event. In addition to his annual in-service trainings, Sergeant Whelan reported being trained in Supervisor Patrol Tactics, Defensive Tactics, and is a member of the Crisis Intervention Team.

On the morning of the incident, Sergeant Whelan was assigned as the patrol sergeant for the 6:30 a.m. to 3:00 p.m. shift. He was wearing his Manchester uniform of the day and operating a fully marked MPD supervisor's cruiser. Sergeant Whelan told investigators he was traveling in the left travel lane of Beech Street, a one-way street with two southbound lanes of travel. Sergeant Whelan reported that after passing Bridge Street, but prior to reaching Lowell Street, he observed Mr. Smith walking north on the sidewalk, and saw him look directly at Sergeant Whelan, extend his right arm out with a "makeshift gun with his fingers and hand," and imitate a firearm recoil as if he was shooting a gun at Sergeant Whelan. He reported that Mr. Smith maintained a serious demeanor during this interaction.

Sergeant Whelan told investigators he was alarmed by Mr. Smith's conduct and believed that Mr. Smith had intended to "inflict fear and alarm." He continued driving, but circled the block to stop and detain Mr. Smith for suspicion of criminal threatening. Sergeant Whelan proceeded to turn left onto Lowell Street, left onto Maple Street, and then left onto Bridge Street heading back toward Beech Street. Sergeant Whelan parked his cruiser on Bridge Street and observed Mr. Smith walking toward him from the opposite side of the street. Sergeant Whelan reported that as he crossed the street to approach Mr. Smith, he asked Mr. Smith if he could speak with him, but Mr. Smith did not initially respond to Sergeant Whelan's question. Sergeant Whelan further reported that he then asked Mr. Smith a second time to speak with him, Mr. Smith questioned whether he was being detained and Sergeant Whelan told him that he was.

Sergeant Whelan observed Mr. Smith place his hand in his right vest pocket and take a bladed stance with his right hip away from Sergeant Whelan. Sergeant Whelan told investigators that based on his training and experience, he interpreted this movement as express body language indicating that Mr. Smith was indeed armed. Sergeant Whelan asked Mr. Smith to remove his hand from his pocket, which he did, and then asked if he was armed. When Mr. Smith responded that he was armed, Sergeant Whelan told Mr. Smith to turn around so that he could pat him down and remove whatever weapon he had while they were speaking together. He then saw Mr. Smith respond by digging his hand back into his right vest pocket. Sergeant Whelan explained to investigators that it was at this point that he believed the "circumstances were grave" and he was then "in fear for his safety." Sergeant Whelan described how he then body locked Mr. Smith with a bear hug by wrapping his arms around Mr. Smith's waist and interlocking his hands to restrict Mr. Smith's movement.

Sergeant Whelan then pivoted with his right foot, bringing Mr. Smith down and trying to control him on the pavement. As Sergeant Whelan was attempting to gain control of Mr. Smith's hands, he heard a gunshot and observed the barrel of a gun protruding in his direction through a hole in Mr. Smith's vest where he concluded the round must have gone through. Sergeant Whelan explained how he believed Mr. Smith had just fired at him, and how Mr. Smith's hand was still inside his pocket with the gun he could now see. Sergeant Whelan told investigators it was at this moment that he drew his own firearm from his holster with his left hand and fired one shot into Mr. Smith's left side. Sergeant Whelan reported that he saw this round impact Mr. Smith, but that Mr. Smith still had his hand on his gun, so Sergeant Whelan then stood up and fired three more shots into Mr. Smith's chest.

Sergeant Whelan explained that the concern he held each time he fired his weapon was that he felt "the circumstances were dire" and he was in fear for his safety as well as the safety of the general public that morning given that this occurred on the "sidewalk of a major thoroughway in the city [with] vehicles, residences, and pedestrian traffic." Sergeant Whelan told investigators that after discharging four shots he stopped shooting because Mr. Smith appeared incapacitated. Sergeant Whelan further stated that he observed the handle of Mr. Smith's gun protruding from his vest as he approached Mr. Smith and placed him in handcuffs.

As confirmed by the BWC footage of this event, Sergeant Whelan notified dispatch of shots fired within seconds of firing at Mr. Smith, and requested an ambulance. Officers arrived on scene, secured Mr. Smith, and rendered him medical aid until the ambulance arrived.

2. Suleiman Haji

Suleiman Haji was interviewed on June 28, 2024, a few hours after the shooting. Mr. Haji stated that while he was driving as a rideshare driver, he observed a police officer approach a

man walking on the sidewalk to speak with him. Mr. Haji saw that the man attempted to pull something out of his vest pocket and that the officer responded by grabbing him, which caused the police officer and the man to fall to the ground. Mr. Haji described how the officer was on top of the man holding his hand while they were on the ground. Mr. Haji told investigators that he believed the officer may have been on top of the man to hold him so he would not take out his weapon. Mr. Haji told investigators that he parked his car, got out, and asked the officer if he needed help. Mr. Haji stated that as the officer and the man were on the ground, he heard a couple shots. Mr. Haji reported that he saw the man holding a black gun in his hand, and believed the man shot first at the officer as the officer was on top of him.

3. Melissa Burpee

Melissa Burpee was interviewed on June 28, 2024, a few hours after the shooting. Ms. Burpee was traveling on Bridge Street in Manchester as a passenger in Mr. Haji's rideshare vehicle. Ms. Burpee also observed a police officer approach a man on the side of the road and speak with him for what she estimated to be approximately 30 seconds. Ms. Burpee explained to investigators that she was sitting in the passenger-side front seat of the vehicle approximately ten feet away when she saw the man (Mr. Smith) attempt to grab what she believed to be a gun from his jacket or sweater pocket. Ms. Burpee saw the police officer (Sergeant Whelan) respond by grabbing the man and bringing him to the ground, at which point the man fired what she believed to be one or two gunshots. Ms. Burpee stated that the police officer responded by firing three to five shots. Ms. Burpee could see the man's firearm on the ground at some point after he had been shot.

B. Video Evidence

Investigators obtained and reviewed all available BWC video footage from the Manchester Police Department members¹ who responded to the scene at 195 Bridge Street, neighborhood security camera footage, and video footage taken by a private citizen present at the scene. Sergeant Whelan's BWC was found to be functioning normally and recorded the entirety of the incident, although its placement on the center of his uniform resulted in the lens being blocked at times while he held Mr. Smith's arm to his body.

All video footage reviewed was found to be consistent with the statements provided by each of the responding officers and the physical evidence at the scene.

1. Sergeant Whelan's Body Worn Camera Video

The audio on Sergeant Whelan's BWC was activated as he exited his cruiser to approach Mr. Smith at 9:38:34 a.m. Within seconds of Sergeant Whelan exiting his cruiser, the footage shows Mr. Smith across the street, walking on the sidewalk in front of 189 Bridge Street.



Figure 1 – Image of Mr. Smith walking in front of 189 Bridge Street toward 195 Bridge Street.

¹ Sergeant Whelan was the sole officer present at the time of the shooting. The BWC footage collected from other members the MPD depicts the events that occurred after Mr. Smith and Sergeant Whelan discharged their firearms.

As Sergeant Whelan approached Mr. Smith, he said, “What’s happening, sir?” Mr. Smith stared at Sergeant Whelan, did not respond, and instead kept walking down the sidewalk. Sergeant Whelan then asked Mr. Smith, “Can I talk to you for a minute?” Mr. Smith responded by asking if he was being “detained” to which Sergeant Whelan affirmed that he was being detained. Mr. Smith stopped walking and faced Sergeant Whelan with his right hand in his vest pocket.



Figure 2



Figure 3



Figure 4

Sergeant Whelan asked Mr. Smith to remove his hand from his pocket and Mr. Smith initially complied (*see* figure 3). Sergeant Whelan then asked Mr. Smith if he had any weapons on him and Mr. Smith responded that he did. As they were speaking, Mr. Smith reached back into his right vest pocket despite Sergeant Whelan’s commands that he keep his right hand visible (*see* figure 4).

After Mr. Smith refused Sergeant Whelan's command to turn around, Sergeant Whelan can be seen attempting to detain Mr. Smith. Sergeant Whelan's BWC device is largely obstructed as he struggled with Mr. Smith making it unclear when the two men went to the ground. After approximately six seconds, a gunshot can be heard, and Sergeant Whelan responded by drawing his weapon and firing four shots. Sergeant Whelan then called for backup and placed Mr. Smith in handcuffs with the assistance of responding MPD officers. Another person can be heard asking Sergeant Whelan if he needed help, to which Sergeant Whelan asked him to please stay back. He then continued to tell Mr. Smith to show him his hands as he approached and attempted to place Mr. Smith in handcuffs. During that process, the barrel of Mr. Smith's gun can be seen protruding through a hole in his vest pocket that was caused by the shot he had fired at Sergeant Whelan (*see* figure 5). Once secured, officers begin rendering medical aid.



Figure 5 – Image of the barrel of Mr. Smith's Beretta pistol pointing out from the hole in his vest pocket

2. Neighborhood Security Camera Footage

Investigators collected footage captured by neighborhood security cameras. In these videos, Mr. Smith can be seen entering the Union Street Market at 621 Union Street at 8:59 a.m. and remaining in the store for approximately one minute. Mr. Smith is later seen at approximately 9:35 walking east on Lowell Street and later turning north on Beech Street. Mr. Smith is seen walking on the west sidewalk of Beech Street before going off frame at 9:35:35 a.m. Less than two minutes later, Sergeant Whelan's police cruiser can be seen traveling south on Beech Street and turning east on Lowell Street. The timing of this video footage is consistent with Sergeant Whelan's report of having driven south past Mr. Smith on Beech Street as Mr. Smith was traveling north.

3. Suleiman Haji Cell Phone Videos

Mr. Haji recorded five videos of the incident, each lasting from two seconds to eleven seconds. Four of the videos depict the events that occurred after Mr. Smith and Sergeant Whelan discharged their firearms. In these videos, Mr. Smith can be seen laying on the sidewalk with officers attempting to secure his firearm and provide medical attention. In one video, taken while Mr. Haji is approaching the scene in his vehicle, Sergeant Whelan can be seen wrestling with Mr. Smith before a loud noise, which may have been a gunshot, can be heard. Due to the angle of the video and its brief duration (two seconds), it is unclear who was holding a firearm at the time of the noise, and if the noise was a gunshot, whether it was Mr. Smith's initial gunshot, or Sergeant Whelan's first gunshot that is recorded.

C. Physical Evidence

1. Scene and Mr. Smith's Firearm

The incident took place on the public sidewalk outside of 195 Bridge Street in Manchester. The New Hampshire State Police Major Crimes Unit, under the direction of the Office of the Attorney General, searched, processed, and documented the area of Bridge Street and Ash Street (*see* figure 6).



Figure 6 – Overhead diagram of the area outside of 195 Bridge Street

Mr. Smith was treated by officers and then EMTs where he fell until he was transported by ambulance to the hospital. During the course of treatment of Mr. Smith at the scene, multiple MPD officers observed the barrel of a black semiautomatic pistol protruding from Mr. Smith's right vest pocket. The weapon was secured and found to be a Beretta Model PX4 Storm, configured in a .40 S&W caliber (*see* figure 7). The Beretta contained thirteen (13) live rounds in

the magazine and a single fired .40 S&W cartridge case which failed to fully eject lodged in the ejection port of the firearm (commonly referred to as a stovepipe jam). The manual safety switch on the Beretta's slide was switched to the fire position, allowing the gun to be fired. However, the jam in the ejection port prevented the gun from firing again after Mr. Smith had fired his first shot. Testing by the New Hampshire State Police Forensic Laboratory confirmed that the .40 S&W cartridge recovered from the ejection port was fired from Mr. Smith's Beretta.



Figure 7 – Image of Mr. Smith's Beretta with the fired cartridge jammed inside the ejection port

2. Sergeant Whelan's Firearm

The firearm used by Sergeant Whelan was a department-issued 9mm Sig Sauer P320 semiautomatic pistol. The pistol was secured by responding MPD officers until New Hampshire State Police investigators arrived. The pistol was examined and found to contain one (1) Speer Luger 9mm live round in the chamber and a magazine with thirteen (13) additional rounds. The pistol had a maximum capacity of eighteen (18) rounds by carrying a full magazine of 17 rounds with an extra unfired round loaded in the chamber. Sergeant Whelan had two additional

magazines on his person, each fully loaded and unused with seventeen (17) additional Speer Luger 9mm rounds.

Investigators located the four (4) spent 9mm Speer Luger rounds on the sidewalk in front of 195 Beech Street that were consistent with—in caliber, make, and model—the unspent bullets found in Sergeant Whelan’s handgun.

D. Autopsy Results

On June 29, 2024, Chief Medical Examiner Dr. Jennie V. Duval conducted an autopsy on the body of Mr. Smith. Mr. Smith sustained four (4) separate gunshot wounds. Each gunshot wound penetrated the front or sides of his chest, causing internal damage to his chest and abdomen. Based on the examination, Dr. Duval concluded that Mr. Smith’s cause of death was gunshot wounds to the chest and abdomen, and that his manner of death was homicide. As used by the Office of the Chief Medical Examiner, homicide is defined as the killing of one person by another.

Toxicology testing revealed the presence of ketamine, an illegal drug, in Mr. Smith’s blood.²

IV. APPLICABLE LAW AND LEGAL STANDARDS

New Hampshire’s laws regarding self-defense, defense of others and the use of physical force by law enforcement are set forth in RSA Chapter 627. Pursuant to RSA 627:4, II(a) and RSA 627:5, II(a), a private citizen and a law enforcement officer are justified in using deadly force when they reasonably believe that such force is necessary to defend themselves or a third

² Toxicology testing found a result of 1,400 ng/mL of ketamine in Mr. Smith’s blood. Ketamine is abused for its hallucinogenic and dissociative effects. Adverse effects can include visual disturbances, drowsiness, agitation, blank stare, hallucinations, delusions, increased respiratory rate, hyperthermia, irrational behavior, and/or dream-like states. A common initial dosage is 1 to 4.5 mg/kg. After a 2.5 mg/kg IV dose, a mean serum ketamine concentration of 1000 ng/mL was observed at 12 min., declining to 500 ng/mL at 30 min.

person from what they reasonably believe to be the imminent use of deadly force. Under RSA 627:9, “deadly force” is defined as “any assault ...which the actor commits with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily injury.” RSA 627:9, II. “Purposely firing a firearm capable of causing serious bodily injury or death in the direction of another person . . . constitutes deadly force.” *Id.*

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

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

Federal cases, while largely addressing the civil standards that apply to federal civil rights lawsuits, provide some discussion of the “reasonableness” standard for the use of force by police officers that is useful in analyzing officer-involved use of force cases in this state. In *Graham v. Connor*, 490 U.S. 386 (1989), the United States Supreme Court stated that “[t]he ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” *Id.* at 396. The Supreme Court continued:

The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.

Id. at 396-97; *see also Ryburn v. Huff*, 565 U.S. 469, 477 (2012).

The Eleventh Circuit has noted:

The Supreme Court has emphasized that there is no precise test or ‘magical on/off switch’ to determine when an officer is justified in using excessive or deadly force. Nor must every situation satisfy certain preconditions before deadly force can be used. Rather, the particular facts of each case must be analyzed to determine whether the force used was justified under the totality of the circumstances.

Garczynski v. Bradshaw, 573 F.3d 1158, 1166 (11 Cir. 2009) (internal citations omitted). That is because “the law does not require perfection – it requires objective reasonableness.” *Phillips v. Bradshaw*, No. 11-80002-CIV, 2013 WL 1296331, at *17 (S.D. Fl. Mar. 28, 2013). The law must account for the fact that dangerous situations often unfold quickly, and law enforcement officers sometimes need to make quick decisions under less-than-ideal circumstances. *See Huff*, 565 U.S. at 477 (finding that appeals court panel “did not heed the District Court’s wise admonition that judges should be cautious about second-guessing a police officer’s assessment, made on the scene, of the danger presented by a particular situation.”)

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

V. ANALYSIS AND CONCLUSION

Based upon all the facts and circumstances surrounding this incident, the Attorney General has concluded that it was reasonable for Manchester Police Sergeant Daniel Whelan to believe, when he fired his weapon at Mr. Smith, that Mr. Smith posed an imminent threat of deadly force as Mr. Smith had just fired upon him, and that deadly force against Mr. Smith was necessary to protect himself as well as members of the public from that perceived imminent threat. Thus, Sergeant Whelan was legally justified when he used deadly force against Andrew Smith.

Mr. Smith was armed with a pistol, which he fired at close range toward Sergeant Whelan. Sergeant Whelan, having witnessed Mr. Smith attempt to shoot him, and unable to control Mr. Smith or stop him from firing again, reasonably believed that Mr. Smith was a continued threat to himself and members of the public. Based on Sergeant Whelan's proximity to Mr. Smith and the apparent direction of the shot, Mr. Smith's conduct constituted a violent felony offense that placed Sergeant Whelan in danger of suffering serious bodily injury from his actions. *See RSA 631:1, I & II* ("A person is guilty of reckless conduct if he recklessly engages in conduct which places or may place another in danger of serious bodily injury ... [and] is a class B felony if the person uses a deadly weapon ..."). Here, the accounts of Sergeant Whelan and two eyewitnesses are corroborated by Sergeant Whelan's BWC and other available video evidence.

Sergeant Whelan's initial contact with Mr. Smith was preceded by Mr. Smith having made a threatening gesture, specifically, extending his right arm out and imitating as if he was shooting a gun at Sergeant Whelan. In response to this gesture and to investigate the crime of criminal

threatening, Sergeant Whelan attempted to speak with Mr. Smith. Sergeant Whelan approached Mr. Smith in a nonconfrontational manner and asked him to stop and remove his hands from his pockets. While Mr. Smith initially complied, he subsequently informed Sergeant Whelan that he was armed and reached his right hand back into his vest pocket, despite Sergeant Whelan's commands to the contrary. He did not lawfully comply with the request to keep his hands out of his pockets and be detained. Instead, he thrust his hand into his pocket, which was confirmed to contain the gun that he carried. At that time, Sergeant Whelan reasonably feared for his safety, and was forced to grab Mr. Smith to stop him from pulling the gun out of his pocket and safely take him into custody. After a few seconds of this physical struggle, Mr. Smith decided to try and shoot Sergeant Whelan, and indeed, he successfully fired his pistol through his vest pocket in the general direction of Sergeant Whelan. These circumstances, objectively viewed, created an immediate apparent life-threatening situation with the reasonable belief that Mr. Smith would fire his pistol again, potentially striking Sergeant Whelan or a member of the public. Being actively shot at, Sergeant Whelan then deployed his own firearm and fired four rounds until he could back away from Mr. Smith. The video shows that it was not until he stopped firing that Mr. Smith pulled his hand out from his pocket and away from the firearm.

Sergeant Whelan's concern for his own safety, as well as for the members of the public that summer morning on Bridge Street, was justified. The street was heavily traveled with residential and commercial traffic. It was a sunny, summer morning, and multiple witnesses were in public who saw what happened, and even stopped to try and help Sergeant Whelan when they saw what happened. His concern about the risk posed to neighboring occupants is a concern grounded in tragic precedent. *See, e.g., State v. Burton*, 460 S.E.2d 181 (N.C. Ct. App. 1995) (discussing stray 9mm bullets that penetrated an exterior wall, one of which killed a four-year-

old child, who was seated on her father's lap); *Bundy v. Terra*, Civil Action No. 19-3865, 2023 WL 3633385 (E.D. PA April 24, 2023) (unpublished) (discussing evidence that a stray 9mm bullet entered a store and killed a store clerk). Therefore, Sergeant Whelan's concerns that Mr. Smith's imminent use of deadly force posed a danger to the neighboring occupants was objectively reasonable.

Under these circumstances, the law does not require any private citizen or law enforcement officer in Sergeant Whelan's position to retreat before using deadly force to defend himself or another from the imminent use of deadly force. Even if the law did require someone to attempt to retreat in such situations before using deadly force, retreat for Sergeant Whelan was not possible without putting his own life and the lives of members of the public at risk given his close proximity to Mr. Smith.

Accordingly, Sergeant Whelan was legally justified in using deadly force against Mr. Smith, and no criminal charges will be filed against him in connection with Mr. Smith's death.