

**Special Investigations and
Prosecutions Unit**

**Report on the Investigation into
The Death of Matthew Felix**



**Letitia James
NYS Attorney General**

EXECUTIVE SUMMARY

On July 8, 2015, Governor Andrew Cuomo signed Executive Order No. 147 (the “Executive Order”), appointing the Attorney General as special prosecutor “to investigate, and if warranted, prosecute certain matters involving the death of an unarmed civilian . . . caused by a law enforcement officer.” On February 25, 2020, at about 4:51 p.m., in Queens, Police Officer Alejandro Perez of the Nassau County Police Department (“NCPD”) shot Matthew Felix (“Mr. Felix”) one time while attempting to arrest him, causing Mr. Felix’s death. Governor Cuomo subsequently issued Executive Order No. 147.33, expressly conferring jurisdiction on the Office of the Attorney General (“OAG”) to investigate any potential unlawful acts or omissions by law enforcement related to Mr. Felix’s death.¹

The Office of the Attorney General’s investigation and review of this matter included the following, among other materials:

- Video footage from a surveillance camera in the vicinity of the incident;
- NCPD paperwork generated in connection with the incident;
- New York City Police Department (“NYPD”) paperwork generated in connection with the incident;
- Audio recordings of radio communications to, from, and between the NCPD police officers involved in the incident and other officers responding to the scene of the incident;
- Interviews of NCPD officers who were involved in the incident, including Police Officer Perez;
- Interview of civilian witness;
- Inspection of the vehicle driven by Mr. Felix;
- Interview of robbery victim;
- Medical records, including records from the responding emergency medical services; and
- Autopsy and toxicology report from the Office of the Chief Medical Examiner (“OCME”) in Queens.

In the late afternoon of February 25, 2020, Mr. Felix, driving a Toyota Camry, was pulled over by Nassau County police officers Alejandro Perez (“PO Perez”), Peter Lang (“PO Lang”), John Giovaniello (“PO Giovaniello”) and Robert Psomas (“PO Psomas”), who intended to arrest him for a gunpoint robbery they believed he committed earlier that day. As Mr. Felix came to a stop near a pedestrian-traveled sidewalk, POs Perez and Lang pulled their vehicle in front of Mr. Felix’s Camry while POs Giovaniello and Psomas positioned their vehicle directly behind it. POs Perez and Lang immediately exited their vehicle with their firearms drawn. As PO Perez approached the driver’s side of the Camry, he yelled out for Mr. Felix to show his hands; instead of complying, Mr. Felix leaned towards the vehicle’s center console prompting PO Perez to alert his fellow officers that Mr. Felix could be reaching for a firearm.

¹ Executive Order 147.33 is attached as Exhibit 1.

At that moment, PO Lang had positioned himself near the front passenger side of the Camry with POs Giovaniello and Psomas also near the vehicle with their guns drawn. As PO Perez continued shouting to Mr. Felix to show his hands, Mr. Felix suddenly placed the Camry into reverse and accelerated backwards striking the unmarked police vehicle parked behind him. Mr. Felix then immediately shifted the car into drive and accelerated forward toward the sidewalk and directly into the path of PO Lang.

Believing that Mr. Felix was going to run over PO Lang and flee the arrest by driving onto the sidewalk, PO Perez fired his weapon three times; PO Lang, in the path of the vehicle, fired his weapon twice. As the shots rang out, Mr. Felix lost control of the vehicle and crashed into a wall directly across the sidewalk. Upon Mr. Felix's vehicle impacting the wall, PO Perez and the other officers were unaware of Mr. Felix's condition or the condition of his vehicle. Fearing that Mr. Felix might have a gun and could continue to flee by driving on the sidewalk, PO Perez fired three additional three shots as POs Giovaniello and Psomas also discharged their weapons. [The Medical Examiner would later determine that none of the shots fired after Mr. Felix's vehicle struck the wall caused Mr. Felix's death.]

Surveillance video of the incident establishes that all shots fired during the incident were fired within approximately six seconds. As the officers approached Mr. Felix's Camry, with its engine still revving, they observed that Mr. Felix was bleeding and unresponsive. They removed Mr. Felix from the vehicle and determined that he was deceased. The officers then radioed for assistance including a request for an ambulance. A loaded firearm was later recovered from the Camry's center console.

According to the Medical Examiner's report, Mr. Felix died from a single gunshot wound that entered through his neck and traveled down into his torso; that bullet was fired from PO Perez's firearm. Mr. Felix also suffered a single gunshot wound to each leg, neither of which contributed to his death. One of the bullets recovered from his leg was identified as being fired from PO Lang's firearm. Given that Mr. Felix's leg wounds were in proximity to each other and that PO Lang fired his weapon twice, it is believed that was responsible for both injuries. The shots fired by PO's Giovaniello and Psomas did not strike Mr. Felix or any other person.

In analyzing whether or not to pursue criminal charges in this or any incident, the OAG is bound by the law of New York State. Penal Law § 35 provides that a police officer is justified in using deadly physical force against another person in certain defined circumstances. In every case, the prosecution must disprove the defense of justification beyond a reasonable doubt.

Having completed its investigation of this incident, the OAG concludes that it cannot overcome the legal burden of proof necessary to charge PO Perez with a crime. Specifically, the OAG cannot prove beyond a reasonable doubt that PO Perez's perception of the risk that Mr. Felix posed to PO Lang and nearby pedestrians was objectively unreasonable – particularly in light of the video evidence that corroborates his account. Therefore, the OAG has determined that pursuing criminal charges against PO Perez for his use of deadly physical force could not – as the legal standard requires – be proven unjustified beyond a reasonable doubt.

Although the OAG finds no criminal culpability in this matter, we use this incident to reiterate a recommendation contained in a prior report, that the NCPD outfit its members with body-worn cameras. We also encourage the NCPD and all police agencies to thoughtfully consider best tactical practices when executing high-risk vehicle stops.

STATEMENT OF FACTS

A. Robbery Incident

On February 25, 2020, at approximately 1:27 pm, Nassau County 911 received a call from robbery victim H.Z. reporting that his car had just been stolen at gunpoint in the vicinity of Park Ave and Nassau Blvd. NCPD responded to the call and H.Z. advised that he had met with a man who had responded to a Facebook advertisement placed by H.Z., offering to sell his Mercedes Benz. The man asked to test drive the Mercedes and did so with H.Z. in the front passenger seat. At some point during that drive, the man stopped the vehicle, pulled out a black firearm, pointed it at H.Z.'s head, and ordered him out of the vehicle. H.Z. complied. After the man drove away, H.Z. used his cell phone to call 911 to report the robbery. H.Z. provided a detailed description of the man – African American, 20-25 years old, 150 lbs., 5'8" to 5'9", and unshaven; H.Z. also described a tattoo of a cross on the man's wrist. H.Z. reported that his girlfriend's MacBook Pro laptop was in the stolen vehicle and could be located through a tracking app on her cell phone.

B. Surveillance of the Felix Residence

A couple of hours later, the NCPD detectives were able to track the MacBook Pro laptop to Cambria Heights, Queens. After driving around the neighborhood, Detective Thomas Roche located the stolen Mercedes in the driveway of a single-family house located at 115-75 221st Street ("the Felix home"), which is located between 115th Road and 116th Avenue. A computer check / of the address revealed one of the residents to be Matthew Felix, who fit the physical description provided by H.Z., including the tattoo on his wrist. A background check of Mr. Felix further revealed that Mr. Felix had several prior arrests, including an open case in Queens for attempted murder in which he allegedly shot someone with a firearm.² Det. Roche then called for the Bureau of Special Operations ("BSO") to assist with the arrest of Mr. Felix.³ While enroute to and upon arrival at Mr. Felix's residence, members of the BSO were debriefed about the earlier gunpoint robbery of H.Z. and provided with a photo of Mr. Felix, along with information about his prior criminal history. The officers set up their vehicles at a distance far enough away from the Felix house so as not to be identified. Det. Roche then left the location and returned to the precinct to perform further work on the robbery case including the preparation of a photo array to confirm Mr. Felix's identity.

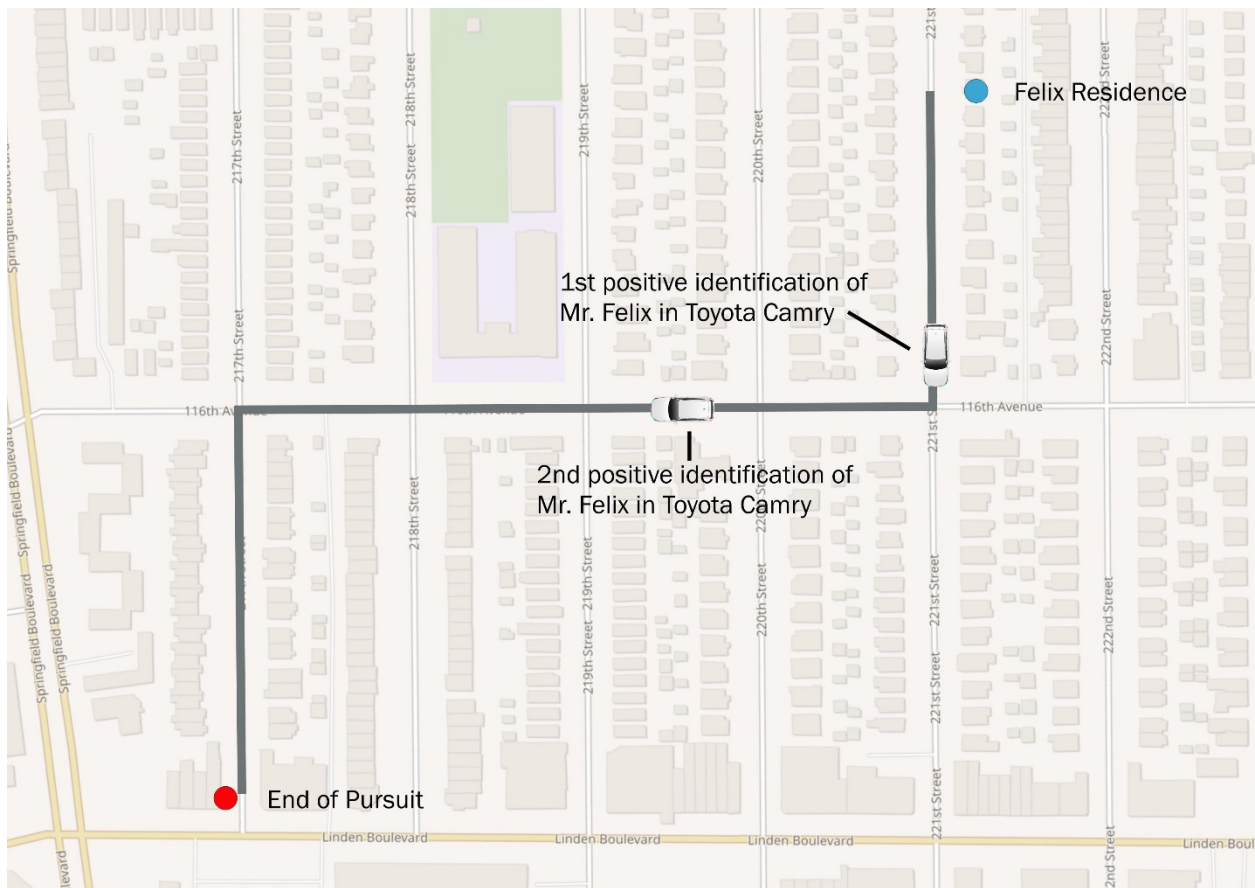
² The relevance of this information will be elucidated below.

³ The Bureau of Special Operations ("BSO") is part of the Nassau County Police Department and deploys as a tactical element with any armed emergency tactical operations, (i.e., barricaded armed persons and hostage rescue operations). The BSO is also responsible for high risk search warrant service and assists county specialized units in apprehension of dangerous suspects and wanted persons.

POs Lang and Perez parked their unmarked vehicle approximately four houses away from the Felix house on the north side of 221st Street, while POs Emil Knight and Jeffrey Toscano parked their unmarked vehicle on the south side of the street. Sgt. Daniel Delargy, their supervisor, was also parked nearby. Shortly after the officers assumed their positions, a silver Toyota Camry with Nevada license plates pulled into the driveway behind the Mercedes and a young Black man quickly exited the vehicle and entered the house. Because the officers' view of the man was obstructed by shrubbery, they could not make a positive identification at that time.

C. Pursuit of Mr. Felix

For perspective, the map below shows the path between Mr. Felix's home and the location of the shooting.



At approximately 4:45 pm, POs John Giovaniello and Robert Psomas arrived at 221st Street, to relieve POs Toscano and Knight. POs Perez and Lang had themselves just been relieved by other responding officers. As POs Perez and Lang left the area, they heard PO Toscano announce over the radio that the young man had entered the Camry and was backing out of the driveway. POs Perez and Lang immediately made a U-turn and drove back toward the Felix house. When they arrived on the corner of 221st Street and 116th Avenue, the Camry was stopped at the intersection, and POs Perez and Lang (driving an unmarked minivan) were able to see through the

open driver's-side window that the driver matched the description of Mr. Felix. At that point, the officers positioned their vehicle behind Mr. Felix and announced over the radio to other officers that there was a "positive identification." In response, Sgt. Delargy directed the officers to pull Mr. Felix over. As Mr. Felix continued south onto 116th Avenue, he drove past POs Giovaniello and Psomas (driving a Ford Explorer), who were driving north; those officers also observed Mr. Felix through the windshield of the Camry and announced their positive identification over the radio.⁴ At that point, POs Giovaniello and Psomas made a U-turn and followed directly behind POs Perez and Lang's unmarked minivan.

Mr. Felix continued south on 116th Avenue and then made a left onto 217th Street. As Mr. Felix progressed down 217th Street, POs Perez and Lang (in the minivan), and POs Giovaniello and Psomas (in the Explorer) activated their lights and sirens to direct Mr. Felix to pull over. Initially, Mr. Felix did not stop, but instead, drove his car very slowly from one side of the street to the other; cars were parked on either side of the street. According to POs Perez and Lang, at that point, they believed Mr. Felix was going to exit the vehicle and flee.

Ultimately, Mr. Felix pulled to the right side of 217th street in the one location on the block where there was no car parked along the curb, although he did not pull into the spot. POs Perez and Lang immediately pulled their minivan in front of Mr. Felix's car, blocking it from going forward while POs Giovaniello and Psomas pulled their Explorer up to Mr. Felix's rear bumper to prevent it from reversing.

D. Escalation

The sequence of events that followed is captured in video from a private surveillance camera located on 217th Street, which faces 216-19 Linden Boulevard. Due to the positioning of the vehicles, the entire incident cannot be seen: [Surveillance Footage](#). [Enhanced video of the surveillance footage is available here: [Enhanced Footage](#)]

As soon as POs Perez and Lang pulled in front of the Camry, they exited their vehicle with guns drawn. PO Perez, wearing his NCPD jacket, approached the driver's side of Mr. Felix's vehicle, while PO Lang, with his police shield displayed around his neck, went to the front passenger side. At the same time, PO Psomas, in plain clothes with his gun out, went to the rear passenger side of Mr. Felix's vehicle, as PO Giovaniello, also in plain clothes with his gun out, went to the rear.

According to PO Perez, he and PO Lang immediately identified themselves as police officers and ordered Mr. Felix to show his hands. At the same time, PO Perez said he could see through the driver's side window that Mr. Felix was reaching toward the console with his right hand, and PO Perez called out, "he's reaching," to alert the other officers that he believed Mr. Felix was reaching for a gun. POs Lang, Giovaniello, and Psomas all later said they heard PO Perez call out "he's reaching" and "let me see your hands."

⁴ The rear passenger and driver's side windows of the Mr. Felix's vehicle along with the rear window were covered with a darkened tint. The front windshield along with the driver and passenger side windows were not tinted.

Within a second or two, according to the four officers standing outside of Mr. Felix's vehicle, Mr. Felix shifted into reverse and accelerated, causing the back of his car to strike the front of PO Giovaniello and Psomas' Explorer, which was parked directly behind it. Although the video footage does not capture the Camry striking the Explorer, the Explorer can be seen rocking backwards; subsequent paint analysis identified paint from Mr. Felix's Camry on the front bumper of the officers' unmarked Explorer.

At that point, PO Lang said he also observed Mr. Felix reaching toward the console.⁵ Although PO Perez said that he shouted for Mr. Felix to "stop," Mr. Felix immediately put the Camry into drive and turned the wheels toward the sidewalk – in the direction of PO Lang, who was at the vehicle's right front bumper.

E. Shooting

As the vehicle began to progress onto the sidewalk, PO Lang had to push himself away from the vehicle to avoid being struck by it. PO Perez –standing near the Camry's rear driver-side door as the vehicle moved forward – fired three shots at Mr. Felix. He later told OAG staff that at that time, he believed the vehicle might kill or injure PO Lang. PO Perez also said that he saw that there were pedestrians on the sidewalk onto which Mr. Felix was attempting to drive and was also aware that Linden Boulevard, a few yards away, was commonly busy with pedestrian foot traffic.

PO Lang – with one hand pushing off the hood of the Camry to get out of its path – also fired two shots. Almost instantaneously upon hearing gunshots, PO Psomas said he fired one shot at Mr. Felix as well, from his position at the rear of the vehicle.⁶

As the first set of shots was fired, Mr. Felix appears to have lost control of his vehicle; the wheels straightened out and the vehicle crashed into the front of a beauty salon directly across the sidewalk. At that point PO Perez fired three additional shots; he said he did so because the Camry's engine was still revving, he did not know whether Mr. Felix had been incapacitated, and he believed Mr. Felix could be in possession of a firearm. PO Giovaniello, who said he observed PO Lang narrowly avoid being hit by the Camry, and saw pedestrians walking along the sidewalk, fired his weapon four times as the vehicle struck the building. He also said that from his position behind the Camry, he could not see whether Mr. Felix was holding or pointing a gun – indeed, he could not see what Mr. Felix was doing at all – because the rear window was darkly tinted.

At that point, PO Lang put his hands up, and no further shots were fired. All 13 shots by the four officers – six by PO Perez, two by PO Lang, one by PO Psomas, and four by PO

⁵ Assuming POs Perez and Lang did in fact see Mr. Felix reaching toward the console area, it is in retrospect certainly possible that he was in fact reaching for the gear shift immediately adjacent to the console. Neither PO Perez nor PO Lang saw Mr. Felix with a firearm in his hand. However, a search of the Camry after Mr. Felix's death did reveal a loaded and operable firearm inside the center console.

⁶ Civilian witness C.S., was across the street from the incident in his vehicle with the windows rolled up, eating and talking on his cell phone. He could see two officers with their guns displayed, one wearing a police jacket and the other with his shield out, and both yelling "stop." His view was partially obstructed, and although he did not see any shots fired, he did hear tires screeching followed by gun shots.

Giovaniello – were fired within the space of six seconds. Mr. Felix was immediately removed from the Camry and was found to be deceased.

PO PEREZ'S ACCOUNT

As discussed in greater detail below, criminal culpability on the part of PO Perez depends on whether his use of deadly physical force against Mr. Felix was justified by law. In turn, the justification determination depends on whether PO Perez actually believed that deadly force was necessary and, if so, whether his own subjective belief was objectively reasonable. As part of its investigation into this aspect of the case, PO Perez was asked to submit to an interview by OAG staff, and on August 12, 2020, he voluntarily did so. Below is a summary of PO Perez's account of the circumstances immediately surrounding the shooting of Mr. Felix.

PO Perez said, in substance, that before the officers stopped Mr. Felix's vehicle he was aware that they were arresting Mr. Felix for an alleged gunpoint robbery committed earlier that day. PO Perez was also aware that Mr. Felix had an open felony case with the Queens County District Attorney for attempted murder during which Mr. Felix allegedly shot someone. As such, PO Perez said he believed that Mr. Felix could be armed and dangerous.

Additionally, at the time he stopped Mr. Felix's Camry, PO Perez observed pedestrians on the sidewalk directly in front of him and was aware that Linden Boulevard, a few yards away, was typically busy with pedestrian traffic.

As PO Perez exited his vehicle, he said he repeatedly shouted for Mr. Felix to show him his hands so that he and other officers could safely approach the vehicle and arrest Mr. Felix. However, Mr. Felix did not show his hands, and instead reached over to the Camry's center console causing PO Perez to believe he might be attempting to retrieve a firearm. Based upon that observation, PO Perez shouted out to his fellow officers "he's reaching," which, PO Perez said, was meant to alert them that he believed Mr. Felix could be reaching for a weapon.

Immediately thereafter, PO Perez said he observed the Camry accelerate backward into the unmarked Explorer and then forward toward PO Lang, who had to push himself away from the Camry to avoid being struck as the vehicle progressed onto the sidewalk. Concerned for PO Lang's life and the safety of the pedestrians on the sidewalk, PO Perez fired a burst of three shots at Mr. Felix. As Mr. Felix's vehicle hit the building in front of him, PO Perez immediately fired another three shots because, according to him, he did not know whether Mr. Felix was incapacitated, and was still concerned about Mr. Felix's access to a firearm, as well as his continued ability to drive the vehicle, since the engine was still revving. Once PO Perez observed PO Lang with his hands up and heard PO Lang shouting to stop firing, he took no further tactical action.

MEDICAL EXAMINER'S REPORT

Dr. Kristen Landi of the OCME conducted an autopsy of Mr. Felix on the morning of February 26, 2020. Prior to issuing a report on Mr. Felix's death, Dr. Landi was provided with Mr. Felix's clothing, OCME investigator's scene report and an account of the circumstances

surrounding Mr. Felix's encounter with the police. Dr. Landi subsequently reviewed Mr. Felix's toxicology report along with video surveillance of the shooting and NYPD crime scene photographs.

The autopsy disclosed that Mr. Felix was struck by three bullets, one each in the left and right legs and a third – the fatal shot – in his neck. Given the positions of the various officers at the time the shots were fired (as captured in the video footage) as well as microscopic comparison analysis of the recovered projectiles, it appears that the only officer who could have fired the two shots that struck Mr. Felix's legs was PO Lang. Indeed, the bullet in one of Mr. Felix's legs was affirmatively matched through a microscopic comparison to PO Lang's firearm. (The bullet that passed through Mr. Felix's other leg was not recovered.)

As to the fatal gunshot wound, Dr. Landi noted that it struck Mr. Felix's neck and traveled downward from left to right, hitting his carotid artery and piercing his heart. PO Perez was the only officer in a position to fire a bullet from that trajectory and in fact microscopic comparison analysis confirmed that bullet was fired from his firearm.⁷

None of the other ten projectiles, including the one fired from PO Psomas' weapon and the four fired from PO Giovaniello's weapon – struck Mr. Felix or anyone else.

After a thorough review of all the evidence – including crime scene photos of blood spatter in the vehicle, videotape of the incident, and the autopsy report – Dr. Landi concluded that it was highly likely that Mr. Felix was shot and killed by one of the initial shots fired by PO Perez, prior to Mr. Felix's striking the wall and coming to a stop. Dr. Landi based this finding principally on the presence of blood spatter on the inside of the windshield area where Mr. Felix's head made contact with the windshield following the crash. Because Mr. Felix's head bore no injury that would account for the presence of that blood, Dr. Landi concluded that it would have come from the gunshot sustained by Mr. Felix – which would have caused either bleeding from the neck or internal injuries resulting in bleeding from the mouth (or both). And because there was little to no blood spatter on other areas of the vehicle's interior – which almost certainly would have been the case if Mr. Felix had been hit after the crash – Dr. Landi concluded that Mr. Felix was struck by the bullet that caused his death before he struck the wall.

Since the shooting of Mr. Felix by PO Perez was the direct cause of his death, the manner of death was designated as "homicide" in the autopsy report. Penal Law § 125.00 defines "homicide" as "conduct which causes the death of a person." The determination that the manner of death is homicide does not resolve the separate issue of whether the homicide was justified by law.

⁷ On the video footage, the Mr. Felix's Camry makes impact with the wall at the 16:51:54 pm timestamp. The footage then appears to capture (based on the movement of his firearm's slide) PO Perez firing three shots between 16:51:55-57. Although PO Perez is not visible on the footage when he fired the initial shots, it is likely they were fired between 16:51:51-53.

LEGAL ANALYSIS

Under New York Penal Law § 35.30(1), “A police officer or a peace officer, in the course of effecting or attempting to effect an arrest...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.”

At the time the officers pulled over Mr. Felix’s vehicle for the purpose of taking him into custody, they reasonably believed (based on their interview with H.Z., the location of the stolen vehicle, and the description of the perpetrator) that Mr. Felix had committed an offense – namely, the gunpoint theft of H.Z.’s Mercedes Benz earlier that day. In light of the nature of the offense (armed robbery), coupled with other information suggesting Mr. Felix’s readiness to use a firearm (i.e., his open attempted murder / shooting case), the officers’ decision to draw their weapons when approaching Mr. Felix would not appear to be objectively unreasonable, in order to protect their safety and to effect the arrest.

The propriety of the officers’ subsequent firing of their weapons is governed by Penal Law § 35.30(1)(c). Under this provision, an officer may use deadly physical force if, “[r]egardless 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 another person from what the officer reasonably believes to be the use or imminent use of deadly physical force.”

Here, the officers fired their weapons only after Mr. Felix began to drive his vehicle onto the sidewalk, in the direction of PO Lang, who had to take immediate evasive action to remove himself from the path of the vehicle. Under those circumstances, it would appear reasonable for PO Lang and the other officers to have believed PO Lang was at risk of death or serious physical injury. Likewise, though far less compelling, it would appear reasonable for the officers to have believed that, if Mr. Felix had been able to mount the sidewalk and drive away (as it appeared he was trying to do), he would have placed pedestrians on 217th Street and on the corner at Linden Boulevard in grave danger as well.

On these points, the video footage provides persuasive evidence. The nature of the immediate risk to PO Lang and the potential risk to nearby pedestrians therefore appears to support the reasonableness of the officers’ beliefs. Minimally, under these circumstances, it would appear difficult, if not impossible, to disprove beyond a reasonable doubt that their beliefs were reasonable.

Here we recognize, however, that official NCPD policy prohibits officers from firing at moving vehicles unless there is a danger posed to the officers or others, beyond that of the vehicle itself.⁸ To be sure, PO Perez’s and Lang’s act of shooting at Mr. Felix while Mr. Felix was inside a moving vehicle, violated that policy - the danger posed to PO Lang and the pedestrians on the sidewalk arose from Mr. Felix’s use of the vehicle exclusively and not, for instance, because he was firing a weapon from inside that vehicle. However, NCPD’s policy *does not* indicate that the

⁸ Department Procedure number OPS 12420 (effective 7/8/16): A police officer “Will not...fire **at** or **from** a moving vehicle unless deadly force is being used against the police officer or another by means other than the moving vehicle.”

driver of a moving vehicle cannot constitute a legitimate risk of death to others; rather, the policy reflects a growing national recognition that shooting at a moving vehicle poses a high risk of death to the driver of the vehicle and others, and that risk of death will almost always outweigh any benefit obtained by shooting at a driver.⁹ NCPD's policy expressly reflects this reality, noting, "Members should be fully aware that shots fired at a moving vehicle may create a greater danger to the public, or other responding officers, than is posed by the moving vehicle itself."

Accordingly, while shooting into a moving vehicle violated NCPD's policy, the existence of that policy does not alter whether PO Perez's and Lang's assessment of the danger posed by Mr. Felix at the time they fired their weapon was reasonable. Further, a violation of NCPD's policy, while certainly a relevant factor in determining objective reasonableness, is not dispositive of criminal culpability arising from the use of force under Penal Law section 35.30(1)(c). See, e.g., *Crespo v. New York*, 191 Misc.2d 395, 396-397 (Sup. Ct. Queens County, 2002) ("Police Officers must be accorded a significant degree of professional discretion when facing the myriad of unknowable circumstances that may be encountered in the conduct of their duties and that to permit causes of action to be premised on the Patrol Guide would permit a trier of fact "to second-guess line-of-duty decisions" and deter the adoption of internal rules and regulations"); *Boss v. Kelly*, 3 Misc.3d 936, 939 (Sup. Ct. N.Y. County 2004) ("The Patrol Guide is not a statute or local law"); *People v. McLean*, 35 Misc.3d 1240(A) at *5 (Sup. Ct. Queens County, 2012) ("[T]hough some of its provisions are couched in mandatory terms, the Patrol Guide does not prescribe the specific action to be taken in each situation encountered by individual officers, but rather is intended to serve as a guide for members of the Police Department").

The OAG strongly supports policies that prohibit officers from shooting at moving vehicles, because as noted, those policies have been shown to dramatically reduce fatalities wherever they are implemented. We have previously recommended that agencies adopt the same type of policy in effect at NCPD,¹⁰ and will continue to do so. But when Mr. Felix's vehicle was being operated on a populated sidewalk in the direction of numerous pedestrians, we cannot say that PO Perez's act of violating the policy gave rise to criminal culpability. "A strict policy [against shooting into vehicles] does not mean that there will never be an exception to the rule,"¹¹ and this case certainly appears to represent that exceedingly rare but necessary exception.

It could also be argued that it was unreasonable for officers to have fired shots after Mr. Felix's vehicle had struck the wall, because at that point Mr. Felix was incapacitated and no longer represented a threat to anyone. Under the case law, any and all shots fired must be independently justifiable on the grounds that the officer reasonably believed they were necessary, at the time they were fired, to defend the shooting officer or others. See, e.g., *People v. Colecchia*, 251 A.D.2d 5, 9 (App. Div. 1st Dept. 1988) ("It has been held that even if a defendant is justified in using deadly physical force at the beginning of a single, ongoing encounter with an assailant, his right to use that force terminates at the point where he can no longer reasonably believe that the assailant still poses a threat to him"), *People v. Del Debbio*, 244 A.D.2d 195 (App. Div. 1st Dept. 1997) ("Even if a defendant is justified in using deadly physical force at the beginning of a single, ongoing

⁹ See e.g., <https://www.policeforum.org/criticalissuesjune22>

¹⁰ See [Thevenin Report](#).

¹¹ <https://www.sfchronicle.com/opinion/article/SF-should-ban-officers-from-shooting-at-vehicles-10800139.php>

encounter with an assailant, his right to use that force terminates at the point he can no longer reasonably believe the assailant still poses a threat to him”).

As a threshold matter, it should be noted that it does not appear that any of the bullets fired after Mr. Felix hit the wall actually struck Mr. Felix. So even if fired at a point when the officers did not reasonably believe them to be necessary, the officers could not be charged with homicide because those shots did not cause Mr. Felix’s death. In principle, however, the officers who fired after Mr. Felix struck the wall could be charged with a crime arising out of their attempt to cause the death of or physical injury to Mr. Felix.

However, it would be difficult to prove beyond a reasonable doubt that the officers’ belief that Mr. Felix continued to represent a threat even after he struck the wall was unreasonable. In virtually all of the published cases, it was or should have been clear to the police officer-defendant that the victim had been disabled even as the defendant continued to use deadly physical force. The facts in the incident involving Mr. Felix are not so clear-cut. As mentioned earlier, the vehicle’s backseat and rear windows were darkly tinted, so the firing officers – who were behind the vehicle when those final shots were fired – were unable to see what Mr. Felix’s condition was - in particular whether he was capable of shifting into reverse, backing away from the wall, and continuing his efforts to flee. They could also not be expected to instantaneously evaluate whether the damage to the vehicle (engine still revving), had rendered it inoperable. In addition, insofar as the concerns about Mr. Felix’s being armed have merit, the firing officers could not know whether he had in fact retrieved his weapon. And finally, given that the (arguably unnecessary) last of the shots were fired within four seconds of the (almost certainly justifiable) first shots, there is little reason to regard them as unreasonably gratuitous.¹²

In deciding whether to go forward with a prosecution in any particular case, the OAG is bound by its ethical obligations to the individual or individuals who are the focus of our investigations. Under the American Bar Association’s Criminal Justice Standards for the Prosecution Function, “A prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice.” ABA, Criminal Justice Standards for the Prosecution Function, §3-4.3(a) (2017). The National Prosecution Standards issued by the National District Attorneys

¹² The plain language of two additional Penal Law sections appear to separately provide a justification defense to the officers. Penal Law § 35.30(1)(a)(i) permits an officer to use deadly physical force when and to the extent the officer reasonably believes it to be necessary to effect an arrest, if the officer reasonably believes that the offense committed by the subject was “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.” Further, Penal Law §35.30(1)(b) permits an officer to use deadly physical force if the officer reasonably believes that “the offense committed or attempted by such person was a felony and . . . in the course of resisting arrest therefor . . . such person is armed with a firearm or deadly weapon.” The offense for which the officers were attempting to arrest Mr. Felix was the felonious, gunpoint robbery of H.Z. Accordingly, both Penal Law § 35.30(1)(a)(i) and Penal Law §35.30(1)(b) apply. While the OAG believes these laws to be unduly permissive and has requested that they be repealed, they currently constitute the law of the state. See, <https://ag.ny.gov/press-release/2021/attorney-general-james-announces-robust-reforms-police-use-force-laws#:~:text=NEW%20YORK%20%E2%80%93%20New%20York%20Attorney.and%20excessive%20use%20of%20force>

Association hold that, “Prosecutors should screen potential charges to eliminate from the criminal justice system those cases where prosecution is not justified or not in the public interest,” and lists among the factors that may be considered: doubts about the accused’s guilt and insufficiency of admissible evidence to support a conviction.” National District Attorneys Association, National Prosecution Standards §4-1.3 (3d. ed.). In light of the near impossibility of proving that the officers’ beliefs in this case were unreasonable beyond a reasonable doubt, the OAG has concluded that it will not present this matter to a grand jury.¹³

RECOMMENDATIONS

I. The NCPD Should Move Expeditiously to Outfit Its Members With Body-Worn Cameras and its Vehicles with Dashboard Cameras.

A surveillance camera located at the scene of this incident, fortuitously captured much of what transpired during the incident. If those cameras had not been present, there would have been no way to independently establish the actions taken by Mr. Felix or the involved police officers, because the NCPD does not currently employ a body-worn camera (“BWC”) or dashboard camera (“DBC”) program. The OAG [previously recommended](#) that the NCPD adopt a BWC program, and we take this opportunity to do so again. Additionally, equipping NCPD vehicles with DBCs would provide an even greater level of transparency and we recommend this as well.

Significantly, the NCPD has publicly indicated a commitment to establishing a BWC program.¹⁴ And in response to requests for public comment regarding its Executive Order 203 Plan,¹⁵ NCPD recently noted that public constituents have recommended that the agency obtain and utilize DBCs as well - NCPD has engaged a consultant to assist with implementation of both programs.¹⁶ The OAG fully supports the NCPD’s efforts in this regard.

II. The NCPD Training Should Emphasize Adhering to Best Practices When Conducting High Risk Police Stops.

Car stops must be conducted in a manner that considers both the location of the stop as well as vehicle positioning, in order to maximize the likelihood of a safe outcome for all involved. Police best practices instruct officers to take charge of the location where a car stop is to occur. In choosing a safe location, officers are generally taught to consider factors such as weather,

¹³ In this or any other case, the decision not to seek criminal charges reflects an evaluation of the facts and elements of the potential crimes measured against the criminal burden of proof beyond a reasonable doubt. The decision not to seek charges is not an indication that the officers’ actions were appropriate, that the death could not have been avoided had different actions been taken, or that the officers should not be disciplined. Those determinations are distinct from whether or not crimes can be proven beyond a reasonable doubt.

¹⁴ See, <https://www.nassaucountyny.gov/DocumentCenter/View/32256/Nassau-County-Police-Reform-and-Reinvention-Plan?bidId>

¹⁵ <https://www.governor.ny.gov/news/no-203-new-york-state-police-reform-and-reinvention-collaborative>

¹⁶ *Id.* at fn17.

time of day, lighting, whether the vehicle used by police is marked or unmarked, and whether the selected location offers escape routes for officers to safely retreat without entering moving traffic; they are also trained to avoid conducting car stops in, or immediately before, intersections. In short, officers should always prepare for vehicular stops with the overarching goal of mitigating the risk of harm to the driver and occupants of the subject vehicle, the members of the general public, and the officers themselves.

Once the police have prepared for the car stop and have selected the location of the stop to maximize the likelihood of a safe outcome, they must endeavor to use time-tested good approach tactics that minimize exposure to known dangers and take advantage of the truism that "time is on your side." Good tactical approaches consider activating equipment including the turret lights and public address ("PA") systems contained in police cars in order to alert the motorist of the officers' goal of having the motorist stop. The PA system should be used to clearly and calmly issue commands such as where to pull the car, along with any additional directives that consider the threat level that officers reasonably perceive. If the motorist fails to comply with directives to stop, officers should be guided by their agency's Vehicle Pursuit Policy rather than rushing into a course of conduct that abandons tactical measures, such as pulling parallel to the suspect vehicle, physical positioning of officers' bodies in front of the subject's vehicle, crossing in front of the subject's vehicle, and failing to take cover, each one of which occurred in this case.¹⁷

In short, unnecessarily risky police conduct can accelerate an event and escalate a police-citizen encounter into one where the use of deadly physical force becomes more likely. Stated differently, unwise tactics can lead to deadly uses of force where deadly force may not otherwise have been necessary. The use of poor tactics also counteracts opportunities to achieve a safe outcome and unreasonably jeopardizes the safety of the person driving the vehicle, the involved officers, and members of the public. Although we cannot say that adhering to best practices relative to the car stop in this case would have obviated the use of deadly force that followed, we can say that there were tactical errors and deadly force was ultimately employed; while the former cannot be shown to have unequivocally caused the latter, it should not be the case that both co-occurred. Every law enforcement agency and officer should be striving to safely conduct car stops - including high risk stops, as this one was – with the goal of preserving the sanctity of *all* human life, avoiding unnecessary uses of force, and minimizing the amount of force that must be employed.¹⁸

¹⁷ See, <https://www.police1.com/officer-safety/articles/6-tips-for-safe-and-successful-traffic-stops-2VkiCN81mT07qWAH/>; <https://www.bluesheepdog.com/traffic-stop-safety/>

¹⁸ See, <https://www.ojp.gov/ncjrs/virtual-library/abstracts/advanced-vehicle-stop-tactics-skills-todays-survival-conscious>

EXHIBIT 1



State of New York

Executive Chamber

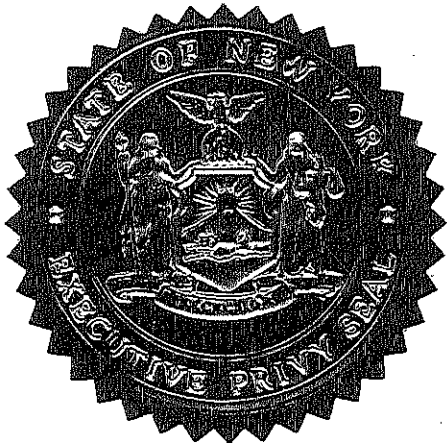
No. 147.33

EXECUTIVE ORDER

In view of the request of Attorney General Letitia James, my order and requirement, embodied in Executive Order Number one hundred and forty-seven, dated July 8, 2015, is hereby amended to include an additional paragraph to the penultimate paragraph as amended by Executive Order Numbers 147.1 - 147.32 to read as follows:

FURTHER, the requirement imposed on the Special Prosecutor by this Executive Order shall include the investigation, and if warranted, prosecution:

(gg) of any and all unlawful acts or omissions or alleged unlawful acts or omissions by any law enforcement officer, as listed in subdivision 34 of section 1.20 of the Criminal Procedure Law, arising out of, relating to, or in any other way connected with the death of Matthew Felix on February 25, 2020, in Queens County.



BY THE GOVERNOR

M. C.
Secretary to the Governor

GIVEN under my hand and the Privy Seal of the
State in the City of Albany this
second day of March in the year two
thousand twenty.

Andrew Cuomo