



Office of the New York State Attorney General Letitia James
Office of Special Investigation

January 31, 2023

Report on the Investigation into the Death of Paul Weeden

SUMMARY

New York Executive Law Section 70-b (“Section 70-b”), authorizes the Attorney General’s Office of Special Investigation (“OSI”) to investigate and, if warranted, to prosecute offenses arising from any incident in which the death of a person is caused by a police officer. When OSI does not seek charges, Section 70-b requires issuance of a public report. This is the public report of OSI’s investigation of the death of Paul Weeden.

On October 4, 2021, Village of Walton Police Department (“WPD”) Patrol Officer Frederick Babcock shot Paul Weeden, causing his death, after Mr. Weeden displayed what was later determined to be a pellet rifle at PO Babcock. After a full evaluation of the facts and the law, OSI will not seek charges against PO Babcock because we conclude that a prosecutor could not prove beyond a reasonable doubt that PO Babcock’s actions were not justified under Article 35 of the New York Penal Law.

FACTS

911 Call and Response

At 3:21 a.m. on Monday October 4, 2021, a man who would only give the first name Paul called 911 and said he needed a police officer at 14 Griswold St. in the Village of Walton, which is in Delaware County. Delaware County Office of Emergency Communications (“OEC”) Dispatcher Dustin Miller took the call. The man said he was “gonna hurt [him]self,” and to “send a cop now.” Mr. Miller tried to keep the man on the line and asked why he wanted to hurt himself, but Paul replied, “Just send a police officer now ... Tell them the door’s unlocked, bye,” and hung up. [Audio of 911 Call](#)

According to OEC records, audio recordings, and OSI’s interview of Dustin Miller,¹ at 3:22 a.m. he dispatched PO Babcock to 14 Griswold St. for a “941” – meaning a mental health call where the person might harm himself or others.² PO Babcock asked for details and Mr. Miller told him, “Caller is uncooperative, reported he just wants to hurt himself. Stated the door is unlocked and to send a police officer, and he disconnected. I’m re-attempting now.” Mr. Miller checked the OEC call history at that address and told PO Babcock that based on a 911 call to the same address the day before, the caller’s name was likely Paul Weeden. Hearing this, PO Babcock asked for a second police officer to respond, saying there were firearms in the house. [Audio of Initial Dispatch](#)

In an interview with OSI, PO Babcock said he had responded to Mr. Weeden’s house for a previous medical call (as detailed below, there were many calls for assistance to Mr. Weeden’s house in the months preceding this incident) and he and Mr. Weeden talked for quite a while as they waited for an ambulance. Although PO Babcock noticed a rifle in the house, he said it is not unusual for people in Delaware County to have guns in their homes. PO Babcock said

¹ OSI and a New York State Police (“NYSP”) investigator interviewed Dustin Miller, PO Babcock, and Delaware County Sheriff’s Office Deputy Logan Flavell on January 24, 2022.

² “941,” the dispatch code for mental health related calls where people might hurt themselves or others, comes from Mental Hygiene Law Section 9.41, which allows police to take a person to a hospital for observation, care, and treatment if they present a threat to themselves or others.

the rifle in the house as well as the nature of the call (mental health related) prompted him to request a second officer.

In an interview with OSI, Dustin Miller said OEC's practice is to request a second officer for all 941 calls, and he canvassed officers in Delaware County to see who was closest to the Village of Walton. Delaware County Sheriff's Office ("DCSO") Deputy Logan Flavell was about six miles away, the closest car to Walton, and Dep. Flavell said he would respond.

PO Babcock's Arrival at the House, Interaction with Mr. Weeden, and the Shooting

The house at 14 Griswold St. has two side-by-side two-story apartments; Mr. Weeden's entrance was on the right.

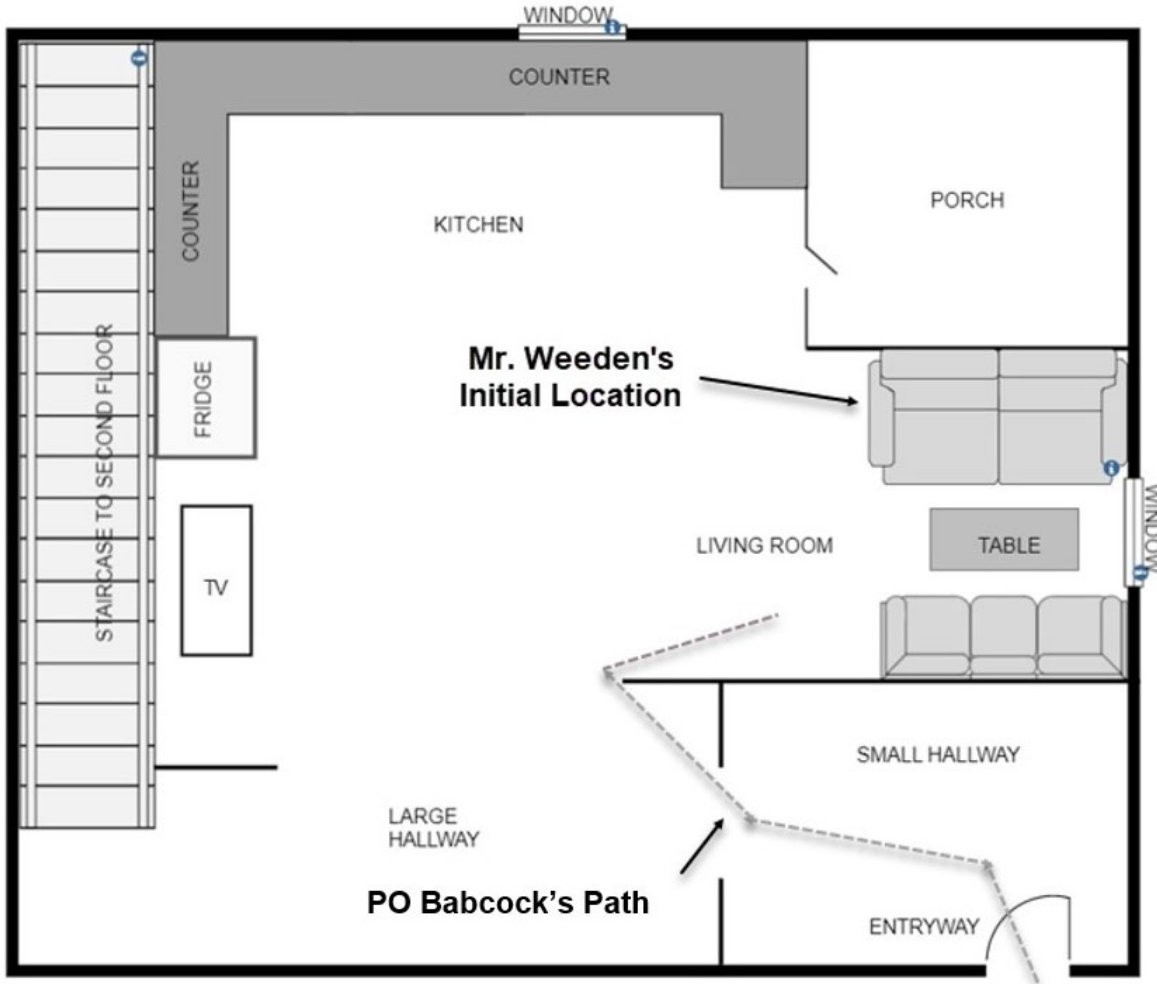


14 Griswold St. Mr. Weeden's porch and entrance door are circled.

WPD does not equip its officers with body worn cameras ("BWC"s). In this section, the description of the events at the house is based on PO Babcock's OSI interview and, where noted, on other evidence.

PO Babcock radioed his arrival at 14 Griswold St. at 3:24:27. In his OSI interview he said he immediately went to the front door and knocked several times, but nobody answered.³ Eventually, PO Babcock said he heard Mr. Weeden say something like, "I'm in here," or "Come in," and he opened the door and stepped inside. The diagram below, which does not contain every detail of Mr. Weeden's apartment, shows relevant portions of the home.

³ Although PO Babcock asked for a second officer to respond, both he and Dustin Miller said there is no requirement that an officer wait for the second officer to arrive before going into a home for a "941" call; Delaware County is very rural and the closest car is often quite distant. Aware that Mr. Weeden said he wanted to harm himself, PO Babcock said he felt he could talk to Mr. Weeden, because of the rapport they developed previously.



Schematic diagram of the interior of Mr. Weeden's apartment (not to scale) prepared from the New York State Police's Forensic Identification Unit's post-incident sketch. PO Babcock's approximate path is shown.

As he entered the apartment, PO Babcock said he began talking out loud to Mr. Weeden to better determine where he was and his mental state. As PO Babcock approached the Large Hallway (see diagram above), Mr. Weeden said, "I'm in here," from the living room. PO Babcock noted that there were two dogs in the apartment – a smaller one in a cage, and a larger one, uncaged. He turned into the living room but kept his back to the wall. PO Babcock said he found Mr. Weeden on a couch, somewhat propped up, with a blanket covering his entire body.

PO Babcock stayed near the wall, which, he said, brought him about 4 feet from the end of the couch where Mr. Weeden was. He said he made several attempts to connect with Mr. Weeden, reminding him that they had met during a previous medical call, but Mr. Weeden did not answer him. PO Babcock assumed Mr. Weeden had some sort of altered mental state by the way he was acting.⁴

⁴ The autopsy showed that Mr. Weeden had 770 ng/mL of the pain-relieving synthetic opioid Tramadol in his blood, along with 110 ng/mL of the Tramadol metabolite O-Desmethyltramadol. The other details from the autopsy are described later in this report, in the Medical Examiner section.

Mr. Weeden said he needed help and to “come over here.”⁵ PO Babcock said he asked Mr. Weeden several times how he could be of help, but Mr. Weeden continued to ask PO Babcock to “come over here.” After a couple of minutes, Mr. Weeden said he needed PO Babcock’s help to get up from the couch and then said, “I’m not going to hurt you. Come over here.” PO Babcock said both of Mr. Weeden’s hands were still under the blanket.



Photograph of the Living Room facing the couch from about where PO Babcock stood.

PO Babcock said he asked Mr. Weeden to remove his blanket so he could see Mr. Weeden’s hands before approaching the couch. Mr. Weeden said he couldn’t do that because he couldn’t sit up. PO Babcock said he repeatedly told Mr. Weeden he wanted to help him but could not do so until he could see his hands. PO Babcock said after about 30 seconds Mr. Weeden sat up on the couch. PO Babcock said he made a mental note that Mr. Weeden sat up without help, although he had repeatedly said he could not, and, for that reason, PO Babcock said he thought Mr. Weeden was trying to draw him over. Sitting up on the couch, Mr. Weeden pulled his left hand out from under the blanket but kept his right hand under it. At that point, PO Babcock said, the uncaged, larger dog came to the side of the couch and began nudging at the blanket with its nose. PO Babcock said Mr. Weeden then pulled a “black

⁵ Quotes are from Off. Babcock’s interview with OSI.

pistol” out from under the blanket with his right hand and put it on his lap with the barrel facing PO Babcock.

PO Babcock said he drew his gun and began backing up, telling Mr. Weeden, “Drop the gun. I can help you.” He radioed OEC. DCSO Dep. Flavell, who was driving to the scene, had activated his BWC, which captured the radio transmissions between PO Babcock and OEC. [WEEDEN VIDEO](#)

PO Babcock said he retreated from the living room entrance, retracing his path toward the front door, while facing Mr. Weeden’s general location. As heard in the WEEDEN VIDEO, at 3:28:43, about four minutes and 15 seconds after he arrived at Mr. Weeden’s home, PO Babcock radioed OEC and gave his WPD car number, saying, “87.” Receiving no response, at 3:28:49, PO Babcock said, “87 Delaware.”⁶

Dustin Miller acknowledged PO Babcock’s radio call at 3:28:51, but PO Babcock did not answer. Mr. Miller again acknowledged PO Babcock’s call, at 3:29:01, but again PO Babcock did not answer. At 3:29:18 Mr. Miller said, “Delaware to 411 [Dep. Flavell] did you copy?” In his OSI interview, PO Babcock said he was backing out of the house during this time, repeatedly telling Mr. Weeden, “Drop the gun. I can help you.” At 3:29:21, as heard on the WEEDEN VIDEO, PO Babcock cut into the radio saying, “Male’s got a firearm,” in a hurried voice.

PO Babcock said he kept slowly backing up until he reached the porch, noting that although he felt safer outside than he had inside, the porch was a small, dark area and there were steps behind him.⁷ He continued trying to speak to Mr. Weeden through the glass-paned storm door, explaining that he was there to help, but Mr. Weeden did not respond. PO Babcock told OSI that while looking through the storm door, with one foot on the landing and one foot on the top step, he saw Mr. Weeden’s shadow moving toward the door and he started issuing commands in a louder voice.

PO Babcock said Mr. Weeden appeared rather quickly at the glass storm door and the first thing he saw was “the black handgun pointed at [him.]” PO Babcock said when he saw the pointed gun, he “discharged [his] duty weapon” through the storm door.

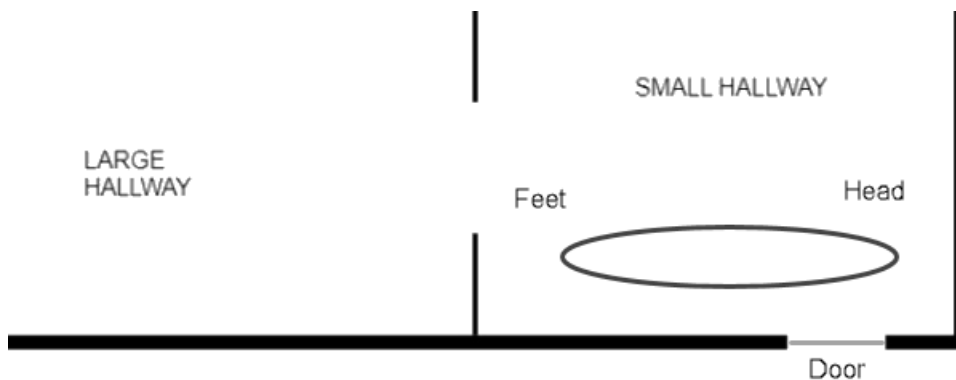
When asked what he was thinking during that time, PO Babcock said as soon as Mr. Weeden pointed the gun at him in the living room, he feared he was in danger “for [his] life.” But after he tried to retreat and Mr. Weeden followed him with the gun, PO Babcock said he “fear[ed] ... for his life even more.”

The WEEDEN VIDEO, at 3:30:15, captures PO Babcock radioing, “Shots fired,” and Dustin Miller acknowledging shots fired. At 3:30:27 PO Babcock radioed, “Start EMS.”

⁶ Compared to the audio of the Initial Dispatch, linked previously, PO Babcock spoke noticeably faster in this audio.

⁷ Members of OSI went to the scene shortly after the shooting. Mr. Weeden’s house was very cluttered. During his interview, PO Babcock said he did not want to trip over the items scattered about while also trying to make sure he could see Mr. Weeden.

PO Babcock said Mr. Weeden fell to the floor, with his head toward the storm door and his feet toward the large hallway, lying on his right side, facing away from PO Babcock, with his left shoulder up.



Schematic diagram of the entryway to Mr. Weeden's home. The oval corresponds to Mr. Weeden's approximate position after he fell to the floor. The door through which PO Babcock fired his weapon is noted.

PO Babcock said he did not see any blood and was unsure whether he'd hit Mr. Weeden; he said Mr. Weeden appeared to be trying to say something to him. PO Babcock said he stepped closer and peered through the now shattered glass door with his flashlight, but when he shined his flashlight on Mr. Weeden's right hand, Mr. Weeden, still holding the pistol, lifted it. At that point PO Babcock said he fired his gun again.

After the second volley, PO Babcock said he radioed dispatch asking them to send EMS. He told OSI that Mr. Weeden did not move after the second set of shots. PO Babcock said he opened the door, handcuffed Mr. Weeden, and removed the gun from Mr. Weeden's hand and moved it away. PO Babcock said he did not know at that point whether anyone else was in the home.

At 3:31:20, according to the WEEDEN VIDEO, Dustin Miller asked PO Babcock for his status. At 3:31:24 PO Babcock replied, "Secured the scene. [Inaudible] in handcuffs." PO Babcock followed up at 3:31:34, saying, "87 Delaware, we're all secured," and Mr. Miller replied, "Received. We are activating EMS."

After the Shooting

As seen on the WEEDEN VIDEO, Dep. Flavell's BWC shows PO Babcock on Mr. Weeden's porch at 3:32:22, about two minutes after the "Shots fired" transmission, breathing heavily; Dep. Flavell encouraged PO Babcock to breathe.

At 3:32:50 Dep. Flavell's BWC shows PO Babcock attempting to rouse Mr. Weeden by shaking his shoulder and saying "Mr. Weeden," but Mr. Weeden did not move.⁸ The BWC shows PO Babcock pointed at a chair on the porch and said, "The gun's right here." The BWC shows that

⁸ In his interview with OSI, PO Babcock said Mr. Weeden never moved at all after the second volley.

after taking several deep breaths PO Babcock began telling Dep. Flavell how the shooting unfolded. The following is taken from the WEEDEN VIDEO between 3:32:04 and 3:34:18:⁹

I went inside he uh he was laying on a bed. And he told me to come in. He told me to come in.

[Break as PO Babcock tries to rouse Mr. Weeden.]

He told me to come inside. He was sitting on the bed. He told me to come here I need help. Come here I need help. Come here I need help.

I said what do you need help with. Trying to de-escalate the situation because I couldn't see his hand. He wouldn't show me his right hand the whole time.

And uh and uh I was like hey man I need to see your hand. He's like come here I don't want to hurt you. I need help. And I was like well what do you need man. And uh he uh. He's like I need help.

I was like alright man I can help you. What do you need? I was like we have a prior relationship. I was like I've been here I helped you with EMS man.

And he's like I don't. I don't want to hurt you. I was like I don't want to hurt you either man.

And uh that's when he showed me the gun. So I backed up to right here so I had an angle. And then I could hear him coming so I started backing retreating a little bit. Trying to get some cover. And uh. He uh he fucking pointed the gun at me man.

Although PO Babcock provided more information in his OSI interview, his on-scene description of the shooting to Dep. Flavell, provided within minutes of the shooting, was consistent with the interview.¹⁰

The BWC shows that at 3:34:21, PO Babcock repositioned Mr. Weeden onto his back and began chest compressions; when asked in his OSI interview why he didn't start CPR immediately, PO Babcock said Mr. Weeden never moved or otherwise exhibited signs of life, and he didn't consider it until Dep. Flavell arrived;¹¹ he also said that initially he did not know if anyone else was in the house. The BWC shows that after about four minutes Dep. Flavell took over the chest compressions until the Village of Walton Fire Department/EMS arrived, which can be heard on Dep. Flavell's BWC at 3:40:16.

⁹ The statements from the BWC are set forth here as transcribed by OSI.

¹⁰ PO Babcock did not review the BWC video prior to the OSI interview.

¹¹ As discussed in the Medical Examiner section of this report, the immediate application of CPR would not have saved Mr. Weeden's life.

As shown on the BWC, EMS assessed Mr. Weeden, began life saving measures, and asked Dep. Flavell to fetch gauze and scissors from his car. At 3:41:42, when Dep. Flavell returned to the porch with those items, the BWC shows PO Babcock holding Mr. Weeden's gun. Dep. Flavell told PO Babcock to leave everything where it was so they could take pictures, and PO Babcock replied, "Yeah, I know but I just don't want it sitting there. It's loaded I'm pretty sure."



Still photograph of PO Babcock holding Mr. Weeden's gun.

In an interview with OSI, which was consistent with a written statement she gave to the New York State Police ("NYSP"),¹² JT, an Emergency Medical Technician (EMT) from Walton Fire/EMS and the first member of the crew to arrive on-scene, said she and her partner took over chest compressions from Dep. Flavell and PO Babcock when they arrived, intubated Mr. Weeden, administered fluids and epinephrine, and activated an automated external defibrillator (AED), which announced "no shock advised."¹³ Mr. Weeden never started breathing or regained a pulse during the EMS efforts. At 3:59:04, Dep. Flavell's BWC shows that JT told Dep. Flavell to tell dispatch to cancel any further emergency response and at 3:59:58 told Dep. Flavell that Mr. Weeden was dead, which Dep. Flavell transmitted to Dustin Miller.

At 4:12:00, Dep. Flavell's BWC shows that EMS checked PO Babcock's heart rate and blood pressure at the back of the ambulance; finding both elevated, they had him sit briefly so they could monitor him. As they waited, JT said she had responded to Mr. Weeden's house the previous morning.

¹² JT provided a written statement to NYSP on October 4, 2021. OSI interviewed JT on October 21, 2021.

¹³ AEDs are fully automated. When the operator applies the pads to a person's chest the machine audibly announces, "shock advised" or "no shock advised." "Shock advised" means the machine has detected a shockable rhythm and the operator should apply a shock to the person. "No shock advised" means the machine does not detect a shockable heart rhythm, and the operator should not proceed to apply a shock to the person.

JT said she had been to Mr. Weeden's house several times over the past few months. When she went to his house the morning before the shooting (October 3, 2021) she noticed the same "black pistol" at the foot of Mr. Weeden's couch as the one PO Babcock had placed on a chair after taking it from Mr. Weeden. JT said the gun had been close to Mr. Weeden, but he had not touched it.¹⁴ She said she'd seen rifles and bows in Mr. Weeden's house before, but never a gun. However, she told OSI that seeing guns in houses in Delaware County is not uncommon.

Review of OEC records shows that during the six months before this incident Mr. Weeden requested EMS to his home fourteen times; seven of those calls took place between September 1, and October 4.

Scene Processing and Ballistics Analysis

NYSP Forensic Identification Unit (FIU) processed the scene, taking ballistics evidence, including PO Babcock's and Mr. Weeden's guns. When fully loaded, PO Babcock's weapon, a Glock .45 Automatic, carries 13 live rounds in the magazine and one in the chamber, for a total of 14. When examined, there were four rounds in PO Babcock's magazine and one in the chamber, meaning that, assuming his gun had been fully loaded, PO Babcock fired his gun nine times.¹⁵

On the porch where PO Babcock stood during the shooting, FIU recovered four expended cartridge casings, one deformed projectile, and Mr. Weeden's gun.



FIU processing of Mr. Weeden's porch. Placards 1-4 correspond to expended cartridge casings. Placard 5 corresponds to a deformed bullet. Placard 6 is the gun PO Babcock took from Mr. Weeden.

¹⁴ JT and the EMS crew transported Mr. Weeden to Delaware Valley Hospital on the morning of October 3.

¹⁵ In his OSI interview, PO Babcock was not able to parse how many shots he fired during the first volley and how many he fired during the second. Although cartridge casings were found in two different places (four on the porch and five on the ground next to the porch), there were many people moving around the area as PO Babcock, Dep. Flavell, other responding officers, and EMTs tried to provide emergency care, and it is possible that casings were shuffled from the porch to the ground during that process.

FIU located five expended cartridge casings on the ground to the right of the porch, for a total of nine expended cartridge casings, which matched the number of live rounds missing from PO Babcock's gun.



FIU processing of the area adjacent to Mr. Weeden's porch. Each placard corresponds to an expended cartridge casing. An additional casing was located under the overturned garbage can, in the circled location.

FIU found two projectiles in the small hallway of Mr. Weeden's home, two embedded in the hallway wall, and one that went through the wall and became embedded in a guitar hanging on the other side. The medical examiner found one projectile in Mr. Weeden's clothing during the autopsy and turned it over to FIU. Two of the nine fired projectiles were never found.

Forensic analysis showed that the nine recovered cartridge casings had class characteristics sufficient to identify them as having been ejected from PO Babcock's Glock .45 Automatic weapon. Only one projectile, the one found on Mr. Weeden's porch, was suitable for forensic analysis. That bullet was consistent with having been fired from a .45 caliber weapon manufactured by "Bersa and Glock," but there were not enough bullet characteristics to identify or eliminate it as having been fired from PO Babcock's gun.

Mr. Weeden's gun was determined to be a Benjamin Trail Nitro Piston, single shot .177 caliber pellet rifle. Advertised as "ideal for small game hunting,"¹⁶ it, like all pellet guns, does not expel bullets under high pressure with the use of explosive propellants, as firearms do. There were no markings on Mr. Weeden's pellet rifle to indicate that it was not a firearm.

¹⁶ See, <https://www.amazon.com/Crosman-Benjamin-Caliber-Piston-Hardwood/dp/B0035S9HWG?th=1&psc=1>.

Medical Examiner

On October 5, 2021, Pathologist Robert Stoppacher, MD, performed an autopsy on Mr. Weeden at Lourdes Hospital in Binghamton, New York. After he issued the final autopsy report, OSI spoke with Dr. Stoppacher to ensure we properly understood his findings.

Mr. Weeden suffered four gunshot wounds, described by Dr. Stoppacher as Wound A to Wound D, from most serious (A) to least serious (D). His characterization of the wounds is summarized below:

Wound A: The projectile entered the left lateral back (left side of the back). Among other damage, the projectile perforated the left lung and trachea before passing through Mr. Weeden's right arm. Dr. Stoppacher located the deformed projectile in Mr. Weeden's clothing.

Wound B: Entry to the right anterior trapezius region with "Pseudo-Stippling" (see below). The projectile perforated Mr. Weeden's right chest cavity and right lung before exiting through the center of Mr. Weeden's back.

Wound C: The projectile entered the left anterior abdomen, perforating the abdominal wall and colon, and exited the left lower back.

Wound D: The projectile entered the left lateral thigh causing soft tissue damage before exiting the back of the knee area.

In three of the wounds (B, C, D), the point of entry was on the front of Mr. Weeden's body; Wound A had a point of entry on the back of Mr. Weeden's body.

Although Dr. Stoppacher could not opine as to the order of the gunshots, Wound B had a characteristic that made it consistent with being the first shot fired, in that it was the only wound with associated "pseudo-stippling." Dr. Stoppacher explained that pseudo-stippling takes place when a bullet strikes an intermediate object, such as glass, before hitting a body; when that happens, the bullet carries fragments of the intermediate object with it as it enters the body. Here, the pseudo-stippling of Wound B consisted of glass fragments, which was not present on any of the other wounds. Dr. Stoppacher said that the pseudo-stippling on Wound B was consistent with the projectile that caused Wound B being the one that shattered the glass, and the lack of pseudo-stippling on Wounds A, C, and D was consistent with the glass having already shattered when those bullets were fired.

OSI asked Dr. Stoppacher if Wound A, the only wound whose entrance was in Mr. Weeden's back, was consistent with Mr. Weeden lying on his right side facing away from the shooter, with his left shoulder up (as PO Babcock had described Mr. Weeden's position when he fired the second volley of shots). Dr. Stoppacher said Wound A was consistent with that scenario.

Regarding Wounds A and B, Dr. Stoppacher said each was independently fatal and would have caused Mr. Weeden's death quickly. OSI asked if the immediate application of CPR could have saved Mr. Weeden's life, and Dr. Stoppacher said that Mr. Weeden would still have died even

if CPR had been applied immediately. Because of the nature of his wounds Dr. Stoppacher did not believe that Mr. Weeden would have survived even if an operating team had been present and ready to start emergency surgery immediately after the shooting.

LEGAL ANALYSIS

New York's law of justification is set forth in Article 35 of the Penal Law. The basic idea underlying the law of justification is the right to defend oneself or another from wrongful physical force.

Under Penal Law Section 35.00, justification is legally a "defense," not an "affirmative defense." This means that, if a case goes to trial, the burden is on the prosecutor to disprove justification beyond a reasonable doubt, Penal Law Section 25.00(1).

There are two provisions in Article 35 potentially relevant to the present case. One is the general provision justifying all persons' (civilians' or officers') use of deadly physical force to defend themselves or others from another person's wrongful use of deadly physical force (Penal Law Section 35.15, Subdivision 2). The other is a provision specifically justifying police officers' use of deadly physical force to defend themselves or others from another person's wrongful use of deadly physical force when the officer is making an arrest or preventing an escape from custody for a criminal offense (Penal Law Section 35.30, Subdivisions 1 and 2; and Section 35.15 Subdivision 2(a)(ii)). An important difference between the general provision and the officer-specific provision concerns the duty to retreat. Civilians may not use deadly physical force in defense of themselves or others if they know they can retreat with complete safety to themselves and others. Penal Law Section 35.15(2)(a). However, officers who are justified in using deadly physical force under Penal Law Section 35.30, because they are making an arrest or preventing an escape for an offense are under no duty to retreat, even if they could do so with complete safety to themselves and others. Penal Law Section 35.15(2)(a)(ii).

The general provision, Section 35.15, reads in part as follows:

"1. A person may ... use physical force upon another person when and to the extent he or she reasonably believes such to be necessary to defend himself, herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful physical force by such other person.... 2. A person may not use deadly physical force upon another person under circumstances specified in subdivision one unless: (a) The actor reasonably believes that such other person is using or about to use deadly physical force. Even in such case, however, the actor may not use deadly physical force if he or she knows that with complete personal safety, to oneself and others he or she may avoid the necessity of so doing by retreating...."

The provision specific to police officers, Section 35.30, reads in part as follows:

"1. A police officer or a 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 he or she reasonably believes such to be necessary to effect the arrest, or to prevent the escape from custody, or in self-defense or to defend a third person from what he or she reasonably believes to be the use or imminent use of physical force; except that deadly physical force may be used for such purposes only when he or she reasonably believes that: ... (c) ... 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.”

Under either Penal Law Section 35.30(1), relating to police officers making arrests, or Penal Law Section 35.15(2), relating to any person, the reasonableness of the person’s belief – that deadly force is being used or is about to be used, and that deadly physical force is a necessary response – is central.

In considering whether the general provision or the police-specific provision is applicable in this case, we note that when Mr. Weeden followed PO Babcock to the door of his house while pointing what appeared to be a firearm at him PO Babcock could reasonably have arrested Mr. Weeden for the offense of Menacing in the Second Degree (Penal Law Section 120.14(1)).¹⁷ However, when interviewed by OSI, PO Babcock said his initial intention was to help Mr. Weeden, and then, after Mr. Weeden displayed his weapon and followed PO Babcock as he tried to retreat, he feared for his life, shooting when he saw Mr. Weeden at the door pointing the gun at him. PO Babcock did not say he intended to arrest Mr. Weeden for an offense. We therefore analyze PO Babcock’s use of deadly force under Penal Law Section 35.15(2)(a)(ii), the provision applicable to any person, and assume he had a duty to retreat.¹⁸

Reasonableness of the Use of Force

The Court of Appeals, in *People v. Goetz*, 68 N.Y.2d 96 (1986), said that “reasonable belief” has both subjective and objective components: the subjective component is satisfied if the person using force actually believed, “honestly and in good faith,” that deadly force was about to be used against that person or another, and that the use of deadly force was necessary to prevent or stop that danger, regardless of whether the belief was accurate, 68 N.Y.2d at 114; the objective component is satisfied if a “reasonable person” under the same circumstances could have held those same beliefs, 68 N.Y.2d at 115. See also *People v. Wesley*, 76 N.Y.2d 555 (1990).

Based on PO Babcock’s statements to Dep. Flavell no more than three minutes after the shooting, as well as his interview with OSI, PO Babcock subjectively believed that Mr. Weeden was going to shoot him and feared for his life. OSI’s investigation showed that PO Babcock’s subjective belief was objectively reasonable.

¹⁷A person is guilty of Menacing in the second degree when that person “intentionally places or attempts to place another person in reasonable fear of physical injury, serious physical injury or death by displaying ... what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm. Penal Law Section 120.14(1).

¹⁸If PO Babcock’s use of deadly force was justified under the more stringent requirements of Penal Law Section 35.15(2)(a)(ii), it would also be justified under Penal Law 35.30(1), which imposes no duty to retreat when officers are making arrests for offenses.

PO Babcock said after he went into the house, he engaged with Mr. Weeden for a few minutes to try to get Mr. Weeden to show his hands. He said Mr. Weeden would not show his hands but, instead, kept encouraging PO Babcock to come closer. When Mr. Weeden finally did show his right hand, he was holding a realistic looking gun. The timing of the radio transmissions support PO Babcock's account that he talked to Mr. Weeden and tried to persuade him to show his hands: he was in the house more than four minutes before he radioed OEC and, in a hurried voice, said, "Male's got a firearm."

Instead of staying on the couch, Mr. Weeden, according to PO Babcock, followed him to the front door, holding the gun. After PO Babcock was outside the storm door, he said Mr. Weeden walked to it and pointed the gun at him. Fearing for his life, PO Babcock said he fired his gun. According to PO Babcock, after Mr. Weeden fell to the ground, PO Babcock peered in through the shattered glass of the door and saw that Mr. Weeden still had the gun in his right hand as he lay on his right side. PO Babcock said he fired again when Mr. Weeden lifted the gun.

Dep. Flavell's BWC corroborates PO Babcock. Mr. Weeden was inside the door and a real looking gun was nearby; PO Babcock told Dep. Flavell he did not want the gun lying around because "It's loaded I'm pretty sure." FIU photographed Mr. Weeden's gun during daylight hours, as shown below.



Mr. Weeden's gun, photographed by FIU.

PO Babcock, unlike FIU, saw the gun at night, under circumstances that were tense and charged. There were no markings on Mr. Weeden's gun that would have alerted him that the gun was anything other than a pistol with an attached silencer.

Although Mr. Weeden's gun was ultimately determined to be a pellet rifle, PO Babcock's belief that it was real was nevertheless reasonable. The law does not require "that an actor's belief as to the intention of another person to inflict serious injury be correct [] for the use of deadly force to be justified." *Goetz*, 68 NY2d at 107. A person who reasonably believes another is about to use deadly physical force need not wait until he is struck or wounded, as long as the person's beliefs are reasonable (see *People v Valentin*, 29 NY3d 57 (2017)). As stated in the

model jury instructions, “It does not matter that [PO Babcock] was mistaken in his belief [that Mr. Weeden was pointing an actual firearm at him], provided that [his] belief was both honestly held and reasonable” (CJI2d[NY] Justification: Use of Deadly Physical Force in Defense of a Person).

The autopsy evidence corroborates PO Babcock’s statement that Mr. Weeden was facing him when PO Babcock initially fired. Three of the four gunshot wounds entered the front of Mr. Weeden’s body, and, because of the pseudo-stippling evidence, the first shot appears to have been a forward-facing shot. Only one of the gunshot wounds entered the rear of Mr. Weeden’s body – the left side of his back. PO Babcock said he fired a second volley when Mr. Weeden, facing away from him, lying on his right side with his left shoulder upward, lifted the gun. The medical examiner said the shot that entered Mr. Weeden’s back was consistent with Mr. Weeden being in the position PO Babcock described.

Based on the investigation, OSI concludes that a prosecutor could not prove beyond a reasonable doubt that PO Babcock’s belief – that Mr. Weeden was about to use deadly physical force against him – was unreasonable.

Duty to Retreat

PO Babcock was in Mr. Weeden’s living room for about four minutes before, according to PO Babcock, the larger dog began nudging at the blanket and Mr. Weeden pulled a “black pistol” out from under the blanket with his right hand and put it on his lap with the barrel facing PO Babcock. PO Babcock retreated, backing out of Mr. Weeden’s house, directing Mr. Weeden to drop his weapon, and saying he could help him as he went. When he reached the porch, PO Babcock said he initially felt safer outside the door and had one foot on the landing and one foot on the top step when Mr. Weeden appeared at the door with the gun. Dep. Flavell’s BWC shows that PO Babcock said in the nearly immediate aftermath of the shooting, “I backed up to right here so I had an angle. And then I could hear him coming so I started backing retreating a little bit. Trying to get some cover. And uh. He uh he [] pointed the gun at me man.”

As described above, the evidence corroborates PO Babcock’s account. PO Babcock had retreated to a point where he felt safer. Under the circumstances, including PO Babcock’s awareness that Mr. Weeden had told 911 he intended to harm himself, and PO Babcock’s lack of knowledge as to whether there were other persons in Mr. Weeden’s home, it was reasonable for PO Babcock not to have initially retreated further. Moreover, when Mr. Weeden came to the glass storm door with the gun in his hand, PO Babcock could reasonably have believed it was not, at that moment, possible to safely retreat further. It was dark, Mr. Weeden was following him with a real-looking gun, and Mr. Weeden’s home was cluttered, with items scattered about and underfoot. Under these circumstances, PO Babcock said he did not want to look behind him or turn around and run down the steps.

For the reasons set forth above, OSI concludes that a prosecutor could not prove beyond a reasonable doubt that PO Babcock’s use of deadly force was not justified under Article 35 of the Penal Law and closes the matter with the issuance of this report.

RECOMMENDATION

WPD should outfit its officers with body-worn cameras

Dep. Flavell arrived on the porch about two minutes after PO Babcock radioed, “Shots fired.” His BWC recorded evidence that was central to this investigation, including Mr. Weeden’s location and position, the gun he had been holding, PO Babcock’s statements and actions in the immediate aftermath of the shooting, as well as the emergency response. But as to what took place inside the house and the fatal shooting itself, OSI can only say that PO Babcock’s version of events was corroborated by other evidence, because PO Babcock was not wearing a BWC.

PO Babcock was not wearing a BWC because the WPD does not have a BWC program. As we have done many times before,¹⁹ OSI recommends that WPD and all law enforcement agencies outfit officers with BWCs.

Dated: January 31, 2023

¹⁹ See Second Annual Report Pursuant to Executive Law Section 70-b.
https://ag.ny.gov/sites/default/files/2022_osi_annual_report.pdf