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# Former prosecutor: Gilford police shooting investigation focuses on question of defense

By ADAM DRAPCHO  
THE LACONIA DAILY SUN

GILFORD — In the wake of the New Year's Day shooting that left a teenager dead, one of the many yet-unanswered questions is whether the police officer who used deadly force will face any charges.

A spokesperson for the state Attorney General's Office said officer-involved shootings that result in death are treated "as we do other homicide cases." Investigators would likely have in mind RSA 627.5, the New Hampshire law that pertains to use of force by officers, which states, in part, that use of deadly force by an officer is justified "To defend himself or a third person from what he reasonably believes is the imminent use of deadly force."

Attorney Michael Lewis has a good idea of what that investigation looks like. Lewis, a partner and senior litigator at Rath, Young and Pignatelli in Concord, worked as a homicide investigator for the Attorney General's Office from 2007 to 2013.

"My brain is conditioned, as a former prosecutor, to ask about the facts of the situation," Lewis said. "And as far as I can tell, I just don't know the facts enough to know if the police officer acted with justification or not, or whether it could be disproven or not."

Such as are available, the apparent facts are that a 911 call was placed shortly before 10 p.m. on Jan. 1. An audio recording of police radio describes a situation involving 17-year-old Mischa Fay "in a rage" and armed with a knife; his mother was waiting outside the Varney Point home and his father was locked inside an office.

The two responding Gilford police officers, veteran Sgt. Doug Wall and officer Nathan Ayotte, entered the home, and moments later, Ayotte discharged his taser and Wall fired his service weapon. Fay was transported to the hospital and died. The cause of death was determined to be a single gunshot wound to the chest.

Lewis said the rules are fairly simple when it comes to such situations.

"In terms of lethal force and New Hampshire law, lethal force is justified against lethal force. You can't use lethal force if you don't believe you [or others] are being threatened with lethal force," Lewis said. Therefore, most homicide investigators have to be prepared to answer the question of whether or not the person who pulled the trigger had reason to believe that their life, or the life of someone else, was under imminent threat.

That's one question Lewis said investigators will focus on. The second is the principle of "beyond a reasonable doubt," as Lewis put it. In other words, even if prosecutors believe they

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— Director of Police Standards and Training John Scippa

might be able to bring some evidence to disprove a defendant's potential self-defense theory, the evidence would have to be so overwhelming that jurors would be persuaded even if they maintain a reasonable amount of skepticism.

"So, those are the two guiding principles: that a police officer has to be prosecuted to a level beyond reasonable doubt, and you have to disprove self-defense or the defense of others," Lewis said.

Charging police officers with homicide, for acts they carried out in the line of duty, is a steep challenge for prosecutors, Lewis said, and not solely because the attorney general and municipal law enforcement agencies usually work closely together.

"It's tough. In the background, the state is going to be thinking about, and sympathetically, too, and not unjustifiably, the dangers that routinely exist with police officers that are entering other people's homes, in a state where lots of people have lots of weapons, and there is an unstable, possible domestic violence situation going on," Lewis said.

Investigators are likely in the process of gathering as much information as possible leading up to the moment that the firearm was discharged. What did officers understand about the situation before they entered the home, what did Fay's parents say in interviews with investigators, how did the officers explain

the events as they unfolded, and does the forensic evidence from the scene support those explanations? Electronic evidence is also important, such as medical records, emails and text messages. Perhaps most revealing will be the body camera footage, which hasn't yet been released by the AG's Office.

## 'A reasonable level of force'

For John Scippa, being director of New Hampshire Police Standards and Training didn't make it any easier to hear the news about the events of Jan. 1 in Gilford.

"It's a tragedy all the way around."

Scippa couldn't comment about the Gilford case, but said that law enforcement officers have specific duties in such situations.

"What are the primary responsibilities of a police officer if they respond to any call? The first priority is to maintain safety to the scene, themselves and all innocent parties," Scippa said, and the first order of doing so is to attempt to de-escalate the situation.

De-escalation often involves engaging with the individual at the center of the crisis. If an officer can establish a dialogue, that in itself can "reduce the elemental state that they are in," Scippa said, and the officer can try to get them to agree with certain requests, such as standing in a specific place, or placing any weapons or objects on the ground.

"De-escalation is dependent not only on the officer, but the responsiveness of the person that officer is engaged with," Scippa said, adding that simply slowing a situation down could result in a more favorable outcome.

"If de-escalation is not possible," Scippa said, "then they are compelled to respond with a reasonable level of force to control the situation and keep people safe."

When such a use of force is necessary, it comes at a considerable cost, Scippa said, including to the officer.

"No police officer ever wants to have to make that tough decision. When a police officer uses force, deadly or otherwise, they have to carry that decision that they made for the rest of their lives," Scippa said.