

ATTORNEY GENERAL'S REPORT REGARDING THE APRIL 20, 2019 HOMICIDE IN HAMPTON, NEW HAMPSHIRE

I. INTRODUCTION

The Office of the Attorney General, the New Hampshire State Police, and the Hampton Police Department have concluded an investigation into a fatal incident that occurred in Hampton, New Hampshire, on April 20, 2019. The investigation has determined that Gregory O'Brien (age 34) caused the death of Juan Astacio (age 34) during a physical altercation. Mr. O'Brien has asserted that he acted in self-defense. The purpose of this report is to summarize the Attorney General's findings and conclusions with regard to Mr. Astacio's death. The findings and conclusions are based on information gathered during the investigation, including police reports, witness interviews, cell phone records, physical evidence, medical evidence, and grand jury testimony.

Pursuant to RSA 626:7, I(a), when a person claims they acted in self-defense, the State has the burden to disprove that claim, beyond a reasonable doubt. Based upon the investigation in this case, New Hampshire Attorney General Gordon J. MacDonald has determined that there is insufficient evidence to disprove Mr. O'Brien's claim of self-defense, beyond a reasonable doubt. As such, no charges will be filed against Mr. O'Brien for causing Mr. Astacio's death.

II. FACTS

A. Overview of the incident

On April 20, 2019, at approximately 2:44 p.m., a visibly upset female juvenile (14 years old) walked into the Hampton Police Department and reported that her mother's adult male roommate had asked her if she wanted to kiss and hug him. The juvenile said that she was disturbed by the roommate's questions and felt uncomfortable, so she left, called a friend, and went to the police department. The juvenile lived in an apartment located across the street from the police department at 87 Brown Avenue

in Hampton. She said that her mother's name was Diana Haile and that their roommate was Juan Astacio. The officers asked the juvenile to call her mother and to have her respond to the police department. Ms. Haile did respond and began completing a report about the incident involving Mr. Astacio.

While that was occurring, the Hampton police received a 911 call at approximately 3:53 p.m. from one of Ms. Haile's friends, Melissa O'Brien. Ms. O'Brien reported an ongoing fight between two men who were across the street in Ms. Haile's apartment at 87 Brown Avenue. Ms. O'Brien reported that one of the men had blood on him and was hurt. She said that the man who was hurt was her friend's roommate (Juan Astacio), that he had stopped breathing, and that they needed an ambulance. Ms. O'Brien told the 911 operator that she and her boyfriend had stopped by the apartment to see her friend and that Mr. Astacio was drunk and tried to hit her boyfriend, and then a fight ensued.

Hampton police officers went to 87 Brown Avenue and upon arriving, heard a commotion upstairs. The officers went to the upstairs bedroom located at the top left of the stairs, where they saw two men in the room. One man was standing and was identified as Gregory O'Brien. Mr. O'Brien was standing over/on top of another man who was on the floor. The man on the floor was Juan Astacio. The officers placed Mr. O'Brien in handcuffs as they attended to Mr. Astacio, who was gasping for air. The officers began CPR on Mr. Astacio and Mr. O'Brien said, "I hit him three times. I hit him three times." Mr. O'Brien later claimed that Mr. Astacio had attacked him and that he (Mr. O'Brien) fought back in self-defense. Mr. O'Brien seemed panicked and concerned for Mr. Astacio's well-being, asked if the officers had a defibrillator, and gave the officers tips on how to perform CPR on Mr. Astacio.

Personnel from the Hampton Fire Department responded to the scene and transported Mr. Astacio to a local hospital, where he was pronounced dead. The New Hampshire Attorney General's

Office and the New Hampshire State Police were notified, and together with the Hampton Police Department, began investigating Mr. Astacio's death

B. Witness interviews

1. Female Juvenile

The female juvenile told the police that on April 20, 2019, she arrived back at her apartment after work. Her mother was not home at the time and was at work. Her mother's roommate, Juan Astacio, was in a chair on the first floor. The juvenile said that Mr. Astacio was "drunk" that day, was not himself, and was acting weird/off. The juvenile said that Mr. Astacio had been acting "weird" for about a month and had been drinking a lot more alcohol lately.

The juvenile said that Mr. Astacio asked her if she had a boyfriend and if she had "made out" with anyone. The juvenile said she felt a little uncomfortable with those questions so she went upstairs to her room. She remained there until Mr. Astacio called her back downstairs. She went downstairs where Mr. Astacio told her that she could not tell anyone, including her mother, what he had said to her. Then he asked her if she would kiss him, and she declined. Mr. Astacio said, "Come on," and that it was not really a "big deal." Mr. Astacio then asked if she would at least hug him, and the juvenile again declined and went back up to her room. Mr. Astacio also asked the juvenile to make a "pinky swear" to promise not to tell her mother about what he had said to her. The juvenile said that Mr. Astacio seemed "out of it" during these interactions with him.

A short time later, the juvenile left the apartment, called a friend and told her that had happened. The friend told her to go to the police, so she went across the street to the Hampton Police Department, and called her mother, Diana Haile, to report what happened. The juvenile told the police that she had known Mr. Astacio about four years before the incident and described him as a nice person.

2. Diana Haile

Diana Haile lived in an apartment at 87 Brown Avenue in Hampton, New Hampshire at the time of the incident. She had lived in that apartment for about five years, with her teenaged daughter. Juan Astacio had lived with her and her daughter as their roommate for the past year and a half. Ms. Haile had met Mr. Astacio through a mutual friend. The two were just friends; they had separate rooms and there was nothing romantic between them.

On April 20, 2019, Ms. Haile was at work. She got a call that afternoon from her teenaged daughter, who was crying. The daughter told Ms. Haile that she was at the Hampton Police Department, that Mr. Astacio was drunk, had asked her to kiss him, and had made her feel uncomfortable.

Ms. Haile left work and drove to the Hampton Police Department. Along the way, she called her friend, Melissa O'Brien. She told Ms. O'Brien that her daughter was very upset because Mr. Astacio had said things to her. After that short call, Ms. Haile called her boyfriend and ask him to meet her at the Hampton Police Department.

After arriving at the Hampton Police Department, Ms. Haile met with her daughter and the police. Ms. Haile told the police that Mr. Astacio did drink alcohol on the weekends and get drunk, and could get "mouthy." However, Ms. Haile said that Mr. Astacio's reported behavior toward her daughter was out of character. Ms. Haile said that her daughter liked Mr. Astacio and that there had never been any issues between them before.

A short time later, Ms. Haile got a call from Ms. O'Brien, who said she was outside at Ms. Haile's apartment. Ms. O'Brien said that she and her ex-husband, Gregory O'Brien, went in to the apartment to meet Ms. Haile there. When Mr. O'Brien went upstairs to use the bathroom, Mr. Astacio attacked Mr. O'Brien, and Mr. O'Brien fought back. Ms. O'Brien said that she and Mr. O'Brien did not know that Mr. Astacio was inside the apartment when they arrived and went inside.

3. Melissa O'Brien

Melissa O'Brien said that on April 20, 2019, she got a call from her friend, Diana Haile. The conversation was very brief and Ms. Haile said something about the fact that Mr. Astacio had said something to Ms. Haile's daughter and they were at the Hampton Police Department. Ms. O'Brien told Ms. Haile that she was on her way. At the time, Ms. O'Brien was with her ex-husband, Gregory O'Brien.

Ms. O'Brien said that after the call from Ms. Haile, she and Mr. O'Brien drove to Ms. Haile's apartment because Mr. O'Brien said that Ms. Haile said to go to her (Haile's) apartment and Ms. O'Brien assumed that Ms. Haile would meet them there. After they arrived, Ms. O'Brien and Mr. O'Brien went into the apartment through the unlocked front door.¹ They did not know if Mr. Astacio was home at the time. Once inside, Ms. O'Brien sat on the couch and Mr. O'Brien went upstairs to use the bathroom. After that, she heard Mr. O'Brien yelling, "Hey stop, don't you wanna stop?" Ms. O'Brien went upstairs and saw Mr. O'Brien and Mr. Astacio wrestling on a bed. She noticed that Mr. Astacio had blood on his face. Mr. O'Brien told her to call the police, so she went downstairs and called them. As she was doing that, Mr. O'Brien yelled that Mr. Astacio was not breathing, and she told him to do CPR.

The police and an ambulance arrived shortly afterwards. Ms. O'Brien said that after the police arrived, Mr. O'Brien told her that Mr. Astacio had hit him and that he hit him back in the face, three times.

According to Ms. O'Brien, Mr. O'Brien barely knew Mr. Astacio. She said that they had met maybe twice before and that there was "no history" between them. Ms. O'Brien surmised that Mr.

¹ Ms. O'Brien said that Ms. Haile left her door unlocked and allowed Ms. O'Brien to come and go into the home since they had known each other for years.

Astacio had attacked Mr. O'Brien because he was drunk and did not recognize Mr. O'Brien as someone he had met before.

4. Gregory O'Brien

At the scene, Gregory O'Brien told the first-responding officers that he hit Mr. Astacio three times. Later on at the police department, Mr. O'Brien said that during the fight he sat on Mr. Astacio and held his arms. Then he said that Mr. Astacio stopped breathing so he started punching his chest (to try to get him to breath).

During a brief formal interview on the evening of April 20, 2019, at the Hampton Police Department, Mr. O'Brien said that Mr. Astacio, who he described as a "big boy," attacked him. Mr. O'Brien said that Mr. Astacio threw a punch at him and then Mr. O'Brien "tried to hold him down." He said that he "did the best I could," and asked the "cops to be called." Mr. O'Brien told the investigators that he did not do anything or hurt anybody. Mr. O'Brien also consented to the seizure of his clothing and said that he was not worried about anything the police would find. He offered to help the police in any way.

Mr. O'Brien voluntarily agreed to another formal interview with the police on May 14, 2019. During that interview, Mr. O'Brien said that he was out shopping with Melissa O'Brien on April 20, 2019, when she got a call from Diana Haile. Ms. O'Brien told him that Ms. Haile said that Juan (Astacio) had said something to Ms. Haile's daughter and so they (Ms. O'Brien and Mr. O'Brien) would be going to Hampton to support her. Mr. O'Brien and Ms. O'Brien then started driving to Hampton. Mr. O'Brien called Ms. Haile along the way and asked her where they should meet her, and she said to meet at her apartment.

When they got to Ms. Haile's apartment, Mr. O'Brien and Ms. O'Brien went inside. Mr. O'Brien said it was dark and quiet in the apartment, so they did not think anyone was there. Ms.

O'Brien sat on the couch on the first floor while Mr. O'Brien went upstairs to use the bathroom. Mr. O'Brien said that after he was done using the bathroom and stepped out, Mr. Astacio attacked him. Mr. O'Brien said that Mr. Astacio did not say anything and instead, swung at him with his fist. Mr. O'Brien attempted to avoid the blow, moved out of the way, and was hit by a glancing blow from Mr. Astacio's arm instead of his fist. Mr. Astacio then grabbed onto Mr. O'Brien and pulled him into Mr. Astacio's bedroom. Mr. O'Brien said he was scared and did not know what was going on, but said he knew he had to stop it (Mr. Astacio's attack). Mr. O'Brien said that he tried to get Mr. Astacio to stop fighting with him and told him to stop, but Mr. Astacio did not respond. At some point, Mr. O'Brien became concerned that there might be a weapon in the room, so he realized he needed to restrain Mr. Astacio. As the two men grappled with each other, Mr. Astacio ended up on top of Mr. O'Brien. Mr. O'Brien punched Mr. Astacio three or four times to try to get Mr. Astacio off him. Eventually, Mr. O'Brien said he got Mr. Astacio in a headlock and was able to get on top of him and sit on his chest and hold his arms to prevent Mr. Astacio from grabbing him. Mr. O'Brien denied choking Mr. Astacio with the headlock. Mr. O'Brien then told Ms. O'Brien to call 911, and eventually noticed that Mr. Astacio was not breathing. He tried to keep Mr. Astacio alive by giving him chest compressions. Mr. O'Brien told the police that he was defending himself against Mr. Astacio and did not think he did "anything wrong" during the incident.

Mr. O'Brien told the police that he had been to Ms. Haile's apartment two or three times before. He had met Mr. Astacio each time and said Mr. Astacio had been "a little bit of a drunk" those times he met him, but otherwise was "happy and laughing." As for how Mr. Astacio acted on April 20, 2019, Mr. O'Brien said that he "was out of his head," was "acting off," and that "something wasn't right."

5. Other witnesses

The police interviewed other people who knew the parties as well as neighbors in the area where the incident occurred. Nothing significant was gleaned from those interviews.

C. 911 Call

The 911 call that Melissa O'Brien placed to the police on April 20, 2019, was obtained and reviewed. During that call, Ms. O'Brien said that there was a fight involving two men, and that someone was really hurt. She told the operator where she was located and that it was her friend's house. When asked who was hurt, Ms. O'Brien said it was "Juan," her friend's roommate.

Ms. O'Brien could be heard yelling to Mr. O'Brien, "The ambulance is coming!" Then she told the operator that he (Mr. Astacio) was dying and to please hurry because he had stopped breathing. After that, Ms. O'Brien yelled to Mr. O'Brien to "do CPR!" A few moments later, she said that he (Mr. Astacio) was breathing again and that they needed an ambulance.

A short time later, Ms. O'Brien said that the police had arrived. When the operator asked Ms. O'Brien if she was on scene, Ms. O'Brien said she was and that they had stopped by to see her friend, he (Mr. Astacio) was drunk, he tried to hit her boyfriend, and they got into a bad fight. Then, she told the operator that Mr. Astacio stopped breathing again.

D. Grand Jury Testimony

As part of the investigation, some individuals were subpoenaed to testify before the grand jury regarding their knowledge of the incident, the witnesses and the involved parties. Since grand jury proceedings are confidential, the substance of that testimony may not be recounted here.

E. Autopsy results

On March 22, 2019, Associate Medical Examiner Dr. Christine James conducted an autopsy on Juan Astacio's body. The autopsy showed that Mr. Astacio was six feet, two inches tall, and weighed

two hundred and fifteen pounds. As for injuries, Mr. Astacio had external and internal trauma to his neck, consistent with manual strangulation.² Those injuries included contusions to the neck, lacerations to the lip and tongue, and fractured thyroid cartilage as well as a fractured hyoid bone. Mr. Astacio also had injuries to his nose that consisted of minor contusions and abrasions, as well as small contusions to his right shoulder and a small abrasion to his left hand.

The cause of Mr. Astacio's death was manual strangulation, and his manner of death was homicide.³ Dr. James could not determine the exact mechanism of strangulation.

Toxicological testing revealed that at the time of Mr. Astacio's death he had a blood alcohol concentration of .183, which by way of illustration, is more than twice the legal limit (.08) to drive in New Hampshire.

F. Physical evidence

The State Police searched the apartment where the incident occurred. Nothing appeared out of place except in Mr. Astacio's bedroom, where the assault took place. In that bedroom, a TV stand was knocked over and a bed was damaged. In addition, there were apparent bloodstains on items in the room, and the floor and portions of the wall. No obvious weapons or other items with blood on them were found.

III. THE APPLICABLE LAW AND ANALYSIS

A. The applicable law

New Hampshire's laws regarding self-defense are contained in RSA Chapter 627. In this case, RSA 627:4, II(a), is the most applicable section and states that:

² Strangulation is a form of asphyxia (depriving the body of oxygen) produced by a constant application of pressure to the blood vessels in the neck. The three forms of strangulation are hanging, ligature, and manual. Manual strangulation occurs when another individual applies external pressure to the victim's neck using his or her hand, arm, leg, or other blunt object.

³ The term "homicide" means that another person caused the death.

A person is justified in using deadly force upon another person when he reasonably believes that such other person is about to use unlawful, deadly force against the actor or a third person.

“Deadly force” includes any assault which the actor “commits with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily injury.” RSA 627:9, II. Where deadly force is involved, what is “reasonable” under the circumstances “is determined by an objective standard.” State v. Leaf, 137 N.H. 97, 99 (1993); see also State v. Cunningham, 159 N.H. 103, 107 (2009). All the circumstances surrounding the incident should be considered in reaching the decision as to what was reasonable. See Leaf, 137 N.H. at 99. In addition, 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. In other words, the inquiry must focus on the situation from the standpoint of a person facing the same situation, with the same knowledge as the person who used the deadly force. That examination cannot be made with the benefit of hindsight, which is afforded by one viewing the circumstances after the fact. Thus, even a mistaken belief that deadly force was necessary could still be justified under the law if that belief was reasonable, since the law does not require the person using deadly force to “have been confronted with actual deadly peril, as long as he could reasonably believe the danger to be real.” State v. Gorham, 120 N.H. 162, 163-64 (1980). If the actor chooses to use deadly force, then the amount of force used to protect himself or others must also be reasonable, and not excessive. See State v. Etienne, 163 N.H. 57, 70 (2011).

Finally, in any case where a person uses deadly force and later claims self-defense, the State has the burden to disprove that self-defense claim beyond a reasonable doubt in order to secure a conviction. See State v. McMinn, 141 N.H. 636, 644-45 (1997). There is no burden on the actor to prove that his actions were lawful or meet the legal standard for self-defense.

B. Analysis

On April 20, 2019, Gregory O'Brien and his girlfriend, Melissa O'Brien, went to Diana Haile's home in Hampton at Ms. Haile's request. Once there, the O'Brien's entered the home through an unlocked door. At the time, Ms. O'Brien was welcome in Ms. Haile's home and often visited and entered the home through that unlocked door.

Once inside, Mr. O'Brien went upstairs to use the bathroom while Ms. O'Brien waited downstairs. It appears that neither of the O'Brien's were aware that Juan Astacio was in the home. After Mr. O'Brien stepped out of the bathroom, Mr. Astacio appeared from his bedroom and tried to punch Mr. O'Brien, and dragged him into his bedroom. The two began to wrestle as Mr. O'Brien tried to free himself from Mr. Astacio. Mr. O'Brien said he told Mr. Astacio to stop, but he did not.⁴ That prompted Mr. O'Brien to struggle and use physical force against Mr. Astacio. It appears that both men continued to wrestle with each other, with Mr. O'Brien eventually hitting Mr. Astacio a few times in the head/face area. Mr. O'Brien said that he was scared during the incident and concerned that Mr. Astacio might try to get a weapon in his room. However, there is no evidence that either man used a weapon of any kind against the other.

As for their relative sizes and capabilities, each man was the same age and physically large and capable of defending himself against the other. Mr. Astacio was six feet, two inches tall, and weighed two hundred and fifteen pounds. Mr. O'Brien was shorter than Mr. Astacio, at five feet eight inches tall, but weighed more than Mr. Astacio, at approximately two hundred and fifty pounds.

Based on all the evidence, it was reasonable for a person in Mr. O'Brien's position to conclude that Mr. Astacio was using actual physical force against him, and potentially deadly force given Mr.

⁴ Ms. O'Brien reported that she did not hear any arguing between the two men before or during the altercation. Instead, she said that she heard Mr. O'Brien verbally try to get Mr. Astacio to stop fighting.

Astacio's physical size and the fact that Mr. Astacio did not stop the attack, despite Mr. O'Brien's request to do so. That entitled Mr. O'Brien to use physical force in response.

As for the force Mr. O'Brien used against Mr. Astacio in response to Mr. Astacio's attack, that force was reasonable and not excessive under the circumstances. Mr. O'Brien was not the initial aggressor and only responded with force when force was used against him. The force he used was not obviously excessive at the time and was proportional to the force used against him. At no time did Mr. O'Brien use a weapon, or kick or stomp Mr. Astacio. Instead, Mr. O'Brien used his hands to hit Mr. Astacio a few times and then tried to immobilize him and stop the attack by using a headlock and holding him down. Hitting an attacker the size of Mr. Astacio and using physical force to try to immobilize him was not unreasonable under the circumstances and despite the fatal injuries, was not clearly deadly force at the time.

While Mr. O'Brien denied choking Mr. Astacio, some force was clearly used that caused the injuries to Mr. Astacio's neck/throat area and the cessation of blood flow leading to death. There were no obvious items at the scene that could account for those injuries. Therefore, it is reasonable to conclude that as the two men were wrestling with each other, some part of Mr. O'Brien's body, either by itself or in conjunction with Mr. Astacio's own body or another item in the room, provided the mechanism that caused Mr. Astacio's fatal injuries.

Although Mr. O'Brien's use of force had lethal consequences, there is no evidence that he intended to use deadly force against Mr. Astacio. This is supported by the fact that Mr. O'Brien: was not the initial aggressor; did not use a weapon against Mr. Astacio; told Mr. Astacio to stop during the assault; asked Ms. O'Brien to call for help; tried to do CPR and render medical assistance to Mr. Astacio; and was cooperative during the investigation. Instead, it appears that Mr. O'Brien tried to use non-deadly force to protect himself from Mr. Astacio's initial assault and to restrain him to end the

altercation, and that Mr. Astacio's death was an accident that occurred while Mr. O'Brien was acting in self-defense.

This conclusion is further supported by the fact that there is no evidence of any prior animosity between Mr. O'Brien and Mr. Astacio that would provide a motive for the actions of either man. By all accounts, the two had limited prior contact and had no negative dealings with each other. The investigators did explore the possibility that Ms. Haile had asked Mr. O'Brien to remove Mr. Astacio from the home based on the incident with her daughter, and that perhaps that prompted the altercation. However, the involved parties and other witnesses who were interviewed denied that ever occurred. Ms. Haile's text messages were reviewed and there was nothing to indicate that she had any animosity toward Mr. Astacio that would have prompted her to ask others to hurt him or forcibly remove him from her home. In addition, the fact that Ms. Haile was already with the police when she spoke to the O'Brien's about what had happened between Mr. Astacio and her daughter, means that Ms. Haile did not need to enlist others to remove Mr. Astacio from her home; the police were already involved and located across the street from her home and could have helped her instead.

As for what motivated Mr. Astacio to attack and struggle with Mr. O'Brien, it is possible that Mr. Astacio's high level of intoxication affected his perceptions and judgment, such that he failed to recognize Mr. O'Brien from their prior encounters and thought he was an intruder.

IV. CONCLUSION

Based on the applicable law and all the facts and circumstances of this case, the Attorney General has determined that the State would be unable to disprove Mr. O'Brien's claim of self-defense, beyond a reasonable doubt. Therefore, no criminal charges will be filed against Mr. O'Brien in connection with Mr. Astacio's death.