

**ATTORNEY GENERAL'S REPORT REGARDING THE MARCH 28-29, 2014,
OFFICER INVOLVED-USE OF FORCE INCIDENT IN FARMINGTON, NH**

March 10, 2015

I. INTRODUCTION

The Office of the Attorney General has concluded an investigation into whether Officer K. Sean Owen of the Farmington Police Department¹, employed excessive force in effectuating the March 28-29, 2014, arrest of Thomas Hurd for criminal mischief and disorderly conduct. The purpose of this final report is to summarize the investigation's findings and conclusions with regard to this incident. The findings and conclusions contained in this report are based on interviews of civilian and law enforcement witnesses, a review of written police reports and witness statements concerning the incident, a video of the incident captured by a police cruiser dashboard camera, an audio recording of Hurd in Officer Owen's police cruiser during his transport to the Strafford County House of Corrections following the incident, and photographs of Hurd.

The investigation has revealed that Officer Owen twice deployed his TASER at Hurd while attempting to take Hurd into custody due to his recent misdemeanor-level criminal activity. Applying the law regarding the use of physical force in law enforcement to all of the circumstances surrounding this incident, the Attorney General concludes that Officer Owen was justified in his initial physical contact with Hurd and the first TASER deployment. Regarding the second TASER deployment, while there is evidence to support the claim that Officer Owen used appropriate physical force as a law enforcement officer, there are also some inconsistencies in the accounts given by Officer Owen. In light of those inconsistencies, the Attorney General is

¹ Officer Owen subsequently left the Farmington Police Department and is presently employed by the Salem Police Department having started there on June 16, 2014. His departure from the Farmington Police Department was unrelated to this incident.

unable to conclusively determine that Officer Owen's actions were justified under the law. However, in spite of these inconsistencies, the Attorney General has concluded that the State would be unable to disprove Officer Owen's claim that his use of force was justified beyond a reasonable doubt. Therefore, as outlined in more detail in this report, no criminal charges will be brought against Officer K. Sean Owen for his actions during the arrest of Thomas Hurd.

II. BRIEF SUMMARY OF THE FACTS

Shortly before midnight on March 28, 2014, Officer K. Sean Owen of the Farmington Police Department responded to the Imperial Garden restaurant on Main Street in Farmington for a report that Thomas Hurd was intoxicated and had broken a number of plates and glasses in the restaurant. Officer Owen requested mutual aid assistance on the call, and Officer Scott Mitchell of the New Durham Police Department responded. While Officer Owen was driving to the restaurant, he drove past the Cumberland Farms convenience store on Main Street in Farmington and observed an individual standing in front of the store wearing a red hooded sweatshirt. At the Imperial Garden, Officer Owen took a report from the bartender concerning Hurd's actions. The bartender's description of the clothing Hurd was wearing matched that of the individual Officer Owen had seen in front of the Cumberland Farms. Officer Owen asked Officer Mitchell to respond to the Cumberland Farms and make contact with the person to determine if it was Hurd. Officer Mitchell arrived first at the Cumberland Farms with Officer Owen arriving shortly thereafter. The interaction between the officers and Hurd in front of the Cumberland Farms was captured on video by the dashboard camera in Officer Owen's cruiser. No audio was recorded.

Officer Mitchell initially spoke with Hurd and asked him to place his hands on the rear of Officer Mitchell's cruiser. Hurd did not comply with the commands and instead repeatedly yelled "Why? Fuck you," and Officer Mitchell can be seen on the video unholstering his

oleoresin capsicum (OC) spray² and shaking the canister. Officer Owen then exited his cruiser and approached Hurd, grabbed him by his left wrist, and walked him toward the rear of Officer Mitchell's cruiser. With Officer Owen holding his left hand, Hurd stepped toward the cruiser and put his right hand on the rear of the cruiser. However, at the same time, in the video Hurd pulled his left hand away from Officer Owen's grasp and turned his body toward Officer Owen. Officer Owen then quickly and forcefully pinned Hurd against the back of Officer Mitchell's cruiser. Officer Owen ordered Hurd to put his hands behind his back but was unable to get control of Hurd's hands while Hurd was against the rear of the cruiser. Hurd had his hands underneath his body and would not put them behind his back. Officer Owen then disengaged from Hurd, unholstered his TASER and took several steps backward, aiming the device at Hurd.³ In the video, the red dot laser sight can be seen shining on Hurd's back as he stood at the rear of Officer Mitchell's cruiser. Officer Owen then deployed the TASER, striking Hurd in the back with both prongs.⁴ During the TASER's five-second activation, Hurd remained in an upright position leaning against the rear of the Officer Mitchell's cruiser. Once the activation expired, Hurd slumped toward the ground but almost immediately stood back up facing toward Officer Owen. Officer Owen then activated his TASER a second time and Hurd's body visibly stiffened before he fell backward between the sidewalk curb and Officer Mitchell's cruiser. Hurd struck his head when he fell and was briefly rendered unconscious.

² Also commonly referred to as "pepper spray"

³ The Farmington Police Department uses the TASER X26 model equipped with video recording capabilities at the base of the weapon's handle.

⁴ When the trigger is depressed on a TASER the weapon fires two barbed prongs which remain attached to the handheld unit by wires. An electrical current then runs from the handheld unit through the wires and into the targeted individual via the barbs or prongs that have stuck into the individual's body. Once fired, the electrical current runs for five seconds and causes neuromuscular incapacitation in the target individual. So long as the prongs remain in the targeted individual additional five-second intervals of electric current can be activated by the officer again pulling the trigger of the handheld unit.

When Hurd regained consciousness he continued to be verbally combative and refused to allow emergency personnel from the Farmington Fire Department, who had been called to the scene, examine him. Officer Mitchell took pictures of the injuries to Hurd's head while at the scene. Hurd was then transported to Frisbie Memorial Hospital by Officer Owen where he was evaluated and cleared for incarceration by medical personnel. Officer Owen then transported Hurd to the Strafford County House of Corrections where he was held pending his arraignment on Monday, March 31, 2014. A portion of Hurd's statements to Officer Owen during the transport was audio-recorded by Officer Owen's cruiser. Hurd can be heard repeatedly threatening and berating Officer Owen while in the rear of the cruiser.

Following the arrest, Officer Owen took steps to preserve the video captured by the cruiser dashboard camera. He also wrote a police report as well as an inter-departmental memo to his supervisor and the chief of police detailing his use of the TASER. Then-Sergeant E. Scott Orlando of the Farmington Police Department reviewed Officer Owen's use of force memo as well as the video of the incident and authored a letter to the chief of police wherein he concluded that Officer Owen's actions on the night of March 28, 2014, were an appropriate use of force and did not violate the department's TASER policy.

Hurd was charged with criminal mischief, criminal trespass, and disorderly conduct based on his acts at the Imperial Garden and was also charged with resisting arrest and criminal threatening based on his actions in front of the Cumberland Farms. His trial was continued twice before ultimately being scheduled for October 28 2014.⁵ On that day, neither Officer Owen nor Officer Mitchell appeared to testify as witnesses for the State. Accordingly, the prosecutor entered into a negotiated resolution with the defendant, through his counsel, wherein he pleaded

⁵ Trial in the Rochester District Court was initially scheduled for June 10, 2014. It was then continued by agreement to September 9, 2014, and rescheduled to the October date.

guilty to class B misdemeanor criminal mischief and agreed to pay a fine and the remaining charges, including the resisting arrest and criminal threatening charges, were *nolle prossed*. During discussion between Hurd's attorney and the prosecutor, Hurd's attorney voiced his concern about Officer Owen's actions in the cruiser video. Later that same day the prosecutor reviewed the video in conjunction with Officer Owen's written report and became concerned about Officer Owen's actions as well. The prosecutor communicated this concern to Chief John Drury of the Farmington Police Department, who, upon his own review, also shared the prosecutor's concern. Thereafter, on October 29, 2014, Chief Drury forwarded the matter to the Strafford County Attorney for review. On November 6, 2014, the Strafford County Attorney referred the case to the Office of the Attorney General for investigation.

III. FACTS

A. Statements by Officer Owen

(1) Officer Owen's Police Report

Officer Owen reported that on March 28, 2014, at 11:57 p.m. he received a direct call at the Farmington Police Department from Christopher Pycko, the bartender at the Imperial Garden restaurant on Main Street. Pycko reported that Hurd was "tearing the restaurant up." Officer Owen responded to the Imperial Garden and spoke with Pycko. Pycko showed Officer Owen the tables and chairs that Hurd had knocked on their sides and the several broken glass dishes on the floor. After viewing the damage, Officer Owen asked Pycko if he wanted Hurd charged. Pycko stated that he wanted Hurd to stay out of the restaurant. Officer Owen then obtained Pycko's identification and contact information. While they were speaking Officer Mitchell arrived. Officer Owen reported that he had requested Officer Mitchell's assistance prior to responding to the Imperial Garden. Officer Owen told Officer Mitchell that Hurd had left the restaurant on

foot and that he had seen an individual standing in front of the Cumberland Farms while driving to the Imperial Garden. Officer Owen then described the clothing that the individual was wearing and Pycko confirmed that matched the clothing Hurd had been wearing. Officer Mitchell stated he would go attempt to speak with the individual and Officer Owen said he would be right behind him once he finished speaking with Pycko.

Officer Mitchell then left the Imperial Garden while Officer Owen finished speaking with Pycko. Officer Owen then responded to the Cumberland Farms. When he arrived at the convenience store he pulled in behind Officer Mitchell's cruiser. Officer Mitchell was already outside speaking with Hurd and directing him to stand at the rear of the cruiser. According to Officer Owen's report, Hurd appeared agitated and argumentative and refused to step to the rear of Officer Mitchell's cruiser. Officer Owen then got out of his cruiser and as he did, he saw Hurd step toward Officer Mitchell. Officer Owen reported that Officer Mitchell took a few steps backward to distance himself from Hurd and also removed his OC spray from its holster. According to Officer Owen, Officer Mitchell again instructed Hurd to step toward the rear of his cruiser and place his hands on the car. Hurd refused to comply, argued aggressively with Officer Mitchell, and stated, "Why? Fuck you," or words to that effect. Officer Owen reported that "Hurd's verbal aggression was escalating toward [Officer] Mitchell as he refused to comply with [Officer] Mitchell's instructions." Officer Owen then approached Hurd and took a hold of his left wrist to escort Hurd to the trunk area of Officer Mitchell's cruiser. According to Officer Owen, he instructed Hurd to come with him as he began to walk toward the vehicle. Officer Owen reported that Hurd "verbally protested and then attempted to pull his hand away from me and turn to face me." Officer Owen then described the following action he took:

At that point I pushed Hurd against the side of [Officer] Mitchell's patrol car and his head down on the trunk to maintain control of

Hurd's movements while attempting to gain control of Hurd's hands. I instructed Hurd to place his hands behind his back several times and to stop resisting. Hurd continued to physically resist and push back against me. As I attempted to gain control of Hurd's left arm, he tensed up in order to prevent me from placing his hands behind his back.

Officer Owen reported that after ordering Hurd to put his hands behind his back several times and telling him not to tense up, he unholstered his TASER and disengaged from Hurd. Officer Owen then turned his TASER on and pointed it at Hurd's back. Officer Owen again instructed Hurd to put his hands behind his back. Hurd refused to comply and yelled "fuck you" at Officer Owen. Officer Owen again instructed Hurd to place his hands behind his back and Hurd again refused and said, "Why? Fuck you." Officer Owen then deployed the TASER and noted in his report that both prongs struck Hurd in the back. Officer Owen then reported:

As the five second TASER activation expired, I instructed Hurd again to place his hands behind his back and told him that if he didn't comply he would be tased again. I waited a couple seconds to give Hurd a chance to comply as he stood back up from the initial TASER activation. As Hurd stood back up his behavior did not de-escalate. Hurd remained non-compliant, directing aggressive and profane language at myself and [Officer] Mitchell. Once it became clear Hurd was not going to comply with my instructions, I activated the TASER a second time.

Officer Owen then reported that Hurd fell backward and landed on the street between the sidewalk and Officer Mitchell's cruiser. Officer Owen continued to instruct Hurd to put his hands behind his back, however Hurd was unresponsive, not moving, and appeared to be unconscious. Officer Owen, concerned that Hurd might wake up and injure himself on Officer Mitchell's cruiser or that he might have difficulty breathing in the position he was in, pulled Hurd onto the sidewalk and then contacted dispatch to request an ambulance respond quickly. While waiting for the ambulance, Officer Mitchell checked Hurd's eyes and reported that his pupils constricted with light. Officer Owen also observed Hurd's breathing was getting heavier.

When Hurd woke up he remained on the ground but immediately became verbally combative with the officers. At that time Officer Owen noticed a glass bottle of Absolut Vodka was sticking out of the front pocket of his sweatshirt. Officer Owen removed the bottle and placed it on the trunk of Officer Mitchell's cruiser. Hurd was then handcuffed by the officers at approximately the same time the ambulance arrived on scene. Officer Owen stood Hurd up so that he could be evaluated by EMS. One of the EMTs asked Hurd a question and Hurd responded by saying "fuck you, shut up you long-haired bitch" or words to that effect. According to Officer Owen, Hurd again became physically resistive and refused to sit on the rear bumper of the patrol car so that he could be evaluated by EMS. Officer Owen placed Hurd against Officer Mitchell's vehicle and searched Hurd's person for weapons. Officer Owen removed Hurd's wallet and a pack of cigarettes from Hurd's pocket and also secured his hat.

While performing the search, Officer Owen noticed Hurd had a bump on the side of his head with a small amount of blood on it. Hurd also had some dirt and small scratches on the side of his face and temple. Officer Owen requested that Officer Mitchell take photographs of Hurd to document the injuries. Hurd became combative when Officer Mitchell was taking pictures and had to be restrained so that the photos could be taken. Officer Owen then put Hurd in the backseat of his cruiser. As Officer Owen was walking Hurd to the cruiser, Hurd said to him, "you don't know who you're fucking with" or words to that effect, and then looked at Officer Owen and said "bullet in your head." Hurd then said that his family members belonged to the Hell's Angels motorcycle club and that he owned several firearms, including a .45 and a shotgun.

After Hurd was secured in Officer Owen's patrol car, Officer Owen obtained contact information for Andre Mohan, who had witnessed the incident in front of the Cumberland Farms. EMS were still on scene and had agreed to attempt to evaluate Hurd again if he would permit

them. Officer Mitchell brought them to Officer Owen's cruiser but as they spoke with Hurd, Officer Owen could hear Hurd shouting profanities and again refusing to be evaluated. Officer Owen then decided to bring Hurd to Frisbie Memorial Hospital to be evaluated before taking him to the Strafford County House of Corrections. While transporting Hurd, Officer Owen notified him that he was being recorded, and Officer Owen then activated the audio recorder inside the patrol car. On the way to the hospital, Hurd stated several times to Officer Owen that he was going to sue the Farmington Police Department for \$15,000.00 for beating him up. Hurd also repeatedly banged his forehead against the partition in the cruiser.

At the hospital, Hurd was evaluated and cleared for incarceration by a doctor in the emergency room. While at the hospital, Officer Owen noticed a lump on Hurd's forehead which was bleeding. Officer Owen had not noticed this bump prior to arriving at the hospital and concluded that it was caused by Hurd banging his head against the cruiser partition. After being cleared for incarceration, Hurd was taken to the Strafford County House of Corrections. At the jail, Hurd refused bail and was held pending his arraignment on Monday, March 31, 2014.

(2) Officer Owen's Gerstein Affidavit⁶

Officer Owen's Gerstein Affidavit was a summarized version of his written report. In relevant part, the affidavit described that in front of the Cumberland Farms, Officer Owen observed Hurd take a couple of steps toward Officer Mitchell and "it appeared that [Officer] Mitchell was instructing Hurd to step toward the rear of his patrol car." Hurd did not comply with Officer Mitchell's instructions and Officer Owen saw Officer Mitchell back away from

⁶ A Gerstein Affidavit is filed with the court in instances such as this when a defendant is arrested without a warrant. See Gerstein v. Pugh, 420 U.S. 103, 113-114 (1975) (holding that following a policeman's on-the-scene assessment of probable cause for arresting a person, the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest). Pursuant to RSA 594:10, a police officer may make an arrest without a warrant on a misdemeanor charge if the officer has probable cause to believe that the person committed a misdemeanor in the officer's presence.

Hurd and unholster his OC spray. Officer Owen then approached Hurd and took a hold of his left wrist to escort him to the rear of Officer Mitchell's cruiser. The affidavit stated, "As [Officer] Owen escorted Hurd to the rear of the patrol car, Hurd pulled his hand away from [Officer] Owen and began to turn toward [Officer] Owen." Officer Owen pushed Hurd toward the back of the patrol car and held Hurd's head on the trunk while he attempted to gain control of Hurd's hands and place them behind his back. Officer Owen instructed Hurd to place his hands behind his back several times and Hurd refused, tensing up his arms to prevent Officer Owen from pulling his hands behind his back. Officer Owen then unholstered his TASER and disengaged from Hurd, taking several steps back from Hurd and instructing him to place his hands behind his back. Hurd did not comply and Officer Owen deployed the TASER, with both prongs striking Hurd in the back. The affidavit reported, "After the initial five second activation [Officer] Owen instructed Hurd again to place his hands behind his back, however Hurd continued to refuse to comply." Officer Owen then activated his TASER a second time, causing Hurd to fall to the ground and lose consciousness. Hurd regained consciousness shortly thereafter and was handcuffed. Emergency personnel responded to assess Hurd, but were unable to do so due to Hurd's "combative nature." While Hurd was being taken to Officer Owen's patrol car he threatened him by stating, "bullet in your head."

(3) Officer Owen's Use of Force Memo

The policies and procedures manual of the Farmington Police Department requires a "Use of Force" report be written by an officer involved in the use of deadly or non-deadly force and submitted to a supervisor and the chief of police. A "Use of Force" report is a separate report from the officer's narrative report concerning the incident. Here, Officer Owen submitted a "Use of Force" report to then-Sergeant E. Scott Orlando on March 29, 2014. The report was

also copied to then-Chief Kevin Willey. The report was submitted as a memo and briefly summarized the incident. Specifically, Officer Owen wrote:

Hurd appeared to be heavily intoxicated and was non compliant with Ofc. Mitchell's commands to step toward the rear of his patrol car. I placed my hand on Hurd's left hand and attempted to escort him toward the rear of the patrol car however he pulled away and tried to spin around to face me. At that point I pushed Hurd toward the patrol car and pushed his head toward the trunk of the patrol car as I attempted to gain control of his hands. Hurd was instructed several times to place his hands behind his back however he failed to comply. As Hurd continued to tense his arms and disregard my instructions to place his hands behind his back, I disengaged and pointed the TASER at Hurd. I instructed Hurd again to place his hands behind his back. Again Hurd did not comply. At that point I deployed the TASER and both prongs made contact with Hurd on his back. After the initial activation had expired, I instructed Hurd again to place his hands behind his back. Again, Hurd did not comply. At that point I activated the TASER a second time. Hurd fell to the ground from this activation and subsequently was handcuffed.

(4) Officer Owen's Interview with Investigators on December 31, 2014.

On December 31, 2014, Officer Owen attended a voluntary interview at the office of his attorney, Eric Wilson. The interview was conducted by two investigators and the lead prosecutor from the Attorney General's Office. The interview was audio recorded.

Officer Owen attended the 153rd New Hampshire Police Academy and began working as a full-time officer for the Town of Farmington in December of 2010. Prior to that Officer Owen was a part-time officer for the Town of Strafford. In that capacity, Officer Owen had also attended the 257th Part-Time New Hampshire Police Academy. Officer Owen stated that he was initially trained in the use of a TASER with the Strafford Police Department and that he was then certified in the use of a TASER through the Farmington Police Department. According to

Officer Owen he went through four hours of TASER-specific recertification training annually with the Farmington Police Department.⁷

On March 28, 2014, Officer Owen was assigned the midnight shift, which began and 8:00 p.m. and continued to 6:00 a.m. on March 29, 2014. Officer Owen was the only Farmington officer on-duty during that timeframe. Shortly before midnight Officer Owen was at the Farmington Police Department typing a report when he received a call directly from Pycko at the Imperial Garden restaurant. Pycko reported that Thomas Hurd was intoxicated and was tearing up the bar. He requested that an officer respond to the restaurant. Officer Owen drove his cruiser to the Imperial Garden which is a short distance from the police department. En route, Officer Owen requested assistance from the New Durham Police Department. Officer Owen made this request in the event Hurd became difficult. Officer Owen stated that Farmington police have had a number of prior dealing with Hurd. Although Officer Owen had never previously arrested Hurd, he was aware from speaking with other Farmington officers and from being present while other officers were dealing with Hurd, that Hurd could be difficult to deal with, and when intoxicated he often is resistive, disorderly, and violent with the police.

On the short drive to the Imperial Garden restaurant, Officer Owen passed the Cumberland Farms convenience store, also on Main Street. Standing in front of the store he saw an individual wearing a red hooded sweatshirt and a baseball cap. Officer Owen could not see the individual's face and could not identify him.

At the restaurant, Officer Owen spoke with Pycko and was brought into the bar. He saw tables on their sides, chairs turned over, and dishes smashed on the floor. According to Officer Owen, Pycko stated that Hurd had entered the restaurant, sat down at the bar, and ordered a

⁷ The Farmington Police Department provided records to investigators that verified Officer Owen was re-certified on April 13, 2013, and July 30, 2011.

drink. Pycko stated that he refused to serve Hurd because he was noticeably intoxicated. Hurd was angered by this and that is when he started to throw tables and chairs around. As Officer Owen asked Pycko for a description of the clothing Hurd had been wearing, Officer Mitchell also arrived at the restaurant. Pycko said Hurd had on a red hooded sweatshirt and a baseball cap. Officer Owen told Officer Mitchell that he had just seen someone matching that description in front of the Cumberland Farms and asked Officer Mitchell to go try to speak with the person. Officer Owen told Officer Mitchell he would be right behind him as soon as he was done with Pycko. Officer Owen warned Officer Mitchell that Hurd might be uncooperative and combative.

Moments later, after Officer Owen finished speaking with Pycko, he got into his cruiser and drove to the Cumberland Farms. Officer Owen said that he rushed to get to the store because he did not want Officer Mitchell to have to deal with Hurd by himself. When he arrived he saw Officer Mitchell speaking with Hurd. Officer Mitchell was gesturing and telling Hurd to go the rear of his cruiser. Hurd was yelling at Officer Mitchell, "Why? Fuck you." As Officer Owen approached Hurd, saw Officer Mitchell had taken his OC spray out of its holster and was shaking the canister and heard Hurd tell Officer Mitchell to "go fuck himself."

Officer Owen approached Hurd in an attempt to de-escalate the situation.⁸ Officer Owen used what he described as "soft hand" control to escort Hurd to Officer Mitchell's cruiser. At that point, Officer Owen stated "[Hurd] wasn't being physically aggressive to me." Officer Owen took Hurd's left wrist and told Hurd to step to the rear of the cruiser and to put his hands behind his back. When questioned about how quickly things turned physical with Hurd and why he did not have a longer conversation with him, Officer Owen explained that based on

⁸ Officer Owen described that his plan as he pulled up to the Cumberland Farms store was to speak with Hurd and possibly place him in protective custody if he determined Hurd was intoxicated as Pycko had reported. Officer Owen stated he would have likely released Hurd to a sober party or taken him to the jail if he was unable to release Hurd to someone. However, Officer Owen did not communicate this to Hurd.

everything he knew at that point—that Hurd destroyed property inside the Imperial Garden, that he was heavily intoxicated, that he was not complying with Officer Mitchell’s commands and was being verbally combative, that Officer Mitchell had unholstered his OC spray, and that Hurd was often aggressive when intoxicated—he believed the situation had already escalated beyond the use of solely verbal commands to gain Hurd’s compliance.

Hurd responded to Officer Owen’s attempt to escort him to the rear of the cruiser by saying, “don’t fucking touch me, get your fucking hands off me.” Officer Owen then felt Hurd try to pull his arm away and try to turn around. Officer Owen responded by pinning Hurd against the back of the cruiser. Officer Owen had his right hand on the back of Hurd’s neck and his left hand on Hurd’s left wrist. Pinned against the cruiser, Hurd tensed up and pulled his arms underneath his body, which prevented Officer Owen from getting control of his hands and putting them behind his back. Hurd also pushed his body backward against Officer Owen. Officer Owen repeatedly ordered Hurd to stop “tensing up” and to put his hands behind his back. Officer Owen also warned Hurd that he would deploy his TASER if he did not comply. Due to Hurd’s actions, Officer Owen considered him to be “actively resisting” being taken into custody.

Therefore, Officer Owen unholstered his TASER and disengaged from Hurd. He stepped back and away from Hurd and again ordered him to put his hands behind his back and warned him he would deploy his TASER if he did not comply. When Hurd did not put his hands behind his back, Officer Owen activated his TASER. Officer Owen was questioned about his decisions at this point. Specifically, Officer Owen—who is significantly larger than Hurd—was asked why he did not simply use his superior physical strength to force Hurd’s arms behind his back. Officer Owen explained that while he likely could have forced Hurd to put his hands behind his back, doing so would risk serious physical injury to Hurd. Instead, he was trained to use his

TASER in such a scenario because it poses less of a risk of physical injury to the subject and to Officer Owen himself. Officer Owen also stated that he did not know whether Hurd had any weapons on his person because neither he nor Officer Mitchell had been able to pat-frisk Hurd. Therefore, Officer Owen concluded that disengaging and deploying his TASER was the safest way to gain Hurd's compliance and avoid injury to himself, Officer Mitchell, and Hurd.⁹

Officer Owen told investigators that during the five-second activation he continuously told Hurd to put his hands behind his back or he would activate the TASER again. When confronted with his narrative and use of force memo, neither of which stated that he had given any instructions during the five-second activation, Officer Owen maintained that he had repeatedly told Hurd to put his hands behind his back during the initial five-second activation.¹⁰

Officer Owen pointed out that during the activation Officer Mitchell did not move in toward Hurd to handcuff him. Officer Owen was aware based on his training that making contact with Hurd at that point would not cause someone to feel the effects of the TASER. According to Officer Owen, he was trained to take such action if he was backing up an officer who deployed his TASER and he could not explain why Officer Mitchell had not taken the opportunity to handcuff Hurd at that point but noted that discrepancies in training are a frequent problem in scenarios involving mutual aid assistance from other departments.

At the end of the five-seconds, Hurd's body slumped down toward the ground as Officer Owen repeatedly told Hurd to put his hands behind his back or he would activate the TASER

⁹ In recounting his TASER training while at the Farmington Police Department, Officer Owen stated that the department required officers to go "hands on" with a subject who is actively resisting arrest or detention, or at least attempt to, prior to deploying their TASER. Therefore, Officer Owen stated that he was required, pursuant to department policy, to attempt to physically restrain a subject first. If that attempt was unsuccessful, then department policy permitted him to disengage and deploy his TASER.

¹⁰ While someone who has been struck with a TASER is unable to physically comply with such commands, officers—including Officer Owen—are taught, when instructed on the proper use of a TASER, to give continuous commands during the five-second cycle because that person can hear the commands and generally will comply with the orders given once the five-second cycle has expired and they are physically able to do so.

again. Hurd then abruptly stood back up and Officer Owen believed he might try to pull the TASER barbs out of his back and turn toward Officer Owen. Anticipating that scenario, which would result in a physical altercation between himself and Hurd and risk injury to both, Officer Owen decided to trigger a second, five-second activation of the TASER hoping to take Hurd into custody with little or no injury.

Immediately after Hurd was hit with the second TASER activation he fell to the ground between Officer Mitchell's cruiser and the sidewalk curb. Officer Owen continued to repeatedly order Hurd to put his hands behind his back but Hurd was completely unresponsive. Realizing Hurd was unconscious he pulled his body off of the street and onto the sidewalk. He recalled being concerned about Hurd's condition and stated, "Obviously, the last thing that anybody wants to do, as a police officer, is to have something like that happen." Officer Owen and Officer Mitchell then checked Hurd's pupil constriction, his pulse, and called for an ambulance. As the ambulance arrived on scene, Hurd began to regain consciousness. Officer Owen described that Hurd immediately reverted to yelling profanity so Officer Owen handcuffed him. A female EMT on scene then tried to approach Hurd but he yelled at her, "fuck you, you long-haired bitch," or words to that effect. Officer Owen sat Hurd up on the bumper of his cruiser so that the EMTs on scene could take a look at Hurd but he would not let them evaluate him. Officer Owen then put Hurd in the back of his cruiser. As Officer Owen was taking Hurd to the cruiser he recalled Hurd threatened to shoot him in the head. Hurd said to Officer Owen, "you fucked with the wrong guy" and told Officer that his family was associated with the Hell's Angels. While Hurd is in the back of the cruiser, the EMTs attempt to evaluate him again but he remained uncooperative and continued to yell expletives at the EMTs.

In addition to the ambulance, Sergeant Brian Driscoll of the Farmington Police Department also arrived on scene. Sergeant Driscoll had just finished his shift and was in plain clothes. According to Officer Owen, Sergeant Driscoll stopped to see what was going on and to make sure everything was okay. Officer Owen recalled giving Sergeant Driscoll a brief synopsis of what had happened and Sergeant Driscoll told Officer Owen to make sure he documented everything. Sergeant Driscoll then left the area.

After the EMTs attempts to evaluate Hurd, Officer Owen asked Officer Mitchell to take photographs of the injuries to Hurd's head. Officer Owen also recovered an almost empty Absolut Vodka bottle from Hurd's sweatshirt pocket. With Hurd in the back of the cruiser, Officer Owen attempted to collect AFIDs from the TASER cartridge on the sidewalk.¹¹ Officer Owen believed he found one AFID. Officer Owen also spoke to Mohan, the witness who had been standing in front of the Cumberland Farms, and got his contact information in case he needed a statement from him. Officer Owen stated that later he attempted to follow-up Mohan a number of times but could not locate him.

Officer Owen then transported Hurd to Frisbie Memorial Hospital in Rochester because he knew the county jail would not accept Hurd unless he had been cleared by a doctor. During the ride to the hospital, Officer Owen activated the audio recording capability in his cruiser. Hurd made the following statements during the transport: "fuck you, I'm going to sue you for fifteen thousand dollars;" "you're a fucking bald-headed faggot;" "you fucking pussy;" "in my opinion, I'll kick your fucking ass;" and "meet me on the street. I'll fucking beat the shit [out of you]." Officer Owen also stated that Hurd smashed his head up against the partition in the

¹¹ TASER cartridges contain an Anti-Felon Identification (AFID) system which disperses confetti-like identification tags when a TASER is deployed. The AFID tags contain bar-coded serialization to allow them to be matched to a specific TASER cartridge. Officers are trained to collect AFIDs if a TASER is deployed and their collection is especially important if multiple TASERs were deployed or suspected of being deployed during an incident.

cruiser that separates the front seat from the back seat area and stated "you fucked with the wrong guy." At the hospital Hurd's behavior remained consistent. He was belligerent and made inappropriate comments to the doctors and nurses. A doctor cleared Hurd for incarceration and Officer Owen transported him to Strafford County House of Corrections. When they arrived at the jail they were met by several corrections officers who brought Hurd into the jail. Officer Owen stated that he was uncooperative during the entire transport.

Following the arrest, Officer Owen took steps to preserve the video recording from the cruiser's camera. He explained the Watch Guard camera system installed in Farmington Police cruisers is always recording to a hard drive within the cruiser. However, the footage will be recorded over, and therefore lost, after a certain period of time unless there is an active trigger that preserves a recording, such as the cruiser's emergency lights being activated or an officer manually initiating a recording. A recording can also be preserved by "defining an event" within the system so that it can later be transferred to a disc. Here, Officer Owen had not activated his cruiser's emergency lights or manually turned on the "record" button in the cruiser. So, concerned that Hurd might later accuse him of excessive force, the day following Hurd's arrest, Officer Owen defined the arrest as an event in the camera system and asked Detective Matt Embry of the Farmington Police Department to download the event to a disc to be included with the case file. Officer Owen also recorded the video as well as the audio onto his phone as a back-up, because he knew there were often issues with the cruiser's recording system.¹²

Regarding Hurd's trial, Officer Owen stated he was initially subpoenaed and appeared at court for trial in September of 2014. He stated that while at court he was told by Prosecutor

¹² Officer Owen played a portion the audio that was recorded while he transported Hurd for investigators during the interview and though his attorney provided investigators with the full audio file, which is approximately twelve-minutes long. The recording is consistent with Officer Owen's recollection of Hurd's statements and demeanor during the transport.

Daniel Donovan that he was going to work out a plea deal in the case and the parties were requesting a continuance for sentencing. Officer Owen then received a second subpoena for a date in October so he called and asked Donovan to let him know if he actually needed to appear for the October trial date. According to Officer Owen, he never heard back from Donovan, so he assumed Hurd had pleaded to the charges and he did not go to court for the October trial date.

B. Interview with Thomas Hurd

On December 22, 2014, Thomas Hurd attended a voluntary interview at the office of his attorney, John Durkin. The interview was conducted by two investigators and the lead prosecutor from the Attorney General's Office. The interview was audio recorded. Hurd is twenty-six years old and a resident of Middleton, New Hampshire. He works as a landscaper.

Hurd stated that on March 28, 2014, he went to the Imperial Garden restaurant at around 9:00 p.m. He had been on his way home but when he saw a number of his friends in the restaurant he went in to say "hello" and see what was going on.¹³ Hurd usually went to the restaurant every Friday and Saturday night, to meet up with friends, have drinks, and hang out.

Hurd stated he had been drinking before he arrived at the Imperial Garden from a bottle of vodka he had with him. Once inside the restaurant Hurd stated he had one drink while sitting at the bar. He described himself as "pretty tanked." He also described himself as "belligerently drunk" but maintained that he does not like to fight when he is drunk. In the restaurant he did not drink from the bottle of vodka that he had with him. Instead it remained inside the front pocket of his hooded sweatshirt. Hurd believed he was at the restaurant for two hours at the most, before he was thrown out. He took issue with the way in which he was told to leave because he felt that Pycko made him "look like a jerk" by announcing in front of everyone that

¹³ Hurd provided investigators with the names of a number of individuals he believed were in the restaurant that evening, but could not provide investigators with any contact information for these individuals.

he was asking Hurd to leave, rather than doing so privately. Hurd thought he had been made to “look like an asshole.” After Hurd was told to leave, he asked to use the bathroom which Pycko permitted. As he was leaving, Hurd stumbled into a tray holding dirty dishes which fell over and broke and also stumbled into a table. Hurd denied he did so purposely. While leaving, Hurd believed someone had put their hands on him and started pushing him out of the restaurant. Hurd recalled pushing back and that things got a “little physical” and “heated” before he left.¹⁴

Hurd had no independent memory of walking to the Cumberland Farms or of being arrested in front of the store. His only memory was being hit by the TASER. He stated, “the only thing I can remember about being arrested was being, the damn jolt in your body. It felt like, something tapping on you so hard every two seconds.” Hurd could not remember whether anything was said to him when he was hit by the TASER. However, Hurd had since viewed the cruiser video and believed that when he initially had his hands up that he was “pleading his case” with the officers meaning he was not using any expletives with the officers, but instead was saying, in essence, “officer, I got no problems.” When Officer Owen took a hold of his arm, Hurd explained that he was not resisting or pulling away, but had stopped walking because he was concerned about falling off of the curb due to his unsteadiness and intoxication. Hurd, while acknowledging his prior arrests, stated that he had never been convicted of resisting arrest.¹⁵

Hurd also had some independent memory of being transported to Frisbie Memorial Hospital. He recalled arguing with Officer Owen on the way to the hospital and calling him names. Afterward, on the way to the jail, Hurd believed he had started to calm down and

¹⁴ Hurd was also later told by a friend that he had put the owner of the restaurant in a headlock. Hurd said that Pycko had called a friend of his, a Mike Boisvert, after the incident to tell Boisvert that Hurd had been arrested and Pycko had told Boisvert that Hurd had put the restaurant owner in a headlock. Boisvert later told this to Hurd. Boisvert had not been in the restaurant at the time and Hurd has no memory of doing this.

¹⁵ Hurd recalled having been arrested in Milton for resisting arrested but stated that the charge had been dropped. Hurd’s criminal record, however, shows that he was convicted of resisting arrest on June 10, 2010, in the Ossipee District Court and was sentenced to 30 days in the House of Corrections, all of which was suspended.

apologized to Officer Owen for his behavior. Hurd also recalled his arrival at the jail. He assumed that Officer Owen had notified the jail that he was uncooperative because when he arrived there were eight to ten correctional officers waiting for him. The following day when he woke up in a jail cell he believed he had been only been in protective custody for the night due to his intoxication. Hurd also recalled wondering if he had actually been hit by a TASER and then looked at his back and saw a mark from the TASER barb. Hurd asked a corrections officer if he was going to be released from protective custody and was surprised when he was told he faced a number of charges. Hurd was also told that he had denied the services of a bail commissioner and would have to wait until the next Monday for bail to be set by the court. After Hurd was bailed and release, he did not go to the hospital or to a doctor to have any injuries examined.¹⁶

Hurd was represented on his charges by Carl Swenson of the New Hampshire Public Defender. Hurd stated that on his October 28, 2014 trial date, he pleaded guilty to the criminal mischief charge and the remaining charges were dismissed. Hurd also stated that the Farmington officer who had deployed the TASER did not show up at court that day. That day was also the first time Hurd viewed the video of the incident. He watched it with Attorney Swenson that day at court. Hurd described that after viewing the video he saw in court who he believed to be Officer Mitchell and said "I wanted to go smack him. I thought it was him because I know he's in the video, he's the other cop that pulls up, and I'd like to walk up and kill the guy. Not kill the guy. Sorry the way I phrased it, it's the way I talk." Hurd maintained he believed he told the officers he had no problem with them and that he was not verbally or physically aggressive.

¹⁶ Investigators requested, through Hurd's attorney to be provided with any medical records from Hurd's evaluation at Frisbie Memorial Hospital on March 29, 2014, when he was cleared for incarceration. Hurd's attorney stated he had requested the records and agreed to provide them to investigators when they were received. To date, investigators have not received any medical records from Hurd's attorney.

C. Officer Mitchell's Report¹⁷

Officer Mitchell reported that on March 28, 2014, at approximately 11:55 p.m., he heard Officer Owen on the radio making several unsuccessful attempts to contact a unit from the Milton Police Department for assistance. Officer Mitchell responded that he was available to assist and he was asked to go to the Imperial Garden for a report regarding a drunken patron. When Officer Mitchell arrived he was told by several people who were standing outside that Hurd was in front of the Cumberland Farms store. Officer Mitchell then went inside and met up with Officer Owen, who was taking a report from a restaurant employee. The employee stated that Hurd had left the restaurant and gone toward the Cumberland Farms and described Hurd as wearing a red hat and red sweatshirt. Officer Mitchell offered to attempt to make contact with Hurd and drove his cruiser to the Cumberland Farms where he saw Hurd standing in front of the store. As he exited his cruiser, Hurd asked, "what's up, man?" According to Officer Mitchell's report, he told Hurd, "I'm looking for you." When Hurd asked why, Officer Mitchell explained they had taken a report of a disturbance at the Imperial Garden restaurant and he fit the description of the suspect. In Officer Mitchell's report he described that, "[Hurd] appeared to be highly intoxicated, [Hurd] was unsteady on his feet, [Hurd's] speech was slurred and [Hurd's] behavior was belligerent, disrespectful and uncooperative." Officer Mitchell asked Hurd to place his hands on the back of his cruiser. Hurd refused and said, "Fuck you. Why?" Officer Mitchell again ordered Hurd to place his hands on the back of the cruiser and he again said, "Fuck you. Why?" Officer Mitchell then took his OC spray from its holster and shook the contents in full view of Hurd and again asked Hurd to put his hands on the rear of the cruiser. Officer Mitchell reported Hurd again refused and was becoming increasingly agitated and aggressive. At that

¹⁷ Since the time of the incident, Officer Mitchell left the New Durham Police Department. Investigators were able to contact Officer Mitchell via email; however he stated that he is working out of the country. Attempts to follow up with Officer Mitchell through email with questions regarding this incident have gone unanswered.

point, Officer Owen pulled up in front of the store. He exited his cruiser and also told Hurd to put his hands on the rear of the car and Hurd refused. Officer Mitchell's report described that Officer Owen then, "approached [Hurd] from behind pinning him against the cruiser repeatedly instructing [Hurd] to place his hands on the cruiser and stop resisting. [Hurd] continued to resist and fight with Officer Owen, pushing back against Officer Owen."

Officer Owen then "broke contact" with Hurd and took several steps backward and unholstered his TASER. He ordered Hurd to place his hands behind his back but Hurd refused and repeatedly stated, "Fuck you. Why?" According to Officer Mitchell's report, Officer Owen asked Hurd three times to place his hands behind his back before Officer Owen fired his TASER. Hurd was then immobilized, standing at the edge of the sidewalk and leaning against the cruiser. Officer Mitchell then described, "Following the five second TASER activation Officer Owen asked [Hurd] to place his hands behind his back and [Hurd] refused." Officer Mitchell also described Hurd as increasingly aggressive and continuing to use expletives. Officer Owen asked Hurd a second time to place his hands behind his back and Hurd again refused. Officer Owen then activated his TASER a second time which caused Hurd to fall and strike his head on the sidewalk. Officer Mitchell reported that Hurd appeared to be unconscious. While Officer Owen called for EMS to respond, Officer Mitchell checked Hurd's condition. He saw that Hurd's chest was moving up and down but when he called out Hurd's name several times he received no response. Officer Mitchell also checked Hurd's pupils with his flashlight and found they reacted to light. Officer Mitchell estimated that Hurd was unconscious for approximately 60 to 90 seconds before he woke up. At that point, Hurd was handcuffed. While lying on the ground, Hurd continued to yell expletives and was "very agitated." When EMS arrived, Hurd refused to be evaluated. Hurd insulted both of the EMS technicians and continued using profanity.

Officer Owen then asked Officer Mitchell to photograph any injuries on Hurd's head and face. Hurd refused to be photographed and began fighting and resisting Officer Owen. Hurd also told Officer Mitchell he was going to "smash [Officer's Mitchell's] head through the window." Officer Owen asked Hurd to calm down and stop resisting and held onto Hurd so Officer Mitchell could take photos of Hurd's head and hand. Officer Owen then put Hurd in the back of his cruiser. Officer Mitchell went with an EMT to again attempt to evaluate Hurd, but he again refused. Hurd was then transported by Officer Owen to Frisbie Memorial Hospital and Officer Mitchell returned to New Durham.

D. Video of the Incident from Officer Owen's Cruiser Video Camera

Officer Owen's cruiser video began recording during his brief drive from the Imperial Garden to the Cumberland Farms store.¹⁸ Officer Mitchell had driven ahead of Officer Owen to the Cumberland Farms, had gotten out his cruiser, and can be seen standing in the road at the back of his cruiser as Officer Owen arrived. Hurd was standing on the sidewalk in front of the store wearing a red hooded sweatshirt and a baseball cap. The video clearly showed that as Officer Owen pulled up in front of the store, Hurd held both of his hands up and appeared to be speaking with Officer Mitchell. Standing in the background wearing a white jacket was Mohan.

Once Officer Owen's cruiser stopped, Officer Mitchell approached Hurd and took his OC spray out of the holster on his belt. Hurd put his hands down and took approximately eight shuffling steps toward Officer Mitchell. Officer Mitchell took two steps back and away from Hurd while shaking his OC spray with his right hand and pointing toward the rear of his cruiser with his left hand. Hurd stopped moving and appeared to be speaking with Officer Mitchell. Forty-three seconds into the video, Officer Owen first appeared and immediately stepped in front of Officer Mitchell and approached Hurd. Officer Owen placed his left hand on Hurd's left wrist

¹⁸ The cruiser video camera recorded footage of the incident but did not record any audio.

and Hurd began to move toward the rear of Officer Mitchell's cruiser and placed his right hand on Officer Mitchell's cruiser. Forty-eight seconds into the video Hurd pulled his left arm away from Officer Owen's grasp and toward his own body. Officer Owen responded quickly and forcefully, let go of Hurd's left hand and—using both of his hands—grabbed Hurd in the shoulder/neck area and pushed Hurd against the side of Officer Mitchell's cruiser. Officer Owen's left hand appeared to hold Hurd by the neck area while his right hand is not visible. Officer Mitchell then re-holstered his OC spray and stepped in between the two patrol cars, briefly obstructing the camera's view of Hurd and Officer Owen. Officer Owen's left arm can then be seen struggling in the area of Hurd's torso. Hurd's hands were not visible and appeared to be underneath his torso. At fifty-seven seconds, Officer Owen's reached for his TASER with his left hand. Officer Owen then took three steps back and away from Hurd and aimed the TASER at Hurd. The red-dot laser sight from the TASER is visible on Hurd's back. Officer Mitchell remained standing between the two cruisers and in close proximity to Hurd.

Hurd then lifted his torso to a standing position with both of his hands clearly visible on the trunk of the cruiser. At one minute and two seconds into the video, Officer Owen fired the TASER. Hurd slumped forward when struck by the TASER barbs, but was held up by the cruiser. After Officer Owen fired the TASER, he took a number of steps backward and out of view of the cruiser video. At one minute and seven seconds, the TASER activation expired and Hurd's knees visibly buckled and he can be seen falling toward the ground. However, he almost immediately stood back up. At one minute and nine seconds—only two seconds after the first TASER activation had expired—Officer Owen activated the TASER a second time and Hurd stiffened and, turning slightly to the left, immediately fell backward in between the sidewalk curb and Officer Mitchell's cruiser. Hurd did not brace for the fall and appeared to strike the left

side of his face on the ground. He remained lying in that location until one minute and twenty-two seconds elapsed in the video at which time Officer Owen grabbed Hurd's right arm and dragged him up onto the sidewalk. Both Officer Mitchell and Officer Owen can then be seen using their radios. They also appeared to be speaking with Mohan, who remained standing in front of the Cumberland Farms. At two minutes and ten seconds, Officer Mitchell reached toward Hurd's neck in an apparent attempt to check his pulse. Officer Mitchell then shined his flashlight in Hurd's face. Officer Mitchell again appeared to check Hurd's pulse at two minutes and forty-eight seconds. Immediately thereafter, Hurd showed the first visible signs of movement after having been unconscious for approximately one minute and thirty-nine seconds.

Officer Owen then rolled Hurd onto his left side. At three minutes and twelve seconds, an individual, wearing a shirt with the word "Boston" on it, identified as Sergeant Brian Driscoll of the Farmington Police Department, quickly approached the officers and Hurd. While Sergeant Driscoll ran up to the scene, Officer Owen and Officer Mitchell held Hurd face down on the sidewalk and handcuffed him. With Hurd lying handcuffed on the ground, Officer Owen made multiple hand gestures toward the trunk of Officer Mitchell's patrol car, apparently demonstrating for Sergeant Driscoll what had happened. Officer Owen also brought his hands up into a shooting position, again demonstrating to Sergeant Driscoll what had happened.

At four minutes and fourteen seconds, Officer Owen can be seen removing a bottle from Hurd's front sweatshirt pocket which he put on the trunk of Officer Mitchell's cruiser. At approximately the same time, the first EMT, Diane Carrier, arrived at the scene. Hurd sat up to a seated position on the sidewalk. Officer Owen shined his flashlight on Hurd's face and Carrier appeared to look at Hurd's head. At four minutes and fifty-two seconds, the ambulance arrived and thereafter the second EMT, Brian Jenckes, can be seen in the video. Immediately thereafter,

Officer Owen and Officer Mitchell brought Hurd to a standing position and leaned him up against Officer Mitchell's cruiser. Sergeant Driscoll also approached Hurd and it appeared that Sergeant Driscoll removed the TASER barbs from Hurd's back. Sergeant Driscoll immediately backed away from Hurd and appeared to be coiling the TASER's wires. Officer Owen then performed a pat-frisk of Hurd while he is still up against Officer Mitchell's cruiser. Hurd was visibly struggling during the search. Sergeant Driscoll can then be seen taking Officer Owen's flashlight and shining it on the sidewalk, in an apparent attempt to locate AFIDs from Officer Owen's TASER. At six minutes and forty-eight seconds, Officer Owen escorted Hurd toward the rear of his cruiser and out of camera view.

At nine minutes and seven seconds, Sergeant Driscoll left the scene. At the same time, Officer Mitchell retrieved a camera from his cruiser and walked toward the rear of Officer Owen's cruiser and out of camera view. The flash from a camera can be seen at ten minutes and seventeen seconds. Officer Mitchell then returned the camera to his cruiser. Officer Owen then reappeared in the camera view without Hurd and appeared to speak with Mohan and the two EMTs who are standing in front of the store. At sixteen minutes and fourteen seconds, Officer Mitchell walked with Jenckes toward the rear of Officer Owen's cruiser and out of camera view. The video then ends abruptly at sixteen minutes and forty-three seconds.

E. Information from Other Witnesses

(1) Christopher Pycko

On December 22, 2014, Pycko was interviewed about the incident. The interview was audio recorded. Pycko works part-time as a bartender at the Imperial Garden on Thursdays and Fridays and was working on March 28, 2014, when Hurd came into the restaurant. Hurd was a regular customer and Pycko recognized him when he arrived. On prior occasions, Pycko has

seen Hurd appear disoriented and intoxicated when he came into the restaurant. He further described Hurd as someone who "always seemed to be combative, most of the time. Some--it was kind of strange. He'd be sitting there just totally fine one minute and the next minute he would be either yelling at somebody or being in their face and the next second he was fine."

On the night in question, Hurd came in and sat down at the bar and appeared to Pycko to be intoxicated and disoriented. Hurd then fell asleep at the bar. Pycko told Hurd that he could not sleep there and asked him to leave. Hurd refused and became "combative." Hurd yelled at him, "I just want. I just need a couple minutes, I just want to sleep." During this interaction Pycko also noticed that Hurd had a bottle of vodka in his sweatshirt pocket. Hurd was asked a number of times to leave the restaurant and refused. Pycko recalled that Hurd then "gets up and he's yelling at me, and he's in my face and I tell him, 'you have to leave,' and he's like 'no.'" Pycko and then restaurant's manager then both confronted Hurd who still refused to leave. Finally, Hurd turned to leave, and on his way out knocked over tables and chairs and broke a number of dishes and glasses. Pycko stated that Hurd had not fallen or stumbled, but rather, "this is on purpose, total. I mean [Hurd] was knocking over chairs and breaking glasses, grabbing glasses and dishes and just throwing them on the floor." Pycko then called the Farmington police to report the incident. Pycko estimated that Hurd had been inside the restaurant for about ten minutes.

An officer from the Farmington police responded a few minutes later and took a report. Pycko could not recall the name of the Farmington officer who responded, but provided a description that matched that of Officer Owen. Pycko also stated that a second officer from another town also responded to the restaurant. According to Pycko, while he was talking with Officer Owen, he (Officer Owen) received information that Hurd was in front of the nearby

Cumberland Farms. Officer Owen then quickly left the restaurant. After Officer Owen left, Pycko and two or three other people who were in the restaurant at the time went outside to see what was happening at the convenience store, which Pycko estimated was approximately seventy-five yards away. While Pycko could not see the interaction between Hurd and the officers he heard some of what was said. Specifically, Pycko heard officers say “stop resisting” and heard the “pop” of a TASER being fired. Beyond that he only heard general yelling and screaming and commotion. Pycko then saw EMS arrive on scene. Following Hurd’s arrest, Pycko called Mike Boisvert, an individual who he knew to be good friends with Hurd, to tell him that Hurd had been arrested and would likely need to be bailed out.

(2) Andre Mohan

Mohan is the nineteen-year-old individual who was standing in front of the Cumberland Farms store when Hurd was arrested. While Officer Owen’s report identified Mohan, neither his report nor the case file contained a statement from Mohan. Accordingly, Mohan was interviewed on December 22, 2014, as part of this investigation.

Mohan was out on the night of March 28, 2014, around midnight because he needed a cigarette. When he saw Hurd standing in front of the Cumberland Farms convenience store smoking a cigarette he approached Hurd and asked him for a cigarette.¹⁹ Mohan stated that Hurd was friendly with him and handed him a broken cigarette and told him that it was his only one, and if Mohan could fix it, he could have it. According to Mohan, Hurd was unsteady on his feet and appeared intoxicated.

Mohan described that as he was standing in front of the store working on fixing the cigarette, two police officers arrived. Mohan recalled the police told Hurd to “stop resisting”

¹⁹ Mohan had never met Hurd before and did not know him. He would only later learn Hurd’s name when he was subpoenaed to court.

multiple times and that Hurd would not allow the police to handcuff him. Mohan stated that one of the officers then backed away from Hurd and fired his TASER. Mohan described that Hurd fell over and appeared to have been knocked out and the police then called an ambulance. When the EMTs arrived Mohan believed that Hurd allowed them to patch him up and "[Hurd] didn't seem aggressive at all." Mohan was unable to recall any other specific information about what transpired between Hurd and the police officers.

(3) Sergeant Brian Driscoll

On December 3, 2014, Sergeant Brian Driscoll of the Farmington Police Department was interviewed about this incident. The interview was audio recorded. Sergeant Driscoll attended the 143rd New Hampshire Police Academy and has been employed with the town of Farmington for approximately eight years. He is currently assigned the rank of Patrol Sergeant and is also a use of force instructor.

On the night of March 28, 2014, Sergeant Driscoll had just finished his shift and was at the Farmington Police Department when Officer Owen was dispatched to the Imperial Garden restaurant for a report of a subject that was out of control and breaking plates. As Officer Owen left the police station, Sergeant Driscoll was getting changed out of his police uniform. When Sergeant Driscoll then left the station he had his radio with him and heard Officer Owen say over the radio that a subject appeared unconscious and heard him ask for an ambulance. Sergeant Driscoll then drove to the scene and as he arrived, he also saw EMT Diane Carrier arrive. Sergeant Driscoll recalled that he approached Officer Owen and asked him what had happened. Officer Owen told him that he had deployed his TASER and had requested an ambulance respond to evaluate Hurd. Sergeant Driscoll recalled using a flashlight to search for AFIDs on the sidewalk but did not recall any specific discussion with Officer Owen about what had

occurred. Sergeant Driscoll then asked Officer Owen if he needed anything else, and when Officer Owen responded that he was all set, Sergeant Driscoll left the scene. Before he left he told Officer Owen to call him if he needed anything. Sergeant Driscoll did not complete a written report regarding his involvement with this incident.

As the use of force instructor at Farmington, Sergeant Driscoll would review use of force incidents when requested to do so by the chief of police of the department's lieutenant. Sergeant Driscoll stated that he did not review the video of this incident and was not asked by the chief of police or the lieutenant to review any part of this matter.

(4) Diane Carrier

On December 23, 2014, Diane Carrier was interviewed about her involvement in this incident. Carrier is the EMS Licensing Coordinator at the New Hampshire Fire Academy. Carrier also works part-time for the Farmington Fire Department as an EMS Captain.

On the evening of March 28, 2014, Carrier was on-call but at home at her residence in Farmington when she was informed that there was a request from the police that EMS evaluate a male subject who had fallen and had a cut on his head. The Cumberland Farms convenience store is approximately half a block from Carrier's residence so she went directly to the scene rather than going to the fire department first. She parked across the street and as soon as she exited her car she could hear the male subject being very vulgar. When she approached the store she saw, Hurd, handcuffed and sitting on the sidewalk. She identified herself and told him she wanted to take a look at him. Hurd responded by screaming and yelling at her and calling her vulgar names. Hurd called her a "fucking asshole" and told her to "get the fuck away from me. don't fucking touch me." In contrast, Carrier never heard the officers on scene raise their voices. Carrier's partner, EMT Brian Jenckes, arrived on scene shortly thereafter with the ambulance

and also approached Hurd. Carrier told Jenckes to take over with Hurd because he was being so uncooperative and belligerent and she thought Jenckes might have a better chance at getting Hurd to cooperative. However, Hurd also refused to speak with Jenckes, and Jenckes told Carrier Hurd had spit at him. Carrier and Jenckes then left the area once the officers told them they were bring Hurd to the hospital.

(5) Brian Jenckes

On December 22, 2014, Brian Jenckes was interviewed about this incident. The interview was audio recorded. Jenckes is an on-call EMT with the Farmington Fire Department. He was working the 6:00 p.m. to 6:00 a.m. shift on March 28-29, 2014, when he was dispatched to a call where the police had used a TASER on an individual, causing a period of unresponsiveness. Jenckes arrived in front of the Cumberland Farms on Main Street at approximately 12:08 a.m. on March 29, 2014. When he arrived he saw a "fairly intoxicated male" who was behaving aggressively and violently. The individual, Hurd, was "yelling, screaming, yelling profanities at EMS as we arrived on scene, the police officers." Jenckes saw the police officers on the ground with Hurd attempting to restrain him. Once the officers handcuffed Hurd and stood him up Jenckes got out of the ambulance and went to try and assess him.

Jenckes recalled that Hurd was yelling and screaming expletives and was spitting at the police and EMS personnel. Jenckes told Hurd that he was called to the scene because of the laceration on Hurd's face and asked him if he wanted to be assessed. According to Jenckes, Hurd responded that he did not want to be treated. Jenckes later made another attempt to assess Hurd as he was being put into a police cruiser. Hurd told Jenckes to, "get out of his face" and spit at him. At that point, Jenckes was done trying to assess Hurd. However, Jenckes had been

able to see that the cut on Hurd's forehead had stopped bleeding and he also appeared alert and oriented, so Jenckes did not have any significant concerns about Hurd's condition.

Jenckes informed the officers on scene that he was not comfortable taking Hurd in the ambulance based on his behavior and the officers told Jenckes that they would take him to Frisbie Memorial Hospital prior to taking him to the county jail so that he could be checked there. Jenckes characterized the behavior of the officers on scene as "very professional." The only issue on scene was Hurd. Jenckes stated that as Hurd was yelling and screaming expletives and spitting the officers were telling him to stop, to calm down, to relax, and asked Hurd to just talk with them but he remained agitated and angry the entire time Jenckes was present.

F. Farmington Police Department's Review of the TASER Incident

(1) Review of Incident by Lieutenant Scott Orlando

(a) Sergeant Orlando's Written Report

In response to Officer Owen's March 29, 2014, memorandum addressed to then-Sergeant Orlando regarding his deployment of his TASER, Sergeant Orlando wrote a brief letter to then-Lieutenant John Drury, dated April 1, 2014, detailing his findings in reviewing the incident. The stated: "I reviewed the Taser video along with the Patrol Car Watch Guard video. The Taser was in accordance with Taser policy. Thomas Hurd actively resisted arrest and [Officer] Owen deployed the Taser consistent with training."

(b) Lieutenant Orlando's Interview with Investigators

On December 3, 2014, Lieutenant E. Scott Orlando was interviewed regarding this incident. The interview was audio recorded. Lieutenant Orlando has worked for the town of Farmington since 2005. He began as a patrol officer, and was then promoted to Sergeant in 2011. He was then promoted to Lieutenant in September of 2014. Prior to being promoted to

Lieutenant, Orlando was the TASER instructor for the Farmington Police Department and authored the department's TASER policy which was adopted on November 23, 2010.

Lieutenant Orlando explained Farmington's policy that a TASER can only be deployed at a subject who actively resists arrest or detention and also explained that in most instances officers are trained to go "hands on" with an actively resisting subject before disengaging and deploying their TASER. Lieutenant Orlando stated that physically fighting with a subject can actually be more dangerous—to both the officer and the subject—then using the TASER so officers are trained to disengage and deploy the TASER if their physical attempts to take a subject into custody are unsuccessful. Lieutenant Orlando also stressed that in the verbal commands given by the officer who has deployed their TASER are very important. He explained that although the subject who is experiencing the neuromuscular incapacitation caused by the TASER cannot move or comply with an officer's commands during the five-second activation, the subject can hear the commands. Therefore, Lieutenant Orlando instructs officers to give continuous commands to a subject during the five-second activation. Lieutenant Orlando also stated that officers are trained that in a scenario where there are two officers at a scene and a TASER is deployed at a subject by one of the officers, the second officer should be making contact with the subject during the five second activation and securing the subject in handcuffs before the activation expires.²⁰ Lieutenant Orlando stated that as the TASER instructor, when a TASER was used by an officer in the field, he would get notified of the use through a memo regarding the use of force. Lieutenant Orlando explained that his review of an incident is limited to the use of a TASER and that any other use of force by a different means would be reviewed by someone else in the department. Lieutenant Orlando also explained that when a TASER is used

²⁰ Officers are trained that a subject who is being actively exposed to a TASER activation can be touched by a third person without that person being subjected to the neuromuscular incapacitation of the TASER.

by an officer, the TASER cartridge is collected and held in evidence and attempts must be made to collect AFIDs on scene and package any that are recovered into evidence.²¹

Concerning this specific incident, Lieutenant Orlando first learned about Hurd's arrest and Officer Owen's deployment of his TASER from the use of force memo Officer Owen submitted. Lieutenant Orlando explained that to review the incident he attempted to view any video recorded from the TASER itself. Here, Lieutenant Orlando stated that the TASER video did not produce any viewable video.²² Lieutenant Orlando also reviewed the video from Officer Owen's dashboard mounted cruiser video camera. According to Lieutenant Orlando, he did not review Officer Owen's full narrative report but rather based his conclusions on his review of the cruiser video and Officer Owen's use of force memo.

Lieutenant Orlando spent a significant amount of time reviewing the video of the incident and he concluded that Hurd actively resisted arrest. Lieutenant Orlando specifically focused on Hurd's movements, both when he first pulled his arm away from Officer Owen's grasp and when he was pinned against the cruiser. Lieutenant Orlando stated that he reviewed the video it was clear that Hurd was pushing back and upward against Officer Owen and was refusing to give Officer Owen his hands. He stated that when an officer finds themselves in a position such as this, they are trained to disengage and deploy their TASER and that he (Lieutenant Orlando) would have done the same thing if he found himself in that position.

Lieutenant Orlando did express his concern about how quickly Officer Owen went "hands on" with Hurd once he arrived at the Cumberland Farms. Lieutenant Orlando stated that

²¹ At the Farmington Police Department, officers are not individually issued a TASER. Rather the department has six TASERs that officers can sign out from the department's gun locker at the beginnings of their shifts and return at the end of their shifts, making the collection of any AFIDs important in determining which officer fired the TASER.

²² Lieutenant Orlando explained that the video camera on the TASER itself is mounted on the bottom of the weapon's pistol grip. Because the camera is in this location, any officer who grips the weapon with two hands in a standard firing position generally covers the video camera with their hands. That was the case with the video from Officer Owen's TASER; the camera was obstructed by his hand and did not produce any viewable video.

he is familiar with Hurd. He described Hurd as someone who can be "very violent" when under the influence of alcohol or drugs. Nevertheless, Lieutenant Orlando stated he believed that Officer Owen could have taken more time to talk with Hurd. Had Lieutenant Orlando found himself in this situation with Hurd he thought the outcome would have been different because he would have initially tried to talk with Hurd for a longer period of time. Regardless, based on Hurd pulling his arm away from Officer Owen, Lieutenant Orlando believed Officer Owen was justified in pinning Hurd against the cruiser and subsequently disengaging and deploying his TASER and that those actions conformed with Officer Owen's training.

Lieutenant Orlando stated that without an audio on the video he was left to assume that Officer Owen gave Hurd verbal commands consistent with his TASER training. Specifically, Lieutenant Orlando explained, "I would hope and assume, in accordance with training, that Officer Owen [after he first deployed the TASER] is saying 'stay down, stay down, put your hands behind your back, stay down, stay down, put your hands behind your back and just continually giving that and maintaining control with the TASER.'" Officers are trained to continuously give these commands so that when the five-second activation expires the subject will immediately comply with the commands they have heard. Lieutenant Orlando explained that the commands that officers are instructed to give to a subject during the five-second activation are important, when considering the reasonableness of Officer Owen's second deployment of the TASER. Assuming that Officer Owen was giving Hurd the "stay down" command consistent with his training, Lieutenant Orlando viewed Hurd slumping and then immediately standing up following the first activation as an aggressive movement in defiance of the orders he was being given which therefore constituted a continuation of his active resistance.

Assuming this scenario, Lieutenant Orlando opined that Officer Owen's second deployment of his TASER was also reasonable and in accordance with Farmington's policy.

However, when presented with Officer Owen's written police report—which he had not previously reviewed—Lieutenant Orlando stated that he may reach a different conclusion regarding the second TASER deployment. This was because Officer Owen's report made no mention of commands he was given to Hurd that were contemporaneous with the first five-second TASER activation, but rather only recounted Officer Owen giving Hurd commands after the activation had expired, and even then made no mention of Officer Owen telling Hurd to “stay down.” Lieutenant Orlando stated, “I clearly think him standing up, to me, is once again demonstrating actively resisting. Now I would come to a different conclusion if on a video [Officer Owen is] not saying anything. You're not doing what you're trained to do if you were silent. That is not okay.” Lieutenant Orlando also added, “if [Officer Owen is] not giving commands during the [first] exposure, I don't think two seconds [between exposures] is enough for someone to comprehend [the commands being given].”

Nevertheless, while Lieutenant Orlando expressed concern that Officer Owen may not have given Hurd the proper commands, he pointed out a number of factors to be considered in considering whether the second TASER activation was reasonable. He pointed out that Officer Mitchell had not acted to take Hurd into custody during the first five-second activation, and that failure to act left Officer Owen in a position where Hurd was no longer incapacitated and had turned toward him. Hurd could then have pulled the TASER barbs out of his back and the confrontation would have again turned physical. Officer Owen also did not know whether or not Hurd had a weapon at that time because he had not had the opportunity to pat-frisk him. In addition, although it was not the command he was trained to give, Officer Owen had ordered

Hurd to put his hands behind his back of number of times throughout the entire incident, and Hurd never made any movement to put his hands behind his back either before or after the first TASER activation. Lieutenant Orlando stated, "If [Officer Owen] is saying 'put your hands behind your back,' to me there's plenty enough time for Hurd to at least show movement."

(2) Interview of Farmington Police Chief John Drury

On December 3, 2014, Chief John Drury was interviewed regarding this incident. The interview was audio recorded. Chief Drury has worked for the town of Farmington since 2000. He was promoted to Lieutenant in 2012 and was appointed Chief of Police in September of 2014, succeeding Chief Kevin Willey.

Chief Drury was the Lieutenant at the time Hurd was arrested on March 28, 2014. As the Lieutenant, Drury approved Officer Owen's police report regarding the arrest and also recalled passing along Officer Owen's use of force memo to Chief Willey. At the time, Chief Drury was not involved in reviewing Officer Owen's actions and did not review the video from Officer Owen's cruiser. Chief Drury confirmed that Officer Owen had been employed with Farmington from 2010 until June of 2014 and that his departure was unrelated to this incident. Chief Drury also reported that there were no other excessive force complaints made against Officer Owen during his time with Farmington.

Chief Drury recalled that on the day of day of Hurd's scheduled October trial, he received a phone call from Prosecutor Daniel Donovan. Donovan reported to Chief Drury that he was concerned Officer Owen's report did not match what he had seen when he viewed the cruiser video. Donovan asked Chief Drury to review the video and Officer Owen's report. Chief Drury reviewed the video and the report and concluded that he agreed with Donovan's assessment. He told investigators, "I was concerned as to how quickly it happened and the amount of force that

was used.” Specifically, Chief Drury said, “How this was dealt with is not how I would have dealt with it.” He explained, “I have been a cop fifteen years, I’ve never used my OC spray, and never TASERed anybody. I’ve always talked to people, to my detriment.” Chief Drury also stated he has known Hurd and his family for his entire career. Chief Drury stated, “my experience with [Hurd] is he’s not a bad kid. If he gets some alcohol in him he can be a pain in the neck.” He continued, “when [Hurd’s] sober he’s not a bad kid at all. When he gets a few drinks in him he becomes an angry drunk.” Following his review of Officer Owen’s report and the cruiser video, Chief Drury compiled the case file and sent everything to the Strafford County Attorney and asked that Officer Owen’s use of force be reviewed.

(3) Interview of Detective Matthew Embry

On December 3, 2014, Detective Matthew Embry was interviewed as part of this investigation. The interview was audio recorded. Detective Embry has worked for the town of Farmington since 2008. He began as a patrol officer, and was then promoted to Detective in August of 2013. Prior to his employment with Farmington, Detective Embry was a part-time police officer in Hampton, Madbury, and with the Strafford County Sheriff’s Department.

Detective Embry’s sole involvement in this matter concerned his download of the video of the incident from Officer Owen’s cruiser. Detective Embry received an email from Officer Owen requesting that he download the video of the Hurd arrest from the cruiser video system to a disc. Emails Detective Embry provided to investigators showed that Officer Owen emailed him on March 29, 2014, and requested a copy of the video from the incident as well as the audio from Hurd’s transport. In subsequent emails Officer Owen explained to Detective Embry that he had “defined an event” for the video so that it could be downloaded to disc. Detective Embry stated that he had downloaded the video but had been unable to download the audio of the

transport because he could not locate the audio file in the system. Embry made a copy of the video of the incident for discovery file in the case against Hurd.

Detective Embry shared that he has also dealt with Hurd in the past. Detective Embry stated, "I know how Tommy Hurd acts and he's very rarely cooperative with the police. And he prides himself on how good of a fighter he is and he's told me before to tell other officers that he's going to kick their ass the time he sees them."

G. The Prosecution of the Charges Against Thomas Hurd

(1) Prosecutor Daniel Donovan

Daniel Donovan was interviewed regarding this incident on December 3, 2014. Donovan is a Sheriff's Deputy in the Strafford County Sheriff's Department and is assigned as the district-court prosecutor for the towns of New Durham, Strafford, Middleton, Milton, and Farmington.

In his capacity as the prosecutor for these towns, Donovan was familiar with Hurd. Donovan described Hurd as someone who generally took responsibility for his actions and was honest about the offense he had committed. Donovan did say that Hurd has an alcohol problem and that it would not surprise him that Hurd was acting belligerently because he frequently behaves that way when he is intoxicated.

Prior to Hurd's scheduled trial on October 28, 2014, Donovan reviewed Officer Owen's report and the cruiser video. He had received both from the Farmington Police Department as part of the discovery materials for the case and had provided them to Hurd's attorney as well. He said, "At the time, reading the reports and looking at the video, it didn't seem like there was anything bad about it."

On the trial date, Donovan stated that his only witness that appeared at court was Pycko. Neither Officer Owen nor Officer Mitchell showed up. Donovan was surprised that Officer

Owen did not appear because he recalled speaking with him the week prior to the trial. Officer Owen had called Donovan to ask whether he needed to appear and Donovan told him that the case looked like it was going to trial so he needed Officer Owen to appear. Donovan recalled that Officer Owen told him he was scheduled to work the night before and therefore would be tired, but that he would make it to court. Donovan said, "I don't know why [Officer Owen] didn't show up but I know that he knew about the date. I know he knew he was required to be there." Donovan did not believe that Officer Owen's failure to appear was connected with the cruiser video or his actions in arresting Hurd.

On the day of trial, Donovan entered into a negotiated plea with Hurd, through his attorney, where he pleaded to a class B misdemeanor charge of criminal mischief and agreed to pay a \$500.00 fine. Donovan stated that the Imperial Garden did not want any restitution for the damage Hurd had caused. Without his necessary witnesses, Donovan *nolle prossed* the remaining charges. At court that day, Donovan also spoke with Hurd's attorney, Public Defender Carl Swenson, about the cruiser video. Attorney Swenson told Donovan that he had some concerns about the video. Donovan told Attorney Swenson that he had already reviewed the video but agreed he would look at it again. Back at his office, Donovan again reviewed the video in conjunction with Officer Owen's written report. Donovan stated, "I watched it three or four times and every time I watched it I said 'it just doesn't seem right.' So I started to make a timeline and if I took into account what the officers said took place, the movements that [Hurd] made, I didn't see that on the video." Specifically, Donovan expressed that the short time period between Officer Owen's first deployment of his TASER and his second deployment did not leave Hurd ample time to regain his composure and follow any orders he was being given.

Based on his concerns, Donovan called Chief Drury. Donovan asked Chief Drury to review the cruiser video and Officer Owen's report and see what he thought about the timeline of events. Donovan told investigators that Chief Drury called him back a short time later and said that he had some problems with what he had seen as well. Donovan then spoke with the Strafford County Attorney and asked that he also review the incident. The Strafford County Attorney thereafter forwarded the case file to the Office of the Attorney General.

IV. LEGAL ANALYSIS OF OFFICER OWEN'S ACTIONS

In its investigation, the Office of the Attorney General has reviewed whether Officer Owen's actions on the night of March 28, 2014, constituted an appropriate use of non-deadly force by a law enforcement officer under RSA 627:5, I. and, if not, whether Officer Owen's actions were criminal in nature.

A. Use of Non-Deadly Force by Law Enforcement, RSA 627:5

New Hampshire's laws regarding the use of physical force by law enforcement are set forth in RSA Chapter 627. RSA 627:5, I, provides that a law enforcement officer is justified in using non-deadly force upon another person when and to the extent that he reasonably believes it necessary to effect an arrest or detention or to prevent the escape from custody of an arrested or detained person. "Non-deadly force" means any assault or confinement which does not constitute deadly force. RSA 627:9, IV. "Deadly force" means any assault which the person 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.

The phrase "reasonably believes" means that the actor "need not have been confronted with actual...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); see also State v. Cunningham, 159 N.H. 103, 107 (2009). Further, all the circumstances surrounding the incident should be considered in determining whether there was a reasonable belief that force was necessary to defend oneself or another. See id. at 99; Aldrich v. Wright, 53 N.H. 398 (1873). The reasonableness standard also applies in a situation where a police officer or private citizen who uses force is mistaken about the situation or the necessity of using force. Thus, either a private citizen or police officer may be justified in using force if he reasonably believed that he or another person was in imminent danger of the use of force, even if, in fact, they were not, and his belief is objectively reasonable. In other words, the actor’s 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. That examination cannot be made with the benefit of hindsight, which is afforded by one viewing the circumstances after the fact.

Moreover, when analyzing the reasonableness of an actor’s use of force, the State must consider that it would bear the burden, at trial, to disprove a claim of self-defense or defense of another beyond a reasonable doubt. See State v. McMinn, 141 N.H. 636, 645 (1997). The person who used force would have no obligation to show that his conduct was reasonable or met the requirements of the law. The burden is on the State to disprove a claim of self-defense beyond a reasonable doubt. Applying the law regarding the use of physical force in law enforcement to all of the circumstances surrounding this incident, the Attorney General concludes that Officer Owen was justified in his initial physical contact with Hurd and the first TASER deployment. Regarding the second TASER deployment, the Attorney General cannot conclusively determine that Officer Owen’s actions were justified under the law. However, there

is insufficient evidence to disprove Officer Owen's claim that his use of force in deploying the TASER a second time was justified, beyond a reasonable doubt.

B. Analysis

(1) Officer Owen Pinning Hurd Against Officer Mitchell's Cruiser

When Officer Owen pulled his cruiser up in front of the Cumberland Farms convenience store he knew that Hurd was intoxicated and that he had just recently broken a number of dishes and glasses at the Imperial Garden restaurant. In addition, although he had never previously arrested Hurd, Officer Owen was aware that Hurd could be difficult to deal with if he had been drinking, and that he often is resistive, disorderly, and violent when dealing with the police if he is intoxicated. The other officers from the Farmington Police Department interviewed in this investigation corroborated this information. Hurd himself also admitted that on the night of October 28, 2014, he was "pretty tanked" and conceded that he was "belligerently drunk." Thus it was reasonable for Officer Owen to anticipate he would encounter some degree of resistance from Hurd. Prior to exiting his cruiser, Officer Owen also heard Officer Mitchell order Hurd to put his hands on the back of the cruiser and saw that Hurd was not complying with those orders and was moving toward Officer Mitchell. Officer Owen also observed Officer Mitchell unholster and shake his canister of OC spray. These observations also reasonably signaled to Officer Owen that Hurd was being noncompliant.

Officer Owen's initial action, taking hold of Hurd's left wrist in a "soft hand" control technique to escort him to the rear of Officer Mitchell's cruiser, was therefore clearly reasonable under all of the circumstances. Officer Owen had legal justification to arrest Hurd or take him into protective custody at that point and Hurd was noncompliant. Officer Owen was also justified in his use of the physical force that immediately followed. While escorting Hurd to the

rear of Officer Mitchell's cruiser, Hurd pulled his left hand away from Officer Owen and turned his body toward Officer Owen. This is corroborated by the video of the incident. Officer Owen reasonably interpreted these actions as Hurd physically resisting being taken into custody. Officer Owen therefore responded reasonably by pinning Hurd against the rear of the cruiser and attempting to gain control of Hurd's hands.

Arguably, Hurd's act of pulling his left hand away from Officer Owen could have been done in an attempt to comply with the command to put his hands on the rear of the cruiser. After all, Hurd had already put his right hand on the rear of the cruiser, and in order to bring his left hand into the same position, he would have had to move it toward the cruiser and necessarily away from Officer Owen, who was behind him at the time. Therefore, what Officer Owen perceived as "pulling away" could very well have been Hurd's attempt to comply with the command to put his hands on the rear of Officer Mitchell's cruiser.

Ultimately, the law dictates that Officer Owen's act of pinning Hurd down onto the cruiser was not an unreasonable use of force by a law enforcement officer. Officer Owen's belief that Hurd, by pulling his left arm away, was physically resisting being taken into custody, was reasonable based on Hurd's verbal statements indicating his unwillingness to comply with the officers and Hurd's physical act—clearly visible on the cruiser video—of pulling his left arm away from Officer Owen and turning his body toward Officer Owen. Even if Officer Owen's belief that Hurd was resisting was mistaken, that is, even if Hurd were not pulling away to resist, but rather did so in an attempt to put his left hand on the cruiser, such a mistaken belief, if reasonable, also justifies Officer Owen's conduct. Here, Officer Owen's perception that Hurd, by pulling his left arm away, was resisting being taken into custody, even if incorrect, was reasonable under all of the circumstances present. The speed and force with which Officer Owen

responded to Hurd's act does not detract from this conclusion. While it may be initially jarring to view the video and how quickly Officer Owen moved to pin Hurd against the rear of the cruiser, his quick reaction time was necessary to protect himself and Officer Mitchell and should be what is expected of a trained law enforcement officer in a situation where an individual is resisting arrest. Thus, the State could not disprove a claim that the physical force employed by Officer Owen when he pinned Hurd down on the trunk of Officer Mitchell's cruiser was justified beyond a reasonable doubt.

(2) Officer Owen's First Deployment of His TASER

Unable to get control of Hurd's hands while he has him pinned on Officer Mitchell's cruiser, Officer unholstered his TASER and disengaged from Hurd. Doing so was consistent with his training in the use of his TASER. As Lieutenant Orlando discussed, continuing to struggle with Hurd, and physically pulling Hurd's arms behind his back as he was clearly refusing to do so by himself, would risk significant injury to Hurd and possibly to Officer Owen. Therefore, it was reasonable for Officer Owen to disengage from Hurd and order him to put his hands behind his back. Officer Mitchell's report corroborated that Officer Owen ordered Hurd to put his hands behind his back at least twice before he deployed his TASER. It would also not be reasonable to expect Officer Owen to re-engage with Hurd once Hurd had stood up and had his hands on the back of the cruiser. At that point, Officer Owen had backed away from Hurd creating distance between the two of them, and could not again close that distance without risking again becoming involved in a physical altercation with Hurd. Therefore, when Hurd refused to put his hands behind his back in spite of the repeated orders from the officers to do so, Officer Owen was justified in deploying his TASER.

(3) Officer Owen's Second Deployment of His TASER

During his interview with investigators Officer Owen maintained that in accordance with the TASER training he had received at the Farmington Police Department he had repeatedly ordered Hurd to put his hands behind his back during the first five-second activation of the TASER. However, this is not corroborated by Officer Owen's written narrative report, his use of force memo, his Gerstein Affidavit or Officer Mitchell's report, lending support to the conclusion that Officer Owen did not act in accordance with his training and failed to give Hurd any commands during the first five-second TASER activation. Rather, Officer Owen's narrative report stated, "As the five second TASER activation expired, I instructed Hurd again to place his hands behind his back and told him if he didn't comply he would be tased again." Similar language is found in Officer Owen's use of force memo. There he wrote, "After the initial activation had expired, I instructed Hurd again to place his hands behind his back." The Gerstein Affidavit stated, "After the initial five second activation [Officer] Owen instructed Hurd again to place his hands behind his back, however Hurd continued to refuse to comply." Officer Mitchell's report also supports the conclusion that Officer Owen was not giving Hurd any commands during the first five-second activation. Officer Mitchell wrote, "Following the five second TASER activation Officer Owen asked [Hurd] to place his hands behind his back and [Hurd] refused."

Officer Owen's apparent failure to give Hurd any commands during the first five-second activation was not in accordance with his training, and raises significant questions about the reasonableness of the second TASER activation. As Lieutenant Orlando opined, it would be unreasonable to expect Hurd to respond to orders to either stay down or put his hands behind his back immediately following the five-second activation if Officer Owen had not been giving constant commands during that time. Ultimately, the inconsistency cannot be resolved because

no audio recording was made of the incident and neither Hurd nor Mohan could recall whether or not the officers were saying anything during the initial five second activation.

However, Officer Owen had ordered Hurd to put his hands behind his back a number of times prior to the first TASER deployment. In addition, Officer Owen was faced with a situation where the assisting officer on scene did not take any action to detain Hurd following the first TASER deployment, which an officer trained in Farmington would reasonable expect under the circumstances. The video also makes clear that although Hurd initially slumped down, he immediately stood back up and turned to face Officer Owen, a position that would have made it easier for Hurd to reach to his immediate left and remove the TASER barbs. Hurd also made no movements to put his hands behind his back and comply with the commands Officer Owen had been giving. Therefore, at the end of the first TASER activation the situation had not resolved and had Hurd removed the TASER barbs, Officer Owen would again have been faced with an imminent physical altercation with Hurd that would likely have resulted in physical injury. That Hurd fell to the ground and was knocked unconscious also does make Officer Owen's conduct unreasonable or unjustified. While unfortunate, it was not reasonably foreseeable that Hurd would respond in such a way to the second TASER activation where he had managed to stay standing during the first TASER activation.

VI. CONCLUSION

Based on all of the facts and circumstances known to Officer K. Sean Owen, and examining the situation from the standpoint of an objective police officer in his position, his initial physical contact with Hurd and his act of pinning him against Officer Mitchell's cruiser was reasonable and legally justified. So too, was Officer Owen's first deployment of his TASER. Regarding the second deployment of the TASER, while there is evidence to support

Officer Owen's claim that his use of force was justified, there are also inconsistencies between Officer Owen's written accounts of the incident, Officer Mitchell's written report, and Officer Owen's interview with investigators—specifically regarding whether he complied with his training and gave proper commands during the first five-second activation of this TASER—which cannot be sufficiently resolved without an audio recording of the incident and thus cast some doubt on the validity of the claim that his use of force in deploying the TASER a second time, was reasonable and justified under all of the circumstances. In light of these inconsistencies and uncertainties, the Attorney General cannot conclusively determine that Officer Owen's actions in the second TASER deployment were justified under the law. Regardless of any inconsistencies in what orders were being given during the first five-second TASER activation and thus, whether it was reasonable to expect Hurd to immediately comply with any order following the expiration of the first activation and whether Hurd's act of standing up could reasonably be constructed as an act of physical resistance, there is insufficient evidence to disprove Officer Owen's claim that his use of force in deploying the TASER a second time was justified, beyond a reasonable doubt. In light of all of the above, Officer Owen's deployment of his TASER a second time will not be ruled justified, but no criminal charges will be brought against him for the incident.

In light of the conclusion reached in this investigation, the Attorney General also considered whether Officer Owen engaged in conduct requiring disclosure pursuant to State v. Laurie, 139 N.H. 325 (1995). Based on the facts and circumstances of this incident as outlined in detail in this report, the Attorney General has concluded that disclosure of this incident under Laurie is not warranted.