



INVESTIGATION INTO THE DEATHS OF
DALTON SMITH AND ANDREA REBELLO

April 2, 2014

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INTRODUCTION

This report is submitted following an investigation into the shooting deaths of Dalton Smith and Andrea Rebello on May 17, 2013. The investigation included interviews with police officers and civilian witnesses, as well as a review of 911 calls, police radio communications, and forensic evidence. This investigation was ordered by District Attorney Kathleen M. Rice and conducted by members of her staff including attorneys from the Major Offense Bureau.

On May 17, 2013, an armed Dalton Smith entered a home, occupied by four college students, located at 213 California Avenue in Uniondale, to commit a robbery. At approximately 2:25 a.m., one of the students placed a 911 call to report the robbery. Numerous members of the Nassau County Police Department (hereinafter "NCPD") responded to the location. Police Officer Nikolas Budimlic was one of the first officers to arrive on the scene. As he approached the residence, a woman, later identified as Andrea Rebello's sister, ran out of the front door and indicated that an intruder was upstairs and armed with a gun. Officer Budimlic entered the residence to investigate the situation. Once inside the residence, Officer Budimlic was confronted by the intruder, later identified as Dalton Smith. Smith was armed with a gun and was physically restraining Andrea Rebello. Smith ignored numerous commands shouted by Officer Budimlic for Smith to drop his weapon. Smith, alternately pointing his gun at Andrea Rebello and Officer Budimlic, threatened to kill both of them. During the confrontation, Officer Budimlic fired eight shots at Smith, killing him. One of the bullets struck Andrea Rebello in the head. Andrea Rebello was transported to Nassau University Medical Center (hereinafter "NUMC") where she succumbed to her injuries.

This investigation has determined that a criminal prosecution of Officer Budimlic is not warranted.

BACKGROUND OF DALTON SMITH

Dalton Smith was born on December 21, 1982. At the time of this incident, Smith was on parole for his involvement in the armed robbery of a delicatessen. He had absconded from parole and a warrant for his arrest had been filed on April 25, 2013. Smith had numerous prior contacts with the criminal justice system. He was convicted on March 3, 2000, for attempted Robbery in the Second Degree in violation of PL §§ 110.00, 160.15(1) and Grand Larceny in the Fourth Degree in violation of PL §155.30(5). On June 26, 2000, Smith was convicted of Promoting Prison Contraband in the Second Degree in violation of PL § 205.20(2). On December 15, 2003, Smith was convicted of Attempted Robbery in the First Degree in violation of PL §§ 110.00, 160.15(4), Criminal Possession of a Weapon in the Third Degree in violation of PL § 265.02(1) and Assault in the Third Degree in violation of PL § 120.00(1).

SUMMARY OF THE INCIDENT

Civilian Accounts¹

During the evening of May 16, 2013, J,² a student enrolled at Hofstra University, was at McHebes bar on Hempstead Turnpike in Hempstead. Also present at McHebes were Andrea Rebello and her twin sister R.³ Both R and Andrea Rebello were students enrolled at Hofstra University. At the time, J was the boyfriend of R.

¹ Although most of the civilians mentioned herein have already been publicly identified in the media, in an effort to minimize further invasions of their privacy, this report will identify them by one of their initials. For the convenience of the reader, their "initial only" identifications are listed here: "B" boyfriend of Andrea Rebello; "R" twin sister of Andrea Rebello; "J" boyfriend of R (Andrea Rebello's twin sister); "S" housemate of Andrea Rebello.

² J provided a written statement to the NCPD on May 17, 2013, and was interviewed by the Nassau County District Attorney's Office (hereinafter "NCDA") on June 4, 2013.

³ Through her attorney, R declined to be interviewed by the NCDA. R provided a written statement to the NCPD on May 17, 2013.

At approximately 12:45 a.m., on May 17, 2013, both R and Andrea Rebello left McHebes bar and headed to their residence located at 213 California Avenue in Uniondale. According to J, he left McHebes bar shortly after the Rebellos and walked to his house located on Kernochen Avenue in Hempstead. After arriving home, J drove his car to 213 California Avenue, parked the car on the street in front of the residence and went inside to join R, Andrea Rebello, and Andrea Rebello's boyfriend B.⁴

At approximately 1:30-1:45 a.m., J, R, and Andrea Rebello decided to get food from a nearby 7-11 convenience store. B left the residence with the others but did not accompany them to the 7-11.⁵ No individuals remained at the residence. J, R, and Andrea Rebello drove in R's car to the store and returned to their residence at approximately 2:10 a.m.

As J and the Rebellos were returning to the residence, S,⁶ another housemate of the Rebello sisters,⁷ arrived home in her car. S was also enrolled at Hofstra University and had been at the library prior to arriving home. All four individuals then entered the residence through the front door.⁸ S, R, and Andrea Rebello entered the residence first and walked directly to the right to the living room area of the residence. J was the last to enter the residence and walked up the staircase leading to the second floor of the residence.⁹ J did not completely shut or lock the front door because he was going to retrieve his car keys from R's room, located on the second floor, in order to move his car that was still parked on the street in front of the residence. J's car was parked near an elementary school where street parking in the morning hours was not permitted.

⁴ Through his attorney, B declined to be interviewed by the NCDA.

⁵ J believed that B went to his own residence at this time.

⁶ S provided a written statement to the NCPD on May 17, 2013, and was interviewed by the NCDA on June 4, 2013.

⁷ Eight Hofstra University students resided at 213 California Avenue, but only Andrea Rebello, R, and S were home at the time of the incident.

⁸ The door was locked with a key code lock. S does not recall whether R or Andrea Rebello unlocked and opened the door.

⁹ The staircase is directly across from the front entrance of the residence.

After retrieving his keys from R's room, J went back down the stairs to move his car. While descending the stairs, however, J observed a tall black male holding a gun, standing inside the residence by the front door. The male was wearing dark clothing and was carrying a backpack. A ski mask covered his face. This individual was later identified as Dalton Smith.¹⁰ Smith pointed his weapon at J and ordered him into the living room area where S and the Rebello sisters were already seated. S had also observed Smith enter the residence through the front door.¹¹ S observed that Smith closed and locked the front door after he entered. Smith ordered all four individuals to sit on the couches in the living room area of the residence while he was pointing his gun at them.

According to J, Smith stated that someone in the house messed up and the occupants of the house owed 10,000 dollars to a "Russian guy." Smith indicated that he was responsible for collecting 5,000 dollars from members of the house. S also recalled Smith demanding 10,000 dollars but remembers him stating that this had something to do with a "white collar crime."¹² J and S both recalled that Smith told them that, if they did not answer his questions truthfully or if anything happened, he would kill them starting with R.¹³

The occupants of the residence told Smith that they did not have the money that he demanded but would give him jewelry and other electronic equipment. Smith ordered all four individuals to S's room, located upstairs and to the right, directly across from R's room. At that time, the occupants of the house retrieved jewelry, laptop computers, cell phones, and cash from various locations throughout the house and brought the items back to S's room. Smith indicated

¹⁰ J did not know the intruder's name while the incident was unfolding. For the sake of clarity, Smith's name is used here, as he was later identified as the intruder observed by J.

¹¹ S did not know the intruder's name while the incident was unfolding. For the sake of clarity, Smith's name is used here, as he was later identified as the intruder observed by S.

¹² Both J and S indicated that they were unfamiliar with the matters to which Smith was referring.

¹³ Smith did not use R's name but, by pointing his gun at her, indicated that he would kill her.

that the items were not enough and asked how much money the occupants had in their respective bank accounts. S told Smith that she had 700 dollars in her bank account. According to S, Smith instructed her to drive to the bank to get the money and to be back within 10-12 minutes. S left Smith and the other occupants in her room and proceeded down the stairs back into the living room. S retrieved her car keys and her cell phone which she had left in the living room before she was ordered upstairs by Smith. She then left the residence and entered her car. S began to travel to a nearby bank. When S turned onto Front Street in Hempstead, she called 911 and reported what had happened. S stayed on the phone with 911 until police arrived at her location in Hempstead.

A review of S's 911 call showed that the call was placed at 2:25 a.m. and lasted approximately twenty-three minutes, ending at 2:48 a.m. S described the events that had just unfolded stating, "I have a guy in my house with a gun; he's holding my friends at gunpoint." S gave the location of her residence as well as her current location. She stated that she was "going to the bank right now to get money for him." In the recorded call, S initially told the 911 operator that police should not go to her house because "he will shoot them," but she later stated that the police "need to go to the house now before he hurts them."

According to J, after S left the residence, J remained in S's room with the Rebello sisters and Smith. J recalls telling Smith that when S returns from the bank, Smith would have enough property/money and Smith could then leave. A short time later, J recalls hearing a car door slam outside of the residence. Smith stated words to the effect of "that girl must be back," presumably referring to S. Smith then directed R to leave the room and check to see if S had returned. J observed R leave S's room and go down the stairs, but from his position he could not see whether R left the residence. J observed Smith walking in and out of S's room and looking

down the staircase toward the front entrance. According to J, Smith then stated that the police were there and that he could not go back to jail. J observed Smith standing outside of S's bedroom with his back to the wall and his gun drawn.

Smith then ordered J to get down on his hands and knees at the top of the staircase facing down toward the front entrance. J complied with Smith's demands and observed that the front door of the residence was open. He saw a uniformed, white police officer standing outside taking cover behind some bushes.¹⁴ According to J, Smith was attempting to conceal himself behind the hallway wall on the second floor. Smith had his gun pointed to the back of J's head and ordered J to tell the police that Smith had a gun and hostages upstairs. J does not have a recollection of the police officer at the front entrance saying anything. Smith asked J if there was another exit from the residence and J informed Smith that there was a back door on the first floor. Smith then ordered Andrea Rebello to come out of S's room and placed her in a kneeling position at the top of the stairs next to J. Smith ordered J to direct him to the rear exit of the residence. J recalls crawling down the staircase toward the front entrance. When J reached the bottom of the staircase, he attempted to leave the residence through the front door but Smith ordered him to stop and to close the front door. J closed the front door of the residence and, now walking upright, made a left into the living room area, attempting to lead Smith to the rear exit. Smith followed J down the stairs, restraining Andrea Rebello in a headlock with one arm and holding his gun with his other hand.

According to J, he began to lead Smith to the rear of the living room while Smith followed with Andrea Rebello in a headlock. While going toward the rear of the residence, walking with the staircase on his left side, J observed Officer Nikolas Budimlic to his left in the

¹⁴ Based on interviews with police officers who arrived on the scene, it is probable that the officer J observed was Officer Joseph Avanzato.

hallway underneath the staircase.¹⁵ Upon seeing Officer Budimlic, J took cover behind a couch that was immediately in front of, and to the right, of his current location. While kneeling behind the couch, J shouted to Andrea Rebello not to worry because the police were there. From his position behind the couch, J could not see Smith or Andrea Rebello. J, however, did observe Officer Budimlic with his weapon drawn pointed in the direction of both Smith and Andrea Rebello. J heard Officer Budimlic give numerous commands to “put the gun down and let the girl go.” J heard Smith state words to the effect of “I will kill her. You put the gun down. Let me go.”

J observed Officer Budimlic, while keeping his weapon aimed at Smith, walk backwards toward a bedroom on the first floor, located to the rear of the residence. J then observed Smith come around the couch where J was kneeling. Smith continued to hold Andrea Rebello in a headlock with his gun drawn. At this point Smith was facing Officer Budimlic with Andrea Rebello positioned in front of him, shielding Smith from Officer Budimlic. While facing Officer Budimlic, Smith began to walk backwards toward a landing at the rear entrance of the house. Smith continued to keep Andrea Rebello in a headlock, thus shielding himself from Officer Budimlic. Officer Budimlic then began to advance on Smith. After Smith, Andrea Rebello, and Officer Budimlic passed J’s location behind the couch, J ran to his left down a small hallway into a bedroom on the first floor, located in the rear of the residence.

While in the bedroom J was no longer able to see the events that unfolded in the living room area of the residence. However, almost immediately after entering the bedroom, J heard two gun shots. After hearing the gun shots, J ran back into the living room area and saw Officer Budimlic with his weapon drawn pointing his gun in a downward direction, toward the landing at

¹⁵ J did not know Officer Budimlic’s name while the incident was unfolding. For the sake of clarity, Officer Budimlic's name is used here, as he was later identified as the police officer observed by J.

the rear entrance of the residence, and then saw him fire several more shots. From his position, and due to the layout of the residence, J could not clearly see Smith or Andrea Rebello but recalled seeing their bodies in the vicinity of the landing area at the rear exit of the residence. After seeing Officer Budimlic fire several shots, J began to scream words to the effect of “that’s what you get!” At that point, J observed police officers “break down” the front door of the residence. J recalled officers handcuffing him and removing him from the residence.

Police Officer Accounts

At approximately 2:29 a.m., units from the First Precinct were assigned by the Communications Bureau to a robbery in progress at 213 California Avenue in Uniondale. A review of police radio communications confirms that at 02:28:46 the Communications Bureau went over the air and stated, “Headquarters to 101, 108, 101, 108 for a robbery in progress. 213 California Avenue in Uniondale cross with Braxton Street and Bedford Court. Complainant states a male with a mask came into the house, had a gun. Complainant left to go get the subject money from the bank in a silver Honda Accord, the Chase Bank. The male black tall wearing a hoodie and a black ski mask.” Officers Nikolas Budimlic,¹⁶ Marlon Sanders,¹⁷ Joseph Avanzato,¹⁸ and Michael Leone¹⁹ were the first officers to respond to the residence. They arrived in three marked NCPD cars.

¹⁶ Police Officer Budimlic had been a member of the NCPD for eight years, and prior to that had been a police officer for twelve years with the New York City Police Department. On May 16, 2013, Officer Budimlic was on routine patrol working a shift that extended from 7:00 p.m. to 7:00 a.m. the following day. Officer Budimlic was working alone, in uniform, and in a marked patrol car. Officer Budimlic was interviewed by the NCDA on May 24, 2013.

¹⁷ Police Officer Sanders had been a member of the NCPD for eight years. On May 16, 2013, Officer Sanders was on routine patrol working the 7:00 p.m. to 7:00 a.m. shift. Officer Sanders was working alone, in uniform, and in a marked patrol car. Officer Sanders was interviewed by the NCDA on May 24, 2013.

¹⁸ Police Officer Avanzato had been a member of the NCPD for six years. Prior to that he had served as a police officer for two and a half years with the New York City Police Department. On May 16, 2013, Officer Avanzato was on routine patrol working the 7:00 p.m. to 7:00 a.m. shift. Officer Avanzato was working with a partner,

Upon arrival, Officer Sanders exited his patrol car holding a flashlight. At this time, Officer Budimlic was approximately ten paces in front of Officer Sanders, walking towards the front entrance of the residence. Officer Sanders observed Officer Budimlic go up the front steps leading to the front entrance. When Officer Budimlic approached the top of the steps, Officer Sanders observed the front door open and R run out of the residence.²⁰ According to Officer Sanders, R ran out of the house and yelled, “He’s got a gun, he’s got a gun and he’s upstairs!” Officer Sanders attempted to grab R by the arm but she ran past both him and Officer Budimlic toward the street. Officer Sanders turned back to focus his attention on the house.

At this time, Officer Sanders observed Officer Budimlic enter the house and go to the right of the entrance door. Officer Sanders moved toward the threshold of the house, in order to provide cover for Officer Budimlic. Officer Avanzato was positioned with one foot on the bottom step of the stoop in front of the house, behind Officer Sanders. Officer Sanders placed one foot inside the house when he observed Smith upstairs holding a silver handgun.²¹ Officer Sanders observed Smith come from the right side of the upstairs of the house and onto the landing of the stairs. At this time, Officer Sanders had his gun drawn.

Officer Sanders observed Smith wearing all black clothing, a ski mask, and gloves. Officer Sanders then pointed his gun at Smith. According to Officer Sanders, Smith yelled out, “I have a real gun, with real bullets!” In response, Officer Sanders took cover in a crouched position on the left side of the doorway entrance outside the house. Officer Avanzato also took

Officer Michael Leone, in uniform, and in a marked patrol car. Officer Avanzato was interviewed by the NCDA on May 24, 2013.

¹⁹ Police Officer Leone had been a member of the NCPD for nine years. On May 16, 2013, Officer Leone was on routine patrol working the 7:00 p.m. to 7:00 a.m. shift with Officer Avanzato, in uniform, and in a marked patrol car. Officer Leone was operating the patrol car. Officer Leone was interviewed by the NCDA on May 24, 2013.

²⁰ Officer Sanders did not know R’s name while the incident was unfolding. For the sake of clarity, R’s name is used here, as she was later identified as the woman observed by Officer Sanders.

²¹ Officer Sanders did not know that the man with the weapon was Smith while the incident was unfolding. For the sake of clarity, Smith’s name is used here, as he was later identified as the man observed by Officer Sanders.

cover near Officer Sanders outside the entrance to the residence. Both Officer Avanzato and Officer Sanders had their weapons drawn and ordered Smith to drop his gun, to which Smith yelled back, “No motherfucker, you drop your gun!” Officer Sanders continued watching Smith while also watching Officer Budimlic, who was now positioned inside the house out of Smith’s line of sight.

Officer Sanders observed Smith, who was at the landing at the top of the stairs, grab J and position J as a shield in front of Smith’s body.²² Officer Sanders observed Smith place his right arm under J’s right arm, pointing the gun at Officer Sanders and Officer Avanzato, yelling, “Now what?” Officer Sanders heard Smith then say, “What now?” In an attempt to calm the situation, Officer Sanders yelled to Smith to drop the gun and release J. Officer Sanders heard Smith yell, “I got a bitch, I got a bitch too! Come out!” Officer Sanders observed Andrea Rebello crawl out onto the landing in front of J.²³ Officer Sanders observed Smith grab Andrea Rebello by the hair and yell, “What now? I’m going to kill her! I’m getting out of here!” Officer Sanders observed Smith alternately pointing the gun at Andrea Rebello, J, and back at Officers Sanders and Avanzato. Via radio, Officer Sanders then requested back up. In his request, Officer Sanders said that Smith had a gun pointed at the hostages’ heads. He also requested that supervisors respond to the scene.²⁴ Both Officer Sanders and Officer Avanzato continued to yell at Smith to drop his gun. Officer Avanzato recalled Smith yelling that if any police officers enter

²² Officer Sanders did not know that the man that Smith grabbed was J while the incident was unfolding. For the sake of clarity, J’s name is used here, as he was later identified as the man observed by Officer Sanders.

²³ Officer Sanders did not know that the woman’s name was Andrea Rebello while the incident was unfolding. For the sake of clarity, Andrea Rebello’s name is used here, as she was later identified as the woman observed by Officer Sanders.

²⁴ A review of police radio communications confirms that at 02:34:13 Officer Sanders went over the air and stated, “He’s got the gun pointed at their heads. We need supervisors.”

the house, Smith would shoot J and Andrea Rebello.²⁵ At this time, Officer Avanzato retreated and took cover behind a car parked on the street in front of the residence.

Seconds later, Officer Sanders heard Smith say, “Fuck it,” at which point Officer Sanders observed Smith push J over Andrea Rebello, who was still in a “crawl” position in front of J. Officer Sanders observed J tumble down the stairs and hit the front door, thereby causing the door to slam shut. Officer Sanders heard the sound of the front door lock. From his position behind the car, Officer Avanzato also observed J either run or fall down the staircase inside the house. Officer Avanzato observed J at the bottom of the staircase and then observed Smith go down the staircase with Andrea Rebello positioned in front of Smith. Officer Avanzato then observed the front door shut. At this time, Officer Sanders retreated back onto the front lawn of the residence.

Numerous other police officers from the First Precinct arrived at the scene as the events were unfolding and took positions outside the residence. Among the police personnel who arrived at the scene were officers Christopher Acquilino,²⁶ Raymond Buttacavoli,²⁷ John Tucker,²⁸ Daniel Healey,²⁹ Nicholas Zaharis,³⁰ Dennis Wunsch,³¹ Ronald Russo,³² and Sergeants Robert Cohen³³ and Richard Herman.³⁴

²⁵ Officer Avanzato did not know that the man with the weapon was Smith, that the other man was J, or that the woman was Andrea Rebello while the incident was unfolding. For the sake of clarity, their names are used here, as they were later identified as the people observed by Officer Avanzato.

²⁶ Police Officer Acquilino had been a member of the NCPD for nine years. Prior to that he had been a police officer for twelve years with the New York City Police Department. On May 16, 2013, Officer Acquilino was on routine patrol working the 7:00 p.m. to 7:00 a.m. shift. Officer Acquilino was working alone, in uniform, and in a marked patrol car. Officer Acquilino was interviewed by the NCDA on May 20, 2013.

²⁷ Police Officer Buttacavoli had been a member of the NCPD for nine years. On May 16, 2013, Officer Buttacavoli was on routine patrol working the 7:00 p.m. to 7:00 a.m. shift. Officer Buttacavoli was working alone, in uniform, and in a marked patrol car. Officer Buttacavoli was interviewed by the NCDA on May 24, 2013.

²⁸ Police Officer Tucker had been a member of the NCPD for six years. On May 16, 2013, Officer Tucker was on routine patrol working the 7:00 p.m. to 7:00 a.m. shift. Officer Tucker was working alone, in uniform, and in a marked patrol car. Officer Tucker was interviewed by the NCDA on May 23, 2013.

²⁹ Police Officer Healey had been a member of the NCPD for six years. On May 16, 2013, Officer Healey was on routine patrol working the 7:00 p.m. to 7:00 a.m. shift. Officer Healey was with a partner, Officer Nicholas Zaharis, in uniform, and in a marked patrol car. Officer Healey was interviewed by the NCDA on May 21, 2013.

Officer Russo stood along the sidewalk and was able, through a gap in the blinds/shades, to look through the front window of the residence. From his position, Officer Russo observed Officer Budimlic standing towards the back of the house. Officer Russo also observed J, slightly off to the side, jumping, cursing, and yelling, “The police are here! Yeah, motherfucker!”³⁵ Officer Russo then observed Smith, moving from left to right, holding Andrea Rebello, in a headlock.³⁶ Smith was pointing a gun to the top of her head. Officer Russo observed Smith proceed toward the right and out of sight. Officer Russo observed Officer Budimlic also move toward the right and out of sight. Seconds later, Officer Sanders heard Officer Budimlic yell multiple times, “Drop the gun! Drop the gun! Drop the gun!” Officer Sanders was communicating via radio and to other police officers at the scene that Officer Budimlic was in the house and that they had to go in.³⁷ Approximately four to five seconds later, Officer Sanders heard two gunshots, a slight pause, and then a second series of gunshots. During the shots being fired, Officer Sanders heard someone yell out, “Get that motherfucker, Yeah! Yeah! You get that

³⁰ Police Officer Zaharis had been a member of the NCPD for eight years. On May 16, 2013, Officer Zaharis was on routine patrol working the 7:00 p.m. to 7:00 a.m. shift. Officer Zaharis was working with a partner, Officer Healey, in uniform, and in a marked patrol car. Officer Zaharis was interviewed by the NCDA on May 23, 2013.

³¹ Police Officer Wunsch had been a member of the NCPD for nine months. On May 16, 2013, Officer Wunsch was on routine patrol working the 7:00 p.m. to 7:00 a.m. shift. Officer Wunsch was working with a partner, Officer Russo, in a marked patrol car. Officer Wunsch was interviewed by the NCDA on May 20, 2013.

³² Police Officer Russo had been a member of the NCPD for five and a half years. On May 16, 2013, Officer Russo was on routine patrol working the 7:00 p.m. to 7:00 a.m. shift. Officer Russo was working with a partner, Officer Wunsch, in uniform, and in a marked patrol car. Officer Russo was interviewed by the NCDA on May 24, 2013.

³³ Sergeant Cohen had been a member of the NCPD for nine years. On May 16, 2013, Sergeant Cohen was on routine patrol working the 6:30 p.m. to 6:30 a.m. shift. Sergeant Cohen was working alone, in uniform, and in a marked patrol car. Sergeant Cohen was interviewed by the NCDA on May 23, 2013.

³⁴ Sergeant Herman had been a member of the NCPD for nineteen years. On May 16, 2013, Sergeant Herman was on routine patrol working the 6:30 p.m. to 6:30 a.m. shift. Sergeant Herman was working alone, in uniform, and in a marked patrol car. Sergeant Herman was interviewed by the NCDA on June 4, 2013.

³⁵ Officer Russo did not know that the man was J while the incident was unfolding. For the sake of clarity, J’s name is used here, as he was later identified as the man observed by Officer Russo.

³⁶ Officer Russo did not know that the woman was Andrea Rebello while the incident was unfolding. For the sake of clarity, Andrea Rebello’s name is used here, as she was later identified as the woman observed by Officer Russo.

³⁷ A review of police radio communications confirms that at 02:34:40 Officer Sanders went over the air and stated, “Headquarters we have a cop inside. Forthwith.”

motherfucker!”³⁸ At this time, Officer Sanders incorrectly believed that Smith was shooting at Officer Budimlic.

As the second round of shots was being fired, Officer Sanders yelled out that he was going into the residence and ran towards the front door. Officer Sanders broke down the door and entered the house. Other police officers followed Officer Sanders into the house. Upon entering the house, Officer Sanders went to the rear of the residence towards the rear door. Once there, Officer Sanders observed Officer Budimlic on the landing next to the rear door. Officer Sanders saw Officer Budimlic attempting to handcuff Smith. Officer Sanders also observed Andrea Rebello in a curled position on the bottom two steps. The movement of her stomach indicated to Officer Sanders that she was still breathing. At that moment, Officer Sanders grabbed Andrea Rebello’s legs and with the help of another police officer, moved Andrea Rebello into the living room area. After picking up Andrea Rebello, Officer Sanders observed a pool of blood where her head had been. Once Andrea Rebello was moved, officers began to attend to her injuries.

Officer Russo was one of the officers who followed Officer Sanders into the residence. Officer Russo observed J to the right of the entrance door. Officer Russo instructed J to get down, and J complied. J was later handcuffed by Officer Leone and Officer Wunsch, who had entered the residence behind Officer Sanders.³⁹ Officer Russo went toward the rear of the residence where he observed Officer Budimlic.

The rear entrance of the house is on a landing that has two sets of stairs. One set of stairs leads to the basement and the other leads to the first floor of the residence. Officer Budimlic was standing halfway down the set of the stairs between the landing and the first floor. Officer Russo

³⁸ Officer Budimlic recalled hearing such a comment, and J acknowledged making a similar statement.

³⁹ J was handcuffed for safety reasons. After he was searched and removed from the residence, the handcuffs were removed.

observed Andrea Rebello located on the same set of stairs above the landing at the rear entrance. Officer Russo observed Smith's body lying with his feet on the landing and his torso on the set of stairs heading to the basement. Officer Russo observed Smith had only one handcuff on, and he proceeded to fully handcuff Smith.

Officer Russo observed that Andrea Rebello was injured but still breathing, and saw Officer Sanders, together with other police officers, pick her up and attend to her. Officer Russo remained with Smith and observed a gun on the landing between the two sets of stairs. Officer Russo picked up the gun and moved it about six inches towards the wall.

Officer Russo tried to open the rear entrance door, where he observed other police officers and Ambulance Medical Technician (hereinafter "AMT") personnel. Officer Russo unlocked the rear door and moved several boxes that were preventing him from opening the rear door. At this time, Officer Russo grabbed a black backpack off of Smith's body, causing it to rip open, and tossed the bag and its contents outside through the rear door he had just opened. Officer Russo, together with the assistance of AMT Michael White, rolled Smith's body over, positioning Smith face up.⁴⁰

Smith was pronounced dead by AMT White at approximately 2:46 a.m. Officer Russo exited the house through the rear entrance and went to an ambulance located at the front of the residence.

Once at the ambulance, Officer Russo saw Officer Budimlic nearby. Officer Russo was instructed by another police officer to transport Officer Budimlic to NUMC via ambulance.

⁴⁰ AMT White had been an AMT and a member of the Nassau County Emergency Ambulance Bureau for nineteen years. On May 16, 2013, AMT White was operating Ambulance No. 2351 and working the 7:00 p.m. to 7:00 a.m. shift. In the early morning hours of May 17, 2013, AMT White was at South Nassau Hospital assigned to an unrelated aided case. At approximately 2:30 a.m., AMT White left South Nassau Hospital and was en route to Freeport when he heard a call come over the radio regarding a robbery involving a man with a gun. AMT White was interviewed by the NCDA on May 21, 2013.

Before leaving the residence, Officer Russo inquired of Officer Budimlic whether he was okay; Officer Budimlic responded that he was. Officer Russo entered the ambulance and transported Officer Budimlic to NUMC. Upon arrival at NUMC, Officer Russo retrieved and secured Officer Budimlic's service weapon.⁴¹ Officer Russo did not have any further conversation with Officer Budimlic.

AMT Regis Beneville arrived at the residence at approximately 2:38 a.m. and began treating Andrea Rebello.⁴² Within minutes, Andrea Rebello was transported to NUMC. Police Officer John Williams operated the ambulance while AMT Beneville and AMT Supervisor Thomas Gaynor remained in the back of the ambulance with Andrea Rebello. En route to NUMC, AMT Beneville and AMT Supervisor Gaynor ventilated Andrea Rebello, inserted IVs and treated Andrea Rebello's wounds. Sometime before arriving at NUMC, Andrea Rebello's pulse stopped. CPR was immediately administered to her. Upon arrival at NUMC, AMT Beneville transferred the victim to NUMC's trauma team. While at NUMC, Andrea Rebello succumbed to her injuries.

Officer Nikolas Budimlic's Account

Upon arrival at 213 California Avenue, Officer Budimlic exited his patrol car and walked toward the residence. Officer Budimlic observed the location to be quiet and the house to be dimly lit. From outside the house, it appeared to Officer Budimlic that the only lighting inside the house was provided by a small number of lamps. Officer Budimlic approached the front

⁴¹ The weapon was a Sig Sauer model 226 .40 caliber service pistol. When fully loaded, the magazine holds twelve rounds. A subsequent check of the service weapon indicated that there were only four live rounds remaining in the magazine, indicating that Officer Budimlic had fired eight rounds.

⁴² AMT Beneville had been an AMT and a member of the Nassau County Emergency Ambulance Bureau for fourteen years. On May 16, 2013, AMT Beneville was operating Ambulance No. 2361 and working the 7:00 p.m. to 7:00 a.m. shift. On May 17, 2013, at approximately 2:30 a.m., AMT Beneville was operating his ambulance on Newbridge Road when he heard a call come over the radio regarding a robbery involving a man with a gun. At approximately 2:34 a.m., AMT Beneville received the assignment to respond to scene. AMT Beneville was interviewed by the NCDA on May 23, 2013.

door of the home, taking one or two steps onto the front stoop. The front door was closed. Officer Budimlic believed Officer Sanders was behind him. Officer Budimlic did not have his weapon drawn. He was able to detect, through a glass portion of the front door, light and movement coming from inside the house. At this time, Officer Budimlic heard what sounded like someone running down the stairs inside the house. Officer Budimlic positioned himself slightly to the right of the entrance door outside the house. Seconds later, Officer Budimlic observed the front door open and R run out of the house past both Officer Budimlic and Officer Sanders.⁴³ When R ran past the officers, Officer Budimlic heard her yell out, “He’s upstairs.” The front door remained open and Officer Budimlic was able to view the inside of the house. Inside the front door, a few feet back from the entrance, Officer Budimlic observed a set of stairs leading to the second floor of the house. To the right, Officer Budimlic observed a living room area. At this time, Officer Budimlic did not see anybody inside the house. Officer Budimlic stepped inside the house and went into the living room area to the right of the entrance door.

While in the living room area, Officer Budimlic heard a male voice coming from the upstairs portion of the house. Based upon the authoritative manner and tone in which the male was yelling, Officer Budimlic described it as a “command” voice. The male was ordering the officers to put their guns on the sidewalk and back up. Officer Budimlic then heard the same male voice forcibly yell, “I got a real gun, I got real bullets. I’m going to kill them!”⁴⁴ At this time, from his position, Officer Budimlic could not see the male. Officer Budimlic did not know at this point whether any other officers had entered the house. Officer Budimlic again heard the same male voice yell out, “Back up, put your guns down, I’m gonna kill you!” Although Officer Budimlic still did not see the male, he believed the male had a gun.

⁴³ Officer Budimlic did not know that the woman was R while the incident was unfolding. For the sake of clarity, R’s name is used here, as she was later identified as the woman observed by Officer Budimlic.

⁴⁴ This investigation revealed that the male voice coming from upstairs was the voice of Smith.

Officer Budimlic moved further into the house, walking parallel to the staircase. Officer Budimlic moved from the base of the staircase toward the rear of the house. At about the middle of the staircase, Officer Budimlic stopped, turned around, and faced the front door of the house. Officer Budimlic noticed a mirror hanging on the wall next to the entrance door and across from the staircase. Officer Budimlic crouched down and used this mirror to view the stairs. At this time, Officer Budimlic did not see anyone on the stairs but continued to hear multiple people and a lot of noise coming from the upstairs of the house. Officer Budimlic heard the same male voice say to someone, "Get the fuck downstairs!" Moments later, Officer Budimlic heard a commotion upstairs and someone come down the stairs rapidly. Seconds later, Officer Budimlic heard the front door slam shut. However, from where Officer Budimlic was positioned, he could not see the front door.⁴⁵

After hearing the front door shut, Officer Budimlic backed further into the house and positioned himself in a hallway behind the staircase. Officer Budimlic was able to see a short distance through the railings of the staircase and continued to face the front of the house. Officer Budimlic lowered the volume of his radio slightly so as to not make his presence known to others in the house. Officer Budimlic was attempting to use the radio to contact dispatch but was unsuccessful due to the volume of radio traffic. He received a steady tone, indicating to him that his calls were not being transmitted. Officer Budimlic attempted to use the emergency button on his radio in order to have dispatch silence other radio traffic, but he was unsuccessful.

Moments after taking cover in a hallway under the staircase, Officer Budimlic observed J come into the living room area.⁴⁶ Seconds later, Officer Budimlic observed Andrea Rebello, held

⁴⁵ Although Officer Budimlic was unaware at the time of the incident, other witnesses establish that the front door slammed shut when J came/ran down/was pushed down the stairs by Smith.

⁴⁶ Officer Budimlic did not know that the man was J while the incident was unfolding. For the sake of clarity, J's name is used here, as he was later identified as the man observed by Officer Budimlic.

in a headlock by Smith, also come into the living room.⁴⁷ Officer Budimlic observed Smith wearing gloves and all black clothing and holding a gun in his right hand. According to Officer Budimlic, Smith was using his left arm to hold Andrea Rebello in a headlock while pointing the gun at J. J was walking upright in front of Smith and Andrea Rebello. At this time, Officer Budimlic believed that Smith was unaware of his presence inside the house.

As all three went toward the rear of the house, Officer Budimlic remained in the hallway under the staircase with his gun drawn. Seconds later, J walked toward the rear of the house and approached the location where Officer Budimlic was positioned. As J passed by Officer Budimlic, J stopped directly across from Officer Budimlic. Officer Budimlic made eye contact with J, and J began to jump up and down and yell excitedly toward Smith, “Yo motherfucker, the police are here, you’re fucked!” At this time, Smith was a couple of feet behind J. Officer Budimlic observed Smith position Andrea Rebello against Smith’s body, using Andrea Rebello as a shield. Officer Budimlic then saw Smith turn his gun towards Officer Budimlic, saying, “Motherfucker, you’re going to die!” Officer Budimlic pointed his weapon at Smith and yelled, “Put the gun down, let the girl go!” Smith yelled back, “Fuck you! I’m going to kill her and you!” At this time, J continued to yell out at Smith, while Officer Budimlic repeatedly told him to get down. J remained in the area even after instructed by Officer Budimlic to get down. Finally, after repeated commands, J took cover behind a couch.

As the standoff continued, Officer Budimlic observed Smith tighten his grip around Andrea Rebello’s neck. Officer Budimlic recalled that Andrea Rebello looked terrified and was crying. While alternately pointing his gun at Andrea Rebello’s head and at Officer Budimlic, Smith continued to threaten both of them verbally. Officer Budimlic repeated his commands to

⁴⁷ Officer Budimlic did not know that the woman was Andrea Rebello or that the man with the gun was Smith while the incident was unfolding. For the sake of clarity, both of these individuals’ names are used here, as they were later identified as the people observed by Officer Budimlic.

Smith to put the gun down and let the girl go. Smith continued to yell out that he would kill both Andrea Rebello and Officer Budimlic, dragging Andrea Rebello and backing up into the kitchen area of the house toward a staircase leading to the rear door. At this time, Officer Budimlic was still positioned in the hallway area with his weapon pointed at Smith. Smith walked backwards holding Andrea Rebello in a headlock, shielding Smith's own body, and continued to point the gun alternately at Andrea Rebello's head and at Officer Budimlic. At this time, Officer Budimlic observed J retreat somewhere behind where Officer Budimlic was standing.⁴⁸

Officer Budimlic then observed Smith backing up toward an area which, unbeknownst to Officer Budimlic, led to a staircase and the rear door. At that time, Officer Budimlic did not know whether the house had a rear door exit. Smith continued to yell threats and curses while Officer Budimlic continued to tell Smith to put the gun down and let the girl go. Officer Budimlic noticed a change in Smith's tone and demeanor, which Officer Budimlic described as becoming more tense and desperate. According to Officer Budimlic, while Smith was attempting to descend backward down the set of steps, Smith began losing control over Andrea Rebello. Smith was trying to retain control over her, but Smith's arm was becoming looser around her neck. Officer Budimlic observed Andrea Rebello begin to turn her body away from Smith, leaving a larger portion of Smith's body more exposed. Officer Budimlic was able to see more of Smith's body mass, including his shoulder, which had previously been shielded by Andrea Rebello. Officer Budimlic observed Smith to be off balance. At that moment, Smith once again pointed his gun at Andrea Rebello's head yelling, "Fuck you, I'll kill her, I'll kill her!" Officer Budimlic, believing Smith would shoot Andrea Rebello and believing this might be his only opportunity, fired his weapon twice at Smith. After the first two shots, Officer

⁴⁸ In his interview, J stated that he retreated into a bedroom located on the rear of the first floor.

Budimlic observed Smith let go of Andrea Rebello but still maintain the gun in his right hand. Officer Budimlic yelled to Andrea Rebello to get down. Officer Budimlic observed Andrea Rebello bend over and lean down toward the steps. At this time, Officer Budimlic observed Smith still standing and attempting to aim his gun at Officer Budimlic. Officer Budimlic stepped forward toward Smith and fired four more shots. Officer Budimlic observed Smith fall to the ground at the landing near the rear exit of the house. Officer Budimlic could no longer see Smith and moved towards the location where Smith had fallen. Officer Budimlic observed that Smith was still alive and was still holding the gun in his right hand. Officer Budimlic fired two more shots at Smith.

At some point, as gunshots were being fired, Officer Budimlic observed J reappear and heard him yelling and cursing at Smith. Officer Budimlic then moved Smith's gun away from Smith's hand. Officer Budimlic attempted to handcuff Smith. Because of Smith's position, Officer Budimlic was unable to place handcuffs on him. According to Officer Budimlic, he once again tried to request assistance via his radio. Again, due to the high volume of radio traffic, Officer Budimlic was temporarily unable to get any communications over the radio. When he was finally able to do so, he at the same time observed police officers, including Officer Sanders, enter the house. Officer Budimlic instructed one of the officers to handcuff Smith. At this time, Officer Budimlic was unaware that Andrea Rebello had been injured. After Smith had been handcuffed by an officer, Officer Budimlic exited the house and proceeded to an ambulance located at the front of the house. Officer Budimlic was transported by ambulance to NUMC. While at NUMC, Officer Budimlic turned his weapon over to another officer.

CRIME SCENE INVESTIGATION

On May 17, 2013, Detective David Nystrom requested a warrant to search the residence located at 213 California Avenue for evidence connected to the events described above.⁴⁹ In his affidavit, Detective Nystrom indicated that he believed proceeds of the burglary, as well as items used during the commission of the burglary, would be found at the crime scene. The search warrant was signed by Honorable Helene Gugerty at approximately 9:50 a.m. Detective Paul Pich and other members of the Crime Scene Search Section (hereinafter "CSSS") assisted in its execution. The residence was examined, and measurements, photographs and a video of the scene were taken.

Members of the CSSS recovered various items from the scene, including a black backpack, six bags of marijuana, assorted U.S. currency, assorted jewelry, cell phones, and laptop computers. These items were recovered outside the house near the rear entrance of the residence.⁵⁰ Inside the residence, members of the CSSS recovered a silver 9mm Luger SCCY model CPX-1 handgun by the body of Smith. The weapon had one bullet in the chamber and one bullet in the magazine. Additionally, members of the CSSS located eight .40 caliber shell casings inside the residence in the vicinity of the landing at the rear entrance.

BALLISTICS

The ballistics evidence was delivered to the New York City Police Department's Police Laboratory Firearms Analysis Section. Among the items delivered to the Firearms Analysis Section were: (1) Officer Budimlic's Sig Sauer model 226 .40 caliber service weapon; (2) the

⁴⁹ Detective Nystrom is assigned to the Homicide Squad and had been a member of the NCPD for twenty-seven years. He was the affiant on the search warrant and assisted in its execution.

⁵⁰ The six bags of marijuana, assorted U.S. currency, assorted jewelry, cell phones, and laptop computers were found in and around the black backpack, which Officer Russo had thrown outside of the rear door.

silver 9mm Luger SCCY model CPX-1 recovered by members of the CSSS; (3) the eight .40 caliber shell casings recovered by members of the CSSS; (4) the seven bullets and bullet fragments recovered during the autopsy of Smith (referenced below); and (5) the bullet and bullet fragments recovered during the autopsy of Andrea Rebello (referenced below).

An operability test of Officer Budimlic's service weapon determined that the weapon was operable. Microscopic examinations were performed on the seven bullets recovered during the autopsy of Smith, the bullet recovered during the autopsy of Andrea Rebello, and the eight .40 caliber shell casings.⁵¹ The examination revealed that all of the items were discharged from Officer Budimlic's service weapon.

The 9mm Luger possessed by Smith was inoperable as received by the Firearms Analysis Section. The inoperability was caused by the trigger bar being disconnected from the trigger. The weapon was disassembled and the trigger bar was reset. After the trigger bar was reset, the weapon could be fired. After the initial test fire the trigger bar again became disengaged. The trigger bar was reset after the initial test fire by banging the weapon against a hard object.

AUTOPSY OF DALTON SMITH

An autopsy was performed on the remains of Dalton Smith on May 18, 2013, by Dr. Dorata Latuszynski of the Nassau County Medical Examiner's Office. Smith had been pronounced dead by AMT White on May 17, 2013, at approximately 2:46 a.m. Dr. Latuszynski determined that the cause of death was "multiple gunshot wounds to torso and left upper extremity with perforations of heart, lung, liver, spleen and stomach."

⁵¹ The bullet fragments recovered during the autopsy of Smith and the bullet fragments recovered during the autopsy of Andrea Rebello were submitted for microscopic examination. However, due to the condition of the bullet fragments, microscopic examination could not be performed.

The external examination revealed major firearm injury to the body and minor blunt force injuries. The firearm injury to the body consisted of six penetrating gunshot wounds of the torso and six gunshot wounds of the left upper extremity, one penetrating into the chest and five perforating wounds of the left forearm. Dr. Latuszynski noted that the atypical appearance of the gunshot wounds to the chest likely represented re-entry wounds of the perforating gunshot wounds to the left forearm. Seven bullets and bullet fragments associated with these wounds were recovered from the body of the deceased.

Dr. Latuszynski observed that Smith was wearing a black long sleeve thermal undershirt showing multiple perforation defects on the front and on the left sleeve, corresponding to the gunshot wounds on the body. The garment was heavily stained/soaked with blood. The autopsy report indicates that Smith had 96.5 mcg/L of delta-9-tetrahydrocannabinol present in his femoral blood.⁵² Detective Michael Maloney of the NCPD Homicide Squad was present at the autopsy of Smith and took possession of the seven bullets and bullet fragments.

AUTOPSY OF ANDREA REBELLO

Andrea Rebello was pronounced dead at NUMC by Dr. Elfond on May 17, 2013, at approximately 3:10 a.m. An autopsy was performed by Dr. Gerard Catanese of the Nassau County Medical Examiner's Office later that day. Dr. Catanese determined that the cause of death was a single gunshot wound to the head. The bullet entered behind the deceased's right ear and traveled right to left, back to front, and upwards.⁵³ The bullet exited from the skull by perforating the right parietal bone. A bullet and bullet fragments associated with the wound were

⁵² Delta-9-tetrahydrocannabinol is the principal psychoactive constituent of the cannabis plant. According to Dr. Joseph Avella, Chief Toxicologist of the Nassau County Medical Examiner's Office, the levels found in Smith's blood are indicative of recent usage of marijuana.

⁵³ It is unknown whether the bullet initially passed through the left forearm of Smith before striking Andrea Rebello.

recovered from her person. Detective Michael Maloney of the NCPD Homicide Squad was present at the autopsy of Andrea Rebello and took possession of the bullet and bullet fragments recovered during the autopsy.

LEGAL ANALYSIS

It is uncontroverted that Police Officer Budimlic used deadly physical force against Dalton Smith. In so doing, he caused the death of Smith and one of Smith's victims, Andrea Rebello. The issue in question is whether Officer Budimlic's use of deadly physical force was justified. In any case in which a justification defense is raised, prosecutors must be prepared to prove beyond a reasonable doubt that the use of deadly physical force was not justified. Penal Law §§ 25.00(1), 35.00.

The defense of justification is set forth in Article 35 of the Penal Law. Penal Law Section 35.15(1) provides that a person may use deadly physical force upon another individual when, and to the extent that, he reasonably believes it to be necessary to defend himself, or a third person, from what he reasonably believes to be the use or imminent use of unlawful deadly physical force by such individual. According to Section 10.00(11) of the Penal Law, deadly force is defined as physical force which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury. The use of deadly physical force is justified by law, therefore, when an individual honestly believes that deadly force is necessary to defend against an aggressor who is using or is about to use deadly force, and when a reasonable person in the individual's position would believe the same. People v. Diguglielmo, 75 A.D.3d 206, 215-16 (2d Dept. 2010), aff'd, 17 N.Y.3d 771 (2011). Conversely, in order to prove guilt, the People must demonstrate beyond a reasonable doubt that the defendant did not believe deadly

force was necessary or that a reasonable person in the same situation would not have perceived that deadly force was necessary. People v. Umali, 10 N.Y.3d 417, 424-26 (2008).

Although in most cases a person, whether a civilian or a police officer, claiming justification for the use of deadly force has a duty to retreat (rather than confront and oppose deadly physical force), such a duty exists only if the actor “knows that with complete personal safety, to oneself and others, he or she may avoid the necessity of [using deadly physical force] by retreating.” Penal Law § 35.15(2)(a). Additionally, there is no duty to retreat if the actor is protecting himself, or a third person, from any one of several particularly heinous crimes, including, robbery, kidnapping, and residential burglary. Penal Law §§ 35.15(2)(b), (c), 35.20(3). Further, police officers do not have a duty to retreat when threatened with deadly physical force if they are attempting to make an arrest. Penal Law §§ 35.15(2)(a)(ii), 35.30(1)(c).

Based on the overwhelming evidence in this case, it would clearly not be possible to prove beyond a reasonable doubt that Officer Budimlic knew that he could retreat with “complete personal safety” not only to himself, but also to J and, specifically, to Andrea Rebello who was being held hostage by Smith with a gun to her head (and whom Smith had repeatedly threatened to kill). Moreover, as a police officer trying to stop a robbery, burglary and possible kidnapping, Officer Budimlic did not have a duty to retreat when Smith threatened both him and Andrea Rebello with deadly physical force.

To warrant criminal charges against Officer Budimlic with regard to the shooting of Smith, prosecutors would need to disprove, beyond a reasonable doubt, that Officer Budimlic reasonably believed that Smith was about to use deadly physical force on himself and/or Andrea Rebello. Officer Budimlic would be permitted to introduce evidence of Smith’s repeated violent and threatening actions throughout the night, of which the officer had personal knowledge, in

order to establish his state of mind and perception of imminent danger. People v. Wesley, 76 N.Y.2d 555, 559-61 (1990); People v. Locicero, 87 A.D.3d 1163, 1164 (2d Dept. 2011). Evaluation of the actor's belief “requires a determination of reasonableness that is both subjective and objective ... The critical focus must be placed on the particular defendant and the circumstances actually confronting him at the time of the incident, and what a reasonable person in those circumstances and having defendant's background and experiences would conclude.” People v. Diguglielmo, 75 A.D.3d at 215-216, (quoting People v. Wesley, 76 N.Y.2d at 559); see People v. Goetz, 68 N.Y.2d 96, 114 (1986); People v. Daniel, 35 A.D.3d 877, 878 (2d Dept. 2006). The determination of whether Officer Budimlic’s fear of imminent deadly physical force was reasonable must be based specifically on the circumstances that he faced at that precise moment without the benefit of retrospect. People v. Wesley, 76 N.Y.2d at 559-60; People v. Goetz, 68 N.Y.2d at 114-15; People v. Locicero, 87 A.D.3d 1163 (2d Dept. 2011). Therefore, the later-developed possibility that Smith’s gun may have been inoperable at the time of the incident is not significant for this analysis. Of course, it is impossible to know with certainty whether Smith’s weapon was operable at the time he was terrorizing the people in the premises on California Avenue. His gun may have been damaged when Smith collapsed after being shot. The gun being loaded, as well as Smith’s repeated comments about having a real gun and real bullets, certainly reinforce that Smith believed that the gun was operable at the time he was threatening to kill various hostages and police officers.

The totality of the evidence supports the conclusion that the shooting of Dalton Smith was legally justified. While Officer Budimlic intentionally used deadly physical force against Smith, he acted upon a clearly reasonable belief that Smith was armed with a gun and was about to use deadly physical force. From the perspective of Officer Budimlic, who was performing his

lawful duties as a police officer when he entered the residence, Smith was a violent individual, who was armed with a weapon, was in the process of committing a home invasion burglary, and was holding two civilians at gunpoint. Additionally, Smith repeatedly pointed his gun at, and threatened to kill, both Andrea Rebello and Officer Budimlic. The entire situation developed and escalated in a matter of minutes. Ultimately, Officer Budimlic was in a standoff with Smith, who was using Andrea Rebello as a shield. Smith ignored numerous commands to drop his weapon and repeated his threats to shoot both Andrea Rebello and Officer Budimlic. Officer Budimlic clearly and reasonably believed that the use of deadly physical force was necessary to defend himself and Andrea Rebello and, on this basis, made the decision to discharge his weapon.

Tragically, one bullet struck Andrea Rebello, who ultimately died from her injuries. Nevertheless, it is clear that Officer Budimlic's intention was to shoot Smith and not Andrea Rebello. While her death is tragic, the law regarding justification is clear: a justification defense is applicable to any use of force, even if that use has unintended consequences. People v. Magliato, 68 N.Y.2d 24, 28-29 (1986); People v. Mcmanus, 67 N.Y.2d 541, 547-48 (1986); People v. Giamanco, 188 A.D.2d 547 (2d Dept. 1992); People v. Johnson, 125 A.D.2d 493 (2d Dept. 1986); People v. Huntley, 87 A.D.2d 488, 494 (4th Dept. 1982), aff'd, 59 N.Y.2d 868 (1983). More specifically, a justification defense is available "even when an innocent bystander is harmed." People v. Lauderdale, 295 A.D.2d 539, 540 (2d Dept. 2002); accord People v. Sierra, 231 A.D.2d 907, 908 (4th Dept. 1996); People v. Reid, 176 A.D.2d 828 (2d Dept. 1991); People v. Gutierrez, 105 A.D.2d 754, 754-55 (2d Dept. 1984).

The tragedy of Andrea Rebello's death was not caused by any criminal misconduct by Officer Budimlic. Her death was caused by Dalton Smith's decisions: his decision to invade a

residence in the early hours of the morning; to rob at gunpoint the occupants of that house; to take hostage all of the residents; to repeatedly threaten to kill them (and various police officers, including Budimlic); to use Andrea Rebello as a human shield; and to ignore multiple orders from uniformed police officers to drop his gun and release his hostages.

CONCLUSION

No task is of greater importance than investigating the death of an individual. The fact that one of the people killed was an innocent victim escalates even further the obvious import of the task. With respect to the shooting deaths of Dalton Smith and Andrea Rebello, the issue is whether the deadly physical force used fell within the parameters of the justification defense or, more precisely, whether the People could prove beyond a reasonable doubt that it did not. In this case, Officer Budimlic reasonably perceived threats of deadly force against himself and others and acted accordingly. Though the results were unquestionably tragic, criminal charges under these circumstances would be inappropriate and legally unsustainable. Accordingly, this criminal investigation is hereby concluded.