

DISTRICT ATTORNEY'S INVESTIGATIVE REPORT

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FACTS

Background

In 2009, Patrick Penders, date of birth August 25, 1950, lived at 378 Bloody Pond Road, Unit 18 in Lake George, New York. In September 2009, he met Rochelle Gussow at the Rite-Aid store in Lake George where he shopped on a near daily basis and where Mrs. Gussow worked part-time. Mr. Penders appeared pleasant and polite. Mr. Penders began courting Mrs. Gussow, who is a widow, by leaving roses for her on her car. They began a relationship and spent time together until just before Valentine's Day 2010, when Mr. Penders attempted to give Mrs. Gussow an engagement ring.¹ Mrs. Gussow refused to accept the ring, telling Mr. Penders that she did not feel that way about him and was still grieving the loss of her husband. Mr. Penders tried to sway Mrs. Gussow back by covering her car with roses. When she told him to stop, Mr. Penders became very angry, telephoned her and cursed at her. Mrs. Gussow terminated all contact with Mr. Penders and did not have any substantive contact with him from the end of February until April 26, 2010.

The Events of April 26, 2010

Telephone Calls

On April 26, 2010, during the evening hours, Mr. Penders made a series of telephone calls. He called a long time friend, Gerald Root, and left a voice message, stating, "Hello, I won't be available after tonight. Just wanted to tell ya I love ya brother.

¹ During their relationship, Mrs. Gussow had been to Mr. Penders' residence on several occasions and noticed a large number of guns and knives as well as a police radio/scanner.

See you on the flip side.” At 9:11 p.m., he telephoned his sister, Priscilla Foster, and told her that he was upset about Rochelle and that he wanted to see her. Ms. Foster advised Mr. Penders not to go to the Gussow residence.

At 9:59 p.m., the defendant telephoned Mrs. Gussow who was at home in Warrensburg with her daughter, Erica, who is 18 years old. When Mrs. Gussow saw that it was Mr. Penders calling, she refused to answer the telephone.

Road Rage

At approximately 11:20 p.m., Bruce Sears, who had just gotten out of work, was traveling northbound on I-87 en route to his home. Mr. Sears, who was driving a 2004 Hyundai Elantra, was traveling in the middle lane at approximately 65-70 miles per hour. Between Exits 22 and 23, Mr. Sears saw a silver Dodge vehicle approximately six car lengths in front of him. Mr. Sears maintained his speed, signaled to change lanes and passed the vehicle on the left, returning to the center lane after he had traveled about six car lengths in front of the silver Dodge. Mr. Sears maintained his speed but suddenly saw bright lights in his rearview mirror. He initially believed that the driver had his high beams on, but realized that the operator of the silver Dodge had accelerated and had substantially shortened the distance between the two vehicles. The driver of the silver Dodge then accelerated, passed Mr. Sears’ vehicle then cut back in front of Mr. Sears’ vehicle. The driver of the Dodge then slowed down as if to annoy Mr. Sears and continued to travel in front of Mr. Sears. As the vehicles approached Exit 23, Mr. Sears signaled that he was going to exit. The silver Dodge did not signal but got off the exit ramp in front of Mr. Sears and pulled his vehicle at an angle halfway up the ramp, blocking Mr. Sears from passing. Mr. Sears was concerned about the erratic conduct of

the driver, so he stopped his vehicle and backed up.² The driver of the silver Dodge then drove his vehicle a few car lengths before he again turned his vehicle at an angle, again blocking Mr. Sears from passing. The driver then slowly progressed to the T intersection. Both vehicles turned left, with the silver Dodge remaining in the lead, now traveling at approximately 20-25 miles per hour. The vehicles traveled on Main Street in Warrensburg, and Mr. Sears saw the Dodge slow to a virtual stop as it turned right onto Horicon Avenue. Mr. Sears committed the silver Dodge's license plate to memory: NY Reg. DGT-2947.³

911 Notification and Response

On April 26, 2010, shortly before 11:38 p.m., Mr. Penders arrived at the residence of Mrs. Gussow, located on Monte Vista Drive in Warrensburg, knocking on the door and demanding to speak with Mrs. Gussow. Her daughter, Erica, told him that it was late, and it would be better if he left. She said, "Okay?" Mr. Penders said, "It is not okay. I need to see your mother." They spoke through a steel door that had a window with a lace curtain. Erica could see Mr. Penders, and it is believed that Mr. Penders could see her. Erica continued to refuse to allow Mr. Penders to speak with her mother and turned off the light, hoping he would leave. Erica immediately called 911. A copy of the 911 call is [attached hereto as Exhibit 1](#). She spoke with Communications Officer David Comstock and told him that a man was at her residence and trying to break in. Communications notified all law enforcement officers that there was a burglary in

² A friend of Mr. Penders, David Peragine, confirmed to police that Mr. Penders had anger issues and severe road rage.

³ Mr. Sears did not call the police that night but instead went home. In the morning, when he saw the media coverage of the events that occurred after his contact with Mr. Penders, he notified the police of the road rage incident. The police confirmed that the license plate that Mr. Sears provided to them matched the registration on Mr. Penders' vehicle.

progress and provided the location. While Erica was on the phone with Communications, Mr. Penders opened fire on the residence, firing five rounds into the door that was locked and restraining his forcible entry. The bullets penetrated the steel door, lodging in the floor in the kitchen. Mr. Penders, who could see through a window in that door, directed the shots to the area of the lock, presumably to dislodge the restraint.⁴ A photograph of the door with the bullet holes is attached [hereto as Exhibit 2](#). Communications Officer Comstock advised Rochelle and her mother to retreat downstairs to their basement for safety and remain there until the police arrived. While speaking with Erica, the Communications Unit updated members of law enforcement that the male intruder was believed to be Patrick Penders who was approximately 60 years old, had white hair pulled back in a pony tail, a grey beard and was wearing a tan vest. Communications also advised patrol that Mr. Penders was armed and had fired shots into the Gussow home.

Law enforcement officers from both the Warren County Sheriff's Office and the New York State Police immediately responded to the call. Within minutes, Officer Haley Grace had arrived in the vicinity of the Gussow residence, when he observed a vehicle, which he believed the suspect was driving, travel from Monte Vista Drive toward Schroon River Road, leaving the area. When the vehicle stopped at a stop sign, Officer Grace saw the driver who matched the description of the suspect given over the police radio. Officer Grace ordered the driver to stay where he was, but Mr. Penders disregarded the order and drove south onto Schroon River Road, heading toward State

⁴ Mrs. Gussow and her daughter were both, at different times, directly on the other side of the locked door while Mr. Penders was shooting. Mrs. Gussow and her daughter were not injured.

Route 9. Officer Grace immediately activated his emergency lights and siren and began pursuing Mr. Penders, providing Communications with a description of Mr. Penders' vehicle and advising Communications that he was attempting a vehicle stop. Officer Grace engaged in a slow speed pursuit of the Pender's vehicle that he clocked as traveling at 45 miles per hour. Sgt. Bartlett joined Officer Grace in the pursuit near the Schroon River Campsites. Sgt. Bartlett directed Officer Scott Phillips to respond to the Monte Vista residence, check on the welfare of the caller and confirm that the vehicle that they were trying to stop was, in fact, that of the suspect. At the entrance of Baker's saw mill, Trooper James Creede joined Sgt. Bartlett and Officer Grace in the pursuit of Pender's vehicle on Schroon River Road.⁵

Slow Speed Pursuit

Sgt. Greg Riley, Officer Jeremy Coon and Officer Joshua Lopez responded to the pursuit. Troopers Richard Billings and Ronald Butler, who were in the same New York State Police marked patrol vehicle joined the pursuit of the Penders vehicle as did Trooper Tarone Liebman who was alone in another marked vehicle. Upon confirming with the caller that the vehicle that they were pursuing was Mr. Pender's vehicle, Sgt. Bartlett authorized Sgt. Riley, and Officers Coon and Lopez to employ stop sticks which they placed on Horicon Avenue in the vicinity of the Warrensburg High School.⁶ Mr. Penders drove his vehicle over the stop sticks, causing damage to at least one tire on the driver's side. Sgt. Bartlett, Officer Grace and Trooper Creede slowed their vehicles to

⁵ Monte Vista Drive is off of Schroon River Road. When traveling in a southerly direction, Schroon River Road becomes Horicon Avenue.

⁶ Stop sticks are used on vehicles with four or more tires when the vehicle is avoiding police apprehension. The police lay the device across the roadway, and the device pierces the tires, causing a controlled deflation of the pursued vehicle's tires with the goal of bringing the pursuit to a safe conclusion.

permit the removal of the stop sticks. Mr. Penders ran a red light as he turned left onto Main Street in Warrensburg which is also State Route 9. Mr. Penders was having trouble controlling his vehicle and almost veered into an on-coming, civilian vehicle. As the pursuit continued southbound on Route 9, Sgt. Bartlett attempted to overtake the vehicle near the Diamond Point Mountain Road. Mr. Penders veered toward Sgt. Bartlett's vehicle, trying to run Sgt. Bartlett's vehicle into the guardrail. Sgt. Bartlett observed the front left tire of Mr. Penders' vehicle come off his vehicle, and his vehicle started emitted heavy black smoke. Mr. Penders was having difficulty maintaining control of the vehicle. Sgt. Bartlett did not believe that the driver would be able to continue much further and instructed a second effort at employing the stop sticks. The pursuit continued southbound on Route 9 into the Village of Lake George. Officer Coon placed stop sticks on Canada Street near John Barleycorn's Pub. As he did so, Mr. Penders swerved to the right and directly into the direction of Officer Coon. Officer Coon repositioned the sticks, pulling them closer to him. As a result, Mr. Pender's vehicle drove over the device, causing damage to the passenger side tires. Despite the damage to the tires, the pursuit continued but the vehicle was losing all control. In fact, the Penders vehicle swerved off the highway in the vicinity of the Valero station and bowling alley, appearing as if it were going to crash. A copy of the radio transmissions of the pursuit are [attached hereto as Exhibit 3](#).

Just outside the village limits approaching the intersection of Routes 9 and 9N, Officer Coon again overtook the fleeing vehicle, deployed the third and final set of stop sticks, which deflated the final tire on Pender's vehicle. Mr. Penders vehicle lost control, almost driving into Gooney Golf parking lot, crossing all four lanes of travel to the north

side of Route 9N and coming to a rest between two telephone poles. Sgt. Bartlett radioed that there was an accident at 12:03 a.m. An aerial photograph of the intersection is [attached as Exhibit 4](#). A photograph of where Mr. Penders vehicle came to rest is [attached as Exhibit 5](#).

Penders Shooting

Sgt. Bartlett radioed that there had been a vehicle accident and exited his patrol car. Headlights and spotlights illuminated Mr. Penders' vehicle, allowing the officers to see Mr. Penders exit his vehicle, holding a black handgun. Sgt. Bartlett and the other officers at the scene issued repeated commands for him to drop the weapon. Mr. Penders disregarded these commands, raised the weapon and aimed it directly at Sgt. Bartlett. Mr. Penders fired his gun, striking Sgt. Bartlett in the abdomen just below his body armor. Sgt. Bartlett, along with Officer Lopez and Troopers Butler, Creede and Liebman returned fire, striking Mr. Penders. Mr. Penders was able to get off a second round, but fell to the ground, landing face down.

Sgt. Riley and Officer Grace approached Mr. Penders with Trooper Creede providing cover. The officers were looking for Penders' gun. Officer Grace rolled Mr. Penders over and saw a gun, a black revolver, in the sand next to him. Officer Grace kicked the .357 Magnum out of the vicinity of Mr. Penders. Sgt. Riley and the troopers remained with Mr. Penders. Officer Grace radioed for two ambulances and returned to Sgt. Bartlett to check on his condition. Sgt. Riley directed Officer Grace to maintain a crime scene log of who was entering and exiting the crime scene.

Sgt. Bartlett was treated and released from Glens Falls Hospital. It was later determined that Sgt. Riley was also struck with a bullet from Mr. Penders' weapon that was stopped by his body armor. He did not require any medical treatment.

Autopsy

Mr. Penders was declared dead on April 27, 2010 at 4:45 a.m., and an autopsy was completed by Dr. Michael Sikirica, a board certified forensic pathologist. A copy of the complete autopsy is [attached as Exhibit 6](#).

When Dr. Sikirica initially observed the body of Mr. Penders, he noted that Mr. Penders wore a belt with an attached folding knife in a holder and a white metal clip. Mr. Penders also had a very large sheath knife tucked into the left front abdominal region of the pants and an additional large knife in a brown sheath that was tucked into the left lower back of his pants. In Mr. Penders' right front vest pocket, Dr. Sikirica noted a belt loop cartridge holder containing 7 Winchester .357 Magnum cartridges with 5 empty spaces for cartridges. In his left rear pocket of his pants was a folding knife.

Dr. Sikirica determined that the immediate cause of death was brain injury and hemorrhage due to gunshot wounds of head, torso and extremities. Upon a full examination of the corpse, Dr. Sikirica observed and detailed eight gunshots wounds during the completion of his autopsy of Mr. Penders:

Gunshot wound #1 was located along the left temporal parietal scalp and skull and penetration into the left parietal cortex. The path of the projectile was from the decedent's left to right, nearly straight and nearly level. A large caliber deformed projectile with a copper jacket, believed to be a .45 caliber was recovered from the white matter in the left parietal cortex.

Gunshot wound #2 was a superficial series of wounds located along the posterior left scapular region. No projectile was recovered. There is no evidence of significant damage to internal structures or deeper tissues.

Gunshot wound #3 was located along the anterior left shoulder area. A badly deformed, smaller caliber jacketed projectile measuring approximately 10 X 9 X 9 mm was recovered in the right perispinal soft tissue. The path of projectile was from decedent's left to right, from front to rear and downward. The fragments recovered from this wound were consistent with .223 caliber ammunition.

Gunshot wound #4 was located along the left upper abdominal region. No projectile was recovered. The path of the projectile was nearly straight, from Mr. Penders' front to rear and nearly level.

Gunshot wound #5 was located slightly inferior to gunshot wound #4 along the left upper abdominal region. In the right, lower medial back, Dr. Sikirica recovered a badly deformed, very flattened jacketed projectile, measuring approximately 25 X 20 X 10 mm. The path of projectile was slightly from decedent's left to right, from front to back and nearly level. This wound was consistent with having been fired with Sgt. Bartlett's Glock .45 caliber gun.

Gunshot wound #6 was located along the upper dorsal portion of the right forearm. There are two metallic fragments of bullet core material noted in the entrance site that lacked rifling characteristics necessary for identification and comparison. However, the size of the injury was more consistent with being inflicted with high velocity ammunition such as the .223 caliber of the Colt M4.

Gunshot wound #7 was a jagged wound located along the ventral medial portion of the left hand. No projectile was recovered and the exact directionality of the wound could not be determined.

Gunshot wound #8 was located along the dorsal lateral portion of the proximal left foot. A large caliber jacketed partially deformed projectile, believed to be a .45 caliber, was recovered from beneath the skin.

Examination of decedents clothing revealed there was no evidence of powder tattooing or soot around any of the perforation sites, eliminating the possibility that any of these rounds were fired at close range.

Thus, head wound was caused by a .45 caliber round and therefore is consistent with having been fired by Sgt. Bartlett or any of the members of the State Police who discharged their weapon. The projectile recovered from the ankle appears to be consistent with the type of ammunition used by the State Police.

Given the nature of the wounds to the right forearm, the left shoulder and the lead fragments that were observed, these wounds are consistent with the .223 ammunition used in the M-4 that was fired by Officer Lopez.

Toxicology

As is the protocol of all autopsies, a toxicological examination of Mr. Penders was conducted to determine his ethanol level and it was measured in his blood, vitreous fluid and urine. His blood ethanol level was 0.19%. His vitreous fluid ethanol level was 0.21%, and his urine ethanol level was 0.25%. In addition, the toxicology results showed an elevated level (1000 ng/ml) of Tramadol in Mr. Penders' system. Tramadol is a synthetic opioid receptor used for the management of moderate to moderately severe pain. After a single 100 mg oral dose of Tramadol, the peak plasma levels range from 230 – 380 ng/ml. Common adverse reactions to Tramadol include sedation, dizziness and headache. Higher doses may elicit agitation, tachycardia, hypertension and seizures. In addition, Meclizine, which is an antihistamine used in the treatment of nausea, vomiting and vertigo, was detected and measured 120 ng/ml. After a single 25 mg oral dose of Meclizine, a peak plasma concentration measures approximately 80 ng/ml at four

hours, declining to 25 ng/ml by eight hours and 5 ng/ml by 24 hours. Adverse effects with Meclizine include drowsiness, fatigue and dry mouth.

Ballistics

Mr. Penders fired five rounds from a .357 Magnum at the Gussow residence.

When he exited his vehicle on Route 9N near the intersection of Routes 9, Mr. Penders fired first. He again was firing from a .357 Magnum. The police returned fired. Mr. Penders fired his weapon a total of two times at the scene.

The Forensic Investigation Unit (FIU) responded to the scene of the shooting to recover any forensic evidence. FIU confirmed that a total of 42 rounds were fired at that location. Four .45 ACP expended cartridge casings, nineteen .45 Gap expended cartridge casings and seventeen .223 expended cartridge casings were recovered in the vicinity of the responding police vehicles.

The police recovered from Mr. Penders' person a Colt Peacekeeper .357 Magnum handgun, serial number 64261V, with four live rounds and two expended cartridge casings recovered from the handgun. Mr. Penders was wearing two loop loaders both capable of containing 12 live .357 rounds, one had twelve live rounds, the other had five rounds missing, presumably the five rounds that he fired at the Monte Vista residence. From Mr. Penders' vehicle, the police recovered: two live .357 rounds from behind the driver's seat, five empty .357 shell casings, a box of ammunition behind the passenger seat and a small billy club.

FIU confirmed the weapon issued to each officer, whether the officer fired his weapon and if so, how many rounds were fired.

Sgt. Ralph Bartlett was issued a Glock 21 and .45 caliber ammunition from the Warren County Sheriff's Office. Sgt. Bartlett fired four rounds.

Sgt. Greg Riley was issued a Glock 21 and .45 caliber ammunition from the Warren County Sheriff's Office. Sgt. Riley did not fire any rounds.

Officer Josh Lopez was issued a Colt M4 and .233 caliber ammunition from the Warren County Sheriff's Office. Officer Lopez fired seventeen rounds.

Trooper Richard Billings was issued a Glock 37 and .45 caliber ammunition from the New York State Police. Trooper Billings did not fire any rounds.

Trooper Ronald Butler was issued a Glock 37 and .45 caliber ammunition from the New York State Police. Trooper Butler fired six rounds.

Trooper James Creede was issued a Glock 37 and .45 caliber ammunition from the New York State Police. Trooper Creede fired eleven rounds.

Trooper Tarone Liebman was issued a Glock 37 and .45 caliber ammunition from the New York State Police. Trooper Liebman fired two rounds.

Legal Analysis⁷

The force used to stop Penders' vehicle and the deadly force used to attempt to affect his arrest were justified under Penal Law 35.30 which provides in pertinent part:

A police officer or peace officer, in the course of effecting or attempting to effect an arrest, or of preventing or attempting to prevent the escape from custody, of a person whom he or she reasonably believes to have committed an offense, may use physical force when and to the extent necessary to effect the arrest . . . except that deadly physical force may be used for such purposes only when he or she reasonably believes that:

(a) The offense committed by such person was:

⁷ Patrick Siler, a legal intern, assisted in the preparation of this analysis.

(i) a felony or an attempt to commit a felony involving the use or attempted use or threatened imminent use of physical force against a person; or

(ii) kidnapping, arson, escape in the first degree, burglary in the first degree or any attempt to commit such a crime; or

(b) The offense committed or attempted by such person was a felony and that, in the course of resisting arrest therefore or attempting to escape from custody, such person is armed with a firearm or deadly weapon; or

(c) Regardless of the particular offense which is the subject of the arrest or attempted escape, the use of deadly physical force is necessary to defend the police officer or peace officer or another person from what the officer reasonably believes to be the use or imminent use of deadly physical force.

Penal Law § 35.30.

Here, two types of force were employed during the course of the pursuit of Mr. Penders and the attempt to place him under arrest. First, the police applied a reasonable and necessary amount of force to bring the Penders' vehicle to a halt by deploying stop sticks. Once the vehicle was disabled, police officers were required to use deadly force in order to prevent Penders from shooting and killing the officers. The amount of force used in both instances was justified under PL § 35.30.

The use of force employed by the police to stop Penders' vehicle was reasonable and necessary to effectuate his arrest.

Police officers properly used stop sticks to stop Penders' vehicle since they reason to believe that Penders had committed an offense and he was clearly attempting to avoid being taken into custody. PL § 35.30.

On the night of April 26, 2010, the police held a reasonable belief that Patrick Penders had committed an offense when they discovered him in close proximity to the location where a burglary had been committed and shots fired had been reported. In fact,

the description given by the caller completely matched Mr. Penders and his vehicle. When Mr. Penders subsequently disobeyed the order given by the police to stay where he was, the police were justified in using force “to the extent necessary to effect the arrest[.]” PL § 35.30.

The deployment of stop sticks represented a reasonable degree of force necessary to affect the arrest of the fleeing suspect. The tactic was used only after the suspect had defied a verbal command to stay where he was, proceeded to flee and was being pursued by multiple police vehicles that had engaged their sirens and emergency lights. The pursuit started in Warrensburg and continued through the Town of Bolton, the Town of Lake George, the Village of Lake George, ending just outside the village limits. The pursuit covered 11.9 miles. The police were obligated to repeat deployment of stop sticks when the suspect continued to flee despite having blown out at least one of his tires. Mr. Penders demonstrated no intention of stopping of his own accord when he attempted to force Sgt. Bartlett’s vehicle into the guardrail. This clear demonstration that Mr. Penders did not intend to stop, coupled with the fact that he had increasing difficulty controlling his vehicle as he was approaching the more populated section of road in Lake George Village, made the use of stop sticks necessary not only to effect the arrest of the suspect but to eliminate a substantial risk of harm to innocent bystanders.

The Justifiable Use of Deadly Force

Police officers properly employed deadly force against Mr. Penders, because they had reason to believe that he had committed a felony involving the use of force against another, Penders was armed with a deadly weapon while attempting to evade arrest, and

the use of deadly force was necessary to prevent Penders from shooting and killing the officers. PL §§ 35.30 (a), (b) and (c).

A. The police reasonably believed that Mr. Penders had committed the felony of Burglary in the First Degree.

As discussed above, the police held a reasonable belief that Patrick Penders had committed an offense when they discovered him in close proximity to the location where they had received reports of a burglary with shots fired, the victim knew the perpetrator and provided his name and description and Mr. Penders matched that description. The requisite probable cause to effect an arrest “does not require proof sufficient to warrant a conviction beyond a reasonable doubt but merely information sufficient to support a reasonable belief that an offense has been ... committed’ by the person arrested.” People v Shulman, 6 N.Y.3d 1, 25 (2005) (quoting People v Bigelow, 66 N.Y.2d 417, 423 (1985)). Thus, it has been well established that “a police officer may effect a warrantless arrest when he or she observes a suspect in close geographic and temporal proximity to the crime scene and the suspect's appearance matches a sufficiently detailed description of the perpetrator received by the officer.” People v. August, 33 A.D.3d 1046, 1048 (3d Dept. 2006) (citing People v Terry, 2 A.D.3d 977, 979 (2003); People v Oliver, 191 A.D.2d 815, 816 (1993); People v Harmon, 293 A.D.2d 303, 303-304 (2002); People v McKethan, 225 A.D.2d 800, 800 (1996); People v Ward, 182 A.D.2d 573, 573 (1992)).

Here, officers were responding to a report of a burglary conducted by an armed suspect who had fired shots. Burglary in the first degree is committed when a person “knowingly enters or remains unlawfully in a dwelling with intent to commit a crime therein, and when, in effecting entry or while in the dwelling or in immediate flight therefrom, he... [i]s armed with explosives or a deadly weapon.” Penal Law § 140.30.

Deadly weapon includes “any loaded weapon from which a shot, readily capable of producing death or other serious physical injury may be discharged...” Penal Law §10.00(13) The report that shots had been fired certainly demonstrated to responding officers that Mr. Penders was armed with a deadly weapon, and he was willing to use it. Inspection of the scene by the police while the vehicle pursuit was still underway confirmed that shots had indeed been fired at the Gussow residence. The officers’ belief that Mr. Penders had committed Burglary in the First Degree was objectively reasonable, placing their conduct squarely within PL § 35.30 (a)(ii), which reads, “deadly physical force may be used for such purposes only when [an officer] reasonably believes that . . . [t]he offense committed by such person was . . . burglary in the first degree.” Penal Law § 35.30.

B. Penders had committed a felony and was armed with a firearm.

PL § 35.30 (b) allows for the use of deadly force when the arresting officer reasonably believes that “[t]he offense committed or attempted . . . was a felony and that, in the course of resisting arrest therefore or attempting to escape from custody, such person is armed with a firearm or deadly weapon.” As stated above, the police reasonably believed that Penders had committed Burglary in the First Degree. By virtue of the report of shots fired and the corroborating evidence of firearm damage found by police at the Gussow house while the pursuit was still underway, the officers also reasonably believed that Penders was armed. This belief was confirmed when Penders exited his vehicle wielding a firearm. Consequently, the use of deadly force was justified by PL § 35.30 (b).

C. The use of deadly force was necessary to defend the officers from what they reasonably believed to be the use of deadly physical force.

PL § 35.30 (c) states that the use of deadly physical force is justified when the officer reasonably believes that such force “is necessary to defend the police officer or peace officer or another person from what the officer reasonably believes to be the use or imminent use of deadly physical force.” Whether the use of force was necessary requires consideration of “whether there was a threat of deadly physical force” McCormack v. City of New York, 2002 NY Slip Op 40007U, 7 (N.Y. Misc. 2002).

In the instant case, Patrick Penders confronted the police officers with a loaded firearm which he openly displayed. The police provided Penders with an opportunity to drop his weapon and surrender, but he did not. Rather, Penders raised the weapon and aimed it directly at Sergeant Bartlett. The situation confronting the officers was similar to that at issue in Williams v. City of New York, 2 N.Y.3d 352 (2004) where a suspect pointed a loaded firearm at several police officers as they attempted to arrest her in her apartment. Williams v. City of New York, 2 N.Y.3d 352 (2004). The Court of Appeals found that “the police officers who fired had a loaded gun pointed in their direction. In these circumstances there is no issue of fact as to whether the police conduct was legally justified . . . and not a violation of the Penal Law.” Id. at 361. Under this standard, the officers in the present case would have been readily justified in using deadly force against Mr. Penders as soon as he raised his weapon. In the hope that such force would not be necessary, the officers actually delayed, opening fire and only did so after Mr. Penders ignore their request to drop his firearm and fired at Sgt. Bartlett. As a result, the officers faced not only a loaded gun pointed in their direction, but targeted fire from a suspect.

The fact that Mr. Penders was able to fire not just one, but two shots before being disabled by return fire evidences that the officers showed tremendous and admirable restraint in their use of deadly force. It also clearly establishes that the officers reasonably believed that the use of deadly force was necessary to defend against the execution of deadly force by Penders. The officers' conduct, then, was also justified under PL § 35.30 (c).

CONCLUSION

Based upon the stated findings of fact and analysis, this office concludes that the officers acted lawfully and in accordance with New York Penal Law § 35.30. The officers' conduct was justified under any and all of the possible provisions of the statute. As such, this office closes the investigation into the officers' conduct.